

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Diane Schafer Goodstein, Circuit Court Judge

JEROID J. PRICE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2021-001013

APPENDIX

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reversed on appeal absent an abuse of discretion. State v. Myers, 359 S.C. 40, 596 S.E.2d 488 (2004). An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion that is without evidentiary support. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000); Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506 (2005).

LAW/ANALYSIS

A. Hearsay

Appellant argues the trial court erred in admitting testimony from Investigator Richardson that Appellant was a supreme or an officer within the Bloods because the testimony was improper hearsay. We agree.

The State contends the testimony was admissible under Rules 702 and 703, SCRE,² because, when the testimony is viewed in context, Richardson did not solely base his opinion on hearsay information. This argument is without merit. Richardson did not testify to his expert opinion, but rather relayed information from informants.

Hearsay is an out of court statement offered to prove the truth of the matter asserted therein. Rule 801(c), SCRE; State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1994). The rule against hearsay prohibits the admission of

² Rule 702, SCRE, states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 703, SCRE, provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

evidence of an out of court statement to prove the truth of the matter asserted unless an exception to the rule applies. Rule 802, SCORE; Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991).

Although Richardson identified items seized from Appellant's apartment as related to the Bloods (e.g., photograph with Appellant throwing a gang sign, notebook with a reference to Bloods, code book referring to the Bloods, and red clothing which is significant to the Bloods), Richardson did not testify he relied on these items in forming an opinion that Appellant was a supreme or officer in the Bloods. Furthermore, Richardson testified he solely based his testimony that Appellant was a supreme on statements from informants. This testimony was hearsay and was not admissible under any exception to the hearsay rule.

Although the testimony was improperly admitted, Appellant has not demonstrated reversible error. See State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (improper admission of hearsay evidence is reversible error only when the admission causes prejudice). Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Thus, an insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989); Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed. State v. Pickens, 320 S.C. 528, 531, 466 S.E.2d 364, 366 (1996).

Defense counsel impeached Richardson's improper testimony by eliciting that his testimony was solely based on information from informants. Also, the inadmissible hearsay testimony was merely cumulative. See State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003) (admission of improper evidence is harmless where the evidence is merely cumulative to other evidence.); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (any error in admission of evidence cumulative to other unobjected-to evidence is harmless). Brooks testified Appellant was a Blood. Further, Lieutenant James Smith testified bullet-proof vests were seized from Appellant's

apartment and Richardson properly testified officers within gangs may have bullet-proof vests. After reviewing the entire record, we find the improper admission of hearsay testimony that Appellant was an officer in the Bloods was harmless.

B. Confrontation Clause

Appellant also argues Richardson's testimony violated his right to confront witnesses under the Sixth Amendment to the United States Constitution and Article 1, § 14, of the South Carolina Constitution. This issue is not preserved for appellate review because Appellant did not properly raise the issue in the trial court. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

CONCLUSION

The admission of Richardson's testimony that Appellant was a supreme or officer within the Bloods was harmless error and we affirm Appellant's conviction.

AFFIRMED.

TOAL, C.J., MOORE, WALLER and PLEICONES, JJ., concur.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

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May 5, 2006

REMITTITUR

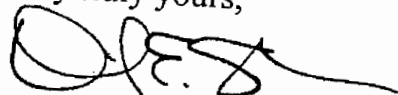
The Honorable Barbara A. Scott
1701 Main St
PO Box 2766
Columbia, SC 29202-2766

Re: The State v. Price, Jeroid John - 2003-GS-40-02295

Dear Ms. Scott:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Very truly yours,


CLERK

DES/jjp

Enclosure

cc: (without enclosure)
Amye Leigh Rushing, Esquire
Chief Attorney Joseph L. Savitz, III
Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General Jeffrey A. Jacobs
Solicitor Warren Blair Giese

2006-CP-400-7168

STATE OF SOUTH CAROLINA)

In the Court of Common Pleas

County of Richland)Jeroid John Price)

Full name and prison number, if any, of applicant.)

v.)

The State of South Carolina)

Name of Respondent)

APPLICATION FOR
POST-CONVICTION RELIEF

2006 DEC -4 PM 9:38
 BARBARA A. SCOTT
 C.C.C. & G.S.
 RICHLAND COUNTY
 FILED

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. Applicant should, therefore, exercise care to assure that all answers are true and correct.

If the applicant 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 McCormick Correctional Institution
386 Redemption Way McCormick, S.C. 29899
2. Name and location of Court which imposed sentence Richland County Court
of General Sessions Columbia, S.C. 29210
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 (a) 2003-GS-40-2295 Murder
 (b) _____
 (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 (a) Dec. 19, 2003 35 Years
 (b) _____
 (c) _____

5. 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 _____
6. Did you appeal from the judgment of conviction or the imposition of sentence? Yes _____
7. If you answered "yes" to (6), list
- (a) the name of each Court to which you appealed:
 - i. The Supreme Court of South Carolina
 - ii. _____
 - iii. _____
 - (b) the result in each such Court to which you appealed:
 - i. Affirmed
 - ii. _____
 - iii. _____
 - (c) the date of each such result:
 - i. Heard March 22, 2006 ----- Filed April 17, 2006
 - ii. _____
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. Opinion No. 26139
 - ii. _____
 - iii. _____
8. If you answered "no" to (6), state your reasons for not so appealing:
- (a) N/A
 - (b) _____
 - (c) _____
9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Violation of 4th Amendment protection against illegal search and seizure
 - (b) Violation of 6th Amendment right to confront adverse witnesses
 - (c) Violation of 6th Amendment right to the effective assistance of counsel

10. State concisely and in the same order the facts which support each of the grounds set out in (9)

(a) See "SUPPORTING FACTS AND MEMORANDUM OF LAW" on page 6

" " " " " " "

(b) " " " " " " "

" " " " " " "

(c) " " " " " " "

" " " " " " "

11. 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 petitions in State or Federal Courts for habeas corpus or post-conviction 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. N/A

ii. N/A

iii. N/A

iv. N/A

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

i. N/A

ii. N/A

iii. N/A

iv. N/A

(c) the disposition thereof:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(d) the date of each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

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

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

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? Yes

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. Violation of 6th Amendment right to confront adverse witnesses
- ii.
- iii.

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

- i. Direct Appeal
- 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) Violation of 4th Amendment -- Trial Counsel did not preserve for appeal
- (b) Violation of 6th Amendment -- PCR is proper venue for I.A.C. allegations
- (c)

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

- (a) your arraignment and plea? Yes
- (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 application with respect to this conviction, which you filed? N/A

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. Cameron B. Litterjohn, Jr. Columbia,
- ii. Amye L. Rushing Columbia, S.C.
- iii. Joseph Savitz, III. Columbia, S.C.

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

- i. Trial
- ii. Trial
- iii. Appeal

18. State clearly the relief you seek in filing this application.

Vacation of sentence or any other relief this Court deems
appropriate.

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

No

1010

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO
INVESTIGATE THE CRIME SCENE

The petitioner contends that his trial counsel was ineffective because counsel did not investigate the case. Counsel's representation was not within the range and scope of competence. Maryulin v. Maryland, 581 F2d 540. See also State v. Pendergrass. In the case at bar, the counsel failed to conduct a substantial investigation into any plausible line of defense. Counsel abdicated his responsibilities to advocate the client's cause.

Part of the prosecution's theory was that petitioner shot the victim while the victim was lying on his back, resulting in the bullet striking the ground (see Exhibits #42-48). Had petitioner's trial counsel investigated the history of the crime scene he would have discovered that this was not the first time a firearm, (of the same caliber as involved in this case, no less), was fired at this scene. The events that are reported in State v. Jackson, (S.C. S.Ct. Opinion No. 26037), occurred at the same crime scene as the petitioner's. Furthermore, the events described in said case make it more likely that the culprit described in Jackson fired the shot into the ground, rather than the petitioner in the present case. Furthermore, the fact that the prosecutor sought to convince the jury that said bullet passed through the victim's body before hitting the ground, despite the fact that the bullet was not tested for blood, should have prompted petitioner's trial counsel to have said bullet examined thoroughly to disprove prosecution's theory.

The Sixth Amendment imposes on counsel a duty to investigate because reasonably effective assistance must be based on professional decisions, and informed legal choices can be made only after investigative procedures are offered and made. The amount of pre-trial investigation work should be reasonable to defy precise measurements as it relates to the real evidence and the fantasy of the prosecutorial case. Strickland v. Washington, 639 F2d 143 at 1251 (1982).

At the heart of effective representation is the independent duty to investigate and prepare. Goodwin v. Balkcom, 684 F2d 805 (5th Cir. 1982). Although the fate of a criminal defendant is determined at trial, the course of that trial can be decisively affected by actions of defense counsel in preparing the case. See E.G. Moore v. U.S., 432 F2d 730 (1970). The courts have therefore insisted that effective counsel conduct a reasonable amount of pretrial investigation, not just obtaining what the solicitor offers you. See E.G. Washington v. Watkins, 655 F2d 1346 (5th Cir. 1987).

When an attorney fails to conduct a substantial investigation, as in the case at bar, into any of his client's plausible lines of defense, the attorney has failed to render effective assistance of counsel. If there is more than one plausible line of defense, the court held, counsel should investigate each line substantially before making a strategic choice about which lines to rely on at trial. Strickland v. Washington, 104 S.Ct. 2052 (1984).

If there is only one plausible line of defense, the court concluded, counsel must conduct a reasonably substantial investigation into that line of defense, since there can be no strategic choice that renders such investigation unnecessary. The same duty exists if counsel relies at trial on only one line of defense, although others are available. In either case, the investigation need not be exhaustive. It must, however, include "an independent examination of the facts, circumstances, pleading and laws involved."

The attorney equally fails to render effective assistance of counsel when he chooses among several plausible lines of defense thereby excluding certain of them, for no strategic reasons. See Gaines v. Hopper, 575 F2d 1149; Powell v. Alabama, 287 U.S. 45 (1932). A complete lack of preparation and investigation cannot be deemed to be a tactical decision made by the attorney. The courts will find ineffective assistance of counsel, if the choice of strategy was so patently unreasonable that no competent attorney would have made the same choice. C.F.U.S. Ex Rel, Roberson v. Pete, 312 F2d 161 (7th Cir. 1963).

Because of counsel's failure to investigate, research and interview witnesses, he could not formulate a trial strategy that would have potentially been effective. There is a reasonable probability that with the proper investigation of the facts, the outcome of petitioner's case would have been different.

TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO OBJECT TO VIOLATION OF CONFRONTATION CLAUSE WHERE RICHLAND COUNTY OFFICER'S TESTIMONY WAS USED SOLELY TO PREJUDICE THE JURY.

The State's theory of this case, the purported motive, was that the shooting resulted from a confrontation in a nightclub between the Crips, of which the State conceded Carl Smalls was a member, and the Bloods, to which the State contended petitioner belonged. Petitioner denied that he belonged to the Bloods.

The gang connection was important to the State's case because, on its surface, the case looked like self-defense. To shore up its professed motive, the State called as a witness a purported expert in gang activity employed by the Sheriff's Department. The expert testified that he learned from informants that petitioner was an officer in the Bloods. Trial counsel objected on the ground that said testimony was hearsay. Petitioner argued on appeal that this testimony was hearsay and therefore a violation of his right to confront witnesses against him. The Supreme Court of South Carolina held that the testimony was hearsay, but withheld ruling on whether the testimony violated the petitioner's right to confront witnesses, stating "this issue is not preserved for appellate review because [petitioner] did not properly raise the issue in the trial court." It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. See Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998).

Counsel for petitioner should have objected to the violation of petitioner's right to confront witnesses against him. Failure to do so prevented petitioner from raising the issue on appeal. Had it not been for counsel's failure to preserve the issue through an objection, petitioner could have successfully challenged this error on appeal. Generally, questions concerning the admissibility or exclusion of evidence cannot be raised on appeal if not urged by objection at the time the evidence is offered. Branton v. Martin, 243 S.C. 90, 132 S.E.2d 285 (1963).

Failure to make an objection at the time evidence is offered constitutes waiver of the right to object. Cogdill v. Watson, 289 S.C. 531, 347 S.E.2d 126 (Ct. App. 1986). The party opposing the admission or exclusion of evidence must object and state the specific grounds for the objection. Roberts v. Roberts, 299 S.C. 315, 384 S.E.2d 719 (1989).

Furthermore, petitioner conviction would likely have been reversed on appeal if not for trial counsel's failure to preserve the issue for appeal through an on the record objection pertaining to the Confrontation Clause. Because of trial counsel's omission, petitioner did not receive the effective assistance of counsel guaranteed him by the U.S. Constitution.

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT OR MOVE FOR MISTRIAL WHERE SOLICITOR'S OPENING AND CLOSING REMARKS WERE TANTAMOUNT TO PROSECUTORIAL MISCONDUCT.

In the present case, the prosecutor knowingly presented perjured testimony. During his opening statements to the jury the prosecutor told the jury that some of the State's witnesses were going to lie. (See Tr.Vol I, p.66, lines 19-23). Trial counsel should have vigorously objected to this clear violation. "When a prosecutor has knowingly used perjured testimony or, equivalently, has knowingly failed to disclose the information that would give the lie to perjurious testimony, a conviction is fundamentally unfair, and must be set aside, if there is any reasonable likelihood the false testimony could have affected the judgment of the jury." See Mastracchio v. Vase, 274 F3d 590 (1st Cir. 2001). The ultimate mission of the system upon which we rely to protect the liberty of the accused as well as the welfare of society is to ascertain the factual truth, and to do so in a manner that comports with due process of law, law enforcement officer or prosecutor who finds it tactically advantageous to turn a blind eye to the manifest potential for malevolent disinformation, in effect, undermines that mission. See U.S. v. Wallack, 935 F2d 445 (2nd Cir. 1991) "[Indeed], if it is established that the government knowingly permitted the introduction of false testimony "reversal is virtually automatic." See U.S. v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392 (1976). A conviction obtained by the knowing use of perjured

testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. The Due Process Clause entitles defendants in criminal cases to fundamentally fair procedures, and it is fundamentally unfair for prosecutor to knowingly present perjury to jury. Where prosecutor knows that his witness has lied, he has a constitutional duty to correct false impression of the facts. All perjury pollutes a trial, making it hard for jurors to see the truth; no lawyer, prosecutor, or defense counsel, civil or criminal may knowingly present lies to a jury then sit idly by while opposing counsel struggles to contain this pollution of the trial. Furthermore, it is as much a prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate method to bring about one.

Trial counsel for petitioner sat idly by while this blatant violation was occurring. Counsel should have vigorously objected and/or moved for an immediate mistrial. Failure to do so resulted in petitioner being denied the effective assistance of counsel guaranteed him by the Constitution. Furthermore, trial counsel did not object when the prosecutor attempted in his closing argument to appeal to the emotions of the jury, rather than focusing on the facts of the case.

The prosecutor, in the present case, asked the jury to convict the defendant, not because he was guilty of the crime, but to prove to petitioner that "life is worth a whole lot more than a color and a gang sign. You let him know that his days of gang banging on the streets of Richland County are over." See Tr.

Vol.I, pg.460, lines 18-20.

"Prosecutor cannot make statements calculated to incite the passions and prejudices of the jurors. Prosecutor engaged in misconduct when he improperly expressed his person beliefs about crucial matters before jury by voicing his skepticism about defendant's insanity defense and stating his beliefs about credibility of expert witnesses, and by bolstering his own opinion of expert's testimony based on his own purported person knowledge of expert's character and motivations." See Darden v. Wainwright, 477 U.S. 637, 643 (1974).

Again, petitioner's trial counsel should have objected. Failure to do so allowed an unjust contamination of the trial, and unfairly stacked the odds against petitioner. Trial counsel failed to provide effective assistance to petitioner in violation of the Sixth Amendment.

1018

APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO ARGUE PREJUDICE VALUE OF HEARSAY TESTIMONY.

On appeal, petitioner argued that the trial court erred in admitting testimony from Investigator James Richardson that petitioner was a "supreme" or officer within the Bloods because the testimony was improper hearsay.

The Supreme Court of S.C. agreed with petitioner that the testimony was hearsay and was not admissible under any exception to the hearsay rule. (See Opinion No. 26139). The Court further held that "although the testimony was improperly admitted, [petitioner] has not demonstrated reversible error.

The Court deemed the improper admission of hearsay testimony...harmless error. The Court's decision was based on the argument that the improper hearsay was cumulative to other evidence that petitioner was a gang member. Specifically, the Court claimed (1)"Brooks testified [petitioner] was a Blood, and (2) Lt. James Smith testified bullet-proof vests were seized from [petitioner's] apartment and Richardson properly testified officers within gangs may have bullet-proof vests.

Petitioner claims Appellate Counsel was ineffective for failing to show: (1) that Brooks never testified that petitioner was a blood or a member of any gang whatsoever and (2) that the evidence seized from petitioner's apartment was not relevant to the issue at hand. Furthermore, Appellate Counsel should have argued that even if the Court deemed the evidence relevant, it should have been suppressed/excluded because its probative value

was substantially outweighed by the danger of unfair prejudice to the petitioner.

Under the case law, even if evidence is deemed relevant and admissible, the court may still exclude it if its probative value is substantially outweighed by the danger of undue prejudice or misleading the jury. State v. Alexander, 303 S.C. 377 (1991)

"Unfair prejudice means an undue tendency to suggest decision on an improper basis, such as an emotional one." State v. Kelly, 343 S.C. 350 (2001).

The introduction of the improper hearsay and the items seized from petitioner's apartment were meant to illicit an emotional response from the jury. Appellate counsel should have argued that petitioner was found guilty by the jury because they believed him to be a gang member and not because they believed him guilty of the crime.

SUPPORTING FACTS AND MEMORANDUM OF LAW

10(A) "VIOLATION OF FOURTH AMENDMENT PROTECTION AGAINST ILLEGAL SEARCH AND SEIZURE."

In the present case, police officers, while conducting a search of petitioner's residence, seized property which was not described in the search warrant. Specifically, photographs of men, including petitioner, making Blood hand signals and wearing Blood colors; a gang code book; red clothing and hats; bullet-proof vests; and a document containing a pledge of allegiance to the United Blood Nation, were seized and subsequently used as evidence at trial.

"To be valid, a search warrant must specifically describe the property or things to be seized." See *Lo-Ji Sales v. New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979); *Stanford v. New York*, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965).

"Evidence which is obtained through an illegal search is not admissible in federal courts pursuant to the Fourth and Fifth Amendments to the United States Constitution. *Weeks v. U.S.*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); *Boyd v. U.S.*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886). This rule of exclusion is applicable to state court proceedings through the due process clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, 86 Ohio L.Abs. 513, 84 A.L.R.2d 933 (1961).

Article IV of the United States Constitution provides protection against "unreasonable searches and seizures." Article 1, §10 of the South Carolina Constitution contains the same express language and provides additional protection against "unreasonable invasions of privacy."

The plain view doctrine is an exception to the warrant requirement. *State v. Brown*, 289 S.C. 581, 347 SE 2d 882 (1986). Under this doctrine, it is lawful for police to remove objects which can be plainly seen on the theory that it is not a search to observe what is already in plain view. *Coolidge v. New Hampshire* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *Harris v. U.S.*, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968).

However, the plain view doctrine does have requirements:

- (1) the officer must be lawfully where the evidence can be plainly viewed;
- (2) the officer must have a lawful right of access to the evidence
- (3) the incriminating nature of the evidence must be immediately apparent.

Horton v. California, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 1112 (1990); *State v. Beckham*, 334 S.C. 302, 513 SE 2d 606 (1999).

In other words, although evidence discovered in plain view is admissible, it must be shown that the initial intrusion which afforded the authorities plain view was lawful, the discovery of the evidence was inadvertent, and the incriminating evidence was immediately apparent to the seizing authorities. *State v. Culbreath*, 300 S.C. 232, 387 S.E.2d 255 (1990); *State v. Dinlgle*, 279 S.C. 278, 306 SE 2d 223 (1983). *Interest of Thomas B.D.* 326 S.C. 614 (Ct.App. 1997).

Because the items seized were not related to the case and were therefore not apparently incriminating the seizure of said items was illegal and therefore should have been suppressed.

10(B) "VIOLATION OF SIXTH AMENDMENT RIGHT TO CONFRONT ADVERSE WITNESSES"

In the present case, Investigator James Richardson was qualified as an expert in gangs and gang activity. Richardson testified about the history of the Bloods and the Crips, gang activities in Columbia, gang clothing, and gang hand signals. During direct examination, Richardson testified Appellant was a member of the Bloods and was a supreme or officer within the gang.

Although Richardson identified items seized from petitioner's apartment as related to the Bloods, Richardson did not testify that he relied on these items in forming an opinion that Petitioner was a member in the Bloods. Furthermore, Richardson testified he solely based his testimony that petitioner was a gang member on statements from informants. This testimony was hearsay and was not admissible under any exception to the hearsay rule.

Petitioner argues that Richardson's testimony violated his right to confront witnesses under the Sixth Amendment to the United States Constitution.

In 1995, South Carolina enacted the South Carolina Rules of Evidence (SCRE), and by doing so adopted most of the Federal Rules on Hearsay.

With the adoption of the Rules of Evidence, the hearsay rule and its components were expressly defined in Rule 801

(c), SCRE, "hearsay" is"

- (1) a statement
- (2) other than one made by the declarant while testifying at the trial or hearing
- (3) offered in evidence
- (4) to prove the truth of the matter asserted.

The rule is founded upon the notion that statements must be subject to examination, and those statements uttered outside the courtroom were not under oath, tested by cross-examination, or made under the seriousness and trappings of a legal proceeding. The exceptions which have developed over the years reflect a notion that sometimes statements are made under circumstances which themselves aid in the reliability as to the truthfulness and accuracy thereof. The seriousness of the rationale underlying the rules and exceptions to hearsay in the criminal context was poignantly set out in *State v. Williams*, 285 S.C. 544, 556, 331 S.E.2d 354, 361 (Ct. App. 1985):

The right of an accused to be confronted by the witnesses against him is perhaps the most important constitutional right provided to people who are not guilty. The right to a trial standing alone, is fairly meaningless if a conviction can be obtained based only on a prosecution witness reciting a statement allegedly made outside of court. Unfortunately, there is no way the right of confrontation can be accorded people who are not guilty to the exclusion of those who may be guilty. This is because, under our system of justice, no one is guilty until he has been tried and proven guilty. In other words, the right of confrontation cannot be accorded to anyone unless it is accorded to everyone. This is a price we pay for living in the United States of America. Many people feel it is a small price.

See also *State v. Dennison*, 305 S.C. 161, 406 S.E.2d 383 (Ct.App. 1991)(discussing the source and importance of the right of confrontation).

Hearsay is inadmissible except as provided by the SCRE "or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE. The statement must therefore fall within an exception to the rule. *Jolly v. State*, 314 S.C. 17, 443 S.E.2d 566 (1994)(the rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies). In *State v. Williams*, the Court held that the defendant was improperly denied his constitutional right of confrontation by the trial court's permitting an officer to testify as to an out-of-court declaration by the defendant's wife.

The Supreme Court of South Carolina has already ruled that Richardson's testimony in the present case was hearsay. (Opinion No. 26139). Furthermore, the Supreme Court could not rule on the issue of whether the admission of Richardson's testimony violated petitioner's right to confront adverse witnesses, because the issue was not preserved for appellate review.

10(C) "VIOLATION OF SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL."

Petitioner alleges that his trial counsel was ineffective for failing to argue and preserve for the record the issues of violation of fourth amendment protection against illegal search and seizure and violation of sixth amendment right to confront adverse witnesses (see Grounds 10(A) and 10(B)).

In Strickland v. Washington, the Supreme Court established the standard for evaluating claims of ineffective assistance of counsel. The defendant must show the following: (1) that counsel's assistance was unreasonable considering all the circumstances of the case, and (2) that "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt."

In the present case, petitioner's conviction would likely have been reversed on appeal if not for trial counsel's failure to preserve the issues found in 10 (A) and 10 (B).

Furthermore, trial counsel was ineffective for failing to object to illegal tactics used by the prosecutor in the case. In his opening remarks, the solicitor told the jury? "I've never had to tell a jury in my 11 years as a prosecutor, some of the State's witnesses that we call may still not tell the truth, whether it's because they're afraid, whether they're protecting their friend or themselves."

"All perjury pollutes a trial, making it hard for jurors to see the truth; no lawyer prosecutor, or defense counsel, civil or criminal may knowingly present lies to a jury then sit idly by while opposing counsel struggles to contain this pollution of the trial. It is as much prosecutor's duty to refrain from improper methods calculated to produce wrongful conviction as it is to use every legitimate method to bring about one. When a prosecutor has knowingly used perjured testimony or equivalently, has knowingly failed to disclose the information that would give the lie to perjurious testimony, a conviction is fundamentally unfair, and must be set aside, if there is any reasonable likelihood the false testimony could have affected the judgment of the jury. *State v. Merriman*, 337 S.E.2d 218; *State v. Goolsby*, 268 SE2d 31; *Mastracchio v. Vase*, 274 F3d 590 (1st Cir. 2001).

Thus trial counsel should have objected immediately and moved to suppress the perjured testimony. This would have prevented Marcus Jones from misleading the jury. (Compare Tr.p.140, lines 9-19 with Tr.p.148, lines 3-20. Clearly perjury).

STATE OF SOUTH CAROLINA)

COUNTY OF Richland)

VERIFICATION

I, Jerold Price, 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.

Jerold Price

Sworn to and subscribed before me

This 27th day of November, 2006

Robin Jean Liberman L.S.

Notary Public for South Carolina

My Commission Expires 11 Dec. 07

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

I, Jerold Price, 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 or 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 proceeding or give security therefor.

Jerold Price
Applicant

Sworn to and subscribed before me

This 27th day of November, 2006

Robin Jean Liberman L.S.

Notary Public for South Carolina

My Commission Expires: 11 Dec. 07

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
	)	2006-CP-40-7168
	)	
Jeriod J. Price, 298791,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

The Respondent, making its Return to the Application for Post-Conviction Relief filed December 4, 2006, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. The Applicant was indicted at the May 2003 term of the Richland County Grand Jury for murder (03-GS-40-2295). Applicant was represented by Cameron B. Littlejohn, Jr., and Amye Rushing, Esquire. On December 17, 2003, Applicant proceeded to trial at the conclusion of which he was found guilty of murder. On December 19, 2003, Applicant was sentenced by the Honorable Reginald I. Lloyd to confinement for a period of thirty-five (35) years.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Supreme Court affirmed Applicant's conviction and sentence. State v. Price, Op. No. 26139 (S.C. filed April 17, 2006).

Attached herewith and incorporated herein by reference are the records of the Richland County Clerk of Court regarding the subject conviction(s), the Applicant's records from the Department of Corrections, the Applicant's trial transcript, and the Applicant's appellate records.

II.

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

1. "Violation of 4th Amendment protection against illegal search and seizure."
2. "Violation of 6th Amendment right to confront adverse witnesses." And
2. "Violation of 6th Amendment right to effective assistance of counsel."

III.

Applicant's first allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised this issue at trial or on appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, the Court should summarily dismiss this allegation.

IV.

The Respondent interprets Applicant's second and third allegations to be claims that he received ineffective assistance of counsel. The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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

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

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under

professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

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

VI.

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

VII.

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

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

[signatures continued on next page]

ROBERT L. BROWN
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

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

May 8, 2007

STATE OF SOUTH CAROLINA	)	IN THE COMMON PLEAS COURT
	)	
COUNTY OF RICHLAND	)	
	)	DOCKET NO.: 2006-CP-40-7168
JEROID J. PRICE	)	
	)	
Applicant	)	AMENDED APPLICATION FOR POST
	)	CONVICTION RELIEF
	)	
STATE OF SOUTH CAROLINA	)	
	)	
Respondent,	)	
_____	)	

FILED
2008 APR 30 AM 9:05
BARBARA A. SCOTT
C.C.C. & G.S.

The Applicant through undersigned Counsel wishes to Amend his Application for Post Conviction Relief as follows:

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO
INVESTIGATE THE CRIME SCENE

The Petitioner contends that his trial counsel was ineffective because counsel did not investigate the case. Counsel's representation was not within the range and scope of competence. *Maryulin v Maryland*, 581 F2D 540. Se also *State v Pendergrass*. In the case at bar, the counsel failed to conduct a substantial investigation into any plausible line of defense. Counsel abdicated his responsibilities to advocate the client's cause.

Part of the Prosecution's theory was that petitioner shot the victim while the victim was lying on his back, resulting in the bullet striking the ground. (See exhibits 42-48). Had petitioner's trial counsel investigated the history of the crime scene he would have discovered that this was not the first time a firearm, (of the same caliber as involved in this case, no less), was fired at this scene. The events that are reported in *State v. Jackson*, (S.C. S. Ct. Opinion No. 26037), occurred at the same crime scene as the petitioner's. Furthermore, the events described in

said case make it more likely that the culprit described in Jackson fired the shot into the ground, rather than the petitioners in the present case. Furthermore, the fact that the prosecutor sought to convince the jury that said bullet passed through the victim's body before hitting the ground, despite the fact that the bullet was not tested for blood, should have prompted petitioner's trial counsel to have said bullet examined thoroughly to disprove prosecution's theory.

The Sixth Amendment imposes on counsel a duty to investigate because reasonably effective assistance must be based on professional decisions, and informed legal choices can be made only after investigative procedures are offered and made. The amount of pre-trial investigation work should be reasonable to defy precise measurements as it relates to the real evidence and the fantasy of the prosecutorial case. *Strickland v. Washington*, 639 F2d 143 at 1251 (1982).

At the heart of effective representation is the independent duty to investigate and prepare. *Goodwin v. Balkcom*, 684 F2d 8-5(5th Cir. 198). Although the fate of a criminal defendant is determined at trial, the course of that trial can be decisively affected by actions of defense counsel in preparing the case. See *E. G. Moore v U. S.*, 432 F2d 730 (1970). The courts have therefore insisted that effective counsel conduct a reasonable amount of pretrial investigation, not just obtaining what the solicitor offers you. See *E. G. Washington v. Watkins*, 655 F2d 1346 (5th Cir. 1987).

When an attorney fails to conduct a substantial investigation, as in the case bar, into any of his client's plausible lines of defense, the attorney has failed to render effective assistance of counsel. If there is more than one plausible line of defense, the court held, counsel should investigate each line substantially before

making a strategic choice about which lines to rely on at trial. *Strickland v. Washington*, 104 S.Ct. 2052 (1984).

If there is only one plausible line of defense, the court concluded, counsel must conduct a reasonably substantial investigation into that line of defense, since there can be not strategic choice that renders such investigation unnecessary. The same duty exists if counsel relies at trial on only one line of defense, although others are available. In either case, the investigation need not be exhaustive. It must, however, include "an independent examination of the facts, circumstance, pleading and laws involved."

The attorney equally fails to render effective assistance of counsel when he chooses among several plausible lines of defense thereby excluding certain of them, for no strategic reasons. See *Gaines v Hopper*, 575 F2d 1149; *Powell v Alabama*, 287 U. S. 45 (1932). A complete lack of preparation and investigation cannot be deemed to be a tactical decision made by the attorney. The courts will find ineffective assistance of counsel, if the choice of strategy was so patently unreasonable that no competent attorney would have made the same choice. *C.F.U.S. Ex Rel, Roberson v Pete*, 312 F2d 161 (7th Cir. 1963).

Because of counsel's failure to investigate, research and interview witnesses, he could not formulate a trial strategy that would have potentially been effective. There is a reasonable probability that with the proper investigation of the facts, the outcome of petitioner's case would have been different.

TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO OBJECT TO VIOLATION
OF CONFRONTATION CLAUSE WHERE RICHLAND COUNTY OFFICER'S
TESTIMONY WAS USED SOLELY TO PREJUDICE THE JURY

The State's theory of this case, the purported motive, was that the shooting resulted from a confrontation in a nightclub between crips, of which the State conceded Carl Smalls was a member, and the Bloods, to which the State contended petitioner belonged. Petitioner denied that he belonged to the Bloods.

The gang connection was important to the State's case because, on its surface, the case looked like self-defense. To shore up its professed motive, the State called as a witness a purported expert in gang activity employed by the Sheriff's Department. The expert testified that he learned from informants that petitioner was an officer in the Bloods. Trial counsel objected on the ground that said testimony was hearsay. Petitioner argued on appeal that this testimony was hearsay and therefore a violation of his right to confront witnesses against him. The Supreme Court of South Carolina held that the testimony was hearsay, but withheld ruling on whether the testimony violated the petitioner's right to confront witnesses, stating "this issue is not preserved for the appellate review because (petitioner) did not properly raise the issue in the trial court". It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. See *Wilder Corp. v Wilke*, 330 S.C. 71, 497 S.E. 2d 731 (1998).

Counsel for petitioner should have objected to the violation of petitioner's right to confront witnesses against him. Failure to do so prevented petitioner from raising the issue on appeal. Had it not been for counsel's failure to preserve the issue through an objection, petitioner could have successfully challenged this error on appeal. Generally, questions concerning the admissibility or exclusion of evidence

cannot be raised on appeal if not urged by objection at the time the evidence is offered. *Branton v Martin*, 243 S.C. 90, 132 S.E. 2d 285 (1963).

Failure to make an objection at the time evidence is offered constitutes waiver of the right to object. *Cogdill v. Watson*, 289 S.C. 531, 347 S.E. 2d 719 (1989).

Furthermore, petitioner conviction would likely have been reversed on appeal if not for trial counsel's failure to preserve the issue for appeal through an on the record objections pertaining to the confrontation clause. Because of trial counsel's omission, petitioner did not receive the effect assistance of counsel guaranteed by the U. S. Constitution.

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT OR MOVE FOR MISTRIAL WHERE SOLICITOR'S OPENING AND CLOSING REMARKS WERE TANTAMOUNT TO PROSECUTORIAL MISCONDUCT

In the present case, the prosecutor knowingly presented perjured testimony. During his opening statements to the jury the prosecutor told the jury that some of the State's witnesses were going to lie. (See Tr. Vol. 1, p. 66, lines 19-23). Trial counsel should have vigorously objected to this clear violation. "When a prosecutor has knowingly used perjured testimony or, equivalently, has knowingly failed to disclose the information that would give the lie to perjurious testimony, a conviction is fundamentally unfair, and must be set aside, if there is any reasonable likelihood the false testimony could have affected the judgment of the jury." See *Mastracchio v Vase*, 274 F3d 590 (1st Cir. 2001). The ultimate mission of the system upon which we rely to protect the liberty of the accused as well as the welfare of society is to ascertain the factual truth, and to do so in a manner that comports with due process of law, law enforcement officer or prosecutor who finds it tactically

advantageous to turn a blind eye to the manifest potential for malevolent disinformation, in effect, undermines that mission. See *U. S. v. Wallack*, 935-F2d 445 (2nd Cir. 1991). "(Indeed), if it is established that the government knowingly permitted the introduction of false testimony "reversal is virtually automatic." See *U. S. v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392 (1976). A conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. The due process clause entitles defendants in criminal cases to fundamentally fair procedures, and it is fundamentally unfair for prosecutor to knowingly present perjury to jury. Where prosecutor knows that his witness has lied, he has a constitutional duty to correct false impression of the facts. All perjury pollutes a trial, making it hard for jurors to see the truth; no lawyer, prosecutor, or defense counsel, civil or criminal may knowingly present lies to a jury then sit idly by while opposing counsel struggles to obtain this pollution of the trial. Further more, it is as much a prosecutor's duty to refrain from improper methods calculated to produce wrongful conviction as it is to use every legitimate method to bring about one.

Trial counsel for the petitioner sat idly by while this blatant violation was occurring. Counsel should have vigorously objected and/or moved for an immediate mistrial. Failure to do so resulted in petitioner being denied effective assistance of counsel guaranteed him by the Constitution, furthermore, violates his right to due process. Trial counsel did not object when prosecutor attempted in his closing argument to appeal to the emotions of the jury, rather than focusing on the facts of the case.

The prosecutor , in the present case, asked the jury to convict the defendant, not because he was guilty of the crime, but to prove to petitioner that "life is worth a whole lot more than a color and a gang sign. You let him know his days of gang banging on the streets of Richland County are over." See tr. Vol 1, pg 460, lines 18-20.

"Prosecutor cannot make statements calculated to incite the passions and prejudices of the jurors. Prosecutor engaged in misconduct when he improperly expressed his personal beliefs about crucial matters before the jury by voicing skepticism about defendant's insanity defense and stating his beliefs about credibility of expert witnesses, and by bolstering his own opinion of expert's testimony based on his own purported personal knowledge of experts character and motivations." See *Darden v Wainwright*, 477 U.S. 637, 643 (1974).

Again, petitioner's trial counsel should have objected. Failure to do so allowed an unjust contamination of the trial, and unfairly stacked the odds against petitioner. Trial counsel failed to provide effective assistance to petitioner in violation of the Sixth Amendment, the Fifth Amendment and Fourteenth Amendment due process clause.

**APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL
WHEN HE FAILED TO ARGUE PREJUDICE VALUE OF HEARSAY TESTIMONY**

On Appeal, petitioner argued that the trial court erred in admitting testimony from Investigator James Richardson that petitioner was a "supreme" or officer within the Bloods because the testimony was improper hearsay.

The Supreme Court of S. C. agreed with petitioner that the testimony was hearsay and was not admissible under any exception to the hearsay rule. (See

Opinion No. 26139). The Court further held that "although the testimony was improperly admitted, (petitioner) has not demonstrated reversible error.

The Court deemed the improper admission of hearsay testimony...harmless error. The Court's decision was based on the argument that the improper hearsay was cumulative to other evidence that petitioner was a gang member. Specifically, the Court claimed (1) "Brooks testified (petitioner) was a Blood, and (2) Lt. James Smith testified bullet-proof vests were seized from (petitioner's) apartment and Richardson properly testified officers within gangs may have bullet-proof vests.

Petitioner claims appellate counsel was ineffective for failing to show: (1) that Brooks never testified that petitioner was a blood or a member of any gang whatsoever and (2) that the evidence seized from petitioner's apartment was not relevant to the issue at hand. Furthermore, appellate counsel should have argued that even if the court deemed the evidence relevant, it should have been suppressed/excluded because its probative value was substantially outweighed by the danger of unfair prejudice to the petitioner.

Under the case law, even if evidence is deemed relevant and admissible, the court may still exclude it if its probative value is substantially outweighed by the danger of undue prejudice or misleading the jury. *State v. Alexander*, 303 S.C. 377 (1991). "Unfair prejudice means an undue tendency to suggest decision on an improper basis, such as an emotional one." *State v. Kelly*, 343 S. C. 350(2001).

The introduction of the improper hearsay and the items seized from petitioner's apartment were meant to illicit an emotional response from the jury. Appellate counsel should have argued that petitioner was found guilty by the jury because they believed him to be a gang member and not because they believed

him guilty of the crime. And in not raising the issue that the evidence should have been suppressed which this was reserved for appeal and in not raising it, appellate counsel was ineffective.

SUPPORTING FACTS AND MEMORANDUM OF LAW

10(A) VIOLATION OF FOURTH AMENDMENT PROTECTION AGAINST ILLEGAL SEARCH AND SEIZURE

In the present case, police officers, while conducting a search of petitioner's residence, seized property which was not described in the search warrant. Specifically, photographs of men, including petitioner, making Blood hand signals and wearing Blood colors; a gang code book; red clothing and hats; bullet-proof vests; and a document containing a pledge of allegiance to the United Blood Nation, were seized and subsequently used as evidence at trial.

"To be valid, a search warrant must specifically describe the property or things to be seized." See *Lo-Ji Sales v New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979); *Stanford v. New York*, 379 U.S. 476, 85 S.Ct. 506, 13 L.ed 2d 431, (1965). "Evidence which is obtained through an illegal search is not admissible in federal courts pursuant to the Fourth and Fifth Amendments to the United States Constitution. *Week V. U. S.*, 232 U. S. 383, 34 S.Ct. 341, 58 L.Ed. 652(1914); *Boyd v. U.S.* 116 U.S. 616, 6 S.Ct.. 524, 29 L.Ed. 746 (1886). This rule of exclusion is applicable to state court proceedings through the due process clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, 86 Ohio L.Abs. 513, 84 A.L.R. 2d 933 (1961).

Article IV of the United States Constitution provides protection against "unreasonable searches and seizures." Article 1 § 10 of the South Carolina

Constitution contains the same express language and provides additional protection against "unreasonable invasions of privacy."

The plain view doctrine is an exception to the warrant requirement. *State v. Brown*, 289 S.C. 581, 347 SE 2d 882(1986). Under this doctrine, it is lawful for police to remove objects which can be plainly seen on the theory that it is not a search to observe what is already in plain view. *Coolidge v. New Hampshire* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *Harris v. U. S.*, 390 234 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968).

However, the plain view doctrine does have requirements:

- (1) The Officer must be lawfully where the evidence can be plainly viewed;
- (2) The Officer must have a lawful right of access to the evidence;
- (3) The incriminating nature of the evidence must be immediately apparent.

Horton v. California, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed. 2d 112 (1990); *State v. Beckham*, 334 S.C. 302, 513, S.E. 2d 606 (1999). In other words, although evidence discovered in plain view is admissible, it must be shown that the initial intrusion which afforded the authorities plain view was lawful, the discovery of the evidence was inadvertent, and the incriminating evidence was immediately apparent to the seizing authorities. *State v. Culbreath*, 300 S.C. 232, 387 S.E. 2d 255 (1990); *State v. Dingle*, 279 S.C. 278, 306 S.E. 2d 223 (1983). *Interest of Thomas B. D.* 326 S.C. 614 (Ct. App. 1997).

Because the items seized were not related to the case and were therefore not apparently incriminating the seizure of said items was illegal and therefore should have been suppressed.

10(B) VIOLATION OF SIXTH AMENDMENT RIGHT TO CONFRONT ADVERSE
WITNESSES

In the present case, Investigator James Richardson was qualified as an expert in gangs and gang activity. Richardson testified about the history of the Bloods and Crips, gang activities in Columbia, gang clothing, and gang hand signals. During direct examination, Richardson testified Appellant was a member of the Bloods and was a supreme or officer within the gang.

Although Richardson identified items seized from petitioner's apartment related to the Bloods, Richardson did not testify that he relied on these items in forming an opinion that petitioner was a member in the Bloods. Furthermore, Richardson testified he solely based his testimony that petitioner was a gang member on statements from informants. This testimony was hearsay and was not admissible under any exception to the hearsay rule.

Petitioner argues that Richardson's testimony violated his right to confront witnesses under the Sixth Amendment to the United States Constitution.

In 1995, south Carolina enacted the South Carolina Rules of Evidence (SCRE), and by doing so adopted most of the Federal Rules on hearsay.

With the adoption of the Rules of Evidence, the hearsay rule and its components were expressly defined in Rule 801(c) SCRE, "hearsay is"

- (1) A Statement
- (2) Other than one made by the declarant while testifying at the trial or Hearing
- (3) Offered in evidence
- (4) To prove the truth of the matter asserted

The rule is founded upon the notion that statements must be subject to examination, and those statements uttered outside the courtroom were not under oath, tested by cross-examination, or made under the seriousness and trappings of a legal proceeding. The exceptions which have developed over the years reflect a notion that sometimes statements are made under circumstances which themselves aid in the reliability as to the truthfulness and accuracy thereof. The seriousness of the rationale underlying the rules and exceptions to hearsay in the criminal context was poignantly set out in *State v Williams*, 285 S.C. 544, 556, 331 S.E. 2d 354, 361 (Ct. App. 1985):

The right of an accused to be confronted by the witnesses against him is perhaps the most important constitutional right provided to people who are not guilty. The right to a trial standing alone, is fairly meaningless if a conviction can be obtained based only on a prosecution witness reciting a statement allegedly made outside of court. Unfortunately, there is no way the right of confrontation can be accorded people who are not guilty to the exclusion of those who may be guilty. This is because, under our system of justice, no one is guilty until he has been tried and proven guilty. In other words, the right of confrontation cannot be accorded to anyone unless it is accorded to everyone. This is a price we pay for living in the United State of America. Many people feel it is a small price.

See also *State v Dennison*, 305 S.C. 161, 406 S.E 2d 383 (Ct.App. 1991)(discussing the source and importance of the right of confrontation)

Hearsay is inadmissible except as provided by the SCRE "or by other rules prescribed by the Supreme Court of this State or by Statute." Rule 802, SCRE. The statement must therefore fall within an exception to the rule. *Jolly v State*,

314 S.C. 17, 443 S.E. 2d 566 (1994)(the rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies). In *State v Williams*, the Court held that the defendant was improperly denied his constitutional right of confrontation by the trial court's permitting an officer to testify as to an out-of-court declaration by the defendant's wife,

The Supreme Court of South Carolina has already ruled that Richardson's testimony in the present case was hearsay. (Opinion No. 26139). Furthermore, the Supreme Court could not rule on the issue of whether the admission of Richardson's testimony violated petitioner's right to confront adverse witnesses, because the issue was not preserved for appellate review.

10(C) VIOLATION OF SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

Petitioner alleges that his trial counsel was ineffective for failing to argue and preserve for the record the issues of violation of Fourth Amendment protection against illegal search and seizure and violation of Sixth Amendment right to confront adverse witnesses (see grounds 10(A) and 10(B)).

VIOLATION OF FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS CLAUSE

In *Strickland v Washington*, the Supreme Court established the standard for evaluating claims of ineffective assistance of counsel. The defendant must show the following: (1) that counsel's assistance was unreasonable considering all the circumstances of the case, and (2) that "there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."

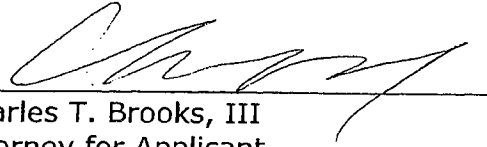
In the present case, petitioner's conviction would likely have been reversed on appeal if not for trial counsel's failure to preserve the issues found in 10(A) and 10(B).

Furthermore, trial counsel was ineffective for failing to object to illegal tactics used by the prosecutor in the case. In his opening remarks, the solicitor told the jury, "I've never had to tell a jury in my 11 years as prosecutor, some of the State's witnesses that we call may still not tell the truth, whether it's because they're afraid, whether they're protecting their friend or themselves."

"All perjury pollutes a trial, making it hard for jurors to see the truth; no lawyer prosecutor, or defense counsel, civil or criminal may knowingly present lies to a jury then sit idly by while opposing counsel struggles to contain this pollution of the trial. It is as much the prosecutor's duty to refrain from improper methods calculated to produce wrongful conviction as it is to use every legitimate method to bring about one. When a prosecutor has knowingly used perjured testimony or equivalently, has knowingly failed to disclose the information that would give the lie to perjurious testimony, a conviction is fundamentally unfair, and must be set aside, if there is any reasonable likelihood the false testimony could have affected the judgment of the jury. *State v. Merriman*, 337 S.E. 2d 218; *State v. Goolsby*, 268 S.E. 2d 31; *Mastracchio v. Vase*, 274 F3d 590 (1st Cir. 2001).

Thus trial counsel should have objected immediately and moved to suppress the perjured testimony. This would have prevented Marcus Jones from misleading the jury. (Compare Tr. p. 140, lines 9-19 with Tr. p. 148, lines 3-20. Clearly perjury).

RESPECTFULLY SUBMITTED ON BEHALF OF
APPLICANT, Jeroid Price

A handwritten signature in black ink, appearing to read 'Charles T. Brooks, III', written over a horizontal line.

Charles T. Brooks, III
Attorney for Applicant
309 Broad Street
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Sumter, South Carolina, 29150
(803) 418-5708

April 28, 2008

1 STATE OF SOUTH CAROLINA
2 COUNTY OF RICHLAND

COURT OF COMMON PLEAS

3
4
5 JERIOD J. PRICE)

6 APPLICANT,)

7 V.)

8 STATE)
9 _____)

TRANSCRIPT OF RECORD
06-CP-40-7168

10 JUNE 25, 2008
11 COLUMBIA, SOUTH CAROLINA
12

13 B E F O R E:

14 THE HONORABLE WILLIAM P. KEESLEY, JUDGE.
15

16 A P P E A R A N C E S:

17 CHARLES T. BROOKS, III, ESQUIRE
18 ATTORNEY FOR THE APPLICANT

19 BRIAN T. PETRANO, ASSIST. ATTORNEY GENERAL
20 ATTORNEY FOR THE STATE
21
22
23

24 STACY L. SHEPPARD
25 CIRCUIT COURT REPORTER

1		I N D E X			
2	<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
3	Jeriod J. Price				
4	By Mr. Brooks	5			
5	Cameron B. Littlejohn				
6	By Mr. Brooks	16			
7	By Mr. Petrano		23		
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E X H I B I T S

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NO.DESCRIPTIONID. EVD.

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(There were no exhibits.)

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1 (The following proceedings were held on June
2 25, 2008.)

3 **THE COURT:** This is the matter of Price versus
4 State. All right, Mr. Attorney General.

5 **MR. PETRANO:** Thank you, Your Honor. May it
6 please the Court.

7 This is 2006-CP-40-7168. This is Mr. Jeriod
8 Price. PCR application filed December 4th, 2006.

9 The applicant was indicted by the May 2003 term
10 for the Richland County Grand Jury for murder,
11 03-GS-40-2295, trial on December 17th, 2003,
12 sentenced on December 19th, 2003, by Judge Reginald
13 I. Lloyd to a period of 35 years.

14 There was a timely notice of appeal. And the
15 South Carolina Supreme Court ultimately affirmed the
16 applicant's conviction. That was opinion number
17 26139 filed April 17th, 2006.

18 And I'll turn it over to Mr. Charles T. Brooks,
19 applicant's counsel of record.

20 **THE COURT:** All right. Mr. Brooks.

21 **MR. BROOKS:** Please the Court. Judge, we would
22 call Mr. Price to the stand.

23 **THE COURT:** Mr. Price, I need you to come
24 around to the bailiff over here for me, please.

25

1 JERIOD J. PRICE,
2 having been duly sworn, testified as follows:

3 **THE COURT:** All right. Mr. Brooks.

4 DIRECT EXAMINATION

5 BY MR. BROOKS:

6 **Q** Mr. Price, are you ready?

7 **A** Sure.

8 **Q** Now, you brought this post-conviction relief
9 application; is that correct?

10 **A** Yes, sir.

11 **Q** And who was your lawyer at your trial?

12 **A** Cameron Littlejohn and Amy Rushing.

13 **Q** Okay. Was Mr. Littlejohn appointed to
14 represent you or did you pay him?

15 **A** He was appointed, sir.

16 **Q** Okay. Do you recall how long he was on your
17 case?

18 **A** I stayed in the county jail about nine months.
19 Mr. Littlejohn was on the case about -- I figure
20 around six, seven months.

21 **Q** And do you recall how many times you met with
22 him before going to trial?

23 **A** About two or three times.

24 **Q** About what?

25 **A** Maybe two or three times.

1 Q And this was at the county detention center?

2 A Yes.

3 Q Because you never got out on bond; is that
4 correct?

5 A No, sir.

6 Q Now, you've raised several issues about
7 Mr. Littlejohn's representation of you; is that
8 correct?

9 A Yes, sir.

10 Q One of them is investigation of the crime
11 scene; is that correct?

12 A Yes, sir.

13 Q What issue do you take with Mr. Littlejohn
14 about investigating the crime scene?

15 A The prosecution theory of the crime scene was
16 that the victim was shot while laying on the ground,
17 resulting in the bullet striking the ground. And
18 had Mr. Littlejohn investigated the crime scene, he
19 would have known that not only was it virtually
20 impossible for the victim to be shot there due to
21 that there was no blood found within the vicinity of
22 where the bullet was retrieved from that they say
23 passed through the victim's body and hit the ground,
24 that prior to the shooting of my incident, there
25 were several other shootings at the club during that

1 same year and prior the year before. There was an
2 incident reported in Jackson, opinion number --

3 Q Let me ask you, going back to the facts, are
4 you saying that Mr. Littlejohn did not go out to the
5 crime scene?

6 A That's what I'm saying. He didn't investigate
7 the crime scene.

8 Q Now, are you saying that, to your knowledge,
9 there had been other shootings prior to this one?

10 A Yes.

11 Q How did you know that?

12 A Well, the history of the club. In Jackson,
13 opinion number 26037, there's a --

14 Q I understand what -- you're trying to read an
15 opinion, tell me about the club.

16 A Okay. The history of the club was known for
17 violence.

18 Q Had you been there before?

19 A Yes, I have.

20 Q Okay. Did you tell Mr. Littlejohn this
21 information?

22 A Mr. Littlejohn brought it up at trial, so he
23 knew.

24 Q About other shootings that had occurred out
25 there?

1 **A** Yes.

2 **Q** Now, you also raised the issue about a
3 ballistics expert, is that right, in terms of what
4 bullet is where and fired from what gun; is that
5 correct?

6 **A** Yes. It was -- there was three shell casings,
7 a .380 bullet -- a .380 shell casing, two .40
8 caliber shell casings, but at trial, they presented
9 the fragment for one bullet and three slugs. One
10 was retrieved out of the victim's body, one was
11 found by the victim and one was found in the ground,
12 that's four shells, that's four slugs.

13 **Q** So did Mr. Littlejohn, to your knowledge, ever
14 get somebody who's trained in ballistics to look at
15 that and investigate that?

16 **A** Not to my knowledge.

17 **Q** Okay. Now, you also raised the issue about
18 suppression of evidence. Tell the Court what you're
19 referring to in that allegation.

20 **A** Yes. Mr. Littlejohn raised -- objected to some
21 evidence that was brought in that was used to paint
22 a picture of my character, I assume, and that the
23 evidence was taken illegally, it was seized
24 illegally. The evidence was seized illegally due to
25 the evidence was not -- the evidence that was

1 obtained that was taken wasn't described in the
2 search warrant. Mr. Littlejohn objected to the
3 relevancy of the evidence, but he never moved for a
4 motion to suppress the evidence.

5 **Q** So are you saying that he should have moved to
6 suppress the evidence based on an illegal search?

7 **A** Yes.

8 **Q** And are you saying that he never did that?

9 **A** No, he didn't.

10 **Q** Now, this information -- there was somebody
11 that testified at your trial about this being gang
12 paraphernalia; is that correct?

13 **A** Yes.

14 **Q** And they also talked about what they heard as
15 far as why this is relevant to gang activity; is
16 that correct?

17 **A** Yes.

18 **Q** Now, you raised an allegation regarding that?

19 **A** Yes.

20 **Q** Specifically, what is your allegation regarding
21 that?

22 **A** That Investigator Richardson testified at my
23 trial. Investigator Richardson was with the
24 Richland County Sheriff's Department and he was
25 qualified as an expert, a gang expert. And he

1 testified that informants had told him that I was a
2 member within the Blood gang, but not only a member,
3 a officer within the gang. Mr. Littlejohn objected
4 to it being hearsay. Upon direct appeal, the
5 Supreme Court held that his testimony was hearsay
6 and was not admissible under any exception to the
7 hearsay rule, but what Mr. Littlejohn failed to do
8 was -- what Mr. Littlejohn failed to do was object
9 to the cross-examination of other witnesses, the
10 informants, and in doing so, he failed to protect me
11 against the confrontation clause.

12 Q Okay. Now, let's go back to the expert,
13 Investigator Richardson. He had brought up hearsay
14 in your trial; is that correct?

15 A Yes.

16 Q And Mr. Littlejohn, he did object to that?

17 A Yes, he objected to the hearsay.

18 Q All right. Now, you also mentioned other
19 informants that testified. You said that
20 Mr. Littlejohn did not effectively cross-examine
21 them; is that correct?

22 A No. They never testified, that's the problem.
23 The informants never testified.

24 Q They never testified at all?

25 A No.

1 **Q** Okay. And do you think that that's something
2 that Mr. Littlejohn should have called them to the
3 stand?

4 **A** Yes, so I can cross-examine the witness against
5 me.

6 **Q** So what your allegation is that, I want to make
7 sure we're clear about this, is that Mr. Littlejohn
8 should have put these people on the stand even
9 though the State didn't call them?

10 **A** Yes.

11 **Q** All right. Now, are there any other issues of
12 Mr. Littlejohn that we haven't covered?

13 **A** On opening -- on opening arguments, the
14 prosecutor, Mr. Pascal, told the jury that he was
15 knowingly presenting perjury to the jury. On
16 opening arguments, Mr. Pascal told the jury that in
17 his 11 years he never had to tell a jury that some
18 of the witnesses that he will present were not
19 telling the truth, whether they're afraid or they're
20 protecting themselves or others, but they were not
21 telling the truth.

22 **Q** Did Mr. Littlejohn object to that?

23 **A** No. I felt like he should have objected and
24 moved for a motion of mistrial due to the
25 prosecutory (sic) -- I felt like it was prosecutory

1 misconduct myself and that --

2 Q Do you think it prejudiced you, it hurt you?

3 A Yes, I felt like it prejudiced me greatly.

4 Q Anything else about Mr. Littlejohn that we
5 haven't covered?

6 A (Witness reviewing document.)

7 Q Did you also indicate that Mr. Littlejohn did
8 not preserve some issues on appeal?

9 A Yes.

10 Q What issues did he not preserve on appeal?

11 A My confrontation clause.

12 Q Anything else? Confrontation clause would have
13 dealt with those other people not testifying; is
14 that correct?

15 A Yes, with Investigator Richardson. And he
16 never objected to the illegal search and seizure.

17 Q Did he -- were there any issues raised about
18 Investigator Richardson's qualifications as an
19 expert?

20 A No, that was his first time testifying as an
21 expert and they qualified him.

22 Q Did Mr. Littlejohn raise an issue about that?

23 A No.

24 Q Now, you also raised an issue about your
25 appellate defense lawyer, Mr. Savitz?

1 **A** Yes.

2 **Q** And what was the issue that you raised about
3 that?

4 **A** The first issue that I raise on appellate
5 counsel was that appellate counsel was ineffective
6 for failing to show how the hearsay testimony
7 prejudiced -- was prejudiced against me because the
8 Supreme Court said even though the hearsay testimony
9 was an error, I failed to show how I prejudice --
10 how it was reversible error.

11 **Q** And that's something you felt that Mr. Savitz
12 should have done a better job of?

13 **A** Yes.

14 **Q** So is that the -- is that your claim in regards
15 to your appellate counsel?

16 **A** The court -- the Supreme Court based their
17 decision based upon arguments that was improper
18 hearsay to other evidence, like Brooks, my
19 co-defendant, they said that Brooks testified that I
20 was a Blood, and that Lieutenant Stan Smith
21 testified that the bullet proof vest was seized from
22 my apartment, and Richardson properly testified
23 officers within gangs may have bullet proof vests.
24 Appellate counsel was ineffective for failing to
25 show that Brooks never testified that I was a gang

1 member and that the evidence seized from my
2 apartment was not relevant to the issue at hand.

3 Q Okay. Anything else about Mr. Savitz'
4 representation that we haven't covered?

5 A Yes.

6 Q Go ahead.

7 A On direct appeal, I had another issue from the
8 relevancy that Mr. Littlejohn had preserved for
9 appeal, the relevancy of the evidence that was used
10 against me.

11 Q And Mr. Savitz never brought that up?

12 A He never brought it up.

13 Q And that was Mr. Littlejohn's objection to the
14 relevancy of the gang stuff that was brought up at
15 trial?

16 A Uh-huh.

17 Q Is there anything else about Mr. Savitz that we
18 haven't covered?

19 A No.

20 Q Now, Mr. Price, back to Mr. Littlejohn, you
21 ended up getting 35 years; is that correct?

22 A Yes, sir.

23 Q Was there ever any plea negotiations, talks or
24 anything like that?

25 A Yes.

1 **Q** Tell the Court about that.

2 **A** First plea, I believe, was like 30 years or
3 something like that. And then Mr. Littlejohn came
4 again, he was like they was looking at zero to 30,
5 but the Solicitor was looking more to like ten years
6 or something like that, like zero to ten within that
7 range, I would get the lesser of the time. And then
8 during trial, during the course of trial, in the
9 middle of the trial, me and Mr. Littlejohn had a
10 talk behind -- in private conference and he was
11 saying something about in the middle of trial that
12 he may be able to get five years and I was leaning
13 toward the five, but he really felt like we had the
14 trial beat, so we went ahead and --

15 **Q** Did he tell you that?

16 **A** Yes. And we went ahead and proceeded with
17 trial.

18 **Q** Okay. Now, you are asking the Court to grant
19 you a new trial on this case; is that correct?

20 **A** Yes, sir.

21 **Q** You understand the possible risks that you run
22 if you were granted that; is that correct?

23 **A** Yes, sir.

24 **Q** Okay. Is there anything else? I think we've
25 covered everything; is that correct, Mr. Price?

1 **A** Yes, sir. That's about right.

2 **MR. BROOKS:** Answer any questions from

3 Mr. Petrano, okay.

4 **MR. PRICE:** Okay.

5 **MR. PETRANO:** No questions.

6 **THE COURT:** Thank you, sir. You may step down.

7 **MR. BROOKS:** Your Honor, we would call

8 Mr. Cameron Littlejohn.

9 **THE COURT:** Come around, please.

10 CAMERON B. LITTLEJOHN,

11 having been duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. BROOKS:

14 **Q** Mr. Littlejohn, I'm just going to try to be
15 brief and hit on the issues that we've discussed.
16 You were appointed to represent Mr. Price; is that
17 correct?

18 **A** That's correct.

19 **Q** And you had him for about nine months?

20 **A** I don't think it was that long. I believe I
21 was appointed some time in May. Ms. Rushing had
22 been appointed prior to me and she had gotten to
23 know Jeriod and met with him on numerous occasions
24 before I was even appointed.

25 **Q** Do you recall how many times you went to see

1 him at the jail?

2 **A** I want to say it was at least four or five
3 times, met with Jeriod very extensively. We went
4 through, you know, virtually all of the things we
5 needed to talk about during those times. Ms.
6 Rushing had met with him and met with him during the

7 course of representation more times than I did.

8 **Q** Did you ever contract an investigator to assist
9 you in the preparation of this case?

10 **A** Not an investigator, two investigators. We had
11 Amos Jones, who was a general investigator. We also
12 had Don Girndt, who was a retired forensics expert
13 from SLED, who helped us with the ballistics and the
14 crime scene.

15 **Q** So it's your testimony that there was a
16 ballistics expert?

17 **A** That's correct.

18 **Q** And that would have been Mr. Girndt?

19 **A** That's correct.

20 **Q** And did you tell Mr. Price about that?

21 **A** I'm sure I did. Mr. Girndt sat there during
22 part of the trial.

23 **Q** Now, did you ever look at any information about
24 the history of shootings at this club?

25 **A** I don't know that I was really aware of any

1 shootings that would have had any bearing on this
2 particular shooting. I know in the materials that
3 were submitted, the Jackson case was cited. I went
4 and looked up the Jackson case. It involved a
5 situation where there were shots fired in the air
6 and I don't know exactly what bearing it had on it,
7 but to get -- I hate to jump ahead, but I went to
8 the crime scene with Mr. Jones. We went in there,
9 looked at the place extensively. We looked exactly
10 where the shooting took place. We took pictures. I
11 mean, it was a very exhaustive crime scene
12 investigation done on our part.

13 Q And you -- did you relay that to Mr. Price what
14 you and Mr. Jones had done?

15 A I'm sure I did.

16 Q Now, there was -- during the trial, there was
17 an investigator who talked about gang activity; do
18 you recall that?

19 A That was the sergeant with the Richland County
20 Sheriff's Department, yes.

21 Q And he talked about certain things being
22 related to gangs; is that correct?

23 A That's correct.

24 Q Was there any motions to exclude him from
25 testifying or anything of that nature?

1 **A** When they called him and attempted to qualify
2 him as an expert, we extensively voir dired him. We
3 objected to his qualifications. We objected to the
4 basis for which he was rendering opinions. We
5 objected to his testimony in total as the record
6 will clearly show. And then, of course, we objected
7 based on hearsay because his opinions were based on
8 information he had gleaned through his experiences
9 with the sheriff's department, which were the basis
10 of things being told to him by other people.

11 **Q** Now, in addition to that, there were some other
12 people, informants. They did not testify, is that
13 correct, some people that Mr. Price wanted you to
14 call to the stand?

15 **A** I do not recall that. I glean from his
16 testimony he's talking about informants that had
17 given Sergeant Richardson information --

18 **Q** That's correct.

19 **A** -- that he wanted me to call, but I didn't feel
20 that that was proper. I mean, that could have done
21 nothing but bolster what the sergeant had said and
22 obviate the reasons for our hearsay objections.

23 **Q** Are you saying that was like a calculated
24 decision of yours not to bring these people in?

25 **A** I don't recall Mr. Price asking me to do that.

1 And had he done it, I would have talked him out of
2 it and made the strategic decision not to do it.

3 Q Now, during the course of the trial at the very
4 beginning, do you recall the Solicitor making a
5 statement questioning the veracity of his own
6 witnesses?

7 A I didn't recall that specifically. I went back
8 and read the transcript when we were getting
9 prepared to come here last time and I noticed where
10 he said that. And if he -- if I was trying the case
11 in this courtroom at this very time and the
12 Solicitor said that, I wouldn't object. I would
13 probably get up and say right on because, in
14 essence, he was saying our witnesses are not
15 believable.

16 Q So, again, would that have been a strategic
17 decision not to raise that as an objection?

18 A Without a doubt.

19 Q Do you recall the police taking some -- seizing
20 some things from Mr. Price's residence?

21 A Yes, sir. They got a search warrant for
22 Mr. Price's residence. We studied the search
23 warrant. I can't recall right now whether we made a
24 motion to suppress the search, but it was either a
25 good search warrant or Judge Lloyd determined it was

1 a good search warrant. In any event, the material
2 that was seized may not have been listed in the
3 search warrant, but, obviously, police officers in
4 executing a search warrant, if they come upon
5 evidence that's not listed specifically in the
6 search warrant, still have the right to seize it.

7 **Q** So do you recall whether or not you made a
8 motion?

9 **A** I do not recall. The record would -- obviously
10 will reflect that.

11 **Q** Was there ever any negotiations in this case?

12 **A** There may have been some at the beginning. I
13 do not remember any -- I certainly don't remember
14 any five year offer that might have been made, but I
15 know in this case, as in all cases, if a plea offer
16 is extended to me, I always take it to the client no
17 matter how ludicrous it may be. The client is given
18 the opportunity to accept it or reject it. I
19 certainly would have done that in this case.
20 Mr. Price wanted his trial and I went in there and
21 tried the case as best I could for him.

22 **MR. BROOKS:** Beg the Court's indulgence, Your
23 Honor.

24 **THE COURT:** Yes, sir.

25 (Pause.)

1 BY MR. BROOKS:

2 Q Mr. Littlejohn?

3 A Yes, sir.

4 Q Do you recall during the closing arguments of
5 this case, the Solicitor mentioning something about
6 convicting my client because of gang activity?

7 A There was -- Mr. Price quoted something in his
8 application, I didn't remember it specifically. I
9 went back and read the transcript and I read the
10 language. It didn't strike me as something that
11 would have been overly prejudicial. You had to -- I
12 try and weigh my decisions as to whether I'm going
13 to object to something, especially during a closing
14 argument, as to the chance of being sustained, okay.
15 As a strategic matter, I don't like to get up, make
16 an objection and get overruled, especially at that
17 point. I did not feel that that would have been an
18 objection that would have been sustained.

19 Q Let me ask you, why would you feel that this is
20 not a time to make an objection? You said that you
21 felt, strategically, this was not the proper place
22 to make the objection if you didn't desire to do so,
23 you didn't feel it would help you?

24 A Well, Mr. Brooks, I've been doing this 32
25 years. I've done probably a thousand trials. And

1 you kind of have a sense of it and you -- sometimes
2 you need to object, you have to object and you know
3 you're going to win, sometimes you're not sure and
4 it's better strategically not to object and just let
5 it go and, hopefully, the jury will disregard it
6 rather than you objecting and bringing it in as a
7 bigger issue than it really is.

8 **MR. BROOKS:** Beg the Court's indulgence.

9 **THE COURT:** Yes.

10 (Pause.)

11 **MR. BROOKS:** No other questions,

12 Mr. Littlejohn.

13 **THE COURT:** Does the State have any questions
14 of the witness?

15 **MR. PETRANO:** Yes, sir. Thank you, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. PETRANO:

18 **Q** You've pretty much gone over everything I
19 wanted to cover, but I do have one other thing.
20 What was the defense here, the strategy?

21 **A** Self-defense.

22 **Q** And in pursuing self-defense, is it possible
23 that logically could be advantageous that this was
24 gang related?

25 **A** Well, possibly. You're saying that one gang

1 member attacked the defendant such to give the -- I
2 guess what you're trying to do is impart a motive to
3 the victim to attack the defendant.

4 Q Yes, sir.

5 A That was something that went on through the
6 trial, yes.

7 Q And it was something that you were aware of
8 that might occur?

9 A Of course.

10 MR. PETRANO: Thank you. Nothing further.

11 THE COURT: Any other questions of the witness
12 from the applicant?

13 MR. BROOKS: No, Your Honor.

14 THE COURT: Thank you, sir. You may step down.
15 Any other evidence from the applicant?

16 MR. BROOKS: That's the applicant's case.

17 THE COURT: Does the State have any other
18 evidence to present?

19 MR. PETRANO: Nothing, Your Honor. I think
20 what's in your packet speaks for itself, especially
21 the transcript and the decision on appeal. Thank
22 you, Your Honor.

23 THE COURT: Mr. Brooks, do you have any
24 argument to make?

25 MR. BROOKS: Judge, we -- just briefly, it's

1 our position we put everything before the Court in
2 regards to my client's claim of ineffective
3 assistance of counsel against Mr. Littlejohn, as
4 well as Mr. Savitz. We've put everything on the
5 record in regards to the opening statements of the
6 prosecution, as well as the people that Mr. Price
7 said that he wanted to be called that were mentioned
8 by Investigator Richardson. We also talked about
9 the suppressions of evidence. We also talked about
10 the closing argument, statements of the prosecution.
11 These are things that my client's position is that
12 his lawyer failed to object and raise as issues
13 during the trial. As such, Judge, we're asking the
14 Court to grant my client's application and present
15 him with a new trial.

16 **THE COURT:** Does the State have any argument?

17 **MR. PETRANO:** Nothing further, Your Honor.

18 **THE COURT:** I'll review the record, notify you
19 of my decision in writing. Thank you very much.

20 **MR. BROOKS:** Thank you, Judge.

21 **MR. PETRANO:** Thank you, Your Honor.

22

23

24

END OF PROCEEDINGS

25

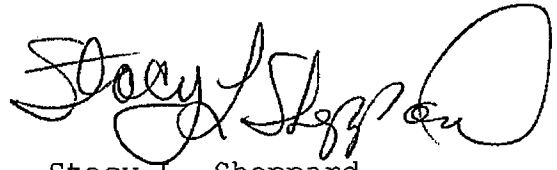
C E R T I F I C A T E

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

I, the undersigned, Stacy L. Sheppard, Circuit Court Reporter for the Fifth 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 the evidence introduced in the hearing of the captioned cause, relative to appeal in the Civil Court for Richland County, South Carolina, on the 25th of June, 2008.

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

November 24, 2008



Stacy L. Sheppard
Circuit Court Reporter

STATE OF SOUTH CAROLINA	)	
COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
	)	
	)	2006-CP-40-7168
Jeriod J. Price, 298791,	)	
Applicant,	)	
v.	)	ORDER OF DISMISSAL
State of South Carolina,	)	
Respondent.	)	

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PROCEDURAL HISTORY

Wade
#1

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 4, 2006, and amended April 28, 2008. The Respondent made its Return on May 14, 2007. An evidentiary hearing into the matter was convened on June 25, 2008 at the Richland County Courthouse. The Applicant was present at the hearing and was represented by Charles T. Brooks, III, Esquire. Brian T. Petrano of the South Carolina Attorney General's Office represented the Respondent.

At the hearing, the Applicant testified on his own behalf. The Applicant's trial counsel, Cameron B. Littlejohn, Jr., Esquire also testified. This Court had before it the records of the Richland County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County.

The Applicant was indicted at the May 2003 term of the Richland County Grand Jury for murder (03-GS-40-2295). Applicant was represented by Cameron B. Littlejohn, Jr., and Amye Rushing, Esquire. On December 17, 2003, Applicant proceeded to trial at the conclusion of which he was found guilty of murder. On December 19, 2003, Applicant was sentenced by the Honorable Reginald I. Lloyd to confinement for a period of thirty-five (35) years.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Supreme Court affirmed Applicant's conviction and sentence. State v. Price, Op. No. 26139 (S.C. filed April 17, 2006).

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

1. "Violation of 4th Amendment protection against illegal search and seizure."
2. "Violation of 6th Amendment right to confront adverse witnesses." And
2. "Violation of 6th Amendment right to effective assistance of counsel."

Wipe #2
The Applicant filed an "Amended Application for Post Conviction Relief" on April 30, 2008; he alleged that he is being held in custody unlawfully for the following reasons:

1. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO INVESTIGATE THE CRIME SCENE
2. TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO OBJECT TO VIOLATION OF CONFRONTATION CLAUSE WHERE RICHLAND COUNTY OFFICIAL'S TESTIMONY WAS USED SOLELY TO PREJUDICE THE JURY
3. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT OR MOVE FOR MISTRIAL WHERE SOLICITOR'S OPENING (SIC) AND CLOSING REMARKS WERE TANTAMOUNT TO PROSECUTORIAL MISCONDUCT
4. APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO ARGUE PREJUDICE VALUE OF HEARSAY TESTIMONY
5. VIOLATION OF FOURTH AMENDMENT PROTECTION AGAINST ILLEGAL SEARCH AND SEIZURE

6. VIOLATION OF SIXTH AMENDMENT RIGHT TO CONFRONT ADVERSE WITNESSES
7. VIOLATION OF SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL
8. VIOLATION OF FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS CLAUSE

At the PCR hearing, the Applicant ignored, in part, some of the above allegations, and combined some of the above allegations into more specific allegations.

FACTS OF FACT AND CONCLUSIONS OF LAW

WPK
#3
This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (1985).

The Applicant alleged that trial counsel was ineffective because there was no adequate investigation of the crime scene. The Applicant explained that there was one, or more, previous shootings at this same night club location, and that an investigation would have revealed that problems with the crime scene, i.e. that the slug recovered underneath the victim could have been from a different shooting. The Applicant alleged that trial counsel was ineffective for failing to produce a ballistics expert to also explain the purported issues with the slugs, considering that shootings had occurred at the same nightclub with a similar caliber weapon and that there was no blood. The Applicant alleged that trial counsel was ineffective for failing to have some of the evidence suppressed because some of the evidence seized was not listed in the search

warrant, i.e. gang paraphernalia. The Applicant alleged that trial counsel should have called the "informants," who the "gang expert" testified had informed him that Applicant was an "Officer" of a gang, so that they could be cross-examined. The Applicant alleged that trial counsel was ineffective for failing to object and/or move for a mistrial when the Solicitor, during opening statements, told the jury that some of the State's witnesses may not tell the truth. The Applicant alleged that appellate counsel was ineffective for failing to better argue that the hearsay issue was prejudicial, that witness Brooks never testified that Applicant was in a gang, and that appellate counsel never adequately addressed the relevancy issue of the bullet proof vests. Finally, the Applicant alleged there were several different plea offers, ranging from thirty (30) down to five (5) years, but that trial counsel informed the Applicant that he could win at trial.

WCU #4
Trial counsel testified he was appointed sometime in May and had met with the Applicant four to five times and had gone over everything. Trial counsel testified that he utilized, ~~not one, but~~ two investigators, one of which was a general investigator, the other a forensics expert. Trial counsel testified that the forensics expert was also at the trial. Trial counsel testified that he is not really aware of any prior shootings, but that he did review the case mentioned in the PCR application, which purportedly proves that another shooting with the same weapon occurred at the same location, but that that case, Jackson, also shots were fired in the air. Trial counsel testified that he, and his experts, went to the scene and conducted "exhaustive" investigations. Trial counsel testified that when the gang expert testified, there were numerous/extensive objections to the expert's qualifications, the hearsay nature of the informants, and the fact that the informants themselves did not testify. Trial counsel testified that it was a trial strategy

^{NOT CALL}
 decision to ~~not~~ call the informants to testify because that would be error in that it would
 negate the ability to characterize, and object, to their testimony as hearsay. Trial
 counsel testified that the opening statement by the Solicitor, regarding how some of
 their witnesses ^{like} would not ^{the like} testify truth, etc., actually helped the Applicant's case and
 basic strategy - suggesting that the State's witnesses were unreliable. Trial counsel
 testified that the search warrant was good, that evidence seized via the search warrant
 was ^{OBTAINED FROM} ~~done so~~ properly, and does not recall why a motion would be made. Trial counsel
 testified that he recalls some plea offers, but that there was never a five (5) year offer,
 and that he brought all plea offers to the Applicant for his consideration. Trial counsel
 testified that during closing arguments the Solicitor said something like, find [Applicant]
 guilty because gangs are bad, and he did not object because he did not feel it was
 prejudicial and did not believe his objection would be sustained and it was best to ^{NOT} ~~not~~
^{WPC #5} make it a bigger issue than it was - trial counsel testified that after thirty-two (32) years
 and probably a thousand trials, it was his opinion and strategic decision to ^{NOT} ~~not~~ bring
 more attention, if any, to the State's closing comment. Finally, trial counsel testified that
 it could be advantageous to suggest that the Applicant was a gang member in order to
 substantiate the self-defense theory in that because the victim was a rival gang member
 there was a motive for his attacking the Applicant.

In a post-conviction relief action, the Applicant has the burden of proving the
 allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334
 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for
 relief, the Applicant must prove that "counsel's conduct so undermined the proper
 functioning of the adversarial process that the trial cannot be relied upon as having

produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed.

This Court finds Applicant's testimony is not credible, while also finding Applicant's counsel's testimony is credible. Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance.

Regarding any allegations that trial counsel failed to investigate and/or failed to consult or use investigators/experts, this Court finds the allegations to be without merit. Trial counsel testified that he had two investigators, a general investigator and a forensics expert, and that the forensics expert was at the trial. (Trial transcript p. 271 – 288).¹ Trial counsel testified that he, and his investigators, conducted exhaustive investigations of the crime scene and the evidence. The Applicant has presented no expert testimony of his own to legitimize his claim that trial counsel could have discovered or better analyzed anything differently. This Court acknowledges Applicant's position that other shootings may have occurred at the crime scene, however this Court finds the Applicant's allegations regarding the relevance of any prior shootings concerning an analysis of this murder to be wholly without merit. Even assuming for argument's sake that trial counsel did not testify that he conducted an independent investigation, the Applicant has in no way satisfied his burden of proof that a different investigation would have revealed anything significant or relevant, ~~mere~~ speculation is insufficient. "Failure to conduct an independent investigation does not constitute

¹ See also, testimony of Jeffrey Hollifield (Trial transcript p. 255-270). See also, testimony of David Collins, (Trial transcript p. 224-252).

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).

Regarding the search warrant, the Applicant's allegations are without merit. The Applicant alleged that some items seized were not related to the case and that the seizure of those items was therefore illegal and trial counsel was ineffective for moving to suppress the items. While the Applicant's amended application contains ample reference to cases and laws regarding search and seizure, the Applicant has failed to satisfy his burden of proof and explain how the laws and cases he cites apply to the evidence recovered and used at his trial. During the PCR hearing, the Applicant did not even attempt to introduce a copy of the warrant. ^{NOT WPR} ~~he complains of.~~

^{WPR #8} Trial counsel articulated valid strategic reasons for other issues that Applicant alleges were examples of ineffective assistance of counsel. The Applicant has failed to meet his burden of proof and convince this Court that trial counsel's strategic decisions were not valid. Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). ^(WPR) Trial articulated valid strategic reasons for not objecting and/or moving for a mistrial concerning the opening and closing comments made by the State. The Applicant has not shown that counsel was deficient in that choice of tactics. During opening statements, the solicitor stated: "And what's even more amazing, something

I've never had to tell a jury in my 11 years as a prosecutor, some of the State's witnesses that we call may still not tell the truth, whether it's because they're afraid, whether they're protecting their friend or themselves." (Trial transcript p. 66 L. 18-23). Trial counsel's strategic reason for not objecting is valid and the Applicant demonstrated no prejudice from the allegedly improper opening statement, ^{WPM} trial counsel testified that the opening statement by the Solicitor, regarding how some of their witnesses may not tell the truth, etc., actually helped the Applicant's case and basic strategy - suggesting that the State's witnesses were unreliable.²

Regarding the State's closing argument(s), this Court disagrees with the Applicant's characterization that the solicitor "asked the jury to convict the defendant, not because he was guilty of the crime, but" (Amended Application for PCR, p. 7).

WPM #9
The Applicant alleged that trial counsel was ineffective for failing to object/ move for a mistrial when the Solicitor, during closing arguments, argued: "ON DECEMBER THE 7TH OF LAST YEAR THAT MAN RIGHT THERE THOUGHT HE GOT AWAY WITH MURDER. YOU PROVE HIM WRONG. YOU LET HIM KNOW THAT LIFE IS WORTH A WHOLE LOT MORE THAN A COLOR AND A GANG SIGN." (Trial transcript p. 460 L. 16-20). Trial counsel testified that he did not object because he did not feel the solicitor's closing comment was that prejudicial and did not believe his objection would be sustained and it was best to not make it a bigger issue than it was - trial counsel testified that after thirty-two (32) years and probably a thousand trials, it was his opinion

² This Court notes that the Solicitor's statement was not akin to suborning perjury, as the application for PCR suggests, rather, the Solicitor was probably alluding to the testimony of witness Brooks. Witness Brooks contradicted himself, testifying that he "doesn't recall" giving a statement to the police that the Applicant is a Blood, when witness Brooks had already testified that he did give such a statement to police. (App. p.87 L. 13-21). The record is obvious that the Solicitor was not trying to suborn perjury, but that he was trying to get to the truth of witness Brooks' statement.

and strategic decision¹ to ~~not~~^{not} bring more attention, if any, to the State's closing comment. This Court finds that, as stated above, valid strategic reasons are enough to find the Applicant's complaint to be without merit, however, this Court agrees with trial counsel that the closing argument is not improper, even if it were, trial counsel's reason for not drawing more attention to the statement is legit.

This Court finds that the Applicant's allegations regarding appellate counsel are wholly without merit, that while the Applicant did reference appellate counsel in his application for PCR (and as amended), the allegations regarding appellate counsel were not developed at the PCR hearing. Despite the fact that the allegations of ineffective assistance of appellate counsel were not developed at the PCR hearing, this Court finds the allegations to be without merit. The Applicant alleges that appellate counsel should have better argued the prejudice regarding the hearsay issue within the direct appeal. Specifically, the Applicant alleges that appellate counsel should have better explained that witness Brooks never testified that Applicant was a Blood. The Applicant's characterization of witness Brooks' testimony is misleading. Witness Brooks testified that he gave a seven-page statement (State's exhibit #60) to police informing them that the Applicant is a Blood. (App. p.87 L. 13-21). While witness Brooks may have tried to testify that he "doesn't recall" giving a statement to the police that the Applicant is a Blood, the relevant issue on appeal was that witness Brooks testified as to whether the victim (and others) could be under the impression that the Applicant is a Blood, and that the confrontation was gang related.³ However, witness Brooks had

³ Witness Brooks' testimony at trial consisted, in part, of his awkward denial to making sworn statements, with his attorney, to investigators that Applicant is a Blood. (Trial transcript p. 103-104).

already testified that he did give such a statement to police. (App. p.87 L. 13-21). This Court also finds no merit to the Applicant's undeveloped claim that appellate counsel was ineffective for not better arguing the irrelevance of the State's gang expert's testimony that bullet proof vests are generally not recovered from lower level gang members, but only the higher ranking gang members. (Trial transcript p. 321 L. 6-19). This Court finds that the Applicant has failed to meet his burden of proof that appellate counsel was ineffective regarding the expert's opinion testimony. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (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).

Finally, the Applicant alleges that trial counsel was ineffective for failing to call witnesses, specifically the unnamed informants ^{MENTIONED BY WAX} that the gang expert alluded to. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318

S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). In addition, trial counsel articulated valid strategic reasons for not calling the informants in as witnesses. Trial counsel testified that if the informants testified then trial counsel could not argue hearsay regarding the conclusions drawn by the gang expert based on the informant(s) statement(s).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003).

Wax #12 When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id. This Court notes that while a portion of this Order is devoted to the Applicant's allegations of ineffective assistance of appellate counsel, it is not because they are legitimate; undeveloped claims of ineffective assistance of appellate counsel should not form the basis of any future attempts to conflict out the Office of Indigent Defense in an attempt to obtain appointed private counsel for the purposes of any potential PCR appeal.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Counsel was not deficient in any manner, nor was Applicant prejudiced by counsel's representation. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

Except as discussed above, this Court finds that the Applicant failed to raise the remaining allegations set forth in his application at the hearing and has, thereby, waived them. As to any and all allegations that were or could have been raised in the application or at the hearing in this matter, but were not specifically addressed in this Order, this Court finds Applicant failed to present any probative evidence regarding such allegations. Accordingly, this Court finds that Applicant waived such allegations and failed to meet his burden of proof regarding them. Accordingly, they are dismissed with prejudice. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issue at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

WAL
#13

CAUTIONS *W.P.K.*

This Court ~~advises~~ Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. ~~Applicant and counsel are directed to Rules 203, 206, and 227 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.~~ *W.P.K.* *may refer* *W.P.K.*

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 5TH day of SEPT., 2008.

William P. Keesley
 The Honorable William P. Keesley
 Presiding Judge
 Fifth Judicial Circuit

Lexington, South Carolina.

C. 1089

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland CountyWilliam P. Keesley, Circuit Court Judge

RECEIVED

JUN 15 2009

S.C. SUPREME COURT

JERIOD PRICE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

ELIZABETH A. FRANKLIN-BEST
Appellate DefenderSouth Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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(803) 734-1343

ATTORNEY FOR PETITIONER.

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ISSUE PRESENTED

The Sixth Amendment of the Constitution gives a defendant the right to confront the witnesses against him. Did the PCR judge err when he found that trial counsel rendered effective assistance of counsel when trial counsel failed to object, on this basis, to a “gang expert’s” testimony that he heard “on the street” that Price was a gang leader?

STATEMENT

Jeriod J. Price was indicted by the Richland County grand jury for murder during the May 2003 term (2003-GS-40-2295). He was tried before the Honorable Reginald I. Lloyd and a jury between December 15-19, 2003. He was represented by Cameron B. Littlejohn, Jr. and Amye Rushing, Esquires. He was convicted and sentenced to 35 years incarceration.

He then filed an appeal, and the South Carolina Supreme Court rendered its decision on April 17, 2006. *See State v. Price*, 368 S.C. 494, 629 S.E.2d 363 (2006).

Price then filed an application for post-conviction relief on December 4, 2006. An amended application was filed on April 30, 2008. An evidentiary hearing was conducted on June 25, 2008 before the Honorable William P. Keesley. Price was represented by Charles T. Brooks, III. The Order of Dismissal was filed September 22, 2008.

This Petition for Writ of Certiorari timely follows.

ARGUMENT

The Sixth Amendment of the Constitution gives a defendant the right to confront the witnesses against him. The PCR judge erred when he found that trial counsel rendered effective assistance of counsel when trial counsel failed to object, on this basis, to a “gang expert’s” testimony that he had “word” that Price was a gang leader.

In his direct appeal, Price raised the issue of the “gang expert’s” testimony, and argued that it was inadmissible hearsay—the objection raised and ruled upon at trial. State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006). Price also raised the confrontation clause issue, but this Court held that it was procedurally barred since it was not raised at the trial level. Price then raised the issue at his post-conviction relief hearing, and in his application.

The State’s “gang expert” testified that Price was in a gang, and that he was a leader of that gang. (App. Page 310, line 9 to page 320, lines 13). He became familiar with Price “on the street.” (Tr. Page 319, lines 11-12) The “gang expert” is a member of the Richland County Sheriff’s Department. (App. Page 303, lines 4-7). In its issued opinion of Price’s direct appeal, the Court found the testimony was improperly admitted, but the error harmless:

“Defense counsel impeached Richardson’s improper testimony by eliciting that his testimony was solely based on information from informants. Also, the inadmissible hearsay testimony was merely cumulative . . . Brooks¹ testified Appellant was a Blood. Further, Lieutenant James Smith testified bullet-proof vests were seized from Appellant’s apartment and Richardson properly testified officers within gangs may have bullet-proof vests. After reviewing the entire record, we find the improper admission of hearsay testimony that Appellant was an officer in the Bloods was harmless.”

Id. At 499-500 (internal citations omitted).

¹ Brooks, Price’s co-defendant, is still in pre-trial detention, awaiting trial on this matter.

Trial counsel rendered ineffective assistance of counsel because he did not argue that the “gang expert’s” testimony violated Price’s right to confront the witnesses against him. Additionally, the testimony was not harmless since the State’s theory of the case was that Price shot the victim because of an on-going gang antagonism. (App. Page 71, line 1 to page 72, line 7). The State placed gangs, and gang membership, front and center of their case against Price. Elevating Price’s status to “leader” of the gang, therefore, made him appear to be more violent than other gang members, and therefore more likely to have committed murder. The testimony was unduly prejudicial, and Price was denied his right to a fair trial.

The “gang expert” in this case did not limit his testimony to generalities about gangs—testimony which would have been completely unobjectionable, and fully within the range of unobjectionable topics that a gang expert could testify about. In this case, he testified as to things he knew *about Jeriod Price*, which, admittedly, he only knew because of hearsay sources. This testimony then placed hearsay information directly before the jury under the guise of “expert testimony.” It was a violation of Price’s right to confront the witnesses against him. U.S.C.A. Amend. 6. *And see* United States v. Taveras, 585 F.Supp.2d 327 (2008); United States v. Mejia, 545 F.3d 179 (2008).

In finding the *hearsay* error harmless, this Court noted two facts: (1) that defense counsel impeached Richardson’s improper testimony by eliciting that his testimony was solely based on information from informants, and (2) that the information was merely cumulative, since another witness, Price’s co-defendant², testified that Price was a Blood, that an officer testified that bullet-proof vests were found in Price’s apartment, and that the expert testified that officers within gangs

may have such vests. Respectfully, had the Court analyzed the testimony as a confrontation clause violation, its decision would have been otherwise.

I. The Testimony Violated Price's Right to Confront the Witnesses Against Him

In addition to violating the state evidentiary rules regarding hearsay, the testimony also violated Price's right to confrontation. State hearsay rules and the federal right to confrontation are not co-extensive:

While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law.

Dutton v. Evans, 400 U.S. 74, 81-82, 91 S.Ct. 210, 216 (1970)

Had counsel made a confrontation clause objection to the testimony, he would have prevailed in having it excluded because its introduction violated Price's right to a fair trial.

The United States Supreme Court has repeatedly held that "[t]he right to confrontation is basically a trial right." Barber v. Page, 390 U.S. 719, 725 (1968); *see also* Pennsylvania v. Ritchie, 480 U.S. 39, 52-53 (1987); California v. Green, 399 U.S. 149, 157 (1970) (emphasis added). The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity to cross-examine him." Crawford v. Washington, 541 U.S. 36, at 53-54 (2004). Therefore, a Confrontation clause violation cannot be cured by defense counsel's cross-examination of the "gang expert" that exposed the fact that his testimony was solely based on information from informants. Price had the right to

have those witnesses brought to court and subjected to cross-examination by his attorney. The violation was “complete” when the State failed to secure those witnesses for his trial.

II. The Testimony was Not Cumulative

The testimony was not cumulative because Ryan Brooks did not testify that Price was a Blood, a point even the State conceded during its closing argument (App. page 90, lines 9-17; App. Page 912, lines 5-17). Without that concession, the testimony of the “gang expert” was even more important to the State’s case for establishing the motive of the crime since Price raised self-defense at trial. It was undisputed that Price was the smaller of the two, and that Smalls was a large man who had previously played defense for the Carolina Gamecocks. (App. p. 253, lines 7-10, App. p. 232, lines 11-24). Several witnesses had testified that Smalls had been aggressive and confrontational all night. (App. p. 243, lines 7-14; App. p. 269, line 11 to page 270, line 13; App. p. 360, line 24 to page 361, line 17). A bouncer had warned the victim earlier to “calm down or else he’d have to leave.” (App. p. 618, lines 14-18).

Aside from the testimony by the “gang expert,” the State did not prove Price’s membership either in the gang, or as a leader of it. Establishing Price as being a member of the gang was important to the State, because it provided the motive for the shooting. In fact, the only reason why any of the gang information was admitted was for purposes of proving this motive, so the jury could understand it. (App. Page 299, line 9 to page 300, line 15). Unless the State could prove Price’s membership, then all of the gang material was improper. The State’s reliance on hearsay testimony from informants does not allow them to meet this burden:

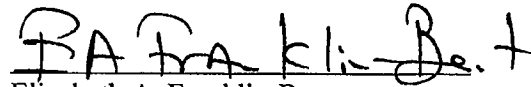
“[I]t is a little too convenient that the Government has found an individual who is expert on precisely those facts that the Government must prove to secure a guilty verdict—even more so when that expert happens to be one of the Government’s own investigators . . . When the Government skips the intermediate steps and proceeds directly from internal expertise to trial, and when those officer experts come to court and simply disgorge their factual knowledge to the jury, the experts are no longer aiding the jury in its factfinding; they are instructing the jury on the existence of facts needed to satisfy the elements of the charged offense.”

Mejia, *supra*, at 191. See also United States v. Nersesian, 824 F.2d 1294, 1308 (2d Cir. 1987). And see Mejia, footnote 4. (“We have not been alone in facing questions about the collision between *Crawford* and testimony by police officers. As the First Circuit has noted, “[p]ost-*Crawford*, the admission of non-testifying informants’ out-of-court testimonial statements, through the testimony of police officers, is a recurring issue in the courts of appeals.” (*quoting United States v. Maher*, 454 F.3d 13, 19 (1st Cir.2006)). The testimony elicited from the “gang expert” that funneled hearsay testimony to the jury under the guise of “expert testimony” actually constituted the basis for the State’s being allowed to introduce any gang evidence at all. Proving Price’s membership in a gang was critical to their prosecution of the case under the theory they advanced. Given that there was no direct testimony establishing his membership other than the “gang expert’s” testimony, the error was not harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967). Price was denied his right to confront the witnesses against him, and it was ineffective for his attorney to not have made the proper Confrontation Clause objection. Respectfully, Price asks this Court to grant his Petition for Writ of Certiorari and ultimately reverse his conviction.

CONCLUSION

For the preceding reason, Price respectfully asks this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

A handwritten signature in cursive script that reads "Elizabeth A. Franklin-Best". The signature is written in dark ink and is positioned above the printed name and title.

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of June, 2009.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

William P. Keesley, Circuit Court Judge

JERIOD PRICE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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 have been served on Brian Petrano, Esquire this 15th day of June, 2009.

Elizabeth A. Franklin-Best

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day
of June, 2009.

Felicia K. Berry (L.S.)
Notary Public for South Carolina

My Commission Expires: August 15, 2010.

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

RECEIVED

JAN 11 2007

S.C. SUPREME COURT

The Honorable William P. Keesley, Circuit Court Judge

Case No. 2006CP4007168

Jeriod Price (Jeroid Price),..... Petitioner,

v.

State of South Carolina,..... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON APPEAL
WHETHER THE PCR COURT CORRECTLY DENIED THE PETITIONER'S
CLAIMS FOR RELIEF REGARDING THE GANG EXPERT'S TESTIMONY?

STATEMENT OF THE CASE

The Respondent agrees with Petitioner's statement of the case for purposes of this Return.

Jeriod J. Price was indicted by the Richland County grand jury for murder during the May 2003 term (2003-GS-40-2295). He was tried before the Honorable Reginald L. Lloyd and a jury between December 15-19, 2003. He was represented by Cameron B. Littlejohn, Jr. and Amye Rushing, Esquires. He was convicted and sentenced to 35 years incarceration.

He then filed an appeal, and the South Carolina Supreme Court rendered its decision on April 17, 2006. See State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006).

Price then filed an application for post-conviction relief on December 4, 2006. An amended application was filed on April 30, 2008. An evidentiary hearing was conducted on June 25, 2008 before the Honorable William P. Keesley. Price was represented by Charles T. Brooks,

The Order of Dismissal was filed September 22, 2008. The Petitioner filed a Petition for Writ of Certiorari on June 15, 2009. This return follows.

STATEMENT OF FACTS

The Club Voodoo in lower Richland County hosted a fraternity party on the evening of December 6, 2002. (App. p. 256, l. 3-11; 278, l. 22-25.) The victim, a 280-pound college football player, attended the party. Petitioner murdered the victim there in the early morning hours of December 7.

The victim was a member of the gang known as the Crips. (App. p. 233, l. 8-12.) The state introduced much evidence that Petitioner was a member of a rival gang, the Bloods. Petitioner's apartment was replete with Blood paraphernalia. Among the evidence seized from the apartment and admitted at trial were photographs depicting young men "throwing up" Blood hand signs and wearing Blood colors (App. p. 321, l. 21 through 322, l. 19; Ex. 52); a book of "different codes that [Bloods] would use like a dictionary" (App. p. 324, l. 20 through 325, l. 13; Ex. 62); an inordinate amount of red clothing and hats of the type known to be worn by Bloods (App. p. 325, l. 17 through 326, l. 25); and bullet-proof vests, worn by high-ranking gang members (App. p. 327, l. 1-19). Police also seized a document containing a "pledge of allegiance" to the United Blood Nation. (App. p. 327, l. 20 through 328, l. 18; Ex. 67.) The pledge contained references to "Crip Killing Thugs." Additionally, Petitioner's partner in the murder, Ryan Brooks, told police that Petitioner was a Blood. (App. p. 110, l. 8-22.)

The victim and Petitioner confronted each other during the party, during a "gang-related" altercation on the dance floor involving Bloods and Crips. (App.

p. 179, l. 22 through 181, l. 1; 207, l. 11-19; 235, l. 4-18; 282, l. 25 through 283, l. 7.) The gang members were “throwing” gang signs at each other and “flashing” their colors. (App. p. 156, l. 19 through 157, l. 4; 207, l. 25 through 208, l. 3.) Petitioner, a much smaller man, was “doing all the talking” for the Bloods. (App. p. 283, l. 17 through 284, l. 20; 292, l. 25 through 293, l. 17.) After the victim did the “Crip walk” and drew a line on the floor with his foot, Petitioner “got in [the victim’s] face” and told The victim, “You’re going to fall like ‘The Matrix,’” which, according to one witness, meant “I’m going to kill you.” (App. p. 280, l. 21 through 281, l. 4; 285, l. 10-15; 295, l. 9-14; 647, l. 23 through 648, l. 6.) Petitioner was making hand motions like gunshots. (App. p. 286, l. 4-6.) Brooks told police that the victim called him a “slob,” a derogatory term used by Crips to “disrespect” Bloods. (App. p. 122, l. 3-16; 316, l. 1-7.)

After the confrontation, the victim did not seem mad and did not act violent. (App. p. 236, l. 22-25; 286, l. 13-16.) He “was cool. He was—he wasn’t, you know, excited or nothing.” (App. p. 648, l. 9-10.) “He didn’t say anything. I mean, he didn’t say anything. He did, you know, what I presume to be the Crip [walk], drew the line, and stepped back. That was it. He never uttered a word.” (App. p. 295, l. 17-20.)

In the wee hours of the morning of December 7, as the partygoers were leaving the club and congregating in the parking lot, Joe Jones saw Ryan Brooks purposefully heading from the parking lot back into the club carrying “steel” in his hand. (App. p. 210, l. 6 through 212, l. 2.) Brooks, who is about 6’1” tall and weighs 200 pounds, wore his hair in braids and was not wearing a hat. (App. p.

95, l. 18 through 96, l. 7; 149, l. 5-17.) Brooks admits that he retrieved a pistol from a car, a chrome .380-caliber semi-automatic. (App. p. 91, l. 1-8; 100, l. 7-10; 347, l. 8-12.) Petitioner also admits leaving the club to retrieve his .40-caliber pistol from a car; he had purchased a .40-caliber pistol six months before the murder. (App. p. 537, l. 4-10; 773, l. 20 through 774, l. 10.)

The two gunmen returned to the club. Brooks shot the victim once. (App. p. 91, l. 19-25; 211, l. 15-24; 213, l. 1-10.) Marcus Jones heard the first gunshot and looked up. There was a pause of a few seconds (App. p. 238, l. 3-8), and then he saw a second gunman, much smaller than Brooks, wearing a "red, black, and white pinwheel hat" fire two more shots. (App. p. 146, l. 9-20; 148, l. 7-18; 154, l. 1-20.) Jones testified that the gunman fired "straight down." (App. p. 154, l. 1-8.) Marcus Jones later picked Petitioner out of a photo lineup as the second gunman, the smaller one with the pinwheel hat. (App. p. 163, l. 4-25; 214, l. 1-19; 552, l. 11 through 553, l. 2.)

The victim died on the floor of the club, after calling 911 on his cell phone. (App. p. 191, l. 1-11; 566, l. 19 through 568, l. 22.) Evidence collected at the crime scene, including bullet fragments recovered from an indentation in the floor, was consistent with the victim having been shot while lying on the floor. (App. p. 390, l. 6 through 391, l. 5.) Marcus Jones testified that the victim did not have a weapon and that the gunman's life was not in danger when he killed the victim. (App. p. 154, l. 16-20.) Although he could not rule out other possibilities (i.e., that the victim fired a weapon), Lieutenant Joseph Powell testified that the result of a gunshot residue test on the victim's left hand were

“most consistent” with his being in a defensive posture and within five feet of a weapon that he did not fire. (App. p. 418, l. 9-20.) Later testimony showed that the victim was right handed. (App. p. 566, l. 11-12.) Dr. Ronald Burns, the pathologist who performed the autopsy on the victim’s body, likewise could not opine conclusively that the victim had been lying down when Petitioner shot him, but testified that his wounds were consistent with that scenario. (App. p. 481, l. 1-7.) Spent .40-caliber and .380-caliber cartridges were recovered near the victim’s body. (App. p. 382, l. 15 through 383, l. 21.)

Three days after the murder, at Petitioner’s request, Jason Woods bought a cell phone in his own name and gave it to Petitioner. (App. p. 352, l. 21 through 353, l. 3; 354, l. 2-10.) Petitioner evaded capture until finally turning himself in to the Richland County Sheriff’s Department on March 19, 2003. (App. p. 562, l. 14-15.)

Jason Wood told police that Petitioner had admitted to him that Petitioner shot the victim. (App. p. 355, l. 20 through 357, l. 18; Ex. 68; Ex. 69.) Petitioner testified at trial and admitted to the shooting, and then to fleeing the club. (App. p. 778, l. 12 through 779, l. 5.) The only issue was whether he did so in self-defense.

STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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).

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. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. 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).

ARGUMENT

THE PCR COURT CORRECTLY DENIED THE PETITIONER'S CLAIMS FOR RELIEF REGARDING THE GANG EXPERT'S TESTIMONY

The Petitioner asserts that the gang expert's testimony was not cumulative because "Ryan Brooks did not testify that [Petitioner] was a Blood." (Petition for Writ of Certiorari at 7 (emphasis in original)). The Respondent disagrees.¹ The Petitioner's characterization of witness Brooks' testimony is misleading. The Respondent submits that the PCR court correctly addressed the Brooks testimony and how he did indeed (albeit awkwardly) testify that the Petitioner was a Blood. (App. p. 1084 – 1085). Witness Brooks testified that while represented by an attorney he gave a seven-page statement (State's exhibit #60) to police informing them that the Petitioner is a Blood. (App. p. 93 L. 13-21, p. 109-110). While witness Brooks may have tried to simultaneously testify that he "doesn't recall" giving a statement to the police that the Petitioner is a Blood, the relevant issue on review was that witness Brooks testified as to whether the victim (and others) could be *under the impression* that the Petitioner is a Blood, and that the confrontation was gang related.

This Court has previously concluded that the gang expert's testimony may have been error, but that it was harmless error:

Brooks testified [Petitioner] was a Blood. Further, Lieutenant

¹ The Petitioner states that the co-defendant, Ryan Brooks, is "still in pre-trial detention, awaiting trial on this matter." (Petition for Writ of Certiorari at 4). While technically accurate, that is only because he pled guilty and then later withdrew that plea. State v. Ryan Brooks, Unpublished Op. No. 2007-UP-006 (S.C. Sup. Ct. filed January 11, 2007).

James Smith testified bullet-proof vests were seized from [Petitioner's] apartment and Richardson properly testified officers within gangs may have bullet-proof vests. After reviewing the entire record, we find the improper admission of hearsay testimony that [Petitioner] was an officer in the Bloods was harmless.

State v. Price, 368 S.C. 494, 500, 629 S.E.2d 363, 366 (2006).

Accordingly, the Respondent submits that the PCR court's order of dismissal is sound and the Petitioner is not entitled to relief regarding any purported error(s) concerning the gang expert's testimony whether the error complained is improper hearsay or other confrontation issues because there is no prejudice.

Trial counsel explained that he did not want to actually call the informants that the gang expert relied on; rather he wanted to take advantage of arguing their absence. (App. p. 1067 – 1068, 1078 - 1079.) Similarly, the Respondent submits that it is merely speculative for the Petitioner to argue that had he been able to confront one or more witnesses that the result would have been favorable. The Petitioner is attempting to limit any analysis and argue only that had a confrontation clause/Crawford claim been made then the gang expert would have been excluded. Another speculation is that the informants would have been called to testify and be "confronted." The Petitioner wants to retain a favorable posture and simply opine that his trial would have been any different had he been able to confront the witnesses he complains of – whereas trial counsel explained that the informants "could have done nothing but bolster what the sergeant had said." (App. p. 1067 l. 20 – 21.) The Petitioner made no attempt to produce the witnesses he complains about not being able to confront.

Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Petitioner's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). A Petitioner must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

In accord with this Court's other above cited PCR cases when an Applicant complains of a missing witness, the Respondent submits that if a Crawford claim is made regarding a witness then it is incumbent upon the PCR applicant to produce the witness at the PCR hearing otherwise the detriment/prejudice is at best speculative.² While not dispositive, this is especially significant in a case such as this when trial counsel provides valid strategic reasoning to support their decision to not call the absent witnesses himself for fear that absent witnesses may testify favorably to the prosecution.³

² Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004).

³ The PCR court's Order of Dismissal contains a similar analysis. (App. p. 1085 – 1086).

CONCLUSION

For the reasons stated above, this Court should affirm the PCR Court's Order and deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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By: 
ATTORNEYS FOR THE RESPONDENT

Columbia, South Carolina
August 31, 2009

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

The Honorable William P. Keesley, Circuit Court Judge

Case No. 2006-CP-40-7168

Jeroid Price (Jeroid Price),.....Appellant,

v.

State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid, addressed to:

**Elizabeth A. Franklin-Best, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia SC 29211-1589**

This 31st day of August, 2009.


BRIAN T. PETRANO
Attorney for Respondent

SWORN to before me this 31st day of August, 2009.


Notary Public for South Carolina.
My Commission Expires: May 11, 2014

The Supreme Court of South Carolina

RE: TRANSFER OF CASES FROM SOUTH CAROLINA
SUPREME COURT TO COURT OF APPEALS

ORDER

RECEIVED

MAR 10 2010

SC COURT OF APPEALS

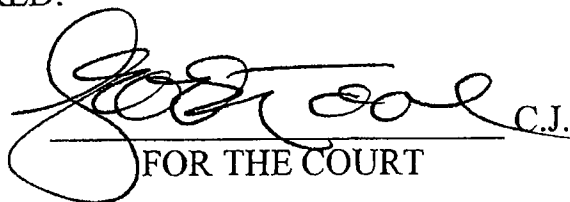
Pursuant to Rule 243(l), SCACR, the following post-conviction relief cases are hereby transferred to the Court of Appeals:

Astudillo, Alfredo S. v. The State-2008102706
Auls, Andre Terrance v. The State-2008102709
Bailey, Ralph v. The State-200770547
Bennett, Dewayne David v. The State-2008108706
Bishop, Tracey L. v. The State-2009121118
Blanchard, Donnie v. The State-2008111266
Bordeaux, Antonio D. v. The State-2008106806
Boseman, Vincent v. The State-2008108727
Brooks, John Eddie v. The State-2009116346
Brown, Gifford v. The State-2008110149
Brown, Tony Lee v. The State-2008106510
Bulsa, Jason v. The State-2008107986
Butler, Kenneth J. v. The State-200888046
Byrd, Monroe v. The State-2008111186
Capers, Allen J. v. The State-2009112607
Cash, Ronnie Lee v. The State-2009116366
Chance, Andrew v. The State-200878306
Chanthavy, Bill v. The State-2008106027
Cheatham, Lionel v. The State-2008105546
Coker, Shameen v. The State-200894647
Collins, Fred L. v. The State-2008107929
Cunningham, Tony Lamar v. The State-2008108846
Davis, Lamon D'Angelo v. The State-200889747
Degraffenreid, Keewon D. v. The State-2009112372
Dinoto, Samuel A. v. The State-2009121592
Durant, Celeste v. The State-200898166

Fields, Shawn v. The State – 2008106808
Fields, Sidney v. The State – 2009116486
Flemming, Clifton v. The State – 2009115106
Fryer, Donald v. The State – 2008105567
Gebhard, Brian v. The State – 2008111208
Griffin, Duane v. The State – 2008108826
Grissom, Jeremy v. The State – 2008101287
Harris, Barrett Bernard v. The State – 2009115486
Hines, Richard A., Jr. v. The State – 2009118947
Holley, Russell L. v. The State – 200772767
Hollis, Kevin Chance v. The State – 200899367
Hubbard-Sarvis, Deborah v. v. The State – 200892409
Hunter, Duone Dornell v. The State – 200898167
Hyman, Tracy Edward v. The State – 200898914
Jackson, Patrick v. The State – 200770126
James, Jerome Will v. The State – 2009117427
Jamison, Matthew v. The State – 2008106026
Johnson, Randy Lee v. The State – 2008107967
Kelly, Carl v. The State – 2009119007
Kennedy, George v. The State – 2009122129
Kitt, Richard v. The State – 2009116387
Langley, Herman Eugene v. The State – 200773291
Lawton, Elliott v. The State – 2008110152
McBride, Justin v. The State – 200880626
McCoy, Johnny v. The State – 2009119826
McCrary, Larry Earl v. The State – 2009114109
McDaniels, Dontell Daniel v. The State – 2008111286
Mack, Tameka v. The State – 2008106507
Manning, Maurice A. v. The State – 200899346
Medlin, Robert Wayne v. The State – 2008108268
Mike, Emmett Lee v. The State – 2008102687
Miller, James Fred v. The State – 2008108277
Monroe, Ismael v. The State – 2008108766
Mouzon, Robbie v. The State – 200898913
Neisler, Robin Prosser v. The State – 2008108278
Nesbitt, Lorenzo v. The State – 2008108769
Norris, Scottie E. v. The State – 2008107926
Owens, Marco v. The State – 200898147
Patterson, Frank R. v. The State – 2008109647
Patterson, Louis T. v. The State – 2009117526
Pearsall, Delbert Raymond v. The State – 2008107948

Poole, Kimberly Renee v. The State – 2009118927
Pressley, Ernest v. The State – 200897109
Price, James Charles, IV v. The State – 2008106508
Price, Jeriod J. v. The State – 2008104446
Reddic, Jerrell v. The State – 200897026
Rickman, Brandon v. The State – 2008103646
Rivera, John J. v. The State – 2008110006
Robbs, Lee v. The State – 2009116490
Robinson, James v. The State – 200898668
Rookard, Steven Christopher v. The State – 2008107307
Simon, Cedric v. The State – 2008107928
Sweet, Robert v. The State – 2009119686
Sweet, Tony T-juan v. The State – 2008107847
Swinger, David Demetrus v. The State – 2009114148
Tapia, Martin v. The State – 200899027
Thompson, Anthony Herman v. The State – 2009118446
Tooks, Lugene v. The State – 2009120366
Vail, Mark Edward v. The State – 2009112367
Wadley, Melvin v. The State – 2009117547
Walton, Willie R. v. The State – 2009123868
Warren, Robert A. v. The State – 2009113673
Washington, Tommy v. The State – 200899029
Watkins, Deborah A. v. The State – 2009121090
Webb, Ernest D. v. The State – 200899406
Wilds, Israel v. The State – 200892411
Williams, Jahmell R. v. The State – 2009115346
Williams, Kenyatta D. v. The State – 2009115326
Williams, Myron v. The State – 200887511
Willingham, Herman v. The State – 2009121807
Wilson, Damon K. v. The State – 2009113286
Wilson, Samuel v. The State – 200879346
Wyatt, Bennie Lee v. The State – 2008102266
Zey, Larry Steven II v. The State – 200898647

IT IS SO ORDERED.


C.J.
FOR THE COURT

Columbia, South Carolina

March 10, 2010

cc: Appellate Defender Elizabeth A. Franklin-Best
Appellate Defender Kathrine H. Hudgins
Appellate Defender LaNelle C. Durant
Appellate Defender M. Celia Robinson
Appellate Defender Robert M. Pachak
Deputy Chief Appellate Defender Wanda H. Carter
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Assistant Attorney General A. West Lee
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Assistant Attorney General Christina J. Catoe
Assistant Attorney General Gregory P. Jones, Jr.
Assistant Attorney General Julie M. Thames
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Assistant Attorney General Mary S. Williams
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Assistant Deputy General Salley W. Elliott
Daniel J. Westbrook, Esquire
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Tara Shurling, Esquire
Tricia A. Blanchette, Esquire
William Parnell Diggs, Esquire
Mr. Russell L. Holley
The Honorable Tanya Gee

The South Carolina Court of Appeals

Jeriod Price,

Petitioner,

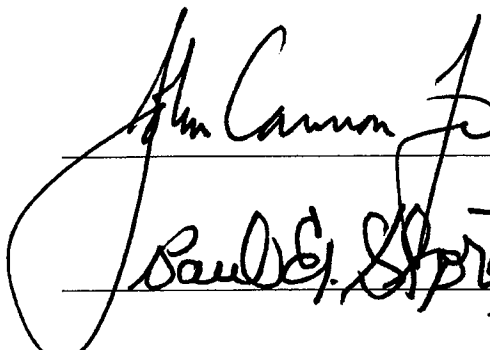
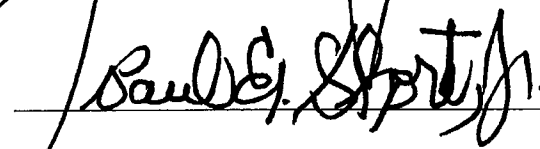
v.

State of South Carolina,

Respondent.

ORDER

This matter is before the court on a petition for a writ of certiorari following the denial of Petitioner's application for post-conviction relief. The petition for a writ of certiorari is denied.

 C. J.
 J.
 J.

Columbia, South Carolina

FILED

Jan. 12, 2011



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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January 28, 2011

REMITTITUR

The Honorable Jeanette W. McBride
1701 Main Street, Room 205
PO Box 2766
Columbia, SC 29202

Re: Price, Jeriod J. v. The State
2006-CP-40-07168

Dear Mrs. McBride:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Sincerely,

A handwritten signature in cursive script that reads "V. Claire Allen".

V. Claire Allen
Deputy Clerk of Court

VCA/lf

cc: Appellate Defender Elizabeth A. Franklin
Assistant Attorney General Brian T. Petrano

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2010

No. A-

JEROID JOHN PRICE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA COURT OF COMMON PLEAS

ELIZABETH FRANKLIN-BEST
Attorney at LawSouth Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1573

QUESTION PRESENTED

WAS PETITIONER DENIED HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WHEN THE STATE ELICITED TESTIMONY FROM A PURPORTED “GANG EXPERT” THAT PETITIONER WAS A MEMBER OF A GANG, AND POSSESSED A LEADERSHIP ROLE IN THE GANG, AND WHEN THAT TESTIMONY CAME FROM “PEOPLE ON THE STREET?”

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IN THE SUPREME COURT OF THE UNITED STATES

April Term, 2011

No. A-

JEROID JOHN PRICE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA COURT OF COMMON PLEAS

Counsel for Jeroid John Price petitions the Court to issue a writ of certiorari to review the South Carolina Court of Common Pleas decision affirming his conviction and sentence.

CITATION TO THE DECISION BELOW

The South Carolina Court of Common Pleas decision is reproduced in the Appendix to this petition at pages A1- A14.

JURISDICTION

Price appealed his sentence and conviction which were affirmed by the South Carolina Supreme Court on April 17, 2006 and found that petitioner's Confrontation Clause issue was

procedurally barred because it was not raised to trial court. State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006). Subsequently, petitioner filed an application for post-conviction relief on December 4, 2006 and alleged trial counsel was ineffective for failing to object to a gang expert's testimony as a violation of the Confrontation Clause. App. 1013. An amended application for post-conviction relief was filed on April 30, 2008 which again raised the Confrontation Clause issue. App. 1031-32. Petitioner and trial counsel provided testimony at an evidentiary hearing on June 25, 2008 on this issue. App. 1057-1059, 1066- 1068. The order of dismissal denying petitioner's claim was filed on September 22, 2008 and the PCR judge found that petitioner did not establish any constitutional violations. App. 1085- 1086.

Petitioner timely filed a petition for writ of certiorari to the South Carolina Supreme Court requesting review of this claim, and South Carolina Supreme Court referred this case back to the South Carolina Court of Appeals for disposition pursuant to South Carolina Appellate Court Rule 227(l). On January 12, 2011 the Court of Appeals denied the writ of certiorari. Ellison v. State, 382 S.C. 189, 676 S.E.2d 671 (2009); Haggins v. State, 377 S.C. 135, 659 S.E.2d 170 (2008).

This Court has jurisdiction pursuant to 28 U.S.C. §1257(a) since Price is asserting the deprivation of a right secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments which provide, in pertinent part:

Amendment VI: In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

Amendment XIV: No State "shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

On May 21, 2003, a Richland County grand jury indicted Jeroid John Price for murder. The deceased was Carl Smalls, who was shot to death inside a nightclub, Club Voodoo on December 7, 2002. The State advanced the motive that the killing was gang related. Smalls (a former football player at the University of South Carolina) was a Crip; the State contended that Price was a Blood. Price denied belonging to a gang and stated that he shot Smalls in self-defense only after the much larger man had violently attacked him without provocation.

Judge Reginald I. Lloyd presided at Price's jury trial December 15 through 19, 2003. He instructed the jury on murder and self-defense. The jury found Price guilty of murder, and the judge sentenced him to imprisonment for thirty-five years.

The State's theory of this case, and the purported motive, was that the shooting resulted from a confrontation in a nightclub between the Crips, of which the State conceded Carl Smalls was a member, and the Bloods, to which the State contended Jeroid Price belonged. App. 71-72, 77. Smalls was a large man. App. 198, 129-130. He was "real strong." App. 240-241. (Smalls had previously played defense for the Gamecocks. App. 254). Price was much smaller. App. 784. Several witnesses testified that Smalls had been aggressive and confrontational all night. App. 97, 120-121, 126-127, 173, 184, 235, 242-243, 259, 281-282, 292-293, 295, 361, 454-455, 627, 639. Former teammate Derrick Watson testified that Smalls asked him for a gun at one point. App. 501. A bouncer had even warned Smalls to "calm down or else he'd have to leave." App. 628.

Price denied that he belonged to the Bloods. App. 754. He testified that, without provocation, Smalls had threatened, "I'll kill you." App. 771. He tried to avoid Smalls, but "it was almost like he was looking for me. It was like wherever I walked I see him coming towards that direction." App. 772. Price then went to his car and armed himself. App. 774. As soon as Price

returned to the bar, he testified, “he [Smalls] rushed me; he just picked me up and rammed me into the wall.” App. 777-778. He and Smalls struggled over the gun. App. 778- 779. Price shot Smalls in self-defense, and retreat had never been an option. App. 791-792. Another witness, and co-defendant, Ryan Brooks, corroborated Price’s account of the shooting. App. 657- 658. Brooks admitted shooting at Smalls during this same confrontation. App. 658- 659.

The gang connection-- and especially Price’s status as a leader-- was important to the State’s case because, on its surface, the case looked like self-defense: Price, the smaller man, shot Smalls, the larger man, after he was physically attacked without provocation. To shore up its professed motive, the State called as a witness a purported expert in gang activity employed by the Richland County Sheriff’s Department. The following exchange occurred during direct examination of this witness:

Assistant Solicitor: As part of your duties and your training, ... a part of what you try to do is kind of keep tabs on gang members here in Columbia?

A. Yes, sir.

Q. Now, through your training, have you become familiar with the defendant, Jeroid Price?

A. I became familiar with his name on the street, yes, sir.

Q. Are you aware of whether he’s affiliated with a gang?

A. Yes, sir.

Defense Counsel: Your Honor, I’m going to object to this. This is beyond the purview of what he’s been qualified to do, and we’re going into hearsay.

App. 319. The judge overruled the objection after a bench conference. App. 319. Direct examination resumed:

Q. Once again, I believe you indicated that you are familiar with

the defendant, Jeroid Price?

A. Yes, sir. His name has been mentioned several times during interviews.

Q. Are you aware of whether he's affiliated with a gang?

A. I am, sir.

Q. What gang is that?

A. The GKB or Gangsta Killer Bloods.

Q. Are you aware of what his position is within that gang?

A. A word that we received is that he is known as a Supreme, which is a higher elevation. He's like an officer within the gang.

App. 319-320. On cross-examination, the witness readily admitted that this "evidence" was pure hearsay:

Defense Counsel: You don't know Jeroid Price, do you?

A. No, sir, I do not.

Q. You never met him?

A. No, sir.

Q. In some of the things you told us about Jeroid Price today, that's based on stuff you've heard from informants –

A. Yes, sir.

Q. – from people who come in and trade information to the Sheriff's Department?

A. No, sir. These people were not paid informants. They were just people on the street who, upon making contact with them, started giving up names.

Q. And it's all hearsay, isn't it?

A. Pretty much, yes, sir.

Q. Because you don't know that of your own personal knowledge?

A. No, sir.

Q. You're just basing it on what somebody told you?

A. Yes, sir.

App. 331. Defense counsel reiterated his objection once the witness had finished testifying:

I object to his description as to Jeroid Price as being high up in the Bloods gang, based on the fact that that was obviously hearsay and things he's heard on the street. And our position would be that would be inadmissible.

App. 338. The judge observed, "I treated your objection as timely and continuing as to that." App. 338.

Trial counsel did not object that the testimony denied Price the opportunity to confront the witnesses against him. The South Carolina Supreme Court held Price's Confrontation Clause issue procedurally barred because it was not raised to the trial court. Price, then, raised the issue in post-conviction that his attorney rendered ineffective assistance of counsel for failing to raise the Confrontation Clause issue. Strickland v. Washington, 466 U.S. 668 (1984). Counsel should have raised the issue because the introduction of this testimony denied Price his right to confront the witnesses against him. Counsel should have raised the meritorious issue. Herring v. New York, 422 U.S. 853 (1975).

The State placed gangs, and gang membership, front and center of its case against Price. Elevating Price's status to "leader" of the gang, therefore, made him appear to be more violent than other gang members, and therefore more likely to have committed murder. This testimony then placed hearsay information directly before the jury under the guise of "expert testimony" and Price was entitled to confront the witnesses upon which this "information" was based.

REASONS FOR GRANTING THE WRIT

PETITIONER WAS DENIED HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WHEN THE STATE ELICITED TESTIMONY FROM A PURPORTED “GANG EXPERT” THAT PETITIONER WAS A MEMBER OF A GANG, AND POSSESSED A LEADERSHIP ROLE IN THE GANG, AND WHEN THAT TESTIMONY CAME FROM “PEOPLE ON THE STREET.”

I. Use of a “gang expert” to funnel hearsay directly to the jury violates the Confrontation Clause.

The United States Supreme Court has repeatedly held that “[t]he right to confrontation is basically a trial right.” Barber v. Page, 390 U.S. 719, 725 (1968); see also Pennsylvania v. Ritchie, 480 U.S. 39, 52-53 (1987); California v. Green, 399 U.S. 149, 157 (1970). The Confrontation Clause bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity to cross-examine him.” Crawford v. Washington, 541 U.S. 36, at 53-54 (2004).

In this case, the state called a law enforcement “expert” to testify regarding statements made to him while he was conducting interviews of various “people on the street.” This “expert” was an investigator with the very department prosecuting this case, and trained solely by law enforcement sources. App. 305-306. See United States v. Dukagjini, 326 F.3d 45, 53 (2003) (“[A]s we have observed elsewhere, when a fact witness or a case agent also functions as an expert for the government, the government confers upon him “[t]he aura of special reliability and trustworthiness surrounding expert testimony, which ought to caution its use.”) He derived all of his information about Price because “[h]is name has been mentioned several times during interviews.” App. 320. From these “interviews,” the officer developed information that Price was a purported leader which, of course, once imparted to the jury, suggested to them that he had heightened violent tendencies. This information was clearly testimonial as the statements were developed during law enforcement

interviews and for purposes of keeping “tabs” on gang members in Columbia, South Carolina. App. 319. The primary purpose of these interviews would have been to investigate criminal activity. Michigan v. Bryant, 131 S.Ct. 1143 (2011). The statements were clearly offered to prove that Price is a leader in the gang. Admission of these statements against Price violated his right to confront the witnesses against him. “[T]he principle evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.” Crawford at 50.

The prejudice to Price is overwhelming-- aside from the testimony by the “gang expert,” the State did not prove Price’s membership either in the gang, or as a leader of it. Establishing Price as being a member of the gang was important to the State because it provided the motive for the shooting and militated against Price’s assertion of self-defense. Indeed, the only reason why any of the gang information was admitted was for purposes of proving this motive. App. 299-300. Unless the state could prove Price’s membership, then all of the gang material was improper. The state’s reliance on hearsay testimony from informants did not allow it to meet this burden:

“[I]t is a little too convenient that the Government has found an individual who is expert on precisely those facts that the Government must prove to secure a guilty verdict—even more so when that expert happens to be one of the Government’s own investigators . . . When the Government skips the intermediate steps and proceeds directly from internal expertise to trial, and when those officer experts come to court and simply disgorge their factual knowledge to the jury, the experts are no longer aiding the jury in its factfinding; they are instructing the jury on the existence of facts needed to satisfy the elements of the charged offense.”

United States v. Mejia, 545 F.3d 179, 191 (2008). *See also* United States v. Nersesian, 824 F.2d 1294, 1308 (2d Cir. 1987). And *see* Mejia, n. 4. (“We have not been alone in facing questions about the collision between *Crawford* and testimony by police officers. As the First Circuit has noted, “[p]ost-*Crawford*, the admission of non-testifying informants’ out-of-court testimonial statements, through the testimony of police officers, is a recurring issue in the courts of appeals.” (*quoting*

United States v. Maher, 454 F.3d 13, 19 (1st Cir.2006)). The testimony elicited from the “gang expert” that funneled hearsay testimony to the jury under the guise of “expert testimony” actually constituted the basis for the state’s being allowed to introduce any gang evidence at all. Proving Price’s membership in a gang was critical to their prosecution of the case under the theory they advanced. Given that there was no direct testimony establishing his membership other than the “gang expert’s” testimony, the error was not harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). Price was denied his right to confront the witnesses against him, and it was ineffective for his attorney to not have made the proper Confrontation Clause objection.

Additionally, in order to prevail in its claim that petitioner was the aggressor, the State had to convince the jury that petitioner was an especially nefarious character. Revealing his purported status as a gang leader allowed the state to do so without offering any evidence otherwise that Price was anything other than the victim of Small’s belligerent and confrontational behavior that night. The State then capitalized on the error when they argued during closing argument:

Carl Smalls didn’t know what he was getting into when he got in that man’s face right there and called him a slob. He didn’t know what he was getting into. He’s not some college-wanna-be gangster. He’s the real thing. How is there any doubt, much less a reasonable doubt, that the defendant and his friend, Ryan Brooks, armed themselves with guns, they hunted Carl down and they shot him, and then the defendant finished the job, walked right back up to him and shot him two more times when he was on the ground?

App. 900.

Trial counsel rendered ineffective assistance of counsel when he did not object under the Confrontation Clause to a “gang experts” testimony, derived from interviews with “people on the street” and which purported to establish both Price’s membership in a gang, and his “leadership” role in it.

II. The agent-expert issue is a recurring phenomenon, and this Court should clarify its relationship to the Confrontation Clause.

This Court should take the opportunity to resolve the issue in this case because this issue is recurring, in various forms, throughout the country whenever a law enforcement expert testifies and relies on hearsay sources as the basis of his or her opinion. Not only is this issue presented in the case of gang experts, the courts are also allowing the introduction of this type of testimony in drug courier profile testimony. See State v Carson, 702 F.2d 351 (2d Cir. 1983); State v. Boissoneault, 926 F.2d 230, 231 (2d Cir. 1991) (agent “contrasted the behavior of street-level dealers of cocaine with the behavior of persons involved solely in the personal use of cocaine”); State. Hubbard, 61 F.3d 1261, 1274 (7th Cir., 1995) (methods and general practices of narcotics dealers). Experts are also being offered to testify as to the meaning of “coded words” and the characteristics of illegal drug activity. United States v. Valle, 72 F.3d 210, 214-15 (1st Cir. 1995) (“[Agent] explained the amount of crack that users normally carry, the effects of an individual does, and the price at each packet. Matters involving dosages, prices, and other particulars endemic to the ingestion and distribution of crack cocaine are beyond the ken of the average juror”); United States v. Pugliese, 712 F.2d 1574, 1582 (2nd Cir. 1983) (“[T]he quantity and purity of heroin used by addicts is not the type of information that is commonly available to laymen. Yet without this information, the jury would have been hampered in its assessment of defendants’ personal use defense.”) See Jihan Younis, Comment, *Agent-Experts in Criminal Trials: The Ultimate Issue Rule as a Defense to the Imprimatur Problem*, 47 CAL.W.L.REV.213 (2010). In short, this is an issue that impacts a wide range of criminal cases, and this Court should clarify the relationship between this type of testimony and the Confrontation Clause. Because petitioner was denied his right to confront the witnesses against him when the state introduced the testimony of a “gang expert” who funneled hearsay

evidence to the jury, and because this issue will continue to arise in this context as well as others, petitioner respectfully asks this Court to grant his petition for writ of certiorari.

CONCLUSION

The Court should grant the writ.

ELIZABETH A. FRANKLIN-BEST
Appellate Defender

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

ATTORNEY FOR PETITIONER

April 8th, 2011

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2010

 No. A-

JEROID JOHN PRICE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

 CERTIFICATE OF FILING BY MAIL

I hereby certify that I am a member of the Bar of this Court and that on April 8th, 2011, I filed the petition for writ of certiorari in the above-referenced case, together with a motion for leave to proceed in forma pauperis, by causing the originals and ten copies of the same to be deposited in the United States Mail, postage prepaid, and properly addressed to the Clerk of this Court.

 Elizabeth A. Franklin-Best
Counsel of Record

SUBSCRIBED AND SWORN TO before me
 this 8th day of April, 2011.

_____(L.S.)
 Notary Public for South Carolina
 My Commission Expires: June 21, 2020.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2010

No. A-

JEROID JOHN PRICE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari and appendix in this case have been served upon opposing counsel by mailing copies in envelopes properly addressed with postage prepaid on this 8th day of April, 2011.

Elizabeth A. Franklin-Best
Counsel of Record

SWORN TO BEFORE me this 8th day
of April, 2011.

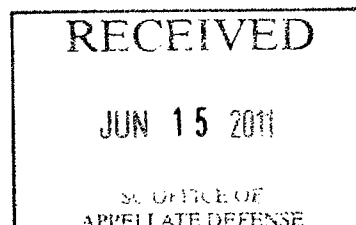
_____(L.S.)
Notary Public for South Carolina
My Commission Expires: June 21, 2020.

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

June 13, 2011

William K. Suter
Clerk of the Court
(202) 479-3011

Ms. Elizabeth Anne Franklin-Best
SC Commission on Indigent Defense
Division of Appellate Defense
1330 Lady St., Fourth Floor
Columbia, SC 29201



Re: Jeriod J. Price
v. South Carolina
No. 10-9966

Dear Ms. Franklin-Best:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

A handwritten signature in black ink that reads "William K. Suter". The signature is written in a cursive, flowing style.

William K. Suter, Clerk

SAO 241
(Rev. 10/07)

RECEIVED
USDC CLERK, COLUMBIA, SC
Page 2

2011 MAY 16 P 2:08

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court		District: South Carolina	
Name (under which you were convicted): Jeroid J. Price		Docket or Case No.:	
Place of Confinement: Lieber Correctional Institution		Prisoner No.: 298791	
Petitioner (include the name under which you were convicted) Jeroid J. Price		Respondent (authorized person having custody of petitioner) v. Wayne McCabe, Warden	
The Attorney General of the State of Henry McMaster			

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

(b) Criminal docket or case number (if you know): **2003-GS-40-2295**
2. (a) Date of the judgment of conviction (if you know): **December 19, 2003**
(b) Date of sentencing: **same as above**
3. Length of sentence: **(35) thirty-five years**
4. In this case, were you convicted on more than one count or of more than one crime? ☐ Yes ☒ No
5. Identify all crimes of which you were convicted and sentenced in this case:

n/a
6. (a) What was your plea? (Check one)

☒ (1) Not guilty

☐ (3) Nolo contendere (no contest)

☐ (2) Guilty

☐ (4) Insanity plea

SAO 241
(Rev. 10/07)

Page 3

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?

n/a

(c) If you went to trial, what kind of trial did you have? (Check one)

☒ Jury ☐ Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

☒ Yes ☐ No

8. Did you appeal from the judgment of conviction?

☒ Yes ☐ No

9. If you did appeal, answer the following:

(a) Name of court: **South Carolina Court of Appeals**

(b) Docket or case number (if you know): **unknown**

(c) Result: **affirmed conviction and sentence (denied relief)**

(d) Date of result (if you know): **heard March 22, 2006 -filed April 17, 2006**

(e) Citation to the case (if you know): **Op.No. 26139**

(f) Grounds raised: **The trial judge erred by allowing a State's witness, a gang investigator with the Sheriff's Department who purported to be an expert in gang activity, to testify the informants had told him "several times during interviews" that Price was "known as a Supreme, which is a higher elevation... like an officer within the [Bloods]." This "evidence" was inadmissible according to the rule against hearsay (Evidence Rule 802), and it's introduction violated Price's right to confront witnesses against him provided by the Sixth Amendment to the United States Constitution and Article 1, §14 of the South Carolina Const.**

(g) Did you seek further review by a higher state court? ☒ Yes ☐ No

If yes, answer the following:

(1) Name of court: **South Carolina Supreme Court**

(2) Docket or case number (if you know): **unknown**

(3) Result: **denied relief**

(4) Date of result (if you know): **April 17, 2006**

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(5) Citation to the case (if you know): **same as above**(6) Grounds raised: **same as above**(h) Did you file a petition for certiorari in the United States Supreme Court? ☐ Yes ☒ NoIf yes, answer the following: **n/a**(1) Docket or case number (if you know): **n/a**(2) Result: **n/a**(3) Date of result (if you know): **n/a**(4) Citation to the case (if you know): **n/a**

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? ☒ Yes ☐ No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: **Richland County Court of Common Pleas**(2) Docket or case number (if you know): **2006-Cp-400-7168**(3) Date of filing (if you know): **December 6, 2006**(4) Nature of the proceeding: **Post Conviction Relief ("PCR")**

(5) Grounds raised: **Numerous grounds of ineffective assistance of counsel and one ground of ineffective assistance of appellate counsel and one ground of Due Process violation when the prosecution knowingly presented false testimony.**

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No

(7) Result:

(8) Date of result (if you know):

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(b) If you filed any second petition, application, or motion, give the same information:

- (1) Name of court: **n/a**
- (2) Docket or case number (if you know): **n/a**
- (3) Date of filing (if you know): **n/a**
- (4) Nature of the proceeding: **n/a**
- (5) Grounds raised: **n/a**

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No **n/a**(7) Result: **n/a**(8) Date of result (if you know): **n/a**

(c) If you filed any third petition, application, or motion, give the same information:

- (1) Name of court: **n/a**
- (2) Docket or case number (if you know): **n/a**
- (3) Date of filing (if you know): **n/a**
- (4) Nature of the proceeding: **n/a**
- (5) Grounds raised: **n/a**

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(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No **n/a**

(7) Result: **n/a**

(8) Date of result (if you know): **n/a**

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion? **yes**

(1) First petition: ☒ Yes ☐ No

(2) Second petition: ☐ Yes ☐ No

(3) Third petition: ☐ Yes ☐ No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

n/a

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: **See attached issues and facts in support**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

same as above

(b) If you did not exhaust your state remedies on Ground One, explain why:

exhausted

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(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☒ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why:

n/a

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☒ No

(2) If your answer to Question (d)(1) is "Yes," state: n/a

Type of motion or petition: n/a

Name and location of the court where the motion or petition was filed:

n/a

Docket or case number (if you know): n/a

Date of the court's decision: n/a

Result (attach a copy of the court's opinion or order, if available):

n/a

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☒ No

(4) Did you appeal from the denial of your motion or petition? n/a ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state: n/a

Name and location of the court where the appeal was filed: n/a

n/a

Docket or case number (if you know): n/a

Date of the court's decision: n/a

Result (attach a copy of the court's opinion or order, if available): n/a

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

Ground One was raised by way of direct appeal

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(c) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One:

Direct Appeal

GROUND TWO:

see attached issues and facts in support

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

same as above

(b) If you did not exhaust your state remedies on Ground Two, explain why:

exhausted

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☒ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why:

This issue was raised by way of PCR

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state: **YES**

Type of motion or petition: **PCR**

Name and location of the court where the motion or petition was filed:

Richland County Court of Common Pleas

Docket or case number (if you know): **2006-Cp-40-7168**

Date of the court's decision:

Order signed September 5, 2008 filed September 22, 2008

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Result (attach a copy of the court's opinion or order, if available):

unavailable

(3) Did you receive a hearing on your motion or petition?

☒ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition?

☒ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☒ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state: **Yes**

Name and location of the court where the appeal was filed:

South Carolina Supreme Court

Docket or case number (if you know): **unknown**

Date of the court's decision: **January 12, 2011**

Result (attach a copy of the court's opinion or order, if available):

unavailable

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

n/a

- (e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you :
have used to exhaust your state remedies on Ground Two

**Petition for Writ of Certiorari presently pending before the
United States Supreme Court**

GROUND THREE:

see attached issue and facts in support

- (a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

same as above

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(b) If you did not exhaust your state remedies on Ground Three, explain why?

exhausted

(c) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

☐ Yes ☒ No

(2) If you did not raise this issue in your direct appeal, explain why:

raised by way of PCR and ruled on in the PCR order but PCR appellate counsel filed an Initial meritorious brief so I was precluded from raising on PCR appeal

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state: **YES**

Type of motion or petition: **PCR**

Name and location of the court where the motion or petition was filed:

Richland County Court of Common Pleas

Docket or case number (if you know): **2006-Cp-40-7168**

Date of the court's decision: **September 22, 2008**

Result (attach a copy of the court's opinion or order, if available):

unavailable

(3) Did you receive a hearing on your motion or petition?

☒ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition?

☒ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

☐ Yes ☒ No

(6) If your answer to Question (d)(4) is "Yes," state: **n/a**

Name and location of the court where the appeal was filed:

n/a

Docket or case number (if you know): **n/a**

Date of the court's decision: **n/a**

Result (attach a copy of the court's opinion or order, if available):

n/a

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(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

The issue was raised during PCR and ruled on in the PCR order, but pcr appellate counsel filed a meritorious brief so I was precluded from raising the issue on appeal

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

n/a

GROUND FOUR:

see attached issue and facts in support

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

same as above

(b) If you did not exhaust your state remedies on Ground Four, explain why:

same as Ground Three (7) (above)

(c) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

☐ Yes ☒ No

(2) If you did not raise this issue in your direct appeal, explain why:

raised by way of PCR

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state: **Yes**

Type of motion or petition:

PCR

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Name and location of the court where the motion or petition was filed:

Richland County Court of Common Pleas

Docket or case number (if you know): **2006-Cp-40-7168**

Date of the court's decision: **September 22, 2008**

Result (attach a copy of the court's opinion or order, if available):

unavailable

(3) Did you receive a hearing on your motion or petition? ☒ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☒ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☒ No

(6) If your answer to Question (d)(4) is "Yes," state: **n/a**

Name and location of the court where the appeal was filed:

n/a

Docket or case number (if you know): **n/a**

Date of the court's decision: **n/a**

Result (attach a copy of the court's opinion or order, if available):

n/a

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

Raised by way of PCR and ruled on in the PCR Court Order, but PCR appellate counsel raised a meritorious brief so I was precluded from raising any issue on pcr appeal

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four:

n/a

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13. Please answer these additional questions about the petition you are filing:

- (a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? ☐ Yes ☒ No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

I raised all the grounds in my pcr application, presented the claims during the pcr hearing and the PCR Court addressed all the issues in the PCR Order. I state appointed PCR appellate counsel only raised one ground by way of a meritorious brief so I was mechanically precluded from raising any issues on PCR appeal.

- (b) Is there any ground in this petition that has not been presented in some state or federal court? If so, ground or grounds have not been presented, and state your reasons for not presenting them:

no

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? ☒ Yes ☐ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

I presently have a petition for writ of certiorari pending before the United States Supreme Court concerning only whether or not my right to confrontation was denied during trial. Ground Two is directed at ineffective assistance of counsel for failing to object on the grounds of a confrontation clause violation

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? ☒ Yes ☐ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the raised.

United States Supreme Court, petition for writ of certiorari,

"Was petition denied his right to confront the witnesses against him when the state elicited testimony from a purported gang expert that Petitioner was a member of a gang, and possessed a leadership role in the gang, and when that testimony from people on the street."

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16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing:

(b) At arraignment and plea:

(c) At trial: **Cameron Little John, Jr.**
Amye L. Rushing

(d) At sentencing: **same as above**

(e) On appeal: **Joseph Savitz, III**

(f) In any post-conviction proceeding: **Charles Brooks, III**

(g) On appeal from any ruling against you in a post-conviction proceeding:

Elizabeth Franklin-Best

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? ☐ Yes ☒ No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

n/a

(b) Give the date the other sentence was imposed: **n/a**

(c) Give the length of the other sentence: **n/a**

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? ☐ Yes ☒ No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*

petition is timely filed

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- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief:

or any other relief to which petitioner may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on 5-12-11 (month, date, year).

Executed (signed) on 5-12-11 (date).

Jerrid Price
Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
DIVISION OF COLUMBIA

CERTIFICATE OF SERVICE

Jeroid J. Price -- Petitioner,

-Vs-

Wayne McCabe, Warden -- Respondent,

The undersigned pro-se, Petitioner, Jeroid J. Price hereby certifies he has placed the enclosed 28 USC §2254 Federal Habeas Corpus Application, Motion for an Evidentiary Hearing in Federal Court and Motion to hold §2254 Application in abeyance in a properly addressed envelope with sufficient postage affixed and placed in the U.S. Mail to the U.S. District Court Mr. Larry Propes, 901 Richland St., Columbia, SC. 29201 this 5-12 day of May 2011.

Respectfully Submitted,

/s/ Jeroid Price
Jeroid J. Price
S CDC# 298791
Lieber Corr. Inst.
P.O. Box 205
136 Wilbron Ave.
Ridgeville, SC. 29472

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
DIVISION OF COLUMBIA

Jeroid J. Price -- Petitioner,

-Vs-

Wayne McCabe, Warden -- Respondent,

PETITION FOR WRIT OF HABEAS CORPUS
PURSUANT TO 28 USC §2254

Jeroid J. Price
SCDC# 298791
Lieber Corr. Inst.
P.O. Box 205
136 Wilborn Ave.
Ridgeville, SC. 29472

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
DIVISION OF COLUMBIA

Jeroid J. Price	)	CA/No. _____
Petitioner,	)	
-v-	)	PETITION FOR WRIT OF HABEAS
Wayne McCabe, Warden	)	CORPUS PURSUANT TO 28 USC §2254
Respondent,	)	
_____	)	

COMES NOW, Jeroid J. Price, pro-se, herein after ("Petitioner") who respectfully moves this Honorable Court to issue the instant habeas corpus petition pursuant to 28 USC §2254. Petitioner believes through the issues presented, statement facts and citations of authorities relied on he will show this Honorable Court his entitlement to the requested relief sought herein.

Respectfully Submitted,

/s/ Jeroid J. Price
Jeroid J. Price

APPLICABLE STANDARD OF 28 USC §2254 UNDER THE AEDPA

Title 28, United States Code, Section §2254(a) provides that "[federal] court[s] shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgement of a state court only on the grounds that he is in custody in violation of the Constitution or Laws, of Treaties of the United States."

Under 28 USC §2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132, 110 Stat. 1218, a federal court may grant a state prisoner's application for habeas corpus relief on a claim exhausted in a state court proceeding only if the adjudication:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

28 USC §2254(d). The Supreme Court clarified the meaning of Section §2254(d) in Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495 (2000).

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal

habeas courts may grant the writ if the state court identifies the correct governing legal principle from Supreme Court decisions but unreasonably applies that principle to the facts of the prisoner's case.

Second, a state court decision also involves an unreasonable application of [the] Court's precedent if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

120 S.Ct. at 1519-20. Ultimately, a federal court must determine whether "the state court's application of clearly established federal law was objectively unreasonable. Id at 1521.

The reviewable issues for this Court is Ineffective Assistance of Counsel for the failure to object and protect Petitioner's Due Process Rights under the Sixth and Fourteenth Amendments: (a). the State Court(s) failure to find Petitioner's right to a fair trial was violated when the trial court admitted [inadmissible] hearsay that denied Petitioner his right to confrontation; (b). the State Court(s) failure to find counsel was ineffective for failing to object to the State's "gang expert's" testimony about what he heard on the streets from non-testifying informants, that denied Petitioner his right to confront witnesses against him; (c). the PCR Court's failure to find counsel was ineffective for failing to object to the Prosecution knowingly presenting false testimony and the improper opening and closing statements to the jury denied Petitioner his right to a fair trial; (d). the PCR Court's failure to find counsel was ineffective for failing to "properly investigate the crime scene in order to develop sound trial strategy.

This Court, by statute [28 USC §2254], has the duty to examine actions by the [State] to make sure that the final result obtained is one keeping with Petitioner's Constitutional Rights. See In re Braxton, 258 F.3d 250 (4th Cir. 2001), citing Jackson v. Virginia, 433 U.S. 307, 323 (1979), for the proposition that "[a]lthough the notion of "finality" is important, such finality is not desirable when it is the "finality" of the deprivation of liberty at the expense of a constitutional right."

STANDARD OF REVIEW OF INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment provides in part: "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense. U.S. Const. amend VI.

It is well established the Sixth Amendment right to counsel "cannot be satisfied by mere formal appointment." Avery v. Alabama, 308 U.S. 444, 446 (1940). Rather, the Sixth Amendment guarantees criminal defendants the assistance of "a reasonable competent attorney." McMann v. Richardson, 397 U.S. 759, 770-71 n.14 (1970). The Supreme Court defined the Sixth Amendment right to effective assistance of counsel in Strickland v. Washington, 466 U.S. 668, 686 (1984). In Strickland, the Court established a two-part test for reviewing claims of ineffective assistance of counsel. Id at 690.

First, the petitioner must demonstrate that counsel's performance is "highly deferential." Id at 689. Indeed, courts must afford a strong presumption that counsel's performance was within the wide range of professionally competent assistance. Id.

Second, if the petitioner is able to demonstrate that his trial counsel's performance was objectively unreasonable, he must then "show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Id at 694. As a result, Petitioner's trial counsel may be deemed ineffective only if his conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id at 686.

GROUND ONE

Petitioner's Due Process Right to a fair trial and the Right to Confrontation was violated when the trial court allowed a State's witness, a gang investigator with the Sheriff's Department who purported to be an "expert in gang activity", to testify that informant's had told him several times that Petitioner was "known as a Supreme, which is a higher elevation, like an officer with the [Bloods]." This evidence was clearly inadmissible according to the rule against hearsay since the introduction of this testimony violated Petitioner's right to confront the witnesses against him, provided by the Sixth Amendment of the United States Constitution.

FACTS

The State's theory was that the shooting resulted from a confrontation in a nightclub between two gangs, "the Crips" which the State conceded the victim Carl Smalls was a member, and "the Bloods", to which the State sought to contend Petitioner belonged.

Several witness testified that Smalls had been the aggressor all night. Derrick Watson testified that Smalls at one point during the night asked him for a gun to which Watson replied in the negative.. "Hell no."

Petitioner denied belonging to the Bloods, and testified that Smalls without provocation had threatened Petitioner... "I'll kill you." Even the bouncers at the Club warned Smalls to calm down or else he'd have to leave. Petitioner testified that he attempted to avoid Smalls but it was almost as though he was looking for

Petitioner. Subsequently, Petitioner went to his vehicle and armed himself out of fear of the confrontation with Smalls.

Petitioner testified that as soon as he returned to the Club, Smalls rushed him, and picked him [petitioner] up and rammed him into the wall and a struggle ensued over the gun. Ultimately, Petitioner shot Smalls in self-defense. The State sought to prove a gang connection because without the alleged gang connection it was clear cut self-defense, since Smalls attack[ed] Petitioner.

The State called a purported "gang expert" employed with the Sheriff's Department. It should be noted this was the first time the alleged "gang expert" was qualified as an expert. The alleged gang expert testified that he became familiar with Petitioner's name on the streets and that Petitioner was affiliated with a gang. At that time Petitioner's counsel objected to hearsay and after brief colloquy the objection was subsequently overruled and the testimony and it's import was entered into evidence. Counsel objected to the gang "expert's" description as to [Petitioner] as being high-up in the Bloods gang, based on the fact that this was obviously hearsay and rumors heard on the street. The import of the State's alleged "gang expert" was highly damaging and wreaked of Petitioner being a gang leader and was only directed to bolster the State's case in chief while simultaneously denying Petitioner his right to confront witness against him. Counsel argued that the testimony should not come in under the hearsay rule and although the trial court overruled the objection, Petitioner's right to confront witnesses against him is so deeply

rooted in our jurisprudence that hearsay and the right to confrontation stem from the same roots. (emphasis supplied).

The South Carolina Court of Appeals unreasonably denied relief, while agreeing the hearsay was inadmissible, Petitioner could not show any prejudice resulting from the admission of the hearsay. To the contrary the Court of Appeals based it's decision on an unreasonable determination of the facts presented during trial. The Court Appeals opinion quoted unsupported facts that "Brooks testified that Petitioner was a Blood." The Court's reliance on that import is clearly in error, since Brooks [never] testified that Petitioner was a Blood. Petitioner herein asserts that the prejudice is readily apparent since the admission of the hearsay denied Petitioner his Due Process Right to a fair trial and the State Court's ruling was objectively unreasonable based on the facts of the case.

GROUND TWO

The State Court(s) erred in failing to find Petitioner was denied his Sixth Amendment guaranteed right to the effective assistance of counsel when counsel failed to object on the basis of a "gang expert's" testimony about what he heard on the streets from non-testifying informants, on the grounds of Petitioner being denied his right to confront witnesses against him.

FACTS

During trial counsel objected and argued this testimony was inadmissible hearsay, which was the issue raised at the appeal level. Petitioner also raised the confrontation clause issue, but the Court held that it was procedurally barred under the confrontation clause issue, since the confrontation clause issue was not objected to and raised during trial.

During PCR Petitioner raised the issue that counsel was ineffective for failing to object on the grounds of the confrontation clause since Petitioner was unable to confront the witnesses against him and the gang experts testimony only served to bolster the State's case that Petitioner was in the Bloods and was a high ranking officer.. i.e. "a Supreme."

The gang expert testified that Petitioner was in a gang and that he was a leader of that gang. The gang expert testified that he had become familiar with Petitioner "on the street." The issue of inadmissible hearsay was objected to and ruled on during the trial level and subsequently raised on direct appeal. The Court held the testimony was improperly admitted, but held the admission was harmless error.

During PCR Petitioner contended counsel was ineffective for failing to object on the grounds that the testimony was not only inadmissible hearsay, but that it violated Petitioner's Sixth Amendment right to confront witnesses against him, especially since hearsay and confrontation stem from the same roots, thus any third year law student is taught. (emphasis supplied). The testimony could not have been harmless since the State's theory was that Petitioner shot the victim because of an ongoing gang rivalry. The State centrally placed gangs, and gang membership as the center stage of their case, and thus elevating Petitioner to leadership status, and along with the inadmissible hearsay made Petitioner appear to be more violent than other gang members in order to influence the jury that Petitioner committed the murder. The gang expert's testimony was clearly unduly prejudicial to the point it denied Petitioner his right to a fair trial.

This testimony was directly placed before the jury under the guise of "expert testimony" and it should be noted this was the [first] time the alleged "gang expert" had ever been qualified as an expert. In finding the inadmissible hearsay harmless error, the Court noted two facts (1) the defense counsel impeached the "gang experts" improper testimony by eliciting testimony was solely based on information from non-testifying informants, and (2) that the information was merely cumulative since Brooks testified that Petitioner was a Blood, and that an officer testified that bullet-proof vests were found in Petitioner's apartment, and the "gang expert" testified that officers within

gangs [may] have such vests. It should clearly be noted that Petitioner contends the Court based its decision on an unreasonable determination of the facts presented during trial because [Brooks] was Petitioner's alleged co-defendant, but Brook's never testified that Petitioner was a Blood. (emphasis supplied).

Petitioner now asserts that he was denied the effective assistance of counsel because counsel failed to object on the grounds of a Confrontation Clause violation. Had counsel made a confrontation clause objection to the testimony he [counsel] would have been success[ful] in excluding the testimony because its introduction clearly violated Petitioner's right to confront witnesses against him that resulted in the denial of Petitioner's right to a fair trial. A Confrontation Clause violation cannot be cured by defense counsel's cross-examination of the "gang expert" that highlighted the fact before the jury that this testimony was solely based on information from informants who were not testifying at trial. The violation was complete when the State "failed" to secure the witnesses for trial.

It is noted that while Brooks never testified that Petitioner was a Blood, the Prosecution even conceded in closing that Brooks never testified Petitioner was a Blood, but the Court's published opinion erroneously states "Brooks testified Petitioner was a Blood." Clearly the Court's opinion was based on an unreasonable determination of the facts presented during trial. Without this inadmissible hearsay testimony the State could not have obtained a conviction, thus the results of the proceeding would have been

different. Aside from the alleged "gang expert" the State "failed" to prove Petitioner's membership in either gang, or any gang for that matter. Petitioner's defense was that of self-defense, yet it was critical for the State to prove Petitioner as a member because it provided the motive for the shooting. And the only reason why the State purported such testimony from an "alleged gang expert" was for the purposes of proving motive. Unless the State could establish Petitioner as a gang member, then all the gang theory was out the window and improper.

The State's reliance on the hearsay testimony from non-testifying informants does allow the State to meet the burden of proving guilt beyond a reasonable doubt. The testimony elicited from the "gang expert" funneled hearsay testimony before the jury under the guise of expert testimony that actually was the only basis for the State being allowed to introduce [any] gang evidence. Given the fact that there was no direct testimony establishing Petitioner as a Blood other than the alleged "gang expert's" testimony, the error was not harmless beyond a reasonable doubt. Clearly Petitioner was not only denied his right to confront witnesses against him the failure of counsel to lodge a confrontation clause objection obliterated Petitioner's right to effective representation and the right to a fair trial.

The State Court and subsequent reviewing Court's unreasonably applied clearly established federal law.

GROUND THREE

The State Court erred in failing to find Petitioner was denied the effective assistance of counsel when counsel failed to object and/or move for a mistrial when the Prosecution's opening and closing arguments resulted in Prosecutorial misconduct.

FACTS

Petitioner asserts he was denied the effective assistance of counsel when counsel failed to object and move for a mistrial when the Prosecution told the jury in opening arguments that some of the State's witnesses were going to lie. This was clearly a Fourteenth Amendment violation since the Prosecution is prohibited from "knowingly" presenting false or perjured testimony. Government witness are sworn to tell the "truth" and when the Prosecution openly told the jury some of the State's witnesses are going to "lie" counsel should have moved for a mistrial.

When a prosecutor has knowingly used false or perjured testimony the conviction must be set aside because the conviction becomes fundamentally unfair, especially in the instant case since this was basically a swearing match and Petitioner's credibility was his defense, and the false testimony more than likely contributed to the verdict.

During closing the Prosecution asked the jury to convict Petitioner, not because he was guilty of the offense alleged, but to [prove] to Petitioner that "life is worth a whole lot more than a color and a gang sign. You let him know that his days of

gang banging on the streets of Richland County are over." Counsel should have objected to the inappropriate comments. The Prosecution overstepped the bounds of fairness with that statement. The jury should only be allowed to convict Petitioner "if the State has proved all the elements of the offense alleged." (emphasis supplied).

The PCR Court's order addressed this issue briefly with sympathy for the State. The PCR Court's Order guised this issue as "The Court notes that the Solicitor's statement was not akin to suborning perjury, as Petitioner asserts, rather the Solicitor was probably alluding to the testimony of Brooks. (PCR Order at p.9 n.3). Surely this was improper for the PCR Court to [assume] what the Solicitor was probably alluding to since the Solicitor has [never] made such an assertion. Thus the PCR Court's finding was also based on an unreasonable determination of the facts in light of the evidence presented during trial.

When a State Prosecutor places his witnesses on the stand [sworn to tell the truth] and then tells the jury some of his witnesses are going to lie, the trial instantly becomes a farce and a sham and a miscarriage of justice, clearly counsel should have objected and/or at least moved for a mistrial. There is reasonable certainty that the information relayed to the jury did contribute to the verdict. Prosecutor's have an obligation to uphold the integrity of the judicial system and the role of the Solicitor is to see that justice is done, not just to obtain a conviction. The error of the Prosecutor telling the jury from the onset and then right before deliberation asking the jury to

convict Petitioner, not because he is guilty of a crime, but to prove to Petitioner that life is worth a whole lot more than a color and a gang sign. You let him know that his days of gang banging on the streets of Richland County are over, clearly denied Petitioner his right to a fair trial and counsel's failure to object denied Petitioner his right to the effective assistance of counsel.

This issue was raised during PCR and addressed in the PCR Court's Order, yet Petitioner could not raise this issue on PCR appeal because PCR appellate counsel filed a meritorious brief addressing only one issue, and therefore, Petitioner was precluded from presenting anything to the Court, therefore, this issue is mechanically exhausted.

GROUND FOUR

The State Court(s) erred in failing to find Petitioner was denied the effective assistance of counsel when counsel failed to "properly investigate" the crime scene in order to develop a sound trial strategy and the failure to do so obscured counsel's performance in rebutting the State's theory of the case.

FACTS

The State's theory of the crime scene was that the victim (Carl Smalls) was shot while laying on the ground, resulting in the bullet striking the ground. Petitioner asserts that had counsel "properly investigated" the crime scene it would have been readily apparent and a viable defense for Petitioner that it was virtually impossible for the victim to be shot as the State contended due to the fact there was [no] blood found within the vicinity of where the bullet was retrieved as the State said the bullet passed through the victim's body and hit the ground.

If counsel had properly investigated the [history] of the crime scene it would have been conceivable and a viable defense for Petitioner that this was not the first time a firearm of the same caliber had been fired at this very Club and that there is a reasonable probability the bullet found could have possibly come from the prior incident at the Club since the prior shots had been fired in the air. The PCR Court erred in failing to find counsel ineffective for failing to conduct an "independent investigation" in order to develop sound trial strategy and a plausible defense for Petitioner. The PCR Court acknowledged

Petitioner's position that other shootings may have occurred at the very crime scene. The PCR Court's Order said that "even assuming for argument sake that trial counsel [did not] testify that he conducted an independent investigation." (PCR Order at p.7). This can not be considered "trial strategy" since counsel himself did not articulate [his] failure to properly investigate the crime scene and develop a plausible defense for Petitioner as "trial strategy", therefore, prejudice is presumed. Counsel was ineffective and Petitioner was denied his Sixth Amendment Right to the effective assistance of counsel.

This issue was presented during the PCR hearing and as quoted above the PCR Court did not rule whether [or] not Petitioner was prejudiced by counsel's failure to investigate. This issue was not presented in the PCR appeal since Petitioner was represented by appointed PCR appellate counsel and counsel presented a meritorious brief and therefore Petitioner was precluded from presenting any remaining issues before the Appellate Court. Therefore this issue is mechanically exhausted.

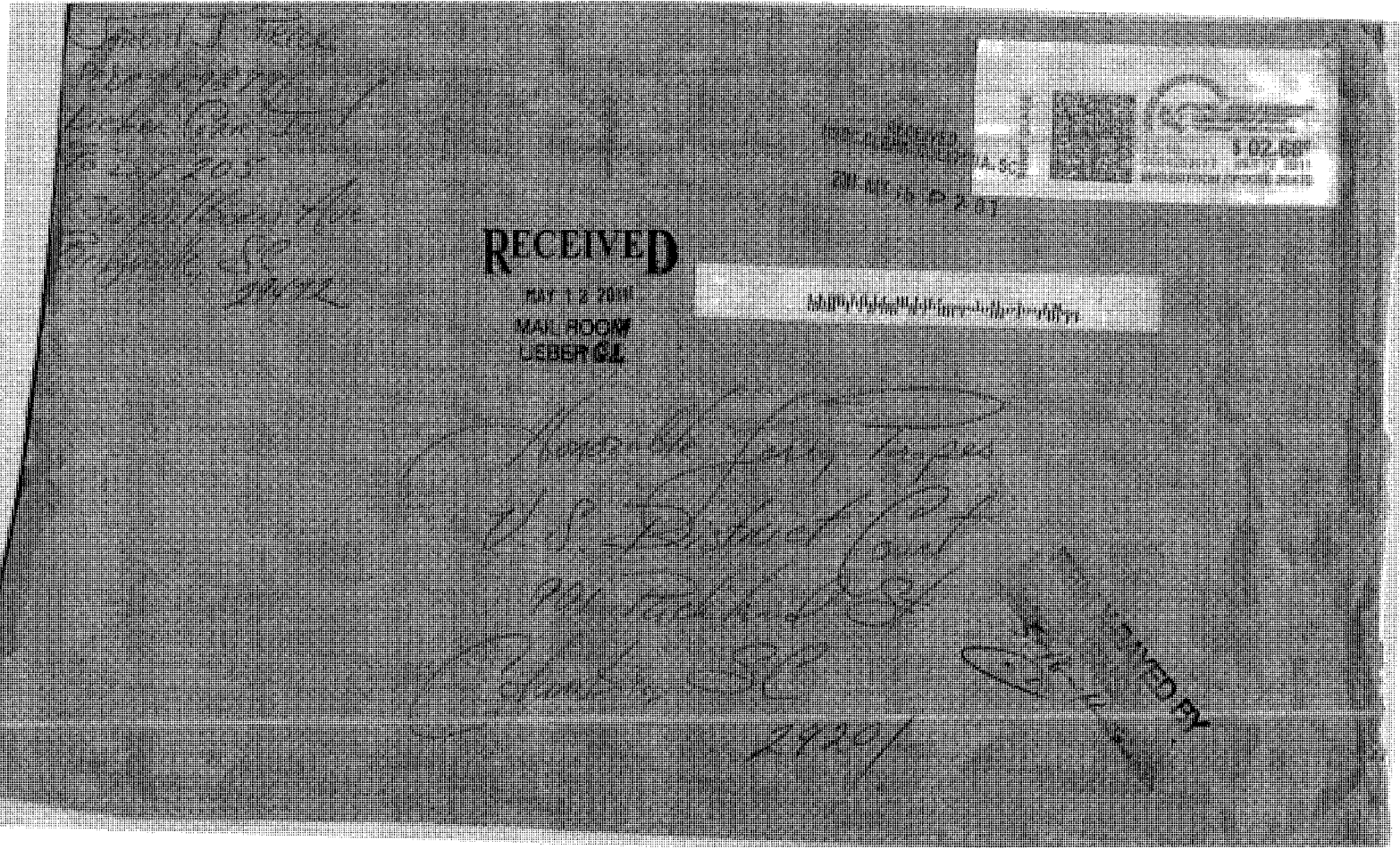
The PCR Court's Order did [not] specify whether [or] not counsel's failure to conduct an independent investigation of the crime scene in conjunction with Petitioner's plausible defense and the reasonable probability that the State's theory of how the victim was shot was impossible. Surely this prejudiced Petitioner since the failure to rebut the State's case denied Petitioner the ability to a complete defense, that was clearly plausible to present to the jury.

CONCLUSION

WHEREFORE, the instant petition for writ of habeas corpus should issue, or in the alternative an evidentiary hearing should be convened and the appropriate relief should be granted as this Honorable Court deems just and necessary in administration of justice.

Respectfully Submitted,

/s/ Gerold J. Price
Gerold J. Price



QUALITY PARK
MARTIN

THE DEPARTMENT OF COMMERCE HAS REVIEWED
AND APPROVED THE INFORMATION CONTAINED
HEREIN FOR THE PURPOSES OF THE
INTERNATIONAL TRADE COMMISSION
AND THE DEPARTMENT OF COMMERCE
DOES NOT ASSUME RESPONSIBILITY
FOR THE CONTENTS OF THE INFORMATION
CONTAINED HEREIN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Jeroid J. Price, #298791,	)	C/A No. 1:11-1172-JMC-SVH
	)	
	)	
Petitioner,	)	
vs.	)	MOTION FOR SUMMARY JUDGMENT
	)	
Wayne C. McCabe, Warden,	)	
	)	
Respondents.	)	

The Respondent, above-named, by and through the undersigned attorneys, respectfully move this Court, pursuant to Rule 56(b) F.R.C.P., for summary judgment based upon the pleadings pursuant to 28 U.S.C.A. §2254(d)(1),(2) .

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General
I.D. No. 4425



By: s/Donald J. Zelenka
ATTORNEYS FOR RESPONDENT

P.O. Box 11549
Columbia, SC
August 31, 2011

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Jeroid J. Price, #298791,	)	C/A No. 1:11-1172-JMC-SVH
	)	
	)	
Petitioner,	)	
vs.	)	
	)	
Wayne C. McCabe, Warden,	)	
	)	
Respondents.	)	

CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, do hereby certify that I have this date served the Respondent's Motion for Summary Judgment and Return with attachments in the foregoing action on the Petitioner by depositing one copy of the same in the United States mail, first-class postage prepaid, and addressed as follows:

Jeroid J. Price, #298791
Lieber Correctional Institution
P. O. Box 205
Ridgeville, SC 29472

This 31st day of August, 2011.



S/Donald J. Zelenka

I.

The Petitioner, Jerrod J. Price, # 298791, is presently confined at the Lieber Correctional Institution of the South Carolina Department of Corrections pursuant to orders of

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commitment from the Clerk of Court for Richland County, S.C. He was indicted by the Richland County grand jury for murder during the May 2003 term (2003-GS-40-2295). He was tried before the Honorable Reginald L. Lloyd and a jury between December 15-19, 2003. He was represented by Cameron B. Littlejohn, Jr. and Amye Rushing, Esquires. He was convicted and sentenced to 35 years incarceration.

DIRECT APPEAL

He then filed an appeal. In the appeal, he was represented by Joseph L. Savitz of the South Carolina Office of Appellate Defense and trial counsel Rushing. The State was represented by Assistant Attorney General Jeffrey A. Jacobs. In the Initial Brief of Appellant, the appellant raised the sole issue of appeal as follows:

The trial judge erred by allowing a State's witness, a gang investigator with the Sheriff's Department who purported to be an expert in gang activity, to testify that informants had told him "several times during interviews" that Price was "known as a Supreme, which is a higher elevation . . . like an officer within the [Bloods]." This "evidence" was inadmissible according to the rule against hearsay (Evidence Rule 802), and its introduction violated Price's right to confront the witnesses against him provided by the Sixth Amendment to the United States Constitution and Article I, Section 14, of the South Carolina Constitution.

Final Brief of Appellant, p. 3. App.p. 971-982. The *Final Brief of Respondent* was made by Assistant Attorney General Jacobs. App.p. 983-999. The South Carolina Supreme Court rendered its decision on April 17, 2006 affirming the conviction. See State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006). App.p. 100-1004. In the opinion, the Court structured the issue presented as:

Did the trial judge err in admitting testimony from an expert witness in the areas of gangs and gang activity that Appellant was an officer in a gang when the expert based his testimony on statements from informants.

State v. Price, supra. App.p. 1002. The remittitur was issued on May 5, 2006.

STATE POST-CONVICTION RELIEF PROCEEDINGS

Price then filed an application for post-conviction relief on December 4, 2006. App.p. 1005. An amended application was filed on April 30, 2008. App.p. 1028. An evidentiary hearing was conducted on June 25, 2008 before the Honorable William P. Keesley. The Applicant was present at the hearing and was represented by Charles T. Brooks, III, Esquire. Brian T. Petrano of the South Carolina Attorney General's Office represented the Respondent. At the hearing, the Applicant testified on his own behalf. The Applicant's trial counsel, Cameron B. Littlejohn, Jr., Esquire also testified. App.p. 1049-1074.

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

1. "Violation of 4th Amendment protection against illegal search and seizure."
2. "Violation of 6th Amendment right to confront adverse witnesses." And
3. "Violation of 6th Amendment right to effective assistance of counsel."

App.p. 1006. The Applicant filed an "Amended Application for Post Conviction Relief" on April 30, 2008, in which he alleged that he is being held in custody unlawfully for the following reasons:

1. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO INVESTIGATE THE CRIME SCENE. App.p. 1028-1030.
2. TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO OBJECT TO VIOLATION OF CONFRONTATION CLAUSE WHERE RICHLAND COUNTY OFFICER'S TESTIMONY WAS USED SOLELY TO PREJUDICE THE JURY. App.p.1030-1032.
3. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT OR MOVE FOR MISTRIAL WHERE

SOLICITOR'S OPENING (SIC) AND CLOSING REMARKS WERE TANTAMOUNT TO PROSECUTORIAL MISCONDUCT. App.p. 1032-1034.

4. APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO ARGUE PREJUDICE VALUE OF HEARSAY TESTIMONY. App.p. 1034-1036.
5. VIOLATION OF FOURTH AMENDMENT PROTECTION AGAINST ILLEGAL SEARCH AND SEIZURE. App.p. 1036-1037.
6. VIOLATION OF SIXTH AMENDMENT RIGHT TO CONFRONT ADVERSE WITNESSES. App.p. 1038-1040.
7. VIOLATION OF SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL. App.p. 1040.
8. VIOLATION OF FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS CLAUSE. App.p. 1040-41.

App.p. 1028-1042. At the PCR hearing, the Applicant ignored, in part, some of the above allegations, and combined some of the above allegations into more specific allegations. Judge Keesley entered the Order of Dismissal was filed September 22, 2008. App.p. 1075-1088.

The Petitioner made a timely appeal from the denial of post-conviction relief to the South Carolina Supreme Court. In the appeal, the petitioner was represented by Appellate Defender Elizabeth Franklin Best of the South Carolina Office of Indigent Defense. The Petitioner filed a Petition for Writ of Certiorari on June 15, 2009 raising the following question presented:

The Sixth Amendment of the Constitution gives a defendant the right to confront the witnesses against him. Did the PCR judge err when he found that trial counsel rendered effective assistance of counsel when trial counsel failed to object, on this basis, to a "gang expert's" testimony that he heard "on the street" that Price was a gang leader?

Petition for Writ of Certiorari, p. 2. The Respondent, through Assistant Attorney General

Brian Petrano made a Return to the Petition on August 31, 2009. On January 12, 2011, the South Carolina Court of Appeals issued its Order that the petition was denied. *Price v. State*, Order (S.C.Ct App. Jan. 12, 2011)(order denying petition for writ of certiorari). The remittitur was issued on January 28, 2011.

The Petitioner filed a petition for writ of certiorari in the U.S. Supreme Court on April 8, 2011. The U.S. Supreme Court denied Mr. Price's certiorari petition on June 13, 2011. Jeroid J. Price v. State of South Carolina, No. 10-9966, _ U.S _ (U.S. June 13, 2011).

FACTS UNDERLYING THE CASE

The Club Voodoo in lower Richland County hosted a fraternity party on the evening of December 6, 2002. (App. p. 256, l. 3-11; 278, l. 22-25.) The victim, Carl Smalls, a 280-pound college football player, attended the party. Petitioner murdered the victim there in the early morning hours of December 7.

The victim was a member of the gang known as the Crips. (App. p. 233, l. 8-12.) The state introduced much evidence that Petitioner was a member of a rival gang, the Bloods. Petitioner's apartment was replete with Blood paraphernalia. Among the evidence seized from the apartment and admitted at trial were photographs depicting young men "throwing up" Blood hand signs and wearing Blood colors (App. p. 321, l. 21 through 322, l. 19; Ex. 52); a book of "different codes that [Bloods] would use like a dictionary" (App. p. 324, l. 20 through 325, l. 13; Ex. 62); an inordinate amount of red clothing and hats of the type known to be worn by Bloods (App. p. 325, l. 17 through 326, l. 25); and bullet-proof vests, worn by high-ranking gang members (App. p. 327, l. 1-19). Police also seized a document containing a "pledge of allegiance" to the United Blood Nation. (App. p. 327, l. 20 through 328, l. 18; Ex.

67.) The pledge contained references to "Crip Killing Thugs." Additionally, Petitioner's partner in the murder, Ryan Brooks, told police that Petitioner was a Blood. (App. p. 110, l. 8-22.)

The victim and Petitioner confronted each other during the party, during a "gang-related" altercation on the dance floor involving Bloods and Crips. (App. p. 179, l. 22 through 181, l. 1; 207, l. 11-19; 235, l. 4-18; 282, l. 25 through 283, l. 7.) The gang members were "throwing" gang signs at each other and "flashing" their colors. (App. p. 156, l. 19 through 157, l. 4; 207, l. 25 through 208, l. 3.) Petitioner, a much smaller man, was "doing all the talking" for the Bloods. (App. p. 283, l. 17 through 284, l. 20; 292, l. 25 through 293, l. 17.) After the victim did the "Crip walk" and drew a line on the floor with his foot, Petitioner "got in [the victim's] face" and told The victim, "You're going to fall like 'The Matrix,'" which, according to one witness, meant "I'm going to kill you." (App. p. 280, l. 21 through 281, l. 4; 285, l. 10-15; 295, l. 9-14; 647, l. 23 through 648, l. 6.) Petitioner was making hand motions like gunshots. (App. p. 286, l. 4-6.) Brooks told police that the victim called him a "slob," a derogatory term used by Crips to "disrespect" Bloods. (App. p. 122, l. 3-16; 316, l. 1-7.)

After the confrontation, the victim did not seem mad and did not act violent. (App. p. 236, l. 22-25; 286, l. 13-16.) He "was cool. He was-he wasn't, you know, excited or nothing." (App. p. 648, l. 9-10.) "He didn't say anything. I mean, he didn't say anything. He did, you know, what I presume to be the Crip [walk], drew the line, and stepped back. That was it. He never uttered a word." (App. p. 295, l. 17-20.)

In the wee hours of the morning of December 7, as the partygoers were leaving the club and congregating in the parking lot, Joe Jones saw Ryan Brooks purposefully heading

from the parking lot back into the club carrying "steel" in his hand. (App. p. 210, l. 6 through 212, l. 2.) Brooks, who is about 6'1" tall and weighs 200 pounds, wore his hair in braids and was not wearing a hat. (App. p. 95, l. 18 through 96, l. 7; 149, l. 5-17.) Brooks admits that he retrieved a pistol from a car, a chrome .380-caliber semi-automatic. (App. p. 91, l. 1-8; 100, l. 7-10; 347, l. 8-12.) Petitioner also admits leaving the club to retrieve his .40-caliber pistol from a car; he had purchased a .40-caliber pistol six months before the murder. (App. p. 537, l. 4-10; 773, l. 20 through 774, l. 10.)

The two gunmen returned to the club. Brooks shot the victim once. (App. p. 91, l. 19-25; 211, l. 15-24; 213, l. 1-10.) Marcus Jones heard the first gunshot and looked up. There was a pause of a few seconds (App. p. 238, l. 3-8), and then he saw a second gunman, much smaller than Brooks, wearing a "red, black, and white pinwheel hat" fire two more shots. (App. p. 146, l. 9-20; 148, l. 7-18; 154, l. 1-20.) Jones testified that the gunman fired "straight down." (App. p. 154, l. 1-8.) Marcus Jones later picked Petitioner out of a photo lineup as the second gunman, the smaller one with the pinwheel hat. (App. p. 163, l. 4-25; 214, l. 1-19; 552, l. 11 through 553, l. 2.)

The victim died on the floor of the club, after calling 911 on his cell phone. (App. p. 191, l. 1-11; 566, l. 19 through 568, l. 22.) Evidence collected at the crime scene, including bullet fragments recovered from an indentation in the floor, was consistent with the victim having been shot while lying on the floor. (App. p. 390, l. 6 through 391, l. 5.) Marcus Jones testified that the victim did not have a weapon and that the gunman's life was not in danger when he killed the victim. (App. p. 154, l. 16-20.) Although he could not rule out other possibilities (i.e., that the victim fired a weapon), Lieutenant Joseph Powell testified that the

result of a gunshot residue test on the victim's left hand were "most consistent" with his being in a defensive posture and within five feet of a weapon that he did not fire. (App. p. 418, l. 9-20.) Later testimony showed that the victim was right handed. (App. p. 566, l. 11-12.) Dr. Ronald Burns, the pathologist who performed the autopsy on the victim's body, likewise could not opine conclusively that the victim had been lying down when Petitioner shot him, but testified that his wounds were consistent with that scenario. (App. p. 481, l. 1-7.) Spent .40-caliber and .380-caliber cartridges were recovered near the victim's body. (App. p. 382, l. 15 through 383, l. 21.)

Three days after the murder, at Petitioner's request, Jason Woods bought a cell phone in his own name and gave it to Petitioner. (App. p. 352, l. 21 through 353, l. 3; 354, l. 2-10.) Petitioner evaded capture until finally turning himself in to the Richland County Sheriff's Department on March 19, 2003. (App. p. 562, l. 14-15.)

Jason Wood told police that Petitioner had admitted to him that Petitioner shot the victim. (App. p. 355, l. 20 through 357, l. 18; Ex. 68; Ex. 69.)

Petitioner testified at trial and admitted to the shooting, and then to fleeing the club. (App. p. 778, l. 12 through 779, l. 5.) . He stated he was not a Blood, but was affiliated with the gang. He asserted that he acted in self-defense. He stated that Smalls was physically larger than him and, on the night of the shooting, Smalls attacked him without provocation. He testified that he struggled over the gun and during the struggle the gun discharged, wounding Smalls.

The trial judge charged murder and self-defense.

ATTACHMENTS

Respondent attaches and incorporates herein by reference the following:

DIRECT APPEAL.

1. State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006).
2. Remittitur Letter, May 5, 2006.

STATE POST-CONVICTION RELIEF MATERIALS

3. *Price v. State*, Petition for Writ of Certiorari.
4. *Price v. State*, Return to Petition for Writ of Certiorari.
5. *Price v. State*, Order (S.C.Ct App. Jan. 12, 2011)(order denying petition for writ of certiorari).
6. Remittitur letter, January 28, 2011.
7. *Price v. State*, PCR Appendix, Three Volumes, 1089 pages. (includes direct appeal briefs, trial transcripts, PCR applications, return transcript and order).

II.

In his pro se petition for a writ of habeas corpus, dated May 12, 2011, Price makes the following allegations:

- I. Petitioner's Due Process Right to a fair trial and the right to confrontation was violated when the trial court allowed a State's witness , a gang investigator with the Sheriff's Department who purported to be an "expert in gang activity," to testify that informants had told him several times during interviews that Petitioner was "known as a Supreme, which is a higher elevation . . .like an officer within the [Bloods]." This evidence was clearly inadmissible according to the rule against hearsay since the introduction violated Price's right to confront the witnesses against him provided by the Sixth Amendment to the United States Constitution. [raised and decided in direct appeal].
- II. The State Court(s) erred in failing to find Petitioner was denied his Sixth Amendment guaranteed right to the effective assistance of counsel when counsel failed to object on the basis of a "gang expert's testimony about what he heard on the streets from non-testifying informants, on the grounds of

Petitioner being denied his right to confront witnesses against him.

- III. The State Court erred in failing to find Petitioner was denied the effective assistance of counsel when counsel failed to object and/or move for a mistrial when the Prosecution's opening and closing arguments resulted in prosecutorial misconduct.
 - A. Asked jurors to convict not because he was guilty, but to prove to Petitioner that " life is worth a whole lot more than a color and a gang sign. You let him know that his days of gang banging on the streets of Richland County are over." [Raised at the PCR hearing, not raised on PCR appeal].
- IV. The State Court's erred in failing to find Petitioner was denied the effective assistance of counsel when counsel failed to properly investigate the crime scene in order to develop a sound trial strategy and the failure to do so obscured counsel's performance in rebutting the State's theory of the case.
 - A. Petitioner asserts that the state's theory was that the victim was shot while laying on the ground, resulting in the bullet striking the ground. He contends that reasonable counsel would have determined that it was not the first time a similar caliber firearm had been fired in the club since prior shots had been fired in the air. [Raised at PCR not in PCR appeal].

III.

Respondent submits that the entire Petition is without merit and must be dismissed.

EXHAUSTION AND PROCEDURAL BAR

In the interest of giving state courts the first opportunity to consider alleged constitutional errors occurring in a defendant's state trial and sentencing, a 2254 petitioner is required to "exhaust" all state court remedies before a federal district court can entertain his claims. 28 U.S.C. S 2254(b) & (c); see also Rose v. Lundy, 455 U.S. 509, 518, 102 S.Ct. 1198, 1203, 71 L.Ed.2d 379 (1982) (noting that "[t]he exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state court proceedings"). Thus, a federal habeas court may consider only those

issues which have been "fairly presented" to the state courts. Picard v. Connor, 404 U.S. 270, 275-78, 92 S.Ct. 509, 512-14, 30 L.Ed.2d 438 (1971); see also Townes v. Murray, 68 F.3d 840, 846 (4th Cir.1995), cert. denied, --- U.S. ----, 116 S.Ct. 831, 133 L.Ed.2d 830 (1996). A claim is fairly presented when the petitioner presented to the state courts the " 'substance' of his federal habeas corpus claim." Anderson v. Harless, 459 U.S. 4, 6, 103 S.Ct. 276, 277, 74 L.Ed.2d 3 (1982) (per curiam) (quoting Picard, 404 U.S. at 278, 92 S.Ct. at 513). " 'The ground relied upon must be presented face-up and squarely; the federal question must be plainly defined. Oblique references which hint that a theory may be lurking in the woodwork will not' " suffice. Mallory v. Smith, 27 F.3d 991, 995 (4th Cir.) (quoting Martens v. Shannon, 836 F.2d 715, 717 (1st Cir.1988)), cert. denied, 513 U.S. 1047, 115 S.Ct. 644, 130 L.Ed.2d 549 (1994). In other words, fair presentation contemplates that "both the operative facts and the 'controlling legal principles' " must be presented to the state court. Verdin v. O'Leary, 972 F.2d 1467, 1474 (7th Cir.1992) (quoting Picard, 404 U.S. at 277, 92 S.Ct. at 513); see also Joubert v. Hopkins, 75 F.3d 1232, 1240 (8th Cir.) ("A claim has been fairly presented when a petitioner has properly raised the 'same factual grounds and legal theories' in the state courts which he is attempting to raise in his federal habeas petition."), cert. denied, -- U.S. ----, 116 S.Ct. 2574, 135 L.Ed.2d 1090 (1996).

To satisfy the exhaustion requirement, a habeas petitioner must fairly present his claim to the state's highest court. See Spencer v. Murray, 18 F.3d 237, 239 (4th Cir.1994) (denying certain claims on exhaustion principles where claims were not raised on direct appeal to the Virginia Supreme Court).

However, the exhaustion requirement for claims not fairly presented to the state's

highest court is technically met when exhaustion is unconditionally waived by the state, Sweezy v. Garrison, 694 F.2d 331, 331 (4th Cir.1982) (per curiam), cert. denied, 461 U.S. 908, 103 S.Ct. 1882, 76 L.Ed.2d 812 (1983), or when a state procedural rule would bar consideration if the claim was later presented to the state court, Coleman v. Thompson, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 2557 n. 1, 115 L.Ed.2d 640 (1991); Teague v. Lane, 489 U.S. 288, 297-98, 109 S.Ct. 1060, 1068-69, 103 L.Ed.2d 334 (1989); see also George v. Angelone, 100 F.3d 353, 363 (4th Cir.1996) ("A claim that has not been presented to the highest state court nevertheless may be treated as exhausted if it is clear that the claim would be procedurally defaulted under state law if the petitioner attempted to raise it at this juncture."); Bassette v. Thompson, 915 F.2d 932, 937 (4th Cir.1990) (If "it is clear that the state law would bar state review, exhaustion is not required, and federal review is precluded."), cert. denied, 499 U.S. 982, 111 S.Ct. 1639, 113 L.Ed.2d 734 (1991). The state procedural bar rule barring federal review must be independent and adequate to support the state court judgment. See Coleman, 501 U.S. at 729, 111 S.Ct. at 2553 ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment."). A state procedural bar rule is not adequate unless it is "consistently or regularly applied." Johnson v. Mississippi, 486 U.S. 578, 589, 108 S.Ct. 1981, 1988, 100 L.Ed.2d 575 (1988).

GROUND ONE

In his first claim, Price asserts that due process and right to confrontation was violated when the court allowed a Deputy Sheriff who was an expert in gang activity testify that

Petitioner was known as a supreme - an officer in the Bloods which was inadmissible as hearsay. This issue was raised in the direct appeal as a matter of state law on hearsay - which the Supreme Court agreed in its opinion, but concluded the state law error was harmless. App.p. 1003-1004. This state law hearsay claim was exhausted.

Within the first allegation, Petitioner also makes a separate claim concerning the sixth amendment right to confrontation by the use of this same testimony. This issue was raised for the first time in the direct appeal. The South Carolina Supreme Court concluded the federal constitution claim was not preserved since it was not raised as such in the trial court. State v. Price, supra.. App.p. 1004.

The South Carolina Supreme Court addressed this procedurally barred claim as follows:

B. Confrontation Clause

Appellant also argues Richardson's testimony violated his right to confront witnesses under the Sixth Amendment to the United States Constitution and Article 1, § 14, of the South Carolina Constitution. **This issue is not preserved for appellate review because Appellant did not properly raise the issue in the trial court.** See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

App.p. 1004.(emphasis added). There are no remaining state remedies available on the confrontation clause claim. It is procedurally barred because it was not timely raised at trial.²

²Although Price objected to the admission of Investigator Richardson's testimony, he did so only on ordinary hearsay grounds, not on Confrontation Clause grounds. App.p. 318-319, 338-339. (Tr. I at 313, l. 16-19; 332, l. 1-12.) Further, there is no controlling law that leads to the conclusion that statements made to the police by an informant, not in response to police interrogation, are testimonial and thus violate the Confrontation Clause absent an opportunity to cross-examine the declarant. See State v. Staten, 364 S.C. 7, ___, 610 S.E.2d 823, 836 (Ct. App. 2005) (stating that statements are not testimonial when they are not "(1) *ex parte* in-court testimony or its functional equivalent; (2) extrajudicial statements contained in

In general, “a federal habeas court may not review constitutional claims when a state court has declined to consider their merits on the basis of an adequate and independent state procedural rule.” Burket v. Angelone, 208 F.3d 172, 183 (4th Cir.2000); see also Wainwright v. Sykes, 433 U.S. 72, 87-91, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (failure to raise contemporaneous objection at trial bars claim in habeas where not preserved on direct appeal). The South Carolina Supreme Court held that Petitioner had procedurally defaulted the confrontation clause claim by not asserting the issue in the trial. A federal habeas court “does not have license to question a state court's finding of procedural default” or to question “whether the state court properly applied its own law.” Barnes v. Thompson, 58 F.3d 971, 974 n. 2 (4th Cir.1995) (citations omitted).³ The confrontation clause claim is barred under Wainwright v. Sykes .

GROUND TWO

In the second claim in the petition, Price asserts that the PCR court erred when it denied the effective assistance of counsel under the Sixth Amendment claim when his trial counsel failed to object to the expert testimony under a violation of his right to confront witnesses. This issue was raised in the state PCR action. App.p. 1013-1014. 1031-32,. See also App.p. 1038-1040, 1060. The PCR judge denied relief, but did not specifically address this claim within its order - other than in testimony summary. See Marlar v. State, 375 S.C.

formalized testimonial materials, such as affidavits, depositions, prior testimony transcripts, or confessions; or (3) taken by police officers in the course of an interrogation.”).

³Nor is a procedural default waived when a state court reaches the merits of a federal claim as an alternative basis for dismissal. Harris v. Reed, 489 U.S. 255, 264 n. 10, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989); Ashe v. Styles, 39 F.3d 80, 86 (4th Cir.1994).

407, 410, 653 S.E.2d 266, 267 (2007)(“Because respondent did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review”); Simpson v. Moore, 367 S.C. 587, 600 n. 3, 627 S.E.2d 701, 708 n.3 (2006)(issue not addressed by PCR judge not preserved for review on appeal); Humbert v. State, 345 S.C. 332, 338, 548 S.E.2d 862, 866 (2001)(same) ; Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127, 128 n. 2 (1992) (“the general rule [is] that issues must be raised to, and ruled on by, the post-conviction judge to be preserved for appellate review.”). See also, Padgett v. State, 324 S.C. 22, 484 S.E.2d 101 (1997) (issues not ruled on by PCR court are not preserved for appeal).

This issue was raised on certiorari within the Petition for Writ of Certiorari as a Confrontation Claim and complaint that counsel did not object .Petition, p. 6. The Respondent did not raise a procedural bar within its Return [Return, p. 9-13], instead primarily addressing a failure to call the witnesses at the PCR hearing and the conclusion that Sixth Amendment prejudice could not be shown. Return, p. 9-13. There are no state remedies available for relitigation of this issue.

GROUND THREE

In his third ground, he claims that counsel was ineffective when he failed to object to the prosecutor’s opening and closing statements concerning “ life is worth a whole lot more than a color and a gang sign. You let him know that his days of gang banging on the streets of Richland County are over.” This issue was raised at the PCR hearing and addressed in the PCR order. App.p. 1083-84. However, this claim was not raised in the petition for writ of certiorari in the PCR appeal which was limited to the claim related to counsel’s failure to

object to the expert's testimony. See Petition for Writ of Certiorari. Therefore, the Petitioner failed to take the same claim to highest court with jurisdiction to hear the claim when he abandoned this preserved claim. No further state remedies are available.⁴ See Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); S.C. Code Ann. § 17-27-90 (1985).

Since the Petitioner has no other available state remedies, this Court may conclude that the Petitioner has technically satisfied the exhaustion requirement. See Matthews v. Evatt, , 105 F.3d 907, 911 (4th Cir. 1997). However, the Petitioner's failure to present these issues to the highest state court with jurisdiction to review her claims has defaulted these grounds for federal habeas relief. Matthews v. Evatt, 105 F.3d at 911; Fisher v. Angelone, 163 F.3d 835, 851 (4th Cir. 1998). See Smith v. Murray, 477 U.S. 527 (1986); Murray v. Carrier, 477 U.S. 478 (1986); Coleman v. Thompson, 501 U.S. 722 (1991). Accordingly, since the Petitioner has not shown cause for her procedural default, this Court should summarily dismiss these grounds for relief. Matthews, Id.; Fisher, Id. Therefore, it is technically exhausted because no remedies exist, but procedurally barred in these proceedings due to the abandonment in the PCR appeal.

GROUND FOUR

In his fourth ground, Petitioner asserts that the state court erred in failing to find counsel ineffective in failing to adequately investigate the crime scene and determine that it

⁴ Procedural default is an affirmative defense which is waived if not raised by respondents. *Gray v. Netherland*, 518 U.S. at 165-66. It is petitioner's burden to raise cause and prejudice or actual innocence. If not raised by petitioner, the court need not consider the defaulted claim. *Kornahrens v. Evatt*, 66 F.3d 1350 (4th Cir.1995), *cert. denied*, 517 U.S. 1171 (1996).

was not the first time a similar caliber firearm had been fired. This issue was raised in the amended application. App.p. 1028-1030. The PCR court rejected the allegation. App.p. 1081-82. The issue was not raised in the PCR appeal. As with some of the earlier claims, the failure to present the allegation on certiorari to the Supreme Court of South Carolina barred consideration of the matter in the PCR appeal. There are no state remedies available for relitigation of the claim. Because this abandonment, the claim is procedurally barred from consideration in this federal habeas action. Matthews v. Evatt, 105 F.3d at 911; Fisher v. Angelone, 163 F.3d 835, 851 (4th Cir. 1998). See Smith v. Murray, 477 U.S. 527 (1986); Murray v. Carrier, 477 U.S. 478 (1986); Coleman v. Thompson, 501 U.S. 722 (1991). Accordingly, since the Petitioner has not shown cause for her procedural default, this Court should summarily dismiss these grounds for relief.

IV. MERITS

GROUND ONE

In his first allegation, he initially contends that the trial court erred in admitting evidence from an “expert in gang activity” that he was told several times in interviews that Petitioner was a supreme which is like an officer in the Bloods in violation of the rule against hearsay.

The trial court qualified Investigator Richardson as an expert. App.p. 307-308. (Tr. I at 301, l. 25 through 302, l. 4.) He testified concerning the history of the Bloods and Crips, about gang activities in Columbia, and about the means of identifying gang members by their clothing and hand signs. App.p. 308 - 319. (Tr. I at 302, l. 12 through 313, l. 4.) His testimony served to explain the significance of many of the items of evidence seized from

Price's apartment

Investigator Richardson also testified that Price is a Blood. Price's attorney objected to that specific testimony, contending that it was beyond Investigator Richardson's expertise and was based on hearsay. App.p. 319. (Tr. I at 313, l. 16-19.) On cross-examination, Investigator Richardson testified that his knowledge of that fact was based on hearsay information provided by unpaid police informants. Investigator Richardson obtained that information in the course of his police duties. App.p. 331. (Tr. I at 325, l. 2-23.)

This issue was raised and denied in the direct appeal as not requiring reversal. Although the state court found that the testimony violated the rule against hearsay, its admission was harmless error. Particularly, the Court stated:

A. Hearsay[4]

Appellant argues the trial court erred in admitting testimony from Investigator Richardson that Appellant was a supreme or an officer within the Bloods because the testimony was improper hearsay. We agree. The State contends the testimony was admissible under Rules 702 and 703, SCRE, FN2 because, when the testimony is viewed in context, Richardson did not solely base his opinion on hearsay information. This argument is without merit. Richardson did not testify to his expert opinion, but rather relayed information from informants.

FN2. Rule 702, SCRE, states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 703, SCRE, provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Hearsay is an out of court statement offered to prove the truth of the matter asserted therein. Rule 801(c), SCRE; State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1994). The rule against hearsay prohibits the admission of evidence of an out of court statement to prove the truth of the matter asserted unless an exception to the rule applies. Rule 802, SCRE; Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991).

Although Richardson identified items seized from Appellant's apartment as related to the Bloods (e.g., photograph with Appellant throwing a gang sign, notebook with a reference to Bloods, code book referring to the Bloods, and red clothing which is significant to the Bloods), Richardson did not testify he relied on these items in forming an opinion that Appellant was a supreme or officer in the Bloods. Furthermore, Richardson testified he solely based his testimony that Appellant was a supreme on statements from informants. **This testimony was hearsay and was not admissible under any exception to the hearsay rule.**

State v. Price, supra. The Supreme Court next addressed whether a new trial should be granted and concluded the admission was harmless error and cumulative to other evidence.

Although the testimony was improperly admitted, **Appellant has not demonstrated reversible error.** See State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (improper admission of hearsay evidence is reversible error only when the admission causes prejudice). Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Thus, an insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989); Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed. State v. Pickens, 320 S.C. 528, 531, 466 S.E.2d 364, 366 (1996).

Defense counsel impeached Richardson's improper testimony by eliciting that his testimony was solely based on information from informants. Also, the inadmissible hearsay testimony was merely cumulative. See State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003) (admission of improper evidence is harmless where the evidence is merely cumulative to other evidence.); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (any error in admission of evidence cumulative to other unobjected-to evidence is harmless). Brooks testified Appellant was a Blood. Further, Lieutenant James Smith testified bullet-proof vests were seized from Appellant's apartment and

Richardson properly testified officers within gangs may have bullet-proof vests. After reviewing the entire record, we find the improper admission of hearsay testimony that Appellant was an officer in the Bloods was harmless.

State v. Price, supra.

The state court concluded as a matter of state evidentiary law that the evidence concerning information the expert received that Petitioner was an officer in the Bloods was inadmissible hearsay. Although we asserted that the evidence was admissible at trial and on appeal, in light of the deference due state evidentiary decisions, we will assume the legal correctness of the decision.⁵

⁵ The State argued under SCRE 702 and 703 that the evidence was admissible. Considering Investigator Richardson's testimony in context and in its totality, it is clear that he did not rely solely on hearsay information from informants in drawing his conclusion that Price is a Blood. Rather, he also relied on the gang paraphernalia seized from Price's apartment and the evidence of Price's actions at the Club Voodoo.

Nonetheless, an expert's reliance upon hearsay is proper. As the United States Court of Appeals for Seventh Circuit, construing Federal Rule of Evidence 703, has held:

Lundy argues, however, that even if some of Milla's testimony is based on his expertise, his conclusion that it was arson is actually based on hearsay testimony about Lundy's motives, plan and opportunities. Lundy is correct to suggest that "expert" testimony based solely on hearsay and third-party observations that are adequately comprehensible to lay people would be improper to admit under Rule 702. An arson expert cannot testify that he heard from an informant that the defendant torched the building and that thus in his expert opinion the defendant probably set the fire. However, hearsay and third-party observations that are of a type normally relied upon by an expert in the field are properly utilized by such an expert in developing an expert opinion. Milla presented uncontroverted evidence that interviews with many witnesses to a fire are a standard investigatory technique in cause and origin inquiries. In addition, Milla's opinion was also based heavily on his own investigation, which ruled out most accidental causes and suggested that an accelerant had been used. . . . In this case the district court did not abuse its discretion in admitting Milla's testimony regarding the cause and origin of the fire as expert testimony.

United States v. Lundy, 809 F.2d 392, 395-96 (7th Cir. 1987); accord *Sphere Drake Ins. v. Trisko*, 226 F.3d 951, 955 (8th Cir. 2000) (holding that trial court properly admitted informants' hearsay statements through expert, because they were not admitted for their truth and because the expert "regularly relied on the statements of informants as an investigating officer. He likewise was permitted to do so in forming the basis

Issues of state law are generally not cognizable in habeas review. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (“it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions... a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.”). Evidentiary

of his expert opinion.”).

More specifically, reliance upon informants in identifying a defendant as a gang member is proper. In *United States v. Hankey*, 203 F.3d 1160 (9th Cir. 2000), the United States Court of Appeals for the Ninth Circuit considered precisely this issue under Federal Rule of Evidence 703. In that case, a police officer testified, as a gang expert, that the defendant was a member of the Bloods. The expert based his opinion in large part on “street intelligence.” The court held:

Certainly the officer relied on “street intelligence” for his opinions about gang membership and tenets. How else can one obtain this encyclopedic knowledge of identifiable gangs? Gangs such as involved here do not have by-laws, organizational minutes, or any other normal means of identification—although as [the expert] testified, some wear colors, give signs, bear tattoos, etc. [The expert] was repeatedly asked the basis for his opinions and fully articulated the basis, demonstrating that the information upon which he relied is of the type normally obtained in his day-to-day police activity.

Id. at 1169-70; see also *Connecticut v. Henry*, 805 A.2d 823, 837 (Conn. App. Ct. 2002) (holding a gang expert’s opinion, based on information received from gang members, admissible because “[p]olice officers must rely on communications with gang members to gather intelligence and form opinions about gang activity because most gangs do not have bylaws, organizational minutes or any other normal means of identification.”).

Finally, Investigator Richardson did not identify Price as the perpetrator of the crime. Rather, he identified him only as a member of the Bloods. The difference is significant. See *Lundy*, 809 F.2d at 396 (“Milla never testified that Lundy or anyone in particular caused the fire. He only testified that in his opinion the fire was not accidental. District courts must ensure that expert opinion testimony is in fact expert opinion, not merely opinion given by an expert.”).

Because Investigator Richardson was testifying as an expert, his identification of Price as a Blood was permissible.

rulings are generally considered state law matters. *Spencer v. Murray*, 5 F.3d 758, 763 (4th Cir. 1993) (“claim about the admissibility of evidence under state law rarely is a claim upon which federal habeas corpus relief can be granted.”). Evidentiary rulings will not be considered in federal habeas ““unless [the] erroneous evidentiary rulings were so extreme as to result in a denial of a constitutionally fair proceeding.”” *Barbe v. McBride*, 521 F.3d 443, 452 (4th Cir.2008), *quoting* *Burket v. Angelone*, 208 F.3d 172, 186 (4th Cir.2000). Thus, the only proper inquiry, if any, is whether the admission of the evidence itself so infected the entire trial that the resulting conviction violated due process. *Estelle*, 502 U.S. at 72.

Respondent submits that the Supreme Court’s conclusion that the admission was the evidence was harmless and cumulative to other evidence was a reasonable application of the facts. Even if the trial court improperly admitted Investigator Richardson’s testimony that Price is a Blood, that evidence was merely cumulative to other evidence that Price was a member of the Bloods, and it was irrelevant to the issue of self-defense. It was, therefore, harmless.

“Whether an error is harmless depends on the particular circumstances of the case. No definite rule of law governs this finding; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial.” *State v. Reeves*, 301 S.C. 191, 193-94, 391 S.E.2d 241, 242-43 (1990). “To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, *i.e.*, there is a reasonable probability the jury’s verdict was influenced by the wrongly admitted or excluded evidence.” *Connors v. City of Forest Acres*, 363 S.C. 460, ___, 611 S.E.2d 905,

908 (2005). When the trial court improperly admits evidence that is merely cumulative of other evidence, the error is harmless. *See, e.g., Fields v. Regional Med. Ctr. of Orangeburg*, 363 S.C. 19, 30, 609 S.E.2d 506, 512 (2005).

Investigator Richardson's testimony that Price was a Blood was merely cumulative. There was ample evidence of this fact before the jury: the police seized a significant amount of gang paraphernalia from Price's apartment, including photographs of young men "throwing up" Blood hand signs and wearing Blood colors, a book of Blood "codes," an inordinate amount of clothing known to be worn by Bloods, bullet-proof vests, and a "pledge of allegiance" to the United Blood Nation. There was also evidence that Ryan Brooks told police that Price was a Blood. See 109-111. But see App.p. 90. Several witnesses testified to the fact that victim Smalls was a Crip, and that Price and Smalls squared off on the dance floor as part of a gang-related confrontation.¹

Even so, given Price's own subsequent testimony that he shot Smalls, the fact that Price was a gang member was irrelevant to the only issue in the case, that of self-defense. Aside from the gang evidence, there was evidence that Price and Brooks were accomplices in the murder, and that Price actually left the club to retrieve a pistol from a vehicle and then returned to the club in search of Smalls; that Price threatened Smalls verbally and by making shooting motions; and that Smalls did not threaten and otherwise did not appear violent or angry after his verbal confrontation with Price.

There was ample evidence of Price's guilt even without the evidence that Price

¹ The evidence seized from Price's apartment was introduced by Investigator Richardson. Brooks's statement and the testimony of other witnesses that the confrontation was gang related were introduced without objection. App.p. 110, 179, 235, 282-283. (Tr. I at 104, l. 8-22; 173, l. 22 through 174, l. 1; 201, l. 11-19; 229, l. 4-18; 276, l. 25 through 277, l. 7.)

contends was improperly admitted. Further, the allegedly improper evidence was cumulative of much other evidence of Price's gang membership. Accordingly, any error in admitting Investigator Richardson's testimony concerning Price's membership in the Bloods was harmless. The claimed state law error must be dismissed where entitlement to a new trial has not been shown.

Assuming this state law error was a constitutional error, the Petitioner's claim must still fail. Because of the threat collateral attacks pose to "finality, comity, and federalism," Fry v. Pliler, 551 U.S. 112, 116, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007), habeas petitioners may secure the writ only if the error "actual[ly] prejudice[d]" them, Brecht v. Abrahamson, 507 U.S. at 637, 113 S.Ct. 1710 (quoting United States v. Lane, 474 U.S. 438, 449, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986)) (internal quotation marks omitted). In making this determination, courts ask whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* In the "unusual" situation where "the matter is so evenly balanced that [the habeas judge] feels himself in virtual equipoise as to the harmlessness of the error [under *Brecht*]"—that is, where the judge is in "grave doubt"—the court must grant the writ. O'Neal v. McAninch, 513 U.S. 432, 435, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995). The Petitioner has failed to show that the admission of the alleged hearsay did not have "a substantial and injurious effect." See also, Baum v. Rushton, 572 F.3d 198, 205 (4th Cir.2009); Barbe v. McBride, 521 F.3d 443, 453 (4th Cir.2008); Bauberger v. Haynes, 632 F.3d 100, 104 -105 (4th Cir. 2011). The initial claim is without merit for this second reason.

In his second portion of the claim, he asserts a confrontation clause violation by the same evidence. As noted above, this is procedurally barred because no confrontation clause

objection was made at trial and it was barred in the direct appeal. It must be dismissed.

GROUND TWO

In his second ground, he contends that his counsel was ineffective for failing to object to the expert testimony as a confrontation clause violation. As stated above, though raised in the amended pleadings, the PCR order did not address this same claim and counsel was not asked at the PCR hearing why his objection did not include a federal constitutional claim. The Petitioner did raise the issue in the Petition for certiorari. However, certiorari was denied.

Respondent submits that the Petitioner cannot satisfy the two prong test of Strickland v. Washington, 466 U.S. 668(1984). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). 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).

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." Strickland v. Washington. 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Strickland.

The Petitioner cannot satisfy the second prong of Strickland. The Supreme Court's assessment of harmless error is the admission of the same testimony, albeit under a different challenge addresses the failing of the Petitioner in this setting. He cannot show that had he made this objection that there is a reasonable probability that the result of the proceedings would have been different. His allegation must be denied for this reasons set out above.²

GROUND THREE AND FOUR

As set out above, ground s three and four are procedurally barred because the claims were abandoned in the PCR appeal. Matthews v. Evatt, supra..

2

Trial counsel explained that he did not want to actually call the informants that the gang expert relied on; rather he wanted to take advantage of arguing their absence. (App. p. 1067 – 1068, 1078 - 1079.) Similarly, the Respondent submits that it is merely speculative for the Petitioner to argue that had he been able to confront one or more witnesses that the result would have been favorable. The Petitioner is attempting to limit any analysis and argue only that had a confrontation clause/Crawford claim been made then the gang expert would have been excluded. Another speculation is that the informants would have been called to testify and be “confronted.” The Petitioner wants to retain a favorable posture and simply opine that his trial would have been any different had he been able to confront the witnesses he complains of – whereas trial counsel explained that the informants “could have done nothing but bolster what the sergeant had said.” (App. p. 1067 l. 20 – 21.) The Petitioner made no attempt to produce the witnesses he complains about not being able to confront. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Petitioner's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). A Petitioner must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

V.

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

WHEREFORE, having made Return, the Respondents request that the Petition, as amended, be dismissed for the reasons set forth above.

Respectfully submitted,

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S/Donald J. Zelenka

By: _____

ATTORNEYS FOR RESPONDENTS

August 31, 2011

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION**

Jeroid J. Price,	)	
	)	
Petitioner,	)	Civil Action No.: 1:11-cv-01172-JMC
	)	
v.	)	ORDER
	)	
Wayne McCabe, Warden,	)	
	)	
Respondent..	)	
	)	

This matter is before this Court for a review of the Magistrate Judge’s Report and Recommendation (“Report”), [Doc. 38], filed on January 26, 2012, recommending that Respondent’s Motion for Summary Judgment [Doc. 21] be granted and Petitioner’s motions for evidentiary hearings [Docs. 3 and 33] be denied. On May 18, 2011, Petitioner, proceeding *pro se*, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 [Doc. 1]. The Report sets forth the relevant facts and legal standards which this court incorporates herein without a recitation.

The parties were notified of their right to file objections [Doc. 38 at 28]. Plaintiff timely filed objections to the Report. [Doc. 50]. In conducting its review, the court therefore applies the following standard:

The magistrate judge makes only a recommendation to the Court, to which any party may file written objections...The Court is not bound by the recommendation of the magistrate judge but, instead, retains responsibility for the final determination. The Court is required to make a *de novo* determination of those portions of the report or specified findings or recommendation as to which an objection is made. However, the Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the Report and Recommendation to which no objections are addressed. While the level of scrutiny entailed by the Court's review of the Report thus depends on whether or not objections have been filed, in either case, the Court is free, after review, to accept, reject, or modify any of the magistrate judge's findings or recommendations.

Wallace v. Housing Auth. of the City of Columbia, 791 F. Supp. 137, 138 (D.S.C. 1992)

(citations omitted).

In light of the standard set forth in *Wallace*, the Court has reviewed, *de novo*, the Report and the objections. After careful review of the Report and objections thereto, the Court hereby **ACCEPTS** the Report. [Doc. 38]. For the reasons set out in the Report, the Respondent's Motion for Summary Judgment [Doc. 21] is therefore **GRANTED** and Petitioner's motions for evidentiary hearings [Doc. 3 and 33] are **DENIED**.

CERTIFICATE OF APPEALABILITY

The law governing certificates of appealability provides that:

(c)(2) A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.

(c)(3) The certificate of appealability . . . shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c). A prisoner satisfies this standard by demonstrating that reasonable jurists would find this court's assessment of his constitutional claims is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). In this case, the legal standard for the issuance of a certificate of appealability has not been met.

IT IS SO ORDERED.



United States District Judge

Greenville, South Carolina
March 21, 2012

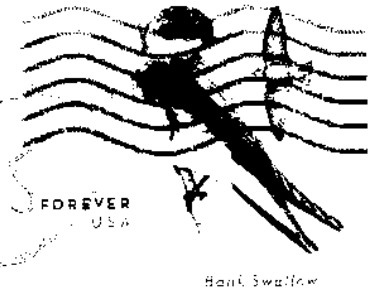
Joshua Hamilton
501 Plymouth St.
Kannapolis N.C. 28025

CHARLOTTE NC 282

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APPROVED
AUG 30 2013

RECEIVED
REVIEW COMMITTEE

MR. JAMES H. HARRIS
JULY 2013

PERIOD PRICE 298791
MCCORMICK C.I. 386-REDEMPTIONWAY
MCCORMICK S.C. 29899

A-115A
mccormick

29899



DEAR MR. PRICE

DATE, AUG, 4, 2013

- HELLO SIR MY NAME IS

JOSHUA HAMILTON

I WAS SHEACRING THE INTERNET
AND I CAME ACROSS A DOCUMENTRY
ON COLUMBIA SOUTH CAROLINA GANG
LAND.

FRIST AND FOR-MOST I JOSHUA HAMILTON
DNT KNOW YOU. BUT, S.R ON DEC, 7, 2002
MR. PRICE I WAS 'PRESENT S.R' AND
HOW THIS LATTER CAME ABOUT IS. MR. PRICE
THE STORY THEY TOLD ON GANGLAND
WASNT THE HONEST TRUTH I WAS
IN FRONT OF THE CLUB MR. PRICE
I WITNESS YOU AND ANOTHER YOUNG
MAN WRESTHING IN THE HALLWAY
AND ANOTHER BUILD MAN WITH AN OBJECT
WALK TOWARDS YOU AND THE YOUNG
MAN. I ACKNOWLEDGE YOU HAD A BALL CAP
ON AND A JERSEY AND THE YOUNG MAN
YOU WAS WRESTHING WITH WAS A BIG
BUILD GUY WITH A BLUE BUTTON UP ON.
THE SAME BUILD GUY THAT WALK TOWARD
YOU AND THE OTHER GUY IN THE BLUE. I SEEN
HIM WAVEING AN SILVER OBJECT I MR. PRICE.
AFTER I HEARD AN LITTLE POP AND SEEN
A GUY WITH BRIENDS TAKE OFF AND LOOK
THAT SAME MAN HE WAVE DURING COM

I SEE YOU AND THAT GENTLEMAN
 STILL FIGHTING, AFTER THAT 1. THE
 POP, I WAS AMAZED THEN I SEEN
 TWO BIG FLASHES WITH TWO BIG BOOMS
 AFTER THAT I TOOK OFF RUNNING AND
 ACKNOWLEDGE A WHITE TRUCK PULL
 OFF. MR. PRICE I AM SURPRISE YOU MADE
 IT OUT THAT HALLWAY THAT BIG
 GENTLEMEN HAD YOU FIGHTING FOR YOUR
 LIFE. ITS NO WAY IN HELL EXCUSE
 MY TONGUES THAT YOU ARE A COLD HEARTED
 KILLER, MR. PRICE AS GOD AS MY
 WITNESS YOU WAS FIGHTING FOR DEAR LIFE.
 BUT THATS THE PAST. BUT THE TRUTH SHOULD
 BE KNOWN. IF YOU NEED TO CONTACT
 ME I CAN BE CONTACTED AT - 704-713-0342
 OR MY E-MAIL. JHOOD845@YMAIL, 704-713-0342
 MAY GOD BE WITH YOU / S.L.

FR

MR HAMILTON

Josh Oland

Applicant contends that he has newly discovered evidence, the standard test governing newly discovered evidence as grounds for post conviction relief is properly applied when relief sought based on evidence discovered post trial that is material to the accused's guilt or innocence. McCoy v. State 737 S.E.2d 623 (S.C. 2013).

FACTS

Here applicant has sworn statement from Mr. Joshua Hamilton, who was searching the internet and came across a documentary on Columbia South Carolina Gangland. This evidence is material to applicant's guilt or innocence. McCoy Supra. In State v McCoy quoting Clark v. State, 434 S.E.2d 266 (1993) provides that a PCR applicant claiming Newly Discovered Evidence must prove that the new evidence (1) would probably change the result if a new trial had; (2) has been discovered since trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence, and (5) is not merely cumulative or impeaching.

CONCLUSION

Wherefore, applicant request a hearing pursuant to §17-27-80 of the South Carolina Code of Laws.

INEFFECTIVE ASSISTANCE OF COUNSEL PURSUANT Lafler v Cooper.

Applicant argues the following United States Supreme Court case is applicable to his appeal. Lafler v Cooper 132 S.Ct. 1376

(2012). The opinion was issued on March 21, 2012, however, applicant find this case can be applied retroactively to this proceeding.

In order to conclude whether the holding announced in the case constitutes an "old rule" or "new rule" for the purposes of determining whether it can be applied retroactively, it must be examined under the framework set forth in Teague v Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989). In Teague, the United States Supreme Court found "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." Id. at 301, 109 S.Ct. at 1070. The Teague Court also noted the concern that application of constitutional rules not in existence at the time a conviction becomes final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." Id. at 309, 109 S.Ct. at 1074. The Teague Court held that ... unless they fell into one of two (2) exceptions, the general rule applies, "new constitutional rules of criminal procedure will not be applicable to those case which have become final before the new rules are announced." Id. at 310, 109 S.Ct. at 1075.

The first exception that would allow a new rule to be applied retroactively is "if it places certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to proscribe." Id. at 311, 109 S.Ct. at 1075. This

exception has been subsequently defined as being substantive (not procedural new rule. See e.g., Beard v. Banks, 542 U.S. 406, 416, 127 S.Ct. 1173, 1180 (2007)).

The second exception that would allow a new rule to be applied retroactively is "if it requires the observance of those procedures that are implicit in the concept of ordered liberty." Teague, 489 U.S. at 311, 109 S.Ct. at 1076. The Teague court explained this second exception was "to be reserved for watershed rules of criminal procedure" and limited to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." Id. at 311, 313, 109 S.Ct. at 1076-77. To determine whether a new rule is a water shed rule, it must (1) "be necessary to prevent an impermissibly large risk of an inaccurate conviction" and (2) "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." See Wharton, 549 U.S., at 418, 127 S.Ct. at 1182.

The applicant finds the holding of Missouri v Frye, set forth a new rule that should be applied retroactively. The case did enact a substantive new rule in criminal procedure. This Court (The Supreme Court of the United States) holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Any exception to that rule need not be explored here, for the offer was a formal one with a

fixed expiration date. When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires. Id at 1408.

The prosecution and trial courts may adopt some measures to help ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading to conviction with resulting harsh consequences. First, the fact of a formal offer means that its terms and its processing can be documented so that what took place in the negotiations process becomes more clear if some later inquiry turns on the conduct of earlier pretrial negotiations. Second, States may elect to follow rules that all offers must be in writing, again to ensure against later misunderstandings or fabricated charges. See N. J. Ct. Rule 3.9-1(b) (2012). ("Any plea offers to be made by the prosecutor shall be in writing and forwarded to the defendant attorney"). Third, formal offers can be made part of the record at any subsequent plea proceeding or before a trial on the merits, all to ensure that a defendant has been fully advised before those further proceedings commence. Hence, Missouri v Frye, 132 S.Ct. 1409 (2012)(is necessary to prevent an impermissibly large risk of an inaccurate conviction.)

In Lafler v Cooper, 132 S.Ct. 1384 (2013) defense counsel advised applicant to reject plea offer on grounds he could not be

convicted at trial. Moreover, in the instant case respondent went to trial rather than accept a plea deal, and it is conceded this was the result of ineffective assistance during the plea negotiations process. Respondent received a more severe sentence at trial, one $3\frac{1}{2}$ times more severe than he likely would have received by pleading guilty. Far from curing the error, the trial caused the injury from the error. Even, if the trial itself is free constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudice from either a conviction on more serious counts or the imposition of a more severe sentence. Id at 1386.

The Applicant answered to plea negotiations at a former PCR evidentiary hearing:

Q. was there ever any plea negotiations, talks or anything like that?

A. Yes.

Q. Tell the Court about that.

A. First plea, I believe, was like 30 years or something like that. And then Mr. Littlejohn came again, he was like they was looking at zero to 30, but the solicitor was looking more to like ten years or something like that, like zero to ten within that range, I would get the lesser of the time. And then during trial, during the coast of the trial, me and Mr. Litteljohn has a talk behind in private conference and he was saying something about in the middle of trial that he may be able to get five years and

I was leaning toward the five, but he really felt like we had the trial beat, so we went ahead and.

Q. Did he tell you that?

A. Yes, And we went ahead and proceed with trial. Appx. p. 1062, PCR transcript, p. 14. line 23-15, p. 1063, PCR transcript p. 15, lines 1-20.

Trial counsel's remarks:

Q. Was there ever any negotiations in this case?

A. There may have been some at the beginning. I do not remember any--I certainly don't remember any five year offer that might have been made, but I know in this case, as in all cases, if a plea offer is extended to me, I always take it to the client no matter how ludicrous it may be. The client is given the opportunity to accept it or reject it. I certainly would have done that in this case. Mr. Price wanted his trial and I went in there and tried the case as best I could for him. Appx. p. 1069, PCR Transcript p. 21, lines 9-21.

Strickland, recognized "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produce a just result." 466 U.S. at 686. The goal of a just result is not divorced from the reliability of a conviction, see United States v Cornic, 466 U.S. 648, 658 (1984); but here the question is not the fairness or

reliability of a conviction, see United States v Cornic, 466 U.S. 648, 658 (1984); but here the question is not the fairness or reliability of the trial but the fairness and regularity of the process that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance. Lafler v Cooper at 1388.

PCR Order of Dismissal dated September 5, 2008 filed September 12, 2008, it reads; that trial counsel testified he recalls some plea offers, but that there was never a five (5) years offer and that he brought all plea offers to the Applicant for his consideration.

"When defense counsel allowed the offer to expire without advising the defendant or allowing him to considered it, defense counsel did not render the effective assistance the Constitution requires." Frye at 1408. This case is or should be retroactive or at lease a hearing to determine if it need be.

CONCLUSION

Wherefore, applicant request a evidentiary hearing pursuant §17-27-80 of the South Carolina Code of Laws to determine if the case is retroactive and to resolve the claim of ineffective assistance of counsel.

3. Appellate Counsel Rendered Ineffective Assistance of Counsel When He Failed To Argue Prejudice Value of Hearsay Testimony.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1982). The Applicant must show that appellate counsel's performance was deficient and that he was prejudice by the deficiency. Tnrift v State, 397 S.E.2d 523 (1990); Gilchrist v State, 612 S.E.2d 702 (2005).

In this case, the claims was raised in a former PCR amended April 30, 2008, the Respondent states the allegations were not developed at the PCR hearing. See Order of Dismissal dated September 22, 2009. Applicant's Appellate Counsel Mr. Savitz never testified at applicant's PCR hearing, so the claim was not developed not because of the Applicant. The Order of Dismissal, states that, Appellate counsel has a professional duty to choose potential issues according to their merit. "Jones v Barnes 463 U.S. 745 (1983). However, if the issue raised requires showing prejudice, and Mr. Savitz should have shown prejudice or else give me permission to file an Anders Brief. In addition, Applicant request that Mr. Savitz be at the hearing, to testify.

The Applicant did not received a fair bite at the apple. See Alice v State, 409 S.E.2d 392, 394 (S.C. 1991). See §17-27-90.

CONCLUSION

Wherefore, Applicant request a hearing on this matter pursuant to §17-27-90 of the S.C. Code of Laws.

Respectfully submitted
July 8th 2014


Gerold John Price

(S) DAMON ROBERTSON - RCSD

S/J Smith RCSD

ARREST WARRANT NUMBER

H283316

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date:

VERDICT

Gaulty

Foreperson of Petit Jury
Date: 12-19-03

DOCKET NO. 2003-GS-40-2295

The State of South Carolina
County of Richland

COURT OF GENERAL SESSIONS

MAY TERM 2003

82

**THE STATE
vs.**

JERIOD JOHN PRICE

Indictment for

MURDER

SC Code: 16-3-10
CDR Code: 0116
Class FEL/EXM(V)

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

LCC PLS AND GS

CERTIFIED TRUE COPY
OF ORIGINAL FILED,
Janette Wright
C.C.C.P.R.G.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on May 21, 2003, the Grand Jurors of Richland County present upon their oath

MURDER

That Jerrod John Price did in Richland County on or about December 7, 2002, feloniously, willfully and with malice aforethought, kill one Carl Felder Smalls by means of a gunshot wound and that the said victim died as a proximate result thereof. All in violation of SC Code of Laws § 16-3-10.

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

CERTIFIED TRUE COPY
OF ORIGINAL FILED

Jeanele B. Giese
C.C.C. 2003/5/21
RICHLAND COUNTY
SOUTH CAROLINA

Warren B. Giese
Warren B. Giese, SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

AKA:

Race:

B

Sex:

M

Age:

DOB:

SS#:

Address:

City, State, Zip

DL#

SID#

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

AW#:

Date of Offense:

S.C. Code §:

CDR Code #:

☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: MURDERin violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 011116☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ 17-25-45The charge is: ☒ As Indicted ☐ Lesser included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 35 days/months/years or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION ☐ Heard, ☐ Waived, ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

\$14-1-206 (Assessments 10% fee)

\$14-1-211(A)(1) (Conv. Surcharge)

\$14-1-211(A)(2) (DUI Surcharge)

\$56-5-2995 (DUI Assessment)

\$35.13 (Public Def/Prob)

\$73.3, 1B TP (Law Enforce. Funding)

\$33.7, 1B TP (Drug Court Surcharge)

\$50-21-114(BUI Breath Test Fee)

\$56-5-2942(J) (Vehicle Assessment)

3% to County (if paid in installments)

TOTAL

Barbara A. Scott

Clerk of Court/Deputy Clerk

Court Reporter:

Rena Gault

PTUP

days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ beginning\$ paid to Public Defender Fund

Other:

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

PRESIDING JUDGE

Judge Code

Sentence Date:

12/17/03

CERTIFIED TRUE COPY
OF ORIGINAL FILED
JAN 12 2004
C.C. P.B.S.RICHLAND COUNTY
SOUTH CAROLINA

White - Clerk

Green - Corrections

Canal - Probation

Defendant

SCCA/217 (7/2003)

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

AKA:

Race:

Sex:

Age:

DOB:

SS#:

Address:

City, State, Zip

DL#

SID#

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

-GS-

A/W#:

Date of Offense:

S.C. Code §:

CUR Code #:

☐ CASE RESTORED

SENTENCE

☐ PLEA☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO:

in violation of § of the S.C. Code of Laws, bearing CDR Code #

☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ 17-26-45The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

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

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ plus 20% fee: \$

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

§14-1-206 (Assessments 10/ 5%)	\$
§14-1-211(A)(1) (Conv Surcharge)	\$100
§14-1-211(A)(2) (DUI Surcharge)	\$100
§56-5-2995 (DUI Assessment)	\$12
§ 35.13 (Public Def/Prob)	\$500
§73.3, 1B TP (Law Enforce. Funding)	\$25
§33.7, 1B TP (Drug Court Surcharge)	\$100
§50-21-114(BUI Breath Test Fee)	\$50
§56-5-2942(J) (Vehicle Assessment)	\$40/ea
3% to County (if paid in installments)	\$
TOTAL	\$

PTUP

days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ beginning

\$ paid to Public Defender Fund

Other:

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

PRESIDING JUDGE

Judge Code:

Sentence Date:

Court Reporter:

CERTIFIED TRUE COPY
OF ORIGINAL FILED
C.C.C. [Signature]
RICHLAND COUNTY
SOUTH CAROLINA

White - Clerk

Green - Corrections

Canary - Probation

Pink - Defendant

SCCA/217 (7/2003)

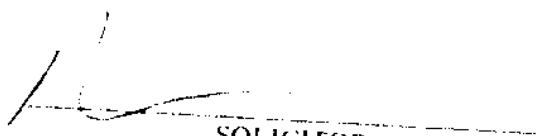
STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT FOR OBTAINING
GOODS BY FALSE PRETENSES

At a Court of General Sessions, convened on December 15, 1993
the Grand Jurors of Richland County present upon their oath:

That Dannie Lee Pierce
did in Richland County on or about October 26, 1992
with intent to cheat and defraud the victim, Decker Boulevard Jewelry
obtain \$50.00 in U. S. Currency
less than Two
valued ~~XXXXXX~~ Hundred Dollars, from the victim by means of false pretenses and represen-
tations, to wit: by presenting two rings to be pawned which Dannie Lee Pierce
falsely claimed to be the owner thereof

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


SOLICITOR

CERTIFIED TRUE COPY
OF ORIGINAL FILED,
Janet A. Williams
C.C.P. S.S.
RICHLAND COUNTY
SOUTH CAROLINA

FORM 5

STATE OF SOUTH CAROLINA)

County of RICHLAND)2014 CP 400-4524
IN THE COURT OF COMMON PLEASJEROID JOHN PRICE, # 298791)

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

v.)

State of South Carolina)

APPLICATION FOR
POST-CONVICTION RELIEFINSTRUCTIONS - 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 McCormick Correctional Inst., 386 Redemption Way, McCormick, S.C. 29899
2. Name and location of Court which imposed sentence Richland County General Sessions Court, Columbia, S.C. 29210
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) (2003-GS-40-2295) (murder)

2014 JUL 29 PM 3:09
JEANNETTE W. MURKIN
C.C.P. CLERK
RICHLAND COUNTY
FILED

1230

- (b) _____
(c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
(a) 12/19/2003) (35 years)
(b) _____
(c) _____
6. Check whether a finding of guilty was made:
(a) after a plea of guilty _____
(b) after a plea of not guilty X
(c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
(a) the name of each Court to which you appealed:
i. The Supreme Court of South Carolina
ii. _____
iii. _____
(b) the result in each such Court to which you appealed:
i. Affirmed
ii. _____
iii. _____
(c) the date of each such result:
i. April 17, 2006
ii. _____
iii. _____
(d) if known, citations of any written opinion or orders entered pursuant to such results:
i. Op. NO: 26139
ii. _____
iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
(a) N/A

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Newly Discovered evidence of self defense
- (b) ineffective Assistance of Counsel
- (c) unconstitutional jury charge
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) New witness affidavit or sworn statement
- (b) ~~per x12128x7x65558x~~ per Missouri v Frye
- (c) Hands of one hands of all jury charge
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? yes
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? yes
- (d) any other petitions, motions or applications in this or any other Court? no
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. PCR Application
- ii. Habeas Corpus
- iii. United States Supreme Court
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. Richland County Court of Common Pleas
- ii. United States District Court
- iii. same as above
- iv. _____

- iv. _____
- (c) the disposition thereof:
- i. **Dismissed** _____
- ii. **Dismissed** _____
- iii. **Dismissed** _____
- iv. _____
- (d) the date of each such disposition:
- i. **Sept. 5, 2008** _____
- ii. **filed** _____
- iii. **July 26, 2012** _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. **N/A** _____
- ii. _____
- iii. _____
- iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
no _____
15. If you answered "yes" to (14) 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. _____

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) Evidence just discovered
 - (b) Lafler v. Cooper just discovered
 - (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? yes
 - (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? no
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. Cameron B. Littejohn, Jr. Columbia
 - Amy L. Rushing, Columbia
 - ii. Joseph Savitz, Columbia
 - _____
 - iii. _____
 - _____
 - (b) the proceedings at which each such attorney represented you:
 - i. Trial
 - Trial
 - ii. Direct appeal
 - _____
 - iii. _____
 - _____

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

New trial

Resentencing on plea negotiations

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

No

Revised 3/2003

STATE OF SOUTH CAROLINA)

VERIFICATION

County of McCormick)

I, Deroid John Price, 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.

Deroid John Price

SWORN to and subscribed before me this 31
day of March, 2014.

Franklin (L.S.)
Notary Public

My Commission Expires: 12-16-2019

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

I, Jeroid John Price, 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.

Jeroid John Price
Applicant

SWORN or affirmed to and subscribed before me this

31 day of March, 2014.

Franklin
Notary Public

My Commission Expires: 12-16-2019

RICHLAND COUNTY
FILED
2014 JUL 21 PM 4:10
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

1236
STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Jerold John Price, #298791

Plaintiff(s)

vs.

STATE OF SOUTH CAROLINA

Defendant(s)

(Please Print)

Submitted By: Jerold John Price

Address: 386 Redemption Way

McCormick, S.C. 29899

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2014-CP-41-4524

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts	Torts - Professional Malpractice	Torts - Personal Injury	Real Property
☐ Constructions (100)	☐ Dental Malpractice (200)	☐ Assault/Slander/Libel (300)	☐ Claim & Delivery (400)
☐ Debt Collection (110)	☐ Legal Malpractice (210)	☐ Conversion (310)	☐ Condemnation (410)
☐ Employment (120)	☐ Medical Malpractice (220)	☐ Motor Vehicle Accident (320)	☐ Foreclosure (420)
☐ General (130)	Previous Notice of Intent Case #	☐ Premises Liability (330)	☐ Mechanic's Lien (430)
☐ Breach of Contract (140)	20__-CP-__-__	☐ Products Liability (340)	☐ Partition (440)
☐ Other (199)	☐ Notice/ File Med Mal (230)	☐ Personal Injury (350)	☐ Possession (450)
	☐ Other (299)	☐ Wrongful Death (360)	☐ Building Code Violation (460)
		☐ Other (399)	☐ Other (499)
Inmate Petitions	Judgments/Settlements	Administrative Law/Relief	Appeals
☒ PCR (500)	☐ Death Settlement (700)	☐ Reinstate Driver's License (800)	☐ Arbitration (900)
☐ Mandamus (520)	☐ Foreign Judgment (710)	☐ Judicial Review (810)	☐ Magistrate-Civil (910)
☐ Habeas Corpus (530)	☐ Magistrate's Judgment (720)	☐ Relief (820)	☐ Magistrate-Criminal (920)
☐ Other (599)	☐ Minor Settlement (730)	☐ Permanent Injunction (830)	☐ Municipal (930)
	☐ Transcript Judgment (740)	☐ Forfeiture-Petition (840)	☐ Probate Court (940)
	☐ Lis Pendens (750)	☐ Forfeiture-Consent Order (850)	☐ SCDOT (950)
	☐ Transfer of Structured Settlement Payment Rights Application (760)	☐ Other (899)	☐ Worker's Comp (960)
	☐ Other (799)		☐ Zoning Board (970)
Special/Complex /Other			☐ Administrative Law Judge (980)
☐ Environmental (600)	☐ Pharmaceuticals (630)		☐ Public Service Commission (990)
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)		☐ Employment Security Comm (991)
☐ Medical (620)	☐ Out-of State Depositions (650)		☐ Other (999)
☐ Other (699)	☐ Sexual Predator (510)		

Submitting Party Signature: _____

Date: _____

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

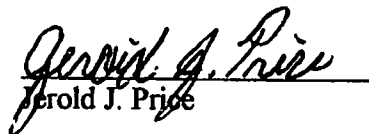
Jerold J. Price
 #298791
 Lieber Corr. Inst.
 P.O. Box 205
 Ridgeville, S.C. 29472

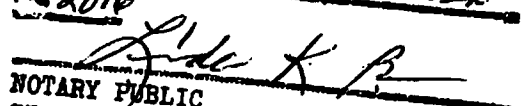
RE: Amending PCR Application: 2014-CP-40-4524

I am requesting, that this issue be amended to my current PCR application pursuant to Rule 15 SCRPC, filed July 21, 2014.

1. Counsel was ineffective for failing to object that the Judge erred in finding Petitioner was not prejudice by trial counsel's failure to object to the charge on the inference of malice from the use of a deadly weapon. *Gibson v. State* decided May 11, 2016.
2. The Judge abused his discretion when he allowed the State's key witness (aunt) to be qualified and be seated as a juror after she disclosed her relationship to the State's key witness during the proceedings.

September 27, 2016


 Jerold J. Price

SWORN TO AND SUBSCRIBED BEFORE ME
 THIS 29th DAY OF SEPTEMBER
2016

 NOTARY PUBLIC
 STATE OF SOUTH CAROLINA
 MY COMMISSION EXPIRES 6-30-26

RECEIVED

NOV 14 2016

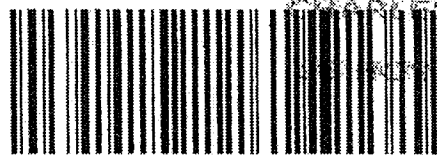
Referred to

Answered

Kinard/PB

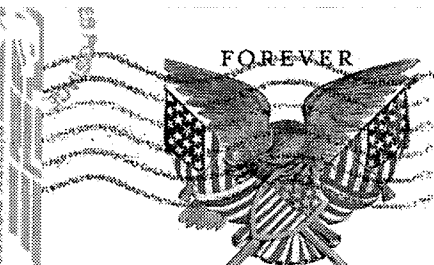
Jeroid Price #298791
Lieber, C.I/A-B-50
P.O. Box 205
Ridgeville, S.C. 29472

CERTIFIED MAIL



7015 1520 0001 7632 9902

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180107 PM 07 2016
\$006.00
UNITED STATES POSTAL SERVICE



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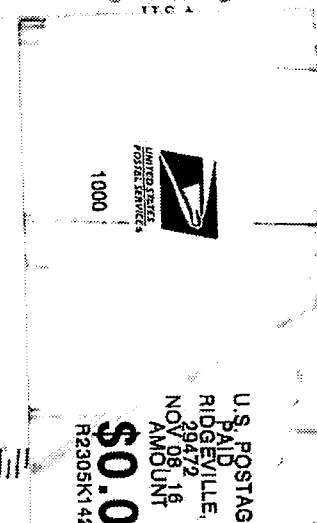
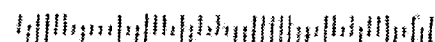
NOV 14 2016

Referred to Kinard/PB

SCDC Answered
Christmas Packet

ALAN WILSON
Attorney General office
P.O. BOX 11549
Columbia, S.C. 29211-1549

29211+1549



PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT

LIEBER CORRECTION
S.C. DEPARTMENT OF

USPS 2013

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Jeroid John Price, 298791,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case NO.: 2014-CP-40-04524

RETURN AND MOTION TO DISMISS

Respondent, making its return to the application for post-conviction relief (PCR) filed July 21, 2014 by Jeroid John Price ("Applicant"), would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted at the May 2003 term of the Richland County Grand Jury for murder (2003-GS-40-2295). From December 15 - 19, 2003, Applicant proceeded to trial before the Honorable Reginald I. Lloyd, III and a jury. He was represented by Cameron B. Littlejohn, Jr. and Amye Rushing, Esquires. The matter was prosecuted by David M. Pascoe, Jr., Donald N. Sorenson, and Bryan Jeffries, Esquires. Applicant was found guilty as indicted, and was sentenced by Judge Lloyd to confinement for a period of 35 years.

Applicant filed a notice of appeal that was perfected by Joseph L. Savitz, III, Esquire of the South Carolina Office of Appellate Defense and Amye L. Rushing, Esquire. His conviction was ultimately affirmed by the Supreme Court of South Carolina in an order filed April 17, 2006. State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006). Remittitur issued to the circuit court on May 5, 2006.

2006-CP-40-7168

Applicant filed his first application for post-conviction relief on December 4, 2006, alleging he was being held in custody unlawfully due to ineffective assistance of counsel for failure to object to a gang expert's testimony as a violation of the Confrontation Clause. Respondent made its return on or about May 14, 2007, and Applicant filed an amended application on April 30, 2008. Applicant was present and represented by Charles Thomas Brooks, III, Esquire for the evidentiary hearing held at the Richland County Courthouse on June 25, 2008. Respondent was represented by Brian T. Petrano, Esquire of the South Carolina Attorney General's Office. By written order dated June 27, 2008, the Honorable William P. Keesley denied and dismissed the application with prejudice. Upon information and belief, Applicant filed a timely notice of appeal and a petition for writ of certiorari was filed on his behalf by Appellate Defender Elizabeth Franklin-Best of the South Carolina Office of Indigent Defense on June 15, 2009. The State, again through Mr. Petrano, filed its return to the petition on August 31, 2009. The South Carolina Supreme Court referred the case to the South Carolina Court of Appeals for disposition pursuant to South Carolina Appellate Court Rule 227(l) (now 243(l)). On January 12, 2011, the Court of Appeals issued an order denying the petition. *Price v. State*, Order (S.C. Ct. App., filed Jan. 12, 2011). Remittitur issued January 28, 2011.

Ms. Franklin-Best appealed to the Supreme Court of the United States on behalf of Applicant, filing a petition for writ of certiorari during the October 2010 term. A letter was issued June 13, 2011 from the Court denying the petition. *Jeroid J. Price v. State of South Carolina*, No. 10-9966, ___ U.S. ___ (U.S. June 13, 2011).

1:11-1172-JMC-SVH

Applicant filed a pro se petition for a writ of habeas corpus in the federal courts on May 12, 2011. Respondent, represented by Assistant Deputy Attorney General Donald J. Zelenka filed a motion for summary judgment on August 31, 2011, as well as a return and memorandum of law in support of motion for summary judgment on the same date. On March 21, 2012, the Honorable J. Michelle Childs issued an order adopting the report and recommendation of the Honorable Shiva V. Hodges and thereby granted the motion for summary judgment and denied Applicant's motions for evidentiary hearings. A certificate of appealability was denied.

II.

In his *third* and current application for collateral relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Newly discovered evidence of self-defense
 - a. New witness affidavit or sworn statement
2. Ineffective assistance of counsel
 - a. Per Missouri v. Frye
3. Unconstitutional jury charge
 - a. Hands of one hands of all jury charge

Applicant added the follow amendments via a filing dated September 27, 2016 and received by Respondent on November 14, 2016:

1. "Counsel was ineffective for failing to object that the Judge erred in finding Petitioner was not prejudice by trial counsel's failure to object to the charge on the inference of malice from the sue of a deadly weapon. *Gibson v. State* decided May 11, 2016."
2. "The Judge abused his discretion when he allowed the State's key witness (aunt) to be qualified and be seated as a juror after she disclosed her relationship to the State's key witness during the proceedings."

Respondent is also in possession of the letter that Applicant contends is newly discovered evidence, which also includes a typewritten statement by Applicant alleging that the letter meets the requirements of "McCoy v. State, 737 S.E.2d 623 (S.C. 2013)" and "Clark v. State, 434

S.E.2d (1993).” It also reiterates ineffective assistance of counsel and includes an allegation of ineffective assistance of appellate counsel. This letter was dated July 8, 2014.

Attached and incorporated herein are the records from the Richland County Clerk of Court, Applicant’s records from the South Carolina Department of Corrections, records from Applicant’s previous post-conviction relief and habeas corpus actions, and records from this post-conviction relief action. Respondent reserves the right to amend this return upon receipt of any relevant information.

III.

Respondent submits that the application 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 (“the Act”). 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 offense 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). The remittitur from Applicant’s direct appeal issued on May 5, 2006. Accordingly, Applicant was required to file this application on or before May 6, 2007. Applicant did not file this application until July 21, 2014, which was well beyond the statutory filing period.

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). Summary dismissal of a PCR application is appropriate when the application is filed after the statutory filing period. Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2003). In

addition, S.C. Code Ann. §17-27-70(c) (1985) 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.” Therefore, Respondent moves to dismiss this application for failure to file within the time mandated by the Act.

IV.

Similarly, this application for post-conviction relief should be summarily dismissed because it is successive to the previous applications for post-conviction relief and federal habeas corpus, and fails to state a claim upon which relief can be granted. S.C. Code Ann. § 17-27-90 (1985) 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). “All applicants are entitled to a full and fair opportunity to present claims in one PCR application.” Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). “Successive PCR applications and appeals are generally disfavored because they allow an applicant to receive more than ‘one bite at the apple’ as it were.” Id. The “burden is on the applicant to establish that any new ground raised in a subsequent application could not have been raised in a previous application.” Id.

Applicant raised his claims of ineffective assistance of counsel in his previous PCR application. Applicant received his “one bite at the apple.” Furthermore, Applicant could have raised his additional claims and allegations, other than that of newly-discovered evidence, in his previous PCR application but failed to do so. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief. Accordingly, he has failed to meet the burden imposed upon him, and the Court should summarily dismiss the application as successive to Applicant’s previous PCR application.

V.

This application should also be dismissed as barred by the equitable doctrine of laches. To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. McElrath v. State, 276 S.C. 282, 283, 277 S.E.2d 890 (1981). Requiring reasonable diligence “guards the state’s legitimate expectation that it will not be called upon without due cause, to defend the integrity of convictions that occurred many years ago, where records and witnesses are no longer available.” Id. (quoting Honeycutt v. Ward, 612 F.2d 36, 42 (2nd Cir. 1979)). Where an applicant for post-conviction relief fails to exercise reasonable diligence, the State may seek the summary dismissal through the equitable doctrine of laches, which is defined as “neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.” Bray v. State, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005) (quoting Whitehead v. State, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002)). “Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of right does not constitute laches.” Id.

Applicant was convicted and sentenced in 2003 and appealed immediately thereafter, but filed this application approximately eight years after his conviction. Absent some explanation or justification for the delay in seeking post-conviction relief, laches will prevent an Applicant from seeking collateral review of his conviction, especially where the delay affects the availability of evidence to review the applicant's claims. McElrath at 283, 277 S.E.2d at 890; Honeycutt at 41; Whitehead at 220, 574 S.E.2d at 202. Applicant offers no such justification, for there is none. The prejudice brought upon the State by this delay, in the form of witness memories and physical evidence naturally faded and degraded by the passage of time, is self-evident. *See, e.g., Bray* at 140, 620 S.E.2d at 745 (finding laches applied seven years after proceeding in question); State v. Serrette, 375 S.C. 650, 654 S.E.2d 554 (Ct. App. 2007) (record reconstruction undoubtedly futile eleven years after proceeding in question). Therefore, the application should be summarily dismissed as barred by the doctrine of laches.

VI.

Applicant's assertion that he is in possession of newly-discovered evidence, such that he should be entitled to an evidentiary hearing, is without merit. The Uniform Post-Conviction Relief Act states that a person may institute a post-conviction relief action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). An applicant requesting a new trial based on after-discovered evidence after a conviction must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and,
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979)).

Applicant has failed to allege facts sufficient to support his claims of newly discovered evidence. Generally, Applicant does not assert any specific date upon which he discovered this “new evidence,” but only alleges that it is “new evidence.” The letter itself is dated August 4, 2013, and postmarked August 7, 2013, and the contents describe the writer’s viewing of a television show called Gangland. The writer, a Joshua Hamilton, states that he saw the program and realized that he was at the scene of the incident, which played out differently than depicted. Respondent alleges that these factors are inadequate to establish a *prima facie* showing that the evidence could not have been discovered before trial by the exercise of due diligence—as required by either Hayden or the statutory exception to the timeliness requirement. See S.C. Code Ann. 17-27-45(C).

The evidence presented in this letter is wholly consistent with the evidence presented at trial. Mr. Hamilton, the author, describes several people struggling in a hallway, and several gunshots sounding as part of that struggle. He does not describe a single individual as the shooter, nor does he affirmatively state that Applicant was not the shooter. He states that a person with a silver object approached Applicant while he was struggling with another gentleman, and asserts that Applicant was fighting for his life. This is consistent with evidence produced at trial. See State’s opening, trial tr. p. 71-73.

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing that he is entitled to relief. 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). Applicant has failed to make such a *prima facie* showing that he is entitled to relief based on the information set forth and, therefore, he is not entitled to an evidentiary hearing in the matter. Accordingly, this matter should be summarily dismissed.

VII.

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

VIII.

WHEREFORE, Respondent moves to summarily dismiss this application because it is untimely, successive to Applicant's prior application, barred by the equitable doctrine of laches, and Applicant has failed to make a *prima facie* case to warrant a hearing on newly-discovered evidence.

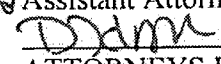
Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JESSICA E. KINARD
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Nov 7, 2017

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Jeroid John Price, 298791,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

2014-CP-40-04524

CONDITIONAL ORDER OF DISMISSAL

2014 NOV 13 AM 11:28
CLERK OF COURT
RICHLAND COUNTY

This matter comes before the Court by way of the application for post-conviction relief (PCR) filed July 21, 2014 by Jeroid John Price ("Applicant"). Respondent made its return requesting the application be summarily dismissed.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted at the May 2003 term of the Richland County Grand Jury for murder (2003-GS-40-2295). From December 15 - 19, 2003, Applicant proceeded to trial before the Honorable Reginald I. Lloyd, III and a jury. He was represented by Cameron B. Littlejohn, Jr. and Amye Rushing, Esquires. The matter was prosecuted by David M. Pascoe, Jr., Donald N. Sorenson, and Bryan Jeffries, Esquires. Applicant was found guilty as indicted, and was sentenced by Judge Lloyd to confinement for a period of 35 years.

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2006-CP-40-7168

Applicant filed his first application for post-conviction relief on December 4, 2006, alleging he was being held in custody unlawfully due to ineffective assistance of counsel for failure to object to a gang expert's testimony as a violation of the Confrontation Clause. Respondent made its return on or about May 14, 2007, and Applicant filed an amended application on April 30, 2008. Applicant was present and represented by Charles Thomas Brooks, III, Esquire for the evidentiary hearing held at the Richland County Courthouse on June 25, 2008. Respondent was represented by Brian T. Petrano, Esquire of the South Carolina Attorney General's Office. By written order dated June 27, 2008, the Honorable William P. Keesley denied and dismissed the application with prejudice. Upon information and belief, Applicant filed a timely notice of appeal and a petition for writ of certiorari was filed on his behalf by Appellate Defender Elizabeth Franklin-Best of the South Carolina Office of Indigent Defense on June 15, 2009. The State, again through Mr. Petrano, filed its return to the petition on August 31, 2009. The South Carolina Supreme Court referred the case to the South Carolina Court of Appeals for disposition pursuant to South Carolina Appellate Court Rule 227(l) (now 243(l)). On January 12, 2011, the Court of Appeals issued an order denying the petition. Price v. State, Order (S.C. Ct. App., filed Jan. 12, 2011). Remittitur issued January 28, 2011.

Ms. Franklin-Best appealed to the Supreme Court of the United States on behalf of Applicant, filing a petition for writ of certiorari during the October 2010 term. A letter was issued June 13, 2011 from the Court denying the petition. Jeroid J. Price v. State of South Carolina, No. 10-9966, ___ U.S. ___ (U.S. June 13, 2011).

1:11-1172-JMC-SVH

Applicant filed a pro se petition for a writ of habeas corpus in the federal courts on May 12, 2011. Respondent, represented by Assistant Deputy Attorney General Donald J. Zelenka filed a motion for summary judgment on August 31, 2011, as well as a return and memorandum of law in support of motion for summary judgment on the same date. On March 21, 2012, the Honorable J. Michelle Childs issued an order adopting the report and recommendation of the Honorable Shiva V. Hodges and thereby granted the motion for summary judgment and denied Applicant's motions for evidentiary hearings. A certificate of appealability was denied.

CURRENT APPLICATION

In his *third* and current application for collateral relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Newly discovered evidence of self-defense
 - a. New witness affidavit or sworn statement
2. Ineffective assistance of counsel
 - a. Per Missouri v. Frye
3. Unconstitutional jury charge
 - a. Hands of one hands of all jury charge

Applicant added the follow amendments via a filing dated September 27, 2016 and received by

Respondent on November 14, 2016:

1. "Counsel was ineffective for failing to object that the Judge erred in finding Petitioner was not prejudice by trial counsel's failure to object to the charge on the inference of malice from the sue of a deadly weapon. *Gibson v. State* decided May 11, 2016."
2. "The Judge abused his discretion when he allowed the State's key witness (aunt) to be qualified and be seated as a juror after she disclosed her relationship to the State's key witness during the proceedings."

Respondent stated that it is also in possession of the letter that Applicant contends is newly discovered evidence, which also includes a typewritten statement by Applicant alleging that the letter meets the requirements of “McCoy v. State, 737 S.E.2d 623 (S.C. 2013)” and “Clark v. State, 434 S.E.2d (1993).” It also reiterates ineffective assistance of counsel and includes an allegation of ineffective assistance of appellate counsel. This letter was dated July 8, 2014.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Statute of Limitations

This Court finds that the application 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 (“the Act”). 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 offense 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). The remittitur from Applicant’s direct appeal issued on May 5, 2006. Accordingly, Applicant was required to file this application on or before May 6, 2007. Applicant did not file this application until July 21, 2014, which was well beyond the statutory filing period.

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). Summary dismissal of a PCR application is appropriate when the application is filed after the statutory filing period. Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2003). In addition, S.C. Code Ann. §17-27-70(c) (1985) 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.” Therefore, this application is dismissed for failure to file within the time mandated by the Act.

Successive

Similarly, this application for post-conviction relief should be summarily dismissed because it is successive to the previous application for post-conviction relief and fails to state a claim upon which relief can be granted. S.C. Code Ann. § 17-27-90 (1985) 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). “All applicants are entitled to a full and fair opportunity to present claims in one PCR application.” Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). “Successive PCR applications and appeals are generally disfavored because they allow an applicant to receive more than ‘one bite at the apple’ as it were.” Id. The “burden is on the applicant to establish that any new ground raised in a subsequent application could not have been raised in a previous application.” Id.

Applicant raised his claims of ineffective assistance of plea counsel. Applicant received his “one bite at the apple.” Furthermore, Applicant could have raised his additional claims and allegations of ineffective assistance of counsel in his previous PCR application but failed to do

so. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations, other than that regarding newly-discovered evidence, in his previous application for post-conviction relief. Accordingly, he has failed to meet the burden imposed upon him, and the Court summarily dismisses the application as successive to Applicant's previous PCR application.

Laches

This application is also dismissed as barred by the equitable doctrine of laches. To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. McElrath v. State, 276 S.C. 282, 283, 277 S.E.2d 890 (1981). Requiring reasonable diligence “guards the state’s legitimate expectation that it will not be called upon without due cause, to defend the integrity of convictions that occurred many years ago, where records and witnesses are no longer available.” Id. (quoting Honeycutt v. Ward, 612 F.2d 36, 42 (2nd Cir. 1979)). Where an applicant for post-conviction relief fails to exercise reasonable diligence, the State may seek the summary dismissal through the equitable doctrine of laches, which is defined as “neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.” Bray v. State, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005) (quoting Whitehead v. State, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002)). “Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of right does not constitute laches.” Id.

Applicant was convicted and sentenced in 2003 and appealed immediately thereafter, but filed this application approximately eight years after his conviction. Absent some explanation or justification for the delay in seeking post-conviction relief, laches will prevent an Applicant from

seeking collateral review of his conviction, especially where the delay affects the availability of evidence to review the applicant's claims. McElrath at 283, 277 S.E.2d at 890; Honeycutt at 41; Whitehead at 220, 574 S.E.2d at 202. Applicant offers no such justification, for there is none. The prejudice brought upon the State by this delay, in the form of witness memories and physical evidence naturally faded and degraded by the passage of time, is self-evident. *See, e.g., Bray* at 140, 620 S.E.2d at 745 (finding laches applied seven years after proceeding in question); State v. Serrette, 375 S.C. 650, 654 S.E.2d 554 (Ct. App. 2007) (record reconstruction undoubtedly futile eleven years after proceeding in question). Therefore, the Application should be summarily dismissed as barred by the doctrine of laches.

Newly-Discovered Evidence

The Court finds Applicant has failed to set forth a *prima facie* showing that he is in possession of newly-discovered evidence, such that he should be entitled to an evidentiary hearing. The Uniform Post-Conviction Relief Act states that a person may institute a post-conviction relief action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). An applicant requesting a new trial based on after-discovered evidence after a conviction must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;

- (4) Is material to the issue of guilt or innocence; and,
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979)).

Applicant has failed to allege facts sufficient to support his claims of newly discovered evidence. Generally, Applicant does not assert any specific date upon which he discovered this “new evidence,” but only alleges that it is “new evidence.” The letter itself is dated August 4, 2013, and postmarked August 7, 2013, and the contents describe the writer’s viewing of a television show called Gangland. The writer, a Joshua Hamilton, states that he saw the program and realized that he was at the scene of the incident, which played out differently than depicted. Respondent alleges that these factors are inadequate to establish a *prima facie* showing that the evidence could not have been discovered before trial by the exercise of due diligence—as required by either Hayden or the statutory exception to the timeliness requirement. See S.C. Code Ann. 17-27-45(C).

The evidence presented in this letter is wholly consistent with the evidence presented at trial. Mr. Hamilton, the author, describes several people struggling in a hallway, and several gunshots sounding as part of that struggle. He does not describe a single individual as the shooter, nor does he affirmatively state that Applicant was not the shooter. He states that a person with a silver object approached Applicant while he was struggling with another gentleman, and asserts that Applicant was fighting for his life. This is consistent with evidence produced at trial. See State’s opening, trial tr. p. 71-73.

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing that he is entitled to relief. 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). Applicant has failed to make such a

prima facie showing that he is entitled to relief based on the information set forth and, therefore, he is not entitled to an evidentiary hearing in the matter. Accordingly, the Court shall summarily dismiss these allegations.

CONCLUSION

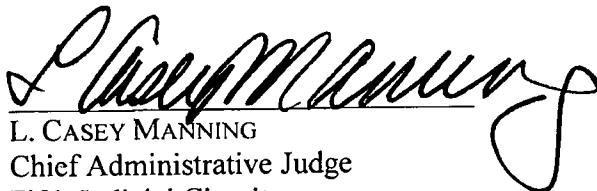
Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty days from the date of service of this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have with the Richland County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Jessica Kinard, Esquire
PCR Division -5th Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Richland County Clerk of Court and opposing counsel within twenty days, and the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 9 day of Nov., 2017.

, South Carolina


L. CASEY MANNING
Chief Administrative Judge
Fifth Judicial Circuit

1258

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: **2014CP4004524**

Jeroid John #298791 Price

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case. Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____

Judge Code _____

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the 13 day of Nov, 20 17 and a copy mailed first class or placed in the appropriate attorney's box on this 13 day of Nov, 20 17 to attorneys of record or to parties (when appearing pro se) as follows:

Jeroid John #298791 Price

John B. Shupper

Jessica Elizabeth Kinard

Jeroid John #298791 Price

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jessie W. Kinard

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
JEROID J. PRICE, #298791,)
Applicant,)
v.)
STATE OF SOUTH CAROLINA,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case Number: 2014-CP-40-04524

**APPLICANT'S REPLY, AFFIDAVITS AND
MEMORANDUM OF LAW OPPOSING
RESPONDENT'S MOTION TO DISMISS
CONDITIONAL ORDER OF DISMISSAL**

2018 JAN 22 PM 3:15
RICHLAND COUNTY
FILED
CLERK OF COURT
J. M. BRIDE

Now comes the Applicant, by and through his undersigned counsel, who submits this Reply, Affidavits, and Memorandum of Law in Opposition to Respondent's Motion to Dismiss and Conditional Order of Dismissal.

Applicant seeks an evidentiary hearing (and new trial) based on newly discovered evidence in the form of a letter from Joshua Hamilton, the contents of which are material and relevant to his guilt or innocence and claim of self-defense. In McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (S.C. 2013), the State argued that summary dismissal of McCoy's second post-conviction relief (PCR) application was proper on the grounds it was successive, untimely and failed to prove a newly discovered evidence claim, much like Respondent's argument in the instant case. In McCoy, the Supreme Court found, "...summary dismissal was error because genuine issues of material fact exist as to whether Petitioner's claim is successive or barred by the statute of limitations." The Supreme Court "reversed and remanded" McCoy's case for an evidentiary hearing. Id.

Section 17-27-45 of the South Carolina Code Ann. establishes procedures for post-conviction relief applications. Section 17-27-45 (A) establishes a one-year statute of limitations:

"An application for relief filed pursuant to this chapter must be filed within one year after the entry of 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 upon an appeal, whichever is later."

Section 17-27-45(C) provides:

SC-17-27-45
msc

“If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.”

Respondent’s reliance on Section 17-27-45(A)’s one-year statute of limitations for filing for PCR relief is misplaced. When newly discovered evidence is the basis for relief in a PCR, S. C. Code Section 17-27-45(C) is applicable, and requires filing *within one year after the date of actual discovery of the facts by the applicant*. Applicant’s 2014 application for PCR relief was timely filed as the Hamilton letter was postmarked August 7, 2013, received by applicant in the first week of September of 2013, and his application for PCR was filed on July 21, 2014. *See* Exhibit A, Hamilton letter and envelope and Exhibit B, Price Affidavit.

Joshua Hamilton Letter

Joshua Hamilton, from Kannapolis, North Carolina, states he saw an episode of “Gangland” on the internet that prompted him to send a letter to Mr. Price dated August 4, 2013.¹ (Joshua Hamilton’s letter and envelope are attached as Exhibit A). Applicant Jeroid Price has also submitted an affidavit in opposition to the motion to dismiss, attached as Exhibit B. Price’s affidavit indicates: “on or around the first week of September of 2013... I receive a letter from a man name Joshua Hamilton...” Price filed this application for PCR on July 21, 2014. The filing date of July 21, 2014 was clearly within the statutory one-year period from the actual discovery date of the newly discovered evidence required by S.C. Code Ann. Section 17-27-45(C). Thus, this application for PCR based on newly discovered evidence was timely filed.

Hamilton’s Observations

Hamilton’s letter indicates he did not know Mr. Price but was present at the club the night of

¹ The letter was dated August 4, 2013 and the envelope was postmarked August 7, 2013. The envelope also had a stamp marked “Received August 30, 2013 SCDC Correspondence Review Committee”. The current application was filed in Richland County on July 21, 2014, within one year of actual receipt of the Hamilton letter.

the shooting. Hamilton adds, "the story they told on Gangland wasn't the honest truth" ... "I witness you and another young man wrestling in the hallway...the young man you was wrestling with was a big build guy with a blue button up on. The same build guy that walk toward you and the other guy in the blue, I seen him waveing (sic) an silver object! Mr. Price after I heard a(n) little pop and seen a guy with briads (sic) take off... I see you and that gentleman still fighting, after that little pop. I was amazed then I seen two big flashes with two big booms after that I took off running..." Hamilton goes on to state, "I am surprise you made it out that hallway that big gentleman had you fighting for your life." He adds, "Its no way in hell excuse my langues (sic), that you are a cold hearted killer. Mr Price as God as my witness you was fighting for dear life. But that's the past. But the truth should be known..."

Jeroid Price's Affidavit

Applicant's affidavit also reveals that his sister told him early this year that "a guy whom I went to school with has been trying to reach out to me." It has been over 16 years since Price saw the man whom Price's sister claimed... "it was something about my incident that he wanted to come clean about and get off his chest.... the man name is Cory Lawrence." SCDC's website reveals that Corie Lawrence had been confined in SCDC since August of 2016 and at Broad River Correctional Institution since September 26, 2016. The affidavit of Corie Lawrence is attached as Exhibit C.

Affidavit of Corie Lawrence

Lawrence's affidavit describes what he observed at the club the night of the shooting. Corie had gone to high school with Applicant Price and lived in the same apartment complex. He was an eyewitness to the shooting who admits he did not come forward in 2002 because "the shooting happened right after my wife's Birthday: I didn't want my wife to know I went to the club that

night.” By 2012 his wife had divorced him and he lost his job. He committed a crime and was eventually sent to SCDC in August of 2016. Lawrence also avers he had seen “an episode of Gangland that reportedly depicted what happened in the club the night of the incident that resulted in Jeroid Price being charged with murder.” He “observed Mr. Price in a struggle with a much bigger man when shots were fired. Both men were standing, involved in a struggle, when the shots were fired.” This testimony supports Applicant’s claim of self-defense and was not previously heard or presented to the jury.

Proof of Timely Filing of Application for PCR

Hamilton’s letter, dated August 4, 2013, was received by Applicant “around the first week of September of 2013”, according to Price’s Affidavit, Exhibit B. Applicant filed this application on July 21, 2014, which was clearly within one year of Applicant’s receipt of Hamilton’s letter in September of 2013. Also, a comparison of the August 7, 2013 postmark on the Hamilton letter with the July 21, 2014 file date stamped on the pleadings in this case, shows this application was filed within one year of the “actual discovery” and receipt of the evidence by Applicant, in the first week of September of 2013.²

Newly Discovered Evidence and Section 17-27-20(A)(4)

S.C. Code Ann. Section 17-27-20(A)(4) allows one to seek post-conviction relief “*if there exists evidence or material facts not previously presented or heard, that requires vacation of the conviction or sentence, in the interest of justice.*” That Hamilton was present and an eyewitness to the shooting is a material fact not previously known. Hamilton’s testimony goes to the issue of applicant’s innocence or guilt and has not been heard or previously presented. Hamilton saw an episode of Gangland that prompted him to send Price a letter dated August 4, 2013

² The “August 30, 2013” dated stamp noting “Received SCDC Correspondence Review Committee” on the front of the Hamilton envelope, appears to explain why Price did not receive the Hamilton letter until around the first week in September of 2013. See Price Affidavit, attached as Exhibit B.

Summary Dismissal and Evidentiary Hearings

Respondent contends this application is successive, not timely filed and should be summarily dismissed without an evidentiary hearing for failure to comply with the one-year statute of limitations in Section 17-27-45(A). Applicant's request for an evidentiary hearing based on "newly discovered evidence of self defense" is necessary to resolve material disputes of fact between the evidence set forth by Applicant (in his pleadings, the Hamilton letter and affidavits of Price and Lawrence), and numerous claims set forth in Respondent's Return and Motion to Dismiss. Applicant asserts the following excerpt from McCoy is applicable in the instant case and supports his request for an evidentiary hearing:

"Petitioner argues his second PCR application should not have been summarily dismissed and asks this Court to reverse and remand this matter for a hearing. We find summary dismissal was error because genuine issues of material fact exist as to whether Petitioner's claim is successive or barred by the statute of limitations.

A PCR application ordinarily must be filed within one year after a conviction or, if a direct appeal is taken, one year after the remittitur is sent to the trial court. S.C.Code Ann. § 17-27-45(A) (2003). However, section 17-27-45(C) provides that if a PCR applicant discovers "material facts not previously [401 S.C. 369] presented and heard that require[] vacation of [his] conviction or sentence," he may file a PCR application "within one year after the date of actual discovery ... or after the date when the facts could have been ascertained by the exercise of reasonable diligence."

A PCR applicant must allege all available grounds for relief in his original application; any ground not raised in the original application may not be the basis for subsequent applications unless the court finds a ground for relief asserted which, for sufficient reason, was not raised in the original application. S.C.Code Ann. § 17-27-90.

'The [PCR] court may grant a motion by either party for summary disposition of the [PCR] application when ... there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.' S.C.Code Ann. § 17-27-70(c). *When considering the State's motion for summary dismissal, where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant. Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (citing S.C.Code Ann. § 17-27-80). Where an applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications and those facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be resolved by a hearing. Cf. Delaney v. State, 269 S.C. 555, 556, 238 S.E.2d 679, 679 (1977) "* McCoy at 737 S.E.2d 626 (Bold and italics added for emphasis).

Examples of Disputed Facts

Jeroid Price avers that he received a letter from a man name(d) Joshua Hamilton whom he had never met, “whom I didn’t know even exist until I started to read his letter.” Price received the Hamilton letter “on or around the first week of September of 2013” according to his affidavit. This fact, the date of actual receipt and discovery of the new evidence, contradicts Respondent’s assertion: “Generally, Applicant does not assert any specific date upon which he discovered this ‘new evidence’, but only alleges that it is ‘new evidence.’” Price clearly states he received Hamilton’s letter “on or in the first week of September of 2013.” (Exhibit B). Price adds:

“So after reading Mr. Hamilton letter and knowing it contends with everything the state key witness (Mr. Jones) said and that the letter goes directly towards my guilt or innocence (sic). I started to get as much law library time that I could get to find the right way to bring this before the courts which lead me to file my P.C. R. on July 21, 2014.”

Respondent claims, “The letter itself is dated August 4, 2013, and postmarked August 7, 2013,…” When one notes that the filing date stamped on Applicant’s pleadings was July 21, 2014, there is no doubt that the filing of the PCR Application was within one year of the actual discovery of the evidence as required by Section 17-27-45(C). Applicant avers that he actually discovered and received the new evidence, Hamilton’s letter, “on or around the first week of September of 2013…” These assertions prove that Applicant’s claim of newly discovered evidence in his PCR Application, was timely filed within one year of the actual date of discovery and receipt of the evidence.

Respondent asserts that the Hamilton letter, “describe the writer’s viewing of a television show called Gangland. The writer, a Joshua Hamilton, states that he saw the program and realized that he was at the scene of the incident, which played out differently than depicted.” While these assertions may be true, they only amount to a fraction of the contents of the letter. Respondent does not acknowledge that Hamilton stated, “The story they told on Gangland wasn’t the honest

truth.” Hamilton indicated he saw Applicant “wrestling with another young man...The young man you was wrestling with was a big build guy.” (These comments support his self-defense claim at trial and raise material disputes of fact). Hamilton heard a “little pop”...“I seen you and that gentleman still fighting, after that little pop. I was amazed then I seen two big flashes with two big booms ...after that I took off running.” He adds, “I am surprise you made it out that hallway that big gentleman had you fighting for your life. Mr. Price as God as my witness you was fighting for dear life. Hamilton also indicated he did not know Price but felt compelled to send the letter because “the story they told on Gangland was not the honest truth.”

Hamilton was an eyewitness whose testimony was not previously known or presented to the jury. It goes directly to the issue of Applicant’s guilt or innocence and is not merely cumulative or impeaching. It corroborates Applicant’s claim of self-defense and could not have been discovered previously by the exercise of due diligence as Price did not know that Hamilton existed, much less that he was present and an eyewitness to the shooting. Price had no idea that Hamilton observed the shooting until he received and read his letter in September of 2013. (Exhibit B)

Respondent also contends:

“The evidence presented in this letter is wholly consistent with the evidence presented at trial. Mr. Hamilton, the author, describes several people struggling in a hallway, and *several gunshots* sounding as part of that struggle. *He does not describe a single individual as the shooter, nor does he affirmatively state that Applicant was not the shooter.* He states that a person with a silver object approached Applicant while he was struggling with another gentleman, and asserts that Applicant was fighting for your life. This is consistent with evidence produced at trial. See State’s opening, trial tr. P. 71-73.”

Respondent’s contentions above establish disputes of fact between Hamilton’s observations and Respondent’s characterization of events. Hamilton does not describe “*several people in a hallway*” but three. He does not claim he heard “*several gunshots sounding* as a part of the

struggle” but heard a single “little pop” and saw that Applicant and the big build guy were still fighting after the “little pop,” and then he saw “two big flashes and two big booms” before he ran away. A single “little pop” followed a short time later by two big booms does not amount to him hearing “*several gunshots* as a part of the struggle.” The claim that “he did not describe a single individual as the shooter...” ignores the inference that flows from what he said he saw and heard: a guy waving a silver object going toward the two men fighting and his hearing a “little pop” before he saw the guy with the silver object and braids run away. That Hamilton doesn’t “affirmatively state that the Applicant was not the shooter” is immaterial. His claim that he saw two big flashes and heard two big booms does not mean that Applicant did not act in self-defense.

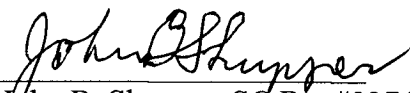
Applicant vigorously disputes that Hamilton’s description of events is “wholly consistent with evidence produced at trial.” Applicant notes that Respondent failed to specify which of Hamilton’s claims were “consistent” with the many statements and theories set forth by the prosecutor in his opening remarks to the jury in pages 71-73. Applicant vigorously disputes that anything the prosecutor said in “opening” amounted to “evidence.”

Applicant submits that the conflicts described above should be resolved at an evidentiary hearing.

Conclusion

For the foregoing reasons Respondent’s Motion to Dismiss should be denied and Applicant’s Motion for an Evidentiary Hearing should be granted.

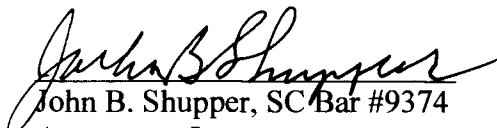
Respectfully submitted:


 John B. Shupper, SC Bar #9374
 Attorney at Law
 P.O. Box 90523
 Columbia, SC 29290
 Phone: (803) 606-7859
jbsupper@hotmail.com
 ATTORNEY FOR APPLICANT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
JERIOD J. PRICE, #298791,	)	Civil Action No.: 2014-40-4524
	)	
Applicant,	)	
	)	
v.	)	CERTIFICATE OF SERVICE
	)	BY HAND DELIVERY
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

The undersigned certifies that a copy of Applicant's Reply, Affidavits and Memorandum of Law Opposing Respondent's Motion to Dismiss was served on counsel for Respondent by hand delivering the same by to the receptionist on the fifth floor of the Office of the Attorney General of South Carolina at 1000 Assembly St, Columbia, SC 29201 on January 22nd, 2018, addressed as follows:

Ms. Jessica Elizabeth Kinard, Esquire
 Assistant Attorney General, PCR Division
 S.C. Attorney General's Office
 PO Box 11549
 Columbia, SC 29211


 John B. Shupper, SC Bar #9374
 Attorney at Law
 P.O. Box 90623
 Columbia, SC 29290
 Phone: (803) 606-7859
jbshupper@hotmail.com
 Attorney for Plaintiff

RICHLAND COUNTY
 FILED
 2018 JAN 22 PM 3:16
 JEANETTE W. MCBRIDE
 C.C.P. & G.S.

DEAR MR. PRICE

DATE, AUG, 4, 2013

- HELLO SIR MY NAME IS

JOSHUA HAMILTON

I WAS SHEARING THE INTERNET
AND I CAME ACROSS A DOCUMENTARY
ON COLUMBIA SOUTH CAROLINA GANG
LAND.

FRIST AND FOR-MOST I JOSHUA HAMILTON
DNT KNOW YOU. BUT, S.R ON DEC, 7, 2002
MR. PRICE I WAS 'PRESENT S.R AND
HOW THIS LATTER CAME ABOUT IS. MR. PRICE
THE STORY THEY TOLD ON GANGLAND
WASNT THE HONEST TRUTH I WAS
IN FRONT OF THE CLUB MR. PRICE
I WITNESS YOU AND ANOTHER YOUNG
MAN WRESTLING IN THE HALLWAY
AND ANOTHER BUILD MAN WITH AN OBJECT
WALK TOWARDS YOU AND THE YOUNG
MAN. I ACKNOWLEDGE YOU HAD A BALL CAP
ON AND A JERSEY AND THE YOUNG MAN
YOU WAS WRESTLING WITH WAS A BIG
BUILD GUY WITH A BLUE BUTTON UP ON.
THE SAME BUILD GUY THAT WALK FORWARD
YOU AND THE OTHER GUY IN THE BLUE. I SEEN
HIM WAVEING AN SILVER OBJECT I MR. PRICE.
AFTER I HEARD AN LITTLE POP AND SEEN
A GUY WITH BREADS TAKE OFF AND LOOK
THAT SAME BUILD HE WAVE DURING COM

I SEE YOU AND THAT GENTLEMAN
 STILL FIGHTING, AFTER THAT LITTLE
 POP, I WAS AMAZED THEN I SEEN
 TWO BIG FLASHES WITH TWO BIG BOOMS
 AFTER THAT I TOOK OFF RUNNING AND
 ACKNOWLEDGE A WHITE TRUCK PULL
 OFF, MR. PRICE I AM SURPRISE YOU MADE
 IT OUT THAT HALLWAY THAT BIG
 GENTLEMEN HAD YOU FIGHTING FOR YOUR
 LIFE, ITS NO WAY IN HELL EXCUSE
 MY TONGUES. THAT YOU ARE A COLD HEARTED
 KILLER, MR. PRICE AS GOD AS MY
 WITNESS YOU WAS FIGHTING FOR DEAR LIFE.
 BUT THATS THE PAST. BUT THE TRUTH SHOULD
 BE KNOWN. IF YOU NEED TO CONTACT
 ME I CAN BE CONTACTED AT - 704-713-0342
 OR MY E-MAIL. JHOOD845@YMAIL, 704-713-0342
 MAY GOD BE WITH YOU /S.L.

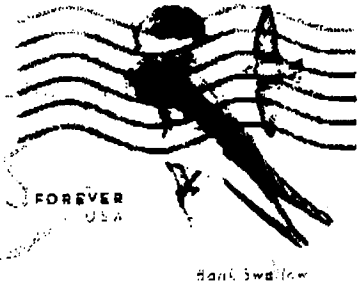
FR

MR HAMILTON

John Hamilton

Joshua Hamilton
501 PLYMOUTH S.T.
KANNAPLIS N.C 28025

CHARLOTTE NC 282
07 AUG 2013 PM 2 L



DX13

Perry

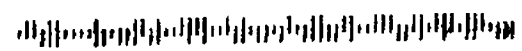
APPROVED
AUG 30 2013

19R
SPECIAL DELIVERY
REVIEW COMMITTEE

PERIOD PRICE 298791
McCORMICK C.I. 386-REDEMPTIONWAY
McCORMICK S.C. 29899

A-115A
McCormick

29899



Affidavit of Jeroid J. Price #298791

The Affiant avers that the following statements are true to the best of my knowledge and recollection.

I Jeroid J. Price was born [REDACTED] 1980. I am competent to make this affidavit under oath.

I was sentenced to serve a thirty-five (35) year sentence for murder in the South Carolina Department of Corrections.

On and around the first week of September of 2013 while being house at McCormick C.I. in the S.M.U housing unit I receive a letter from a man name Joshua Hamilton this man I never met before in my life whom I didn't know even exist until I started to read his letter.

And in Mr. Hamilton letter he tells me that he was at the scene of the incident that cost me my life, in his letter he tells how Mr. Small was in the Hallway Wrestling and how in his words I was fighting for my life, he also talks about how he seen when the shots were fired. Mr. Hamilton also talks about why he wrote to me after seeing a T.V. Show call Gangland in which they show a Actor whom suppose to be me shooting a man as the man is laying on the floor.

After viewing this Show Mr. Hamilton not knowing until now the result of the incident he

2018 JAN 22 PM 3:45
FILED
JANET M. McBRIDE
C.C.P. & C.S.

Seen years ago felt obligated to come forward and let the truth be told.

So After reading Mr. Hamilton letter and knowing that it contends with everything the state key witness (Mr. Jones) said and that the letter go's directly towards my guilt OR innocence. I started to get as much Law Library time that I could get to find the right way to bring this before the court's which lead me to file my P.C.R ON July 21, 2014.

Early this ⁽²⁰¹⁷⁾ year my sister told me that this guy whom I went to school with has been trying to reach out to me. For I haven't seen or heard from him in over 16 yrs but once he talk with my sister he basically told her how he change his life and give his life to God and that it was something about my incident that he wanted to come clean about and get it off his chest. Once I heard this I told her to let him know that anything dealing with that he needs to contact my Attorney the Man name is Cory Lawrence.

The statements and OR Affidavit of the above witnesses go's directly to contend what was said by the state witness and go's directly toward my guilt OR innocence in this case.

(3) State of NM
County of Lea

SWORN to and Subscribed before me
this 11th day of December, 2017

Sam McCreary

NOTARY PUBLIC FOR NEW MEXICO



My Commission expires November 4, 2020

Jeroid J. Price
Signature of Jeroid J. Price

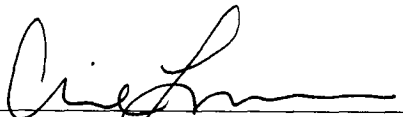
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
JERIOD J. PRICE, #298791,	)	Civil Action No.: 2014-40-4524
	)	
Plaintiff,	)	
	)	
v.	)	AFFIDAVIT OF CORIE LAWRENCE
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

By my signature below, I aver that the following statements are true to the best of my knowledge and recollection:

1. My name is Corie Lawrence and I am competent to make statements under oath;
2. I was arrested in North Carolina for multiple felony charges from Richland County, South Carolina on or about November 14, 2012;
3. I was extradited to South Carolina in early December of 2012, and remained in pre-trial confinement for roughly 44 months at the Alvin S. Glenn Detention Center in Richland County;
4. I earned my GED at Alvin S. Glenn Detention Center while confined there from 2012 to 2016;
5. I was transferred to the SCDC Reception and Evaluation Center at Kirkland Correctional Institution on or about August 18, 2016 following my guilty plea in Richland County;
6. I was assigned to the Broad River Correctional Institution on or about September 26, 2016, and have remained here since. I was assigned a job in the kitchen and have not been charged with any rules violations since entering SCDC;
7. I was married in 2002 and worked as a maintenance technician for several apartment complexes for roughly ten years, until 2012;
8. In 2012, I lost my job, my wife divorced me, my grandfather passed away and I was extradited to South Carolina after my arrest in North Carolina;
9. I lived in St. Andrews' Point Apartments with my family while attending Columbia High School and for a few years thereafter;

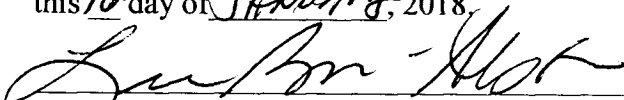
10. I saw an episode of "Gangland" that reportedly depicted what happened in the club the night of the incident that resulted in Jeroid Price being charged with murder;
11. I was at the club the night of the shooting and knew Mr. Price from our attending the same high school and our families living in the same apartment complex;
12. The "Gangland" video did not accurately depict what I observed that night at the club;
13. I observed Mr. Price in a struggle with a much bigger man when shots were fired;
14. Both men were standing, involved in a struggle, when the shots were fired;
15. I didn't come forward in 2002 because the shooting happened right after my wife's Birthday: I did not want my wife to know I went to the club that night.

FUTHER AFFIANT SAYETH NOT


Corie Lawrence, (#369405)

DOB
[REDACTED]-81

Sworn and Subscribed before me
this 10th day of JANUARY, 2018.


NOTARY PUBLIC FOR SOUTH CAROLINA

LISA BROWN-ALSTON
Notary Public, State of South Carolina
My Commission Expires 2/5/2023

My Commission Expires: 2/5/2023

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
JERIOD J. PRICE, #298791,)
Plaintiff,)
v.)
STATE OF SOUTH CAROLINA,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
Civil Action No.: 2014-CP-40-4524

NOTICE OF MOTION AND MOTION
FOR SCDC TRANSPORT ORDER

RICHLAND COUNTY
FILED
2018 MAR -9 PM 4:23
JEANETTE W. MCBRIDE
C.C.P. & G.S.

To: Assistant Attorney General Jessica E. Kinard, Esquire

NOTICE

The Applicant, though his undersigned counsel, hereby notifies the State that he will move for a Transport Order before the Honorable Brooks P. Goldsmith, Presiding Judge over the March 19, 2018 term of PCR court in Richland County, at 9:30 AM on Monday, March 19, 2018.

MOTION

Now comes Applicant, by and through his undersigned counsel, who moves this Court for an Order directing the South Carolina Department of Corrections to transport the Applicant, Jeroid J. Price, #298791, back to South Carolina where he has two actions pending in the Richland County Court of Common Pleas. Applicant offers the following in support of this motion:

1. Applicant filed his PCR Application, *pro se*, in Richland County on July 21, 2014. He filed a *pro se* amendment to this PCR on or about October 19, 2016. On October 27, 2016, the Applicant filed a *pro se* action against SCDC pursuant to the SC Tort Claims Act.¹
2. Applicant was *involuntarily transferred* to the New Mexico Department of Corrections, on or about March 13, 2017, within six months of his filing of the above pleadings, effectively denying him access to the Courts where he had two actions pending.

¹ Applicant's Tort Claim Complaint (2016-CP-40-03697) was filed in Richland County on or about October 27, 2016. The case was scheduled for a roster meeting on November 30, 2017. Undersigned counsel went to the Clerk of Court to inquire about the Roster meeting on November 30, 2017. Upon information and belief, the case was removed from the docket with instructions that it was not to be added to the docket until Plaintiff returned to South Carolina.

3. Applicant has no ties to the State of New Mexico and contends his involuntary transfer to New Mexico was arbitrary, capricious and retaliatory action for filing a Complaint against SCDC pursuant to the SC Tort Claims Act less than six months before his transfer to New Mexico.

4. Applicant's Affidavit, (Exhibit A), claims, *inter alia*, that his involuntary transfer to the New Mexico Department of Corrections denied him due process of law, judicial review of the decision to involuntarily transfer him, access to the courts and was accomplished in a manner that did not comply with the specific procedures mandated by SCDC Policy OP-21.03, a copy of which is attached as Exhibit B.

5. Affiant claims he was not eligible for *involuntary* transfer because he had a PCR pending at the time he was transferred New Mexico, on or about March 13, 2017.

6. SCDC Policy and Procedure OP-21.03, and specifically, Paragraph 4 of said policy, sets forth the eligibility requirements for involuntary transfers, stating: "...the procedures below *will be followed...*" (*Italics used for emphasis*).

- a. Paragraph 4.1 states: "The inmate ***should not have any post-conviction relief hearings pending*** or detainers." (Bold and *Italics* used for emphasis).
- b. Paragraph 4.3 states: "The Classification Caseworker will serve written notice (SCDC Form 18-34, '48 Hour Notice') upon the inmate at least 48 hours prior to the ICC hearing, advising the inmate that s/he:"
- c. "is being considered for an involuntary transfer to another state prison system under the Interstate Corrections Compact. (NOTE: A detailed memorandum outlining the reasons for the transfer will be included in the written notice with a copy to the inmate, and will also be read to the inmate at the hearing.);"

7. Paragraphs 4.3, 4.3.1, 4.3.2, 4.3.3, 4.3.4, 4.3.5, 4.3.6, 4.3.7, and paragraphs 4.4, 4.5, 4.7 and 4.8 of said policy mandate specific procedures must be followed, including but not limited to the inmate's right to be present, cross-examine witnesses, be advised of "State Classification Committee findings with explicit reasons why such transfer should or should not take place", and receive a written copy of the Division Director's Memorandum approving the transfer and have the right "to appeal to the Director of the South Carolina Department of Corrections."

8. The Applicant avers in his Affidavit, (Exhibit A), that SCDC failed to comply with the procedures published in SCDC Policy OP-21.03 and his involuntary transfer denied him due process of law and access to the courts, and, should therefore be declared null and void.

For the reasons set forth above, counsel for Applicant respectfully moves this Court to grant Applicant's Motion for a Transport Order directing SCDC officials to return Applicant to SCDC, specifically, the general population at Kirkland Correctional Institution in Columbia, where he was confined when involuntarily transferred on or about March 13, 2017, without undue delay.


John B. Shupper, SC Bar #9374

Attorney at Law

P. O. Box 90623

Columbia, SC 29290

Phone: (803) 606-7859

jbsupper@hotmail.com

March 9th, 2018
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
JERIOD J. PRICE,	)	Civil Case Number: 2014-CP4004524
	)	
Plaintiff,	)	
	)	
v.	)	Affidavit of Jeriod J. Price, (SCDC # 298791)
	)	
SOUTH CAROLINA DEPARTMENT	)	
OF CORRECTIONS,	)	
	)	
Defendant.	)	

The Affiant avers that the following statements are true to the best of his knowledge and recollection:

1. I, Jeriod J. Price, was born February 22, 1980. I am competent to make this affidavit under oath;
2. I was sentenced to serve a thirty-five (35) year sentence for murder in the South Carolina Department of Corrections (hereinafter, "SCDC"), on or about December 19, 2003;
3. I was assigned SCDC # 298791 when admitted to SCDC shortly after my conviction in 2003;
4. I was continuously confined in SCDC facilities from my admission to SCDC in 2003 until I was suddenly, and without written notification of the reasons, *involuntarily transferred* to the New Mexico Department of Corrections, on or about March 13, 2017, (**Bold and italics added for emphasis**);
5. I had filed a Post-Conviction Relief Application (PCR) challenging my 2003 conviction and sentence in Richland County, South Carolina, on or about July 21, 2014 (Case Number: 2014-CP4004524);
6. I filed an Amendment to my PCR case, (2014-CP4004524), on or about October 19, 2016;
7. I filed an action pursuant to the SC Tort Claims Act against SCDC in the Richland County Court of Common Pleas, (Case Number: 2016CP4006397) on or about October 27, 2016;
8. My PCR was pending a hearing in the Richland County Court of Common Pleas when I was *involuntarily transferred* from Kirkland Correctional Institution, (hereinafter, "KCI"), in the SCDC, to the New Mexico Department of Corrections, on or about March 13, 2017;

9. I am informed and believe that my tort claim action, is set for a roster meeting in the Richland County Court of Common Pleas on or about November 30, 2017;
10. On or about March 6, 2017, I was transferred from the Lieber Correctional Institution (LCI) general population where I was a "level 2" inmate worker, to the Kirkland Correctional Institution where I was assigned to the "general population" as an inmate "cadre" worker;
11. I had a conversation with KCI Warden Tim Riley about getting assigned to the recreation department shortly after my arrival at KCI. This conversation occurred shortly before my involuntary transfer from SCDC to New Mexico on or about March 13, 2017;
12. I have reviewed SCDC's Policy and Procedures related to inmate transfers pursuant to the Interstate Corrections Compact, (S.C. Code Section 24-11-10, et seq., as amended), and SCDC Policy/Procedure Number OP-21.03;
13. The Interstate Corrections Compact and SCDC Policy OP-21.03, et seq., set forth a series of actions that must be followed by state officials when an inmate is to be considered for an *involuntary transfer* to another state. The policy mandates that an inmate **must be notified** in writing at least 48 hours prior to the convening of a hearing before a classification committee where the committee will consider an *involuntary transfer* pursuant to the ICC and SCDC Policy OP-21.03. That policy clearly provides that an inmate has the right to be present, question witnesses, present evidence and "may request a counsel substitute to investigate the reasons for the involuntary transfer and assist in his presentation at the hearing." (OP-21.03, 4.3.2);
14. I was never provided advance written notice that the warden had requested that I be *involuntarily transferred* to another state pursuant to the Interstate Corrections Compact prior to any hearing wherein an involuntary transfer to another state was to be considered;
15. Paragraph 4.3.1 of said policy includes a "Note" that states: "A detailed memorandum outlining the reasons for the transfer will be included in the written notice with a copy to the inmate, and will also be read to the inmate at the hearing.);"; (Bold added for emphasis)¹

¹Other provisions of the SCDC OP-21.03, et seq., were obviously included to comport with the due process requirements of the Fifth and Fourteenth Amendments to the South Carolina Constitution and the United States, including the right to be provided written notice of the hearing, the right to be present at a hearing, the right to confront witnesses and present evidence and have a counsel substitute assist him at the hearing and the right to written notice of the disposition of the transfer request and the right to appeal the decision of the committee or final decision of the warden or agency. SCDC policy also provides that *types of the hearings on involuntary transfers must be maintained for six (6) years*;

16. I was never provided the "detailed memorandum outlining the reasons for the transfer" in writing as required by 4.3.1 of said policy cited above in paragraph 15;
 17. SCDC Policy OP-21.03, et seq., contains the eligibility criteria, guidelines and specific procedures SCDC officials must follow *prior to inmates being involuntarily transferred* to another state under the Interstate Corrections Compact;
 18. Paragraph 4 of SCDC Op-21.03 contains the following: "SOUTH CAROLINA AS SENDING STATE-INVOLUNTARY TRANSFER: When an inmate is to be *involuntarily* transferred from the SCDC to another state, the procedures below will be followed:" (Bold added for emphasis)
 19. Paragraph 4.1 of OP-21.03 states: "*The inmate should not have any post-conviction relief hearings pending or detainers.*"; (Bold and *Italics* added for emphasis)
 20. I had a PCR hearing pending at the time I was *involuntarily transferred* to New Mexico on or about March 13, 2017;
 21. Paragraph 4.3 of Op-21.03 mandates that, "The Classification Caseworker will serve written notice (SCDC Form 18-34, '48 hour Notice') upon the inmate at least 48 hours prior to the ICC hearing, advising the inmate that s/he...";
 22. I was never provided written notice that I was being considered for an *involuntary transfer* to another state prior to any hearing or *my involuntary transfer* to New Mexico on or about March 13, 2017;
 23. Paragraph 4.3.1 continues with: "is being considered for an involuntary transfer to another state prison system under the Interstate Corrections Compact (NOTE: *A detailed memorandum outlining the reasons for the transfer will be included in the written notice with a copy to the inmate, and will also be read to the inmate at the hearing.*)";
 24. I was never provided a copy of the detailed memorandum outlining the reasons for the transfer as required by the provisions of SCDC policy cited above in paragraph 23;
 25. I was not provided advanced written notice that I was to appear before a classification committee where a Warden's request to *involuntarily transfer* me to another state under the Interstate Corrections Compact would be considered;
 26. I did not receive advance written notice of a hearing *on the subject of an involuntary transfer to another state*, nor did I ever appear before a hearing board or classification committee *that advised me I was being considered for an involuntary transfer to another state*, nor was I provided a copy of a written memorandum outlining the reasons why I was being considered for involuntary transfer to another state, nor was I provided written
-

notice of the final disposition of the request for an involuntary transfer, from which I could have appealed the decision to involuntarily transfer me, prior to my being transported from South Carolina to New Mexico to serve the balance of my sentence;

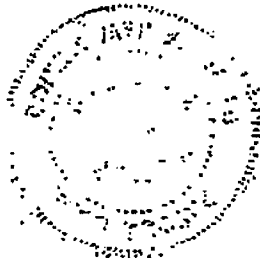
27. SCDC policy requires Department of Corrections officials to maintain tapes of any hearing related to a Warden's request for an *involuntary transfer* to another state under the Interstate Corrections Compact. SCDC officials transferred me to New Mexico *without affording me an opportunity to receive a written disposition on the warden's request for an involuntary transfer to another state and without an opportunity to listen to tapes of any hearing the agency might claim was related to a warden's request for an involuntary transfer to New Mexico;*
28. Upon information and belief, my involuntary transfer to New Mexico was not accomplished in a manner that complies with agency policy and violated my right to due process, a fair hearing and equal protection of law;
29. I believe my involuntary transfer from SCDC to New Mexico on or about March 13, 2017, denied me due process and equal protection of law, and should be declared null and void;
30. SCDC denied me *access to the courts* and an opportunity to perfect my PCR that was pending a hearing at the time I was *involuntarily transferred to New Mexico on or about March 13, 2017;*
31. I am informed that my PCR is still pending a hearing and that a roster meeting will be held on November 8, 2017 to determine if the case will be heard during the December, 2017, term of PCR court in Richland County.
32. Most of my family members and approved visitors live in South Carolina or North Carolina. I have no relatives in New Mexico and will not be able to visit with family members during the balance of my sentence because of the distance from my relatives' homes to New Mexico;
33. By involuntarily transferring me to New Mexico when I have two pending cases in Richland County, South Carolina, SCDC officials have effectively denied me access to the courts. I believe such action clearly prejudices my pending PCR and Tort Claim cases in Richland County and "judicial review" of the SCDC involuntary transfer action.

FURTHER AFFIANT SAYETH NOT

Gerard J. Price
Gerard J. Price (SCDC #298791)

Sworn and Subscribed before me, this 1 day of November, 2017

Bonita Lugo
NOTARY PUBLIC FOR NEW MEXICO
My Commission Expires: 4-9-18



OP-21.03, "Interstate Corrections Compact," November 1, 2004

SCDC POLICY/PROCEDURE

NUMBER:OP-21.03

TITLE:INTERSTATE CORRECTIONS COMPACT

ISSUE DATE: NOVEMBER 1, 2004

RESPONSIBLE AUTHORITY: DIVISION OF CLASSIFICATION AND INMATE RECORDS

OPERATIONS MANUAL: OPERATIONS

SUPERSEDES:OP-21.03 (January 1, 2002); Change 1 (March 4, 2003)

RELEVANT SCDC FORMS/SUPPLIES: 18-34, 19-100

ACA/CAC STANDARDS:3-4182

STATE/FEDERAL STATUTES: Articles I through X, Section 24-11-10 et seq., South Carolina Code of Laws, 1976, as amended (also referred to as the Interstate Corrections Compact)

PURPOSE: To establish guidelines for the administration of the Interstate Corrections Compact within the South Carolina Department of Corrections.

POLICY STATEMENT: To promote the safety and security of the SCDC, the Agency will provide for the interstate transfer of inmates to and from the South Carolina Department of Corrections in compliance with the requirements of the Interstate Corrections Compact. (3-4182)

Change 1 to "OP-21.03 are at sections paragr 3.14

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3. SOUTH CAROLINA AS SENDING STATE - VOLUNTARY TRANSFER

4. SOUTH CAROLINA AS SENDING STATE - INVOLUNTARY TRANSFER

5. SOUTH CAROLINA AS RECEIVING STATE

6. DEFINITIONS

1. RESPONSIBILITIES:

1.1 The Interstate Corrections Compact will be administered by the ICC Coordinator (designated State Classification Committee Member) under the supervision of the Chairman of the State Classification Committee (SCC) of the Division of Classification and Inmate Records. The Chairman, SCC, will ensure

that an equitable exchange exists between South Carolina and other signatory states.

1.2 Procedures as defined in Articles I through X of the South Carolina Code of Laws, 24-11-10 et seq., will be adhered to in the administration of the Interstate Corrections Compact; and all contractual agreements will be reviewed by General Counsel and the Agency Director. Inmates sentenced under the Youthful Offender Act are not eligible for interstate transfers due to the short amount of time that they normally serve and due to the lack of similarly legislated programs in other states.

2. SECURITY/TRANSPORTATION: Wardens, Division of Security personnel, and the Extradition Officer will provide appropriate interstate transportation and security officers for the transfer of inmates from SCDC institutions in compliance with related SCDC policies/procedures addressing the transportation of inmates when required. (3-4182)

3. SOUTH CAROLINA AS SENDING STATE - VOLUNTARY TRANSFER: When a requests to be transferred from South Carolina to another state, the exchange procedures below are to be followed:

3.1 Any inmate applying for an Interstate Corrections Compact transfer must meet the following criteria:

3.1.1 must confirm with classification caseworker that the state is a member of the compact;

3.1.2 must have immediate family in the state to which s/he is requesting to be transferred;

3.1.3 must have at least two (2) years remaining to serve on his/her current (or consecutive) sentence (to include both projected max-out and parole eligibility dates);

3.1.4 must have served at least six (6) months within the South Carolina Department of Corrections;

3.1.5 must not have post-conviction relief hearings pending;

3.1.6 must not have a detainer (wanted, hold, or notify) except in the state to which s/he is requesting to be transferred; and

3.1.7 must not have had a disciplinary conviction of any type or an administrative transfer for security reasons within the past six (6) months.

3.1.8 must not have been a previous participant in the ICC program and was not returned to SCDC for any disciplinary/behavior reasons, or as a result of the inmate's request.

3.1.9 must waive the right to return to SCDC for the purpose of appearing before the parole board.

3.2 The inmate may request a transfer to his/her home state by submitting a completed SCDC Form 19-100, "Interstate Corrections Compact Application," to the appropriate Classification Caseworker. The inmate will be required to sign the "consent for transfer" and "waiver for hearing" sections on the form. Other

information to be provided includes, but is not limited to: names, addresses, and relationships of immediate family members in the requested state.

3.3 Any inmate approved for a voluntary transfer from South Carolina to another state will be responsible for paying the costs of transportation as determined by the South Carolina Department of Corrections. The inmate must sign a statement that says s/he will pay these costs before the application will be processed. Funds to cover these costs must be in the inmate's E.H. Cooper account in accordance with SCDC Policy/Procedure ADM-15.12, "E.H. Cooper Trust Fund," prior to the actual transfer. The ICC Coordinator or designee will be responsible for determining transportation costs and providing that information to the inmate.

3.4 The Institutional Classification Committee (ICC) will review the inmate's institutional record to determine the inmate's progress and probable effect of such a transfer on the inmate's classification plan.

3.5 Upon approval by the ICC, the Classification Caseworker will forward the transfer request to the ICC coordinator or designee. A copy of this request will be filed in the inmate's institutional record.

3.6 Upon review and approval of the submitted application, the ICC coordinator or designee will determine if South Carolina has a contract with the requested state. If a contract has been signed and is valid, the ICC coordinator or designee will forward a completed copy of the inmate's Central and medical records to the requested state for review and approval/disapproval. The inmate will be advised of this action.

3.7 Upon notification of disposition (approval/disapproval) from the requested state, the ICC coordinator or designee will advise the inmate and, if the request has been approved, will make transportation arrangements with the receiving state.

3.8 If an inmate is approved for an interstate transfer and the requested state is not a member, the inmate will be advised in writing by the ICC coordinator or designee.

3.9 If an inmate is approved for an interstate transfer and the requested state is a member of the Compact by an agreement with South Carolina, but is not active, the ICC coordinator or designee will make a reasonable effort to implement such an agreement.

3.10 The receiving state will submit an initial classification summary to South Carolina within ninety (90) days of the receipt of the inmate and thereafter will submit a classification progress report semi-annually. The ICC coordinator or designee will review the reports, make any necessary changes in the Earned Work Credit section of the inmate's automated record, and submit reports for file in the inmate's central record.

3.11 Transfer under the provisions of the Interstate Corrections Compact will not affect the release or parole date as determined by the State of South Carolina, except as applicable to any normal earned work credit changes or disciplinary actions. Inmates who serve South Carolina sentences in other states may be awarded earned work credits and/or earned educational credits as determined by the Division Director of

Classification and Inmate Records, based upon information furnished by the other state's corrections department.

3.12 Pursuant to procedures regarding Interstate Corrections Compact (ICC) transfers, inmates who transfer under the ICC do so at their own request and are not eligible for inmate pay from SCDC while at the receiving state. If the inmate is returned to SCDC for administrative reasons, s/he may be assigned to a job and receive inmate pay provided such is allowed by policies/procedures governing inmate pay.

3.13 An SCDC inmate that was transferred to another state as a result of an Interstate Corrections Compact transfer may request to be returned to the SCDC. The inmate must clearly state his/her reasons for requesting their return to the SCDC. If this request is approved, the inmate will be responsible for all expenses incurred in facilitating this request. Once returned to the SCDC, the inmate will be ineligible for future ICC transfers, under this incarceration or future incarcerations.

3.14 If any inmate is disapproved by the SCDC or the requested state, for an Interstate Corrections Compact, s/he may reapply six (6) months after the date of disapproval if all other requirements cited in Procedure 3.1, above, are met.

4. SOUTH CAROLINA AS SENDING STATE - ~~IN VOLUNTARY TRANSFER~~ When a involuntarily transferred from the SCDC to another state, ~~the procedures below will be followed:~~

4.1 The Warden may request that an inmate be considered for an involuntary transfer to another state. This request would normally be based upon a need by the inmate for protection beyond that which is available within this state, or based upon the inmate's being a management problem in SCDC, or in the interest of rehabilitation (i.e., to provide an inmate a fresh start in another prison system). ~~the inmate should not have any post-conviction relief hearings pending or deferred~~

4.2 The Classification Caseworker will forward the request for the involuntary transfer to the ICC coordinator or designee.

4.3 The Classification Caseworker will serve written notice (SCDC Form 18-34, "48 Hour Notice") upon the inmate ~~at least 48 hours prior to the ICC hearing~~, advising the inmate that s/he:

4.3.1 ~~is being considered for an involuntary transfer~~ to another state prison system under the Interstate Corrections Compact (NOTE: ~~no written memorandum outlining the reasons for the transfer will be provided to the inmate prior to the hearing, and will also be read to the inmate at the hearing.~~);

4.3.2 ~~may request a counsel assist him to investigate the reasons for the involuntary transfer~~ and assist in his/her presentation at the hearing;

4.3.3 ~~has the right to be present at the hearing and that a taped recording of the hearing and State Classification Committee deliberations will be maintained for six (6) months~~

4.3.4 ~~may offer witnesses on his/her behalf as to why the inmate should or should not be granted such a transfer~~
~~inmate~~: The ICC coordinator or designee may limit the number of witnesses and rule on issues of relevancy. Reasons will be documented as to why certain evidence or witnesses were not admitted into the record.);

4.3.5 ~~may cross-examine witnesses called against inmate~~, if any;

4.3.6 ~~will have an opportunity to be heard~~; and

4.3.7 ~~will be advised by memorandum of the state classification committee inmate~~

4.4 The ICC Coordinator or designee ~~will~~ within three (3) working days after the hearing, submit a report to the Division Director of Classification and Inmate Records recommending approval or denial of the interstate transfer. This report will be in memorandum format and ~~will contain explicit reasons why such transfer should or should not take place. The inmate will be provided a copy of the report~~

4.5 If approved, the report will then be submitted to the Division Director of Classification and Compliance. ~~The Division Director of Classification and Compliance will either approve or disapprove~~ the report and submit it to the Division Director of Operations, with an information copy to the ICC coordinator or designee and to the Warden.

4.6 Upon receipt, the Division Director of Operations will either approve or disapprove the recommendation. If the Division Director of Operations recommends approval, s/he will provide a copy of the memorandum and approval to the Division Director of Classification and Inmate Records and instruct him/her that the procedures of the Interstate Corrections Compact are to be utilized and to arrange a transfer as expeditiously as possible.

4.7 ~~The inmate will be advised in writing via a memorandum by the ICC coordinator or designee of the decision~~

4.8 ~~The inmate may appeal any request local to the Director of the South Carolina Department of Corrections~~

4.9 The receiving state will provide a Classification Progress Report (available from the Division of Classification and Inmate Records every six (6) months to SCDC. The progress report will include any changes in Earned Work Credits, custody, disciplinary history, and/or security status.

4.10 Inmates who transfer under the ICC on an involuntary basis are not eligible for inmate pay from SCDC while at the receiving state. If an inmate is returned to SCDC for administrative reasons, s/he may be assigned to a job and receive inmate pay provided such is allowed by policies/procedures governing inmate pay.

5. SOUTH CAROLINA AS RECEIVING STATE: When an inmate voluntarily requests to be transferred to the SCDC or is being recommended for involuntary transfer, the interstate transfer procedures below will be followed:

5.1 Inmate requests for interstate transfer or referrals for involuntary transfer will be forwarded to the ICC coordinator or designee from the appropriate correctional officials of the sending state.

5.2 Requests for transfer to South Carolina must be accompanied by the following:

5.2.1 a complete criminal history record;

5.2.2 institutional and medical records; and

5.2.3 if applicable, a statement from the inmate indicating that the transfer is voluntary.

5.3 The ICC coordinator or designee will review and approve/disapprove each request for transfer to South Carolina based on the information cited in Procedure 5.2.1 through 5.2.3, above.

5.4 The ICC coordinator or designee will, if s/he deems necessary, verify relatives and previous residences in South Carolina and/or contact those relatives to determine reaction to and support for such a transfer.

5.5 The ICC coordinator or designee will advise the sending state of his/her decision and make transporting arrangements if approval is granted. Inmates from other states cannot be guaranteed placement in a specific institution, custody, or program within the SCDC.

5.6 All inmates received under the provisions of the Interstate Corrections Compact will undergo normal intake processing as specified by the ICC coordinator or designee in compliance with SCDC policies and procedures related to reception and evaluation.

5.7 The appropriate Reception and Evaluation Center will forward a complete initial classification summary to the ICC coordinator or designee for submission to the sending state.

5.8 The Central and Institutional records will be compiled and maintained as with any other inmate, except for computation of the parole date and the release date, which will be maintained by the sending state.

5.9 The assigned Classification Caseworker will complete a Classification Progress Report (available from the Division of Classification and Inmate Records every six (6) months or upon request from the sending state and submit the report to the Chairman, SCC. The Chairman, SCC, will forward the report to the sending state. These reports will give any changes in the inmate's status, i.e., earned work credits, disciplinaries, custody, or security level.

6. DEFINITIONS:

Home State refers to the state in which it has been confirmed that the inmate's immediate family resides.

Immediate Family refers to an inmate's mother, father, children (to include adopted), sister, brother, grandmothers, grandfathers, great-grandmothers, great-grandfathers, wife, husband, common-law spouse, grandchildren, great-grandchildren, stepbrothers, stepsisters, stepparents, foster parents, stepchildren, step grandchildren, half-brothers, half-sisters, and in-laws.

Interstate Corrections Compact refers to an agreement among specific states whereby each of the participating states agrees to provide facilities and programs on the basis of cooperation for the confinement, treatment, and rehabilitation of offenders with the most economical use of human and material resources.

Receiving State refers to the state to which an inmate is sent through an Interstate Corrections Compact transfer other than the state where s/he was convicted and originally confined.

Sending State refers to the state in which the inmate was convicted and is being held.

State Classification Committee (SCC) refers to the Committee within the Division of Classification and Inmate Records that is responsible for processing statewide transfers.

SIGNATURE ON FILE

Jon E. Ozmint, Director

ORIGINAL SIGNED COPY MAINTAINED IN THE DIVISION OF POLICY DEVELOPMENT.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
JERIOD J. PRICE, #298791,)
Plaintiff,)
v.)
STATE OF SOUTH CAROLINA,)
Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

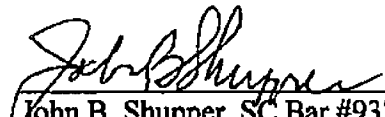
Civil Action No.: 2014-40-4524

CERTIFICATE OF SERVICE
BY HAND DELIVERY

RICHLAND COUNTY
FILED
2018 MAR -9 PM 4:33
JEANETTE W. McBRIDE
C.C.P. & C.S.

The undersigned certifies that a copy of Applicant's Notice of Motion and Motion for SCDO
with exhibits A and B
Transport Order has been served on counsel for Respondent by delivering a copy of the same to
the Receptionist on the Fifth Floor of the Office of Attorney General by hand delivery, addressed
as follows, on this 9th day of March, 2018:

Ms. Jessica Elizabeth Kinard, Esquire
Assistant Attorney General, PCR Division
S.C. Attorney General's Office
1000 Assembly Street
Columbia, SC 29201


John B. Shupper, SC Bar #9374
Attorney at Law
P.O. Box 90623
Columbia, SC 29290
Phone: (803) 606-7859
jbsupper@hotmail.com
Attorney for Plaintiff

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
County of Richland	)	2014-CP-40-0004524
	)	
JEROID PRICE,	)	
	)	
APPLICANT,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
RESPONDENT,	)	

March 19, 2018
Columbia, South Carolina

BEFORE:

THE HONORABLE BROOKS P. GOLDSMITH, JUDGE.

APPEARANCES:

JESSICA KINARD, ASSISTANT SOLICITOR
Attorney for the State

JOHN SHUPPER, ESQ.
Attorney for the Applicant

KAREN AMBROZIAK
Official Court Reporter

C O N T E N T S

INDEX OF EXHIBITS:

(There were no exhibits introduced.)

INDEX OF WITNESSES:

(There were no witnesses called.)

1 MS. KINARD: That's the reason we're here is that
2 Mr. Price is not here.

3 Beg the Court's indulgence, and I'll call the case.

4 May it please the Court. Thank you, Your Honor.
5 This is the matter of Jeroid J. Price vs. The State of
6 South Carolina. It's case number 2014-CP-40-4524.

7 We're before the court on application for Post
8 Conviction Relief that was filed on July 21st, 2014. This
9 is a subsequent request for Post Conviction Relief on
10 behalf of Mr. Price. He's alleging newly discovered
11 evidence.

12 I did not hand up a judge's packet because this is a
13 motion. I do have one if you'd like to review it.

14 THE COURT: On this case, probably not.

15 MS. KINARD: Probably not, okay.

16 THE COURT: Go ahead.

17 MS. KINARD: I have it if you'd like it.

18 Due to the nature of the application as successive
19 and outside the statute of limitations, the State has
20 opposed its filing as we do not believe Mr. Price has
21 presented a prima facie case on which to grant any relief
22 for newly discovered evidence. We do have a signed
23 conditional order of dismissal in this case, I believe.

24 And so part of the issue now is that the State's
25 motion to dismiss based on the fact that it's excessive

1 and outside the statute of limitations is pending.

2 However, Mr. Price is currently incarcerated in New
3 Mexico under the Interstate Corrections Compact. It is
4 his opinion -- and I ask Mr. Shupper to correct me if I'm
5 wrong -- that he is there without proper due process and
6 unauthorized to leave.

7 It is my understanding that the motion before the
8 court, which Your Honor has received, is to have Mr. Price
9 transported to South Carolina for a hearing on a motion to
10 dismiss his PCR.

11 It is the State's position that he has the right to
12 be present at that hearing due to the nature of the
13 filing, as well, as the provisos of the uniform Post
14 Conviction Relief Procedures Act. And, therefore, we
15 would oppose that motion. However, we certainly would
16 Mr. Shupper to further elaborate on that.

17 THE COURT: Sure.

18 MR. SHUPPER: May it please the Court, Your Honor.
19 John Shupper for Mr. Jeroid Price.

20 Your Honor, one matter that Ms. Kinard didn't
21 mention, I think you're aware of from our email
22 correspondence last week, is she has consented --
23 Ms. Kinard has consented on behalf of the State to
24 continue the arguments on the motion to dismiss, and so
25 we're here on a motion for a transport order only. There

1 is a consent order that we'll provide the court if the
2 court wishes on the argument phase.

3 Your Honor, Mr. Price has served 14 years in the
4 Department of Corrections. He had vigorously challenged
5 his conviction during all of that time. I believe in 2011
6 or 2012, his federal habeas was denied.

7 At a point in 2013, he received a letter from someone
8 he didn't know who had seen an episode of Gang Land that
9 depicted his offense and triggered this person's
10 recollection of being in the club that night. And he sent
11 a letter to the Applicant stating that he witnessed the
12 events, and Mr. Price filed his PCR within one year of
13 receipt of that newly discovered evidence.

14 He -- no action was taken on this case until October
15 of 2016 when the Applicant filed an amendment to his PCR.
16 It was still pending. A week or so later, he filed a
17 complaint against the Department of Corrections pursuant
18 to terms of the South Carolina Tort Claims Act, making
19 other allegations. So as of the end of October of 2016,
20 he had two actions pending in a Richland County Court of
21 Common Pleas, his PCR and his Tort Claims Act.

22 Within six months, he was without notice
23 involuntarily transferred to the State of New Mexico to
24 serve the balance of his sentence. At the time of that
25 transfer, he had two actions pending, one of Post

1 Conviction Relief application, the instant case.

2 All of these actions were filed pro se by the
3 Applicant. I was hired subsequent to the transfer and
4 notified the Attorney General and the clerk that I was
5 involved in the PCR.

6 We submitted an affidavit from Mr. Price that I
7 obtained, that was sent to me from New Mexico, wherein he
8 stated that he had reviewed the Department of Corrections
9 policies on Interstate Corrections Compact transfer,
10 specifically, SCDC policy number OP-21.03.

11 Paragraph four and subsequent paragraphs deals
12 specifically with the criteria for involuntary transfers,
13 as well, as mandating procedures the Department of
14 Corrections must follow prior to initiating or completing
15 a transfer that was requested.

16 We submitted both his affidavit and a copy of the
17 published policy, and those policies and affidavit are
18 attached as Exhibit A and B to this motion respectfully.

19 Your Honor, paragraph four, essentially, states it
20 has a criteria, a prerequisite for the department
21 requesting Interstate Compact Transfer to another state.
22 The inmate should have no detainers or Post Conviction
23 application pending. It's -- I'll read it. The inmate
24 should not have any Post Conviction Relief hearing pending
25 or detained.

1 At the time of his transfer on March 1st or
2 thereabouts of 2017, he not only had a Post Conviction
3 Relief action pending, he had a Tort Claims action
4 pending.

5 Now, paragraph 4.1, all the way through paragraph 4.8
6 of the department's policies governing Interstate
7 Corrections Compact transfers, involuntary transfers.

8 There's a different set of procedures for voluntary.
9 It states the inmate should be advised in advance in
10 writing of the nature of the hearing, given an opportunity
11 to attend, to cross-examine witnesses, to have assistance
12 of an inmate represented and to help prepare his case
13 before a hearing committee that will -- that is going to
14 consider an involuntary interstate compact transfer.
15 Essentially, all the due process protections of notice,
16 right to be heard, rebut accusations, present evidence.

17 Furthermore, there is a provision that there's a
18 multi-tier review provision that basically states once the
19 committee hears the matter, gives him -- the inmate
20 notice, hears the matter, they're supposed to provide
21 written reasons for the proposed transfer. And then it
22 goes through this review process.

23 Mr. Price's affidavit alleges he never received any
24 of those notices, procedures weren't followed. It's his
25 contention that his transfer, involuntary transfer was not

1 accomplished in the manner that shows the department
2 complied with mandated procedures of their own policy.

3 Furthermore, there is a provision that says if the
4 transfer request from the warden is approved at the
5 highest levels, then the inmate will be provided a
6 memorandum in writing for the specific reasons reflecting
7 the decision whether to transfer them or not.

8 Mr. Price's affidavit alleges he never received any
9 such notice or disposition. And the policy also provides
10 for the opportunity to appeal a decision from the director
11 of the department that approves the transfer. The policy
12 provides that the hearing will be maintained on tape and
13 shall be available for a period of years.

14 Your Honor, this is similar to any Administrative
15 Procedures Act, what I would say notice provisions in due
16 process provisions in that if you don't like the decision
17 of the agency, you can file a grievance, you can challenge
18 it, you can file an appeal.

19 All of those provisions are included in the
20 department policy OP-21.03. Applicant alleges none of
21 those were filed. Therefore, it deprives him the right of
22 judicial review, which is provided for not only in the
23 policy, but by the Administrative Procedures Act.

24 So, essentially, the Applicant's position is the
25 involuntary transfer should be declared null and void;

1 that the department should be ordered to return the
2 Applicant to South Carolina where he can be present for
3 the two actions that are pending.

4 Your Honor, from 1985 to 1997, I was playing class
5 monitor under the federal lawsuit Nelson vs. Lee, later
6 File vs. Evans (phonetic). It was a 160-page consent in
7 Federal Court.

8 MS. KINARD: Your Honor, I think this is a bit far
9 afield of our motion.

10 MR. SHUPPER: I'm sorry. I couldn't hear her.

11 MS. KINARD: I think this is a little far afield of
12 the motion at hand.

13 MR. SHUPPER: Well, I was just going to say, Your
14 Honor, I'm very familiar with the department's policies
15 and procedures. In those policies and procedures in
16 effect then, there were provisions that prevent -- that
17 had specific procedures to transfer an inmate from one
18 institution to the supermax at Casey, Kirkland
19 Correctional Institute.

20 Five years ago, the department did the same thing to
21 Mr. Price. They pulled him off the yard, they locked him
22 up in supermax. They, essentially, held him incomunicado.

23 His mail was not delivered directly to him and ended
24 up being delivered to correspondence review commitment
25 from headquarters and taking a month or two sometimes for

1 him to receive correspondence. At that time, he still had
2 actions pending in court.

3 The provisions on the policy for transfer to supermax
4 back then provided the same thing. You initiate request
5 from the warden. It goes through the chain of command.

6 The inmate gets a hearing, an opportunity to respond.
7 And if everything is approved by the highest level, by the
8 director of the Department of Corrections, he may then be
9 transferred to supermax.

10 My investigation in that case found that they didn't
11 follow their procedures then as pertaining to Mr. Price.
12 Ultimately, he was released from supermax to -- and
13 transferred to another institution.

14 Like I said, Your Honor, he received this letter in
15 2013 and filed this PCR in 2014, remanded it in 2016,
16 filed the Tort Claims Act in 2016, six months later, he is
17 in max out. He can't proceed.

18 And since these actions were pro se, I'd submit that
19 that, essentially, gives him the right to be present for
20 any hearings. Certainly, I don't think there's any
21 question that the department's own policy prohibits
22 interstate corrections compact transfers when an inmate is
23 not willing to go along with it, but an involuntary
24 transfer while a PCR is pending. Not only does he have a
25 PCR pending, but he had a Tort Claims Act pending.

1 And therefore, we believe that Mr. Price's transfer
2 should be null and void, brought for a judicial review and
3 access to the court. And we're asking, Your Honor, to
4 direct the Department of Corrections to return him so he
5 may assist counsel and go forward with his two pending
6 cases in the Richland County Court of Common Pleas.

7 THE COURT: All right. Thank you, Mr. Shupper.

8 MR. SHUPPER: Thank you, Your Honor.

9 THE COURT: All right. Ms. Kinard.

10 MS. KINARD: Thank you, Your Honor. First of all, I
11 do agree Mr. Shupper. We do agree based on a continuous
12 order to present to you that we would not argue the motion
13 to dismiss today. This is just a transport order.

14 But to simplify it, Mr. Shupper and Mr. Price are
15 using this PCR to try and shoehorn an action to get him
16 back to South Carolina. There has been nothing presented
17 in the view of the State that would allow him, first, to
18 go forward on a motion to dismiss based on newly
19 discovered evidence. We believe that that motion to
20 dismiss should be granted.

21 However, that aside, there is nothing in the PCR act
22 that requires the Applicant to be present at the time of
23 their hearing. In fact, section 17-27-80 says the court
24 may order the applicant brought before it for hearing. So
25 there is no requirement for him to be present. There is

1 no requirement for him to be in the State to be here to
2 testify to any of that.

3 Mr. Shupper referenced the Interstate Corrections
4 Compact as being under the APA. We're not acting under
5 the APA. We're acting under a state statute and the Rules
6 of Civil Procedure.

7 Even assuming arguendo that his transfer to New
8 Mexico was improper, was mishandled, whatever you want to
9 call it, that doesn't matter for purposes of this PCR.
10 He's had this PCR. He's had a federal habeas. And he has
11 not presented enough evidence at this point to necessarily
12 withstand a motion to dismiss.

13 So our argument is that, first, we need to have a
14 motion to dismiss, which he does not have a right to be
15 present for, and then should he survive that, we would
16 have a full evidentiary hearing. And that may be a more
17 appropriate time to consider his transport back to South
18 Carolina. But simply for a motion to dismiss on accepting
19 outside the statute of limitations PCR application, that
20 does not warrant transfer back from New Mexico.

21 Granted, we don't know why he was sent to New Mexico.
22 I'm not privy to that information, I don't know. But the
23 fact that he is there, we could, perhaps, assume that it's
24 for a reason. I don't know.

25 Regardless, the fact that he has a pending PCR, the

1 fact that he has a pending Tort Claims Act, the Tort
2 Claims Act does not land into this whatsoever. We're
3 simply before the court on this PCR to determine whether
4 he needs to be back on a motion to dismiss on a successive
5 untimely application, and the State's position is that he
6 simply does not. He does not have right to be present for
7 a motion to dismiss. There's no requirement for him to be
8 present for a motion to dismiss. The statute does not
9 authorize it.

10 And, quite simply, those are the arguments, that it
11 was simply not necessary in order for the interest of
12 justice to be served for him to be present for the hearing
13 on the motion to dismiss and successive an untimely PCR
14 application where the only evidence of newly discovered
15 evidence is a letter -- I believe two letters where people
16 saw a television show that believes that changes or should
17 have changed the outcome of his trial.

18 THE COURT: Thank you, Ms. Kinard.

19 Brief response?

20 MR. SHUPPER: Your Honor, the rules cited by
21 Ms. Kinard, essentially, states that the presence of an
22 Applicant at the hearing is a matter for the discretion of
23 the court.

24 I submit to this court that this is an extremely
25 unusual circumstance and stress that these actions were

1 pro se actions by an inmate who was subsequently
2 transferred to another state, effectively cutting off his
3 avenue of appeal for the involuntary transfer.

4 We've submitted an affidavit and department's
5 policies that show that; that inmates should not have PCR
6 applications pending when you're being considered for
7 involuntary transfer. I don't think there's any question
8 on that.

9 And secondly, that had they not shipped the --
10 Mr. Price to New Mexico last March, there was a roster
11 meeting in June that he could have attended and could have
12 gone forward with his PCR pro se.

13 Certainly, I don't think the State is saying they
14 were just going to have a roster meeting and not let him
15 be present or have a hearing on a motion. And at the time
16 in June, the State took the position at the roster meeting
17 well, it appears that this Hamilton letter that was
18 attached to it met -- would match the newly discovered
19 evidence provisions and that it wasn't likely that the
20 State would move to dismiss based on that letter.

21 But he was pro se inmate at that time, had he not
22 been transferred, he would be here to carry his own case
23 forward. But because he was shipped involuntarily, his
24 family had to hire counsel to try remedy the situation.
25 He can't file an appeal in the transfer action and he has

1 a right to judicial review by virtue of being in the
2 Department of Corrections, but his avenue of appeal and
3 judicial review was severed by his transfer to New Mexico.
4 So I just don't think, it's quite as simple as the AG has
5 argued.

6 In addition, we've agreed to continue the arguments
7 on the motion to dismiss. So I don't really want to go
8 there and respond to those allegations because we've
9 already agreed to continue that aspect.

10 THE COURT: Right.

11 MR. SHUPPER: But, Your Honor, it's just
12 fundamentally unfair. It smacks of retaliation. And in
13 all my years, I've never seen the department involuntarily
14 transfer someone who has a PCR or any other action
15 pending. And I think that's why they put that in their
16 policy.

17 He has a right to continue his appeal, despite the
18 Attorney General's belief that it's successive and barred
19 and all her other arguments. He was transferred without
20 notice and without his consent.

21 THE COURT: Well, what Ms. Kinard is saying is he is
22 not necessarily -- he does not necessarily have to be
23 present for the hearing on that motion to dismiss.

24 MR. SHUPPER: Yes, sir, and I believe that's
25 discretionary, that's in the court's discretion to order

1 that he be present for his motion to dismiss. But the
2 fact remains that he filed these actions for PCR. Nobody
3 knows the record better than Mr. Price, nobody.

4 He's been -- he's extremely familiar with the record.
5 And to not allow him to be present to assist counsel that
6 he had to hire because he was sent out of state
7 involuntarily just doesn't meet the standards of justice
8 in my opinion.

9 It deprives him of his right to be heard, the right
10 to challenge his conviction and the right to judicial
11 review of the department's decision to transfer him.

12 He can't file a grievance against the Department of
13 Corrections from New Mexico. They don't allow it. He's
14 tried. The only way -- and that's why the policy 1600 --
15 I mean, OP 21.03, governing interstate compact not only
16 says that he shouldn't have a PCR pending.

17 Obviously, everyone wants some finality in the
18 judgment. But it also provides the opportunity to review
19 an adverse decision to the inmate who is being considered
20 or whose transfer is approved, an involuntary transfer is
21 approved, and he's been denied that.

22 He was called -- he was in the jail population. He
23 was called to report and was told you're going to New
24 Mexico. He didn't get any written disposition, which in
25 all my years of dealing with the Department of

1 Corrections, they always have a written disposition from
2 which the inmate can appeal if he doesn't like the
3 decision.

4 He was cut off from the grievance, denied the right
5 to appeal and the right to judicial review. I submit
6 under those circumstances, there's sufficient reason for
7 Your Honor to direct the department to bring him back.

8 THE COURT: Go ahead.

9 MS. KINARD: I'm sorry, Your Honor, but I have to
10 clarify a misstatement by Mr. Shupper. If there were a
11 roster meeting that had his case on it, he would not have
12 been present because this is a successive and untimely
13 filing.

14 We filed our return motion to dismiss, as well as
15 conditional order of dismissal, which was signed by Judge
16 Manning and granted on the grounds of successive, untimely
17 and laches.

18 So were there a roster hearing, he would not have
19 been here to go forward pro se. The fact that he filed
20 these actions pro se does not mean anything at this
21 juncture.

22 This is not the proper forum for Mr. Price or Mr.
23 Shupper to request a transport order. This is simple a
24 PCR. We're not adjudicating the actions of the Department
25 of Corrections.

1 We're not looking at whether what they did is right
2 or wrong. We're simply trying to see if he should be here
3 for his motion to dismiss. And the State argues he should
4 not.

5 As Mr. Shupper mentioned, he has a pending Tort
6 Claims Act. Perhaps, that would be the better avenue.
7 That is certainly not for this court to decide either.
8 But in strictly the confines of this PCR action, it is not
9 the proper place for this court to decide whether SCDC was
10 right or wrong.

11 We do have the COD and the State stands by its
12 assertion and the order saying that he -- there is no
13 newly discovered evidence to allow him to go forward, and
14 he should not be -- based on that, we assert he should not
15 be necessarily present based on a motion to dismiss.
16 Thank you.

17 THE COURT: I tell you what, I'm going to grant your
18 motion on the grounds that his presence is necessary to
19 assist his attorney in defending the motion.

20 You can recite when you prepare the order your other
21 arguments if you want to show what you will argue, but the
22 grounds of your motion is not what you are -- all of the
23 other stuff you're arguing about how the department can
24 properly transfer, you can put that in there that you
25 argued that, but the court did not rule on that. I found

1 it unnecessary to do so and grants the motion on the
2 grounds that his presence is necessary to assist the
3 attorney.

4 MR. SHUPPER: Thank you.

5 THE COURT: All right. Do that within ten days.
6 Please let Ms. Kinard see a copy of it first.

7 MR. SHUPPER: Thank you, Your Honor, I will. I have
8 to modify the proposed order, but I'll be happy to provide
9 that within the time allotted. Thank you, Your Honor.

10 THE COURT: All right, sir.

11 (Whereupon, the proceedings were concluded.)
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CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Karen Ambroziak, Official Court Reporter for the
5th Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
complete Transcript of Record of the proceedings had and
evidence introduced in the trial of the captioned case,
relative to appeal, in the Court of Common Pleas for
Richland County, South Carolina, on the 19th day of March,
2018.

January 12, 2022

Karen Ambroziak

Karen Ambroziak, RPR
Circuit Court Reporter

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
JEROID J. PRICE, #298791,)
Plaintiff,)
v.)
STATE OF SOUTH CAROLINA,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2014-CP-40-4524

TRANSPORT ORDER

RICHLAND COUNTY
FILED
2018 APR -4 PM 4:52
JEANETTE W. MCBRIDE
C.C.P. & G.S.

This matter came before the Court by way of written motion filed March 9, 2018 by counsel for the above-captioned PCR Applicant, who sought an order directing South Carolina Department of Corrections officials to return Applicant to South Carolina from the New Mexico of Corrections. The Applicant was involuntarily transferred to New Mexico on or about March 13, 2017 while his *pro se* PCR was pending in the Richland County Court of Common Pleas. Applicant's Affidavit (Exhibit A) and SCDC Policy OP-21.03 (Exhibit B) were attached to Applicant's motion.

A hearing was held before this Court on March 19, 2018. John B. Shupper, Esquire, of the Richland County bar, argued on behalf of the Applicant who remains confined in New Mexico. Jessica E. Kinard, Esquire, Assistant Attorney General, opposed Applicant's motion on behalf of the State of South Carolina. This Court has reviewed the Affidavit of Applicant Price, SCDC Policy OP-21.03 and considered arguments of counsel for the State and counsel for Jeroid Price.

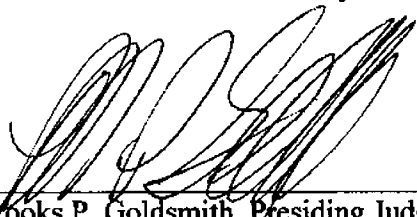
This Court finds that the Applicant, Jeroid J. Price, SCDC #298791, should be present to assist his counsel at a hearing on the State's Motion to Dismiss when said hearing is scheduled in the Richland County Court of Common Pleas.

THEREFORE, Applicant's Motion for a Transport Order, is hereby GRANTED. The South Carolina Department of Corrections is hereby directed to have the Applicant, Jeroid J. Price,

#298791, returned to South Carolina so he may assist his counsel and be present for the hearing on the State's Motion to Dismiss that is currently pending a hearing in the Richland County Court of Common Pleas.

THEREFORE, IT IS ORDERED, that the South Carolina Department of Corrections shall have Jeroid J. Price, (SCDC #298791), transported to Richland County, South Carolina, so he may assist his counsel in the preparation for his pending PCR case in the Court of Common Pleas, the same county where he was confined at the time of his involuntary transfer to New Mexico, without further delay.

AND IT IS SO ORDERED.



Brooks P. Goldsmith, Presiding Judge
Fifth Circuit Court of Common Pleas

This 21 day of March, 2018.

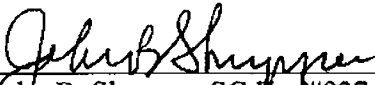
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
JERIOD J. PRICE, #298791,	)	Civil Action No.: 2014-40-4524
Applicant,	)	
v.	)	CERTIFICATE OF SERVICE
STATE OF SOUTH CAROLINA,	)	BY U.S. MAIL
Respondent.	)	

RICHLAND COUNTY
 FILED
 2018 APR -4 PM 4:52
 JEANETTE W. MCBRIDE
 C.C.P. & G.S.

The undersigned certifies that a copy of the Transport Order in the above-captioned case was served on Assistant Attorney General Lindsey McCallister, Esquire, by depositing the same with the United States Postal Service, sufficient first-class postage affixed, this 4th day of April, 2018, addressed as follows:

Ms. Lindsey McCallister, Esquire
 Assistant Attorney General, PCR Division
 S.C. Attorney General's Office
 PO Box 11549
 Columbia, SC 29211


 John B. Shupper, SC Bar #9374
 Attorney at Law
 P.O. Box 90623
 Columbia, SC 29290
 Phone: (803) 606-7859
jbsupper@hotmail.com
 Attorney for Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Jeroid J. Price (SCDC #298791),

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2014-CP-40-04524

**AMENDED TRANSPORT ORDER
AND
ORDER GRANTING CONTINUANCE**

RICHLAND,
FILED
2019 JUN 14 PM 3:05
JEANETTE W. McBRIDE
Clerk, C.S., & F.C.

This matter came before the Court upon request for continuance of the evidentiary hearing which is scheduled for June 21, 2019. This request was made by John Shupper, Esquire, counsel for Applicant, via email to the Court (*see attached*) for medical reasons. A telephone conference was held on June 14, 2019, with Mr. Shupper; Assistant Attorney General Lindsey McCallister on behalf of the State of South Carolina; Barton Vincent, Esquire, Sally Elliott, Esquire, and security personnel on behalf of the South Carolina Department of Corrections.

As is more fully set forth below, Applicant's request for continuance is GRANTED; and the Transport Order in this action (which was signed on March 29, 2018 and filed on April 4, 2018) is AMENDED over Applicant's objection.

FINDINGS

This action was commenced on July 21, 2014 when Applicant, acting *pro se* while housed at the South Carolina Department of Corrections ("SCDC"), filed his Application for Post-Conviction Relief ("PCR Application"). He then filed an Amended PCR Application on October 19, 2016. Due to security concerns, SCDC transferred Applicant to the State of New Mexico on or about March 13, 2017.


Page 1 of 3

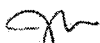
Amended Transport Order
Jeroid J. Price v. State, 2014-CP-40-04524

On June 1, 2017, Mr. Shupper filed a Notice of Appearance of Counsel, taking over as counsel for Applicant. He then filed a "Motion for SCDC Transport Order" on Applicant's behalf on March 9, 2018. In that motion, Applicant contends that his transfer to New Mexico occurred in violation of his due process rights, that his residence in New Mexico denies him access to South Carolina courts, and that SCDC violated its own internal policies in transferring him out of state. Arguments on that motion were heard on March 19, 2018, after which the Court determined that Applicant "should be present to assist his counsel at a hearing on the State's Motion to Dismiss when said hearing is scheduled..." (*See* Transport Order, filed April 4, 2018.) At that time, the State's Motion to Dismiss was scheduled to be heard on June 1, 2018.

Now, more than a year has elapsed since the date on which the Court believed that the hearing would occur; and while the State stands ready to proceed with that hearing – which is scheduled for June 21, 2019 – Applicant's counsel has requested that the hearing be continued. The Court finds that the next available term of court for this matter will occur during the week of October 28, 2019. SCDC has expressed its continued security concerns in housing Applicant; yet the Court finds that it remains proper for Applicant to be present at SCDC for some period of time in advance of his hearing and on the hearing date in order to assist his counsel.

IT IS, THEREFORE, ORDERED that Applicant's request for continuance is GRANTED, and that this matter shall be rescheduled from June 21, 2019 to the week of October 28, 2019.

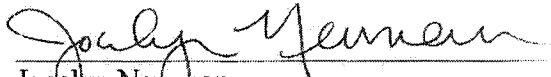
IT IS FURTHER ORDERED that the Transport Order filed in this action on April 4, 2018 is AMENDED such that Applicant need not be continually housed at SCDC pending hearing on the State's Motion to Dismiss. Rather, the South Carolina Department of Corrections may exercise its discretion in determining Applicant's housing location and custody status (in compliance with applicable policies and statutes).


Page 2 of 3

IT IS FURTHER ORDERED that, should Applicant be transported elsewhere, the South Carolina Department of Corrections shall return him to South Carolina no later than September 30, 2019 so that he may assist his counsel and be present for the hearing on his Applicant for Post-Conviction Relief, which is currently scheduled for the week of October 28, 2019.

AND IT IS SO ORDERED.

June 14, 2019
Columbia, South Carolina.


Jocelyn Newman
Chief Administrative Judge

Newman, Jocelyn

From: Lindsey McCallister <LMcCallister@scag.gov>
Sent: Wednesday, June 12, 2019 11:28 AM
To: Newman, Jocelyn
Cc: John Shupper; Samuel Key; Newman, Jocelyn Law Clerk ()
Subject: Jeroid Price PCR

*** EXTERNAL EMAIL: This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Judge Newman,

Mr. Shupper is requesting a continuance in this matter, which is currently scheduled for Friday, June 21. Would it be possible to have a status conference by phone sometime this week to discuss scheduling? Additionally, it's my understanding SCDC may also want to be heard based on Judge Goldsmith's previous transport order. (I am working remotely today and having trouble attaching a copy of that order, but please let Mr. Key know if you would like a copy and he will send it.) Thank you!

Lindsey

State of South Carolina)	In the Court of Common Pleas
)	Fifth Judicial Circuit
County of Richland)	2014-CP-40-04524

Jeroid Price,	)	
	)	
Applicant,	)	
	)	
vs.	)	Transcript of Record
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	
	)	

November 12, 2019
Richland County Judicial Center
Columbia, South Carolina

B E F O R E:

The Honorable Diane Shafer Goodstein, Judge

A P P E A R A N C E S:

John Shupper, Esquire
Attorney for Applicant

Lindsey McCallister, Assistant Attorney General
Attorney for Respondent

Maryann S. Nevers, CVR-M-CM, RVR, RVR-M
Circuit Court Reporter
Certified Verbatim Reporter - Master
Certificate of Merit
Realtime Verbatim Reporter - Master

I N D E X

Proceedings 4

TESTIMONY - WITNESS

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Certificate Page. 113

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVID.</u>

(No exhibits were marked for identification
or entered into evidence during proceeding.)

TRANSCRIPT OF RECORD

(Whereupon, the proceeding was commenced at 10:27 a.m.)

THE COURT: All right. Ms. McCallister, if you would please call our first case.

MS. MCCALLISTER: Yes, ma'am. This is *Jeroid John Price v. the State of South Carolina*, 2014-CP-04524. We're here today on the state's motion to dismiss, filed in response to a successive PCR application, which Mr. Price initially filed on July 21st, 2014. Mr. Price is present, and he is represented by Mr. John Shupper in this action.

Your Honor, Mr. Price is presently confined in the South Carolina Department of Corrections, pursuant to orders of commitment of the Richland County Clerk of Court. He was indicted in May 2003 for one count of murder. And from December 15th through the 19th, 2003, he proceeded to a jury trial before the Honorable Reginald Lloyd and a jury.

He was represented at trial by Cameron Littlejohn and Amye Rushing. And the matter was prosecuted by David Pascoe, Donald Sorenson, and Bryan Jeffries. He was found guilty as indicted and was sentenced by Judge Lloyd to a term of imprisonment of 35 years.

He filed a notice of appeal, and that was perfected by Joseph Savitz of the Office of Appellate Defense. His conviction was ultimately affirmed by the Supreme Court of

1 South Carolina in an order filed April 17th, 2006. And the
2 remittitur was returned to the circuit court on May 5th,
3 2006.

4 Mr. Price then filed his first application for
5 postconviction relief on December 4th, 2006, alleging that
6 he was being held in custody unlawfully due to ineffective
7 assistance of counsel for failure to object to a gang
8 expert's testimony as a violation of the confrontation
9 clause. The state's made a -- made its return.

10 Mr. Price filed amendments, and then an evidentiary
11 hearing into the matter was held at the Richland County
12 Courthouse on June 25th, 2008. Mr. Price was present and
13 represented at that hearing by Charles Brooks. The state
14 was represented by Brian Petrano of the South Carolina
15 Attorney General's Office.

16 By written order dated June 27th, 2008, Judge Keesley
17 denied and dismissed that application with prejudice. Mr.
18 Price filed a timely notice of appeal of the denial of that
19 postconviction relief application. And a petition of writ
20 of *certiorari* was filed on his behalf by appellate defender
21 Elizabeth Franklin-Best of the South Carolina Office of
22 Appellate Defense.

23 The state, again through Mr. Petrano, filed a return.
24 The Supreme -- the South Carolina Supreme Court referred
25 the case to the Court of Appeals for disposition. And on

1 January 12th, 2011, the Court of Appeals issued an order
2 denying the petition. Ms. Franklin-Best then appealed to
3 the Supreme Court of the United States on Mr. Price's
4 behalf. That petition was denied on June 13th, 2011.

5 Next, Mr. Price filed a pro se petition for a writ of
6 *habeas corpus* on May 12th, 2011. The state was represented
7 by Don Zelenka and filed a motion for summary judgment, as
8 well as a return and memorandum of law, on August 31st,
9 2011. On March 21st, 2012, the Honorable Judge Michelle
10 Childs issued an order adopting the report and
11 recommendation of the magistrate judge and granting the
12 motion for summary judgment. A certificate of
13 appealability was also denied.

14 Your Honor, as I said before, we're here today on Mr.
15 Price's second application for postconviction relief, which
16 he filed pro se on July 21st, 2014, with amendments filed
17 September 27th, 2016. In his application he alleges the
18 following grounds: First, he alleges newly-discovered
19 evidence of self-defense. He also alleges some other
20 additional allegations of ineffective assistance of
21 counsel, an unconstitutional jury charge, and ineffective
22 of -- assistance of PCR-counsel claim, a claim that the
23 judge abused his discretion when he allowed a juror to -- a
24 particular juror to be seated and ineffective assistance of
25 appellate counsel.

1 Your Honor, on November 7th, 2017, the state filed a
2 return and motion to dismiss, asking the Court to dismiss
3 all allegations except the newly-discovered-evidence claim
4 on the basis of the statute of limitations, the equitable
5 doctrine of *laches*, and because the application was
6 successive. The state also moved to dismiss the newly-
7 discovered-evidence claim on the ground that he had failed
8 to make a *prima facie* showing that he was entitled to an
9 evidentiary hearing and because the evidence that he puts
10 forward does not meet the five-factor test for newly-
11 discovered evidence set forth in *Hayden v. State* and *State*
12 *v. Caskey*.

13 Judge Casey Manning signed a conditional order of
14 dismissal to that effect, which was filed November 13th,
15 2017. And then Mr. Price, through his counsel, Mr.
16 Shupper, filed a response to that conditional order and a
17 memorandum of law on January 22nd, 2018.

18 In response -- in his response to the conditional
19 order, counsel for Mr. Price only addressed the newly-
20 discovered-evidence claim. So at that time -- at this
21 time, the state would renew its motion for the dismissal of
22 all the remaining claims, based on the grounds I set forth
23 before: successiveness, statute of limitations, and *laches*
24 because good cause has not been shown why the conditional
25 order should not become final as to those issues.

1 The state would also renew its motion to dismiss the
2 newly-discovered-evidence claim on the grounds set forth in
3 its written response; namely, that it does not meet the
4 five-factor test set forth in South Carolina case law;
5 specifically, that the evidence offered by Mr. Price is
6 cumulative to testimony that was presented at trial and it
7 would not change the result if a new trial were had.

8 Your Honor, in order to get to this point to have a
9 hearing on the motion, Mr. Shupper submitted some exhibits,
10 I believe attached to his response. Part of those included
11 a letter and affidavits. Your Honor, at this time, the
12 state would move to strike those documents, particularly
13 the letter, as it's -- it's not sworn. It's not competent
14 evidence. It -- it was -- we understand it was necessary
15 for him to show that he should have a hearing on the
16 motion. But in terms of considering the merits, we would
17 ask that that be -- that that be stricken.

18 And so those are the state's motions at this time.
19 I'll let Mr. Shupper respond.

20 THE COURT: Okay. Yes, sir.

21 MR. SHUPPER: May it please the Court, Your Honor.

22 THE COURT: Yes, sir.

23 MR. SHUPPER: Since we left chambers, Mr. Rutherford
24 has appeared in court and brought a matter to my attention.
25 And, Your Honor, I was going to ask the Court to -- to

1 allow the applicant's restraints to be removed. He poses
2 no threat. There's a roomful of deputies, and he's not
3 going anywhere. So I would ask the Court to order that his
4 restraints be removed.

5 THE COURT: All right. And I -- I -- you know,
6 security is one of those things I'll leave to security.
7 And if you specifically need him to -- to have a hand or
8 whatever, you know, just let me know we need to loosen or
9 whatever. Just let me know specifically, but I don't -- I
10 tend not to -- to interfere with that. I'll let security
11 handle that issue.

12 MR. SHUPPER: Your -- Your Honor ---

13 THE COURT: Yes.

14 MR. SHUPPER: --- thank you, Your Honor. At -- at --
15 and in view of that ruling, I would ask, based on what Mr.
16 Rutherford has presented to me in -- in the few minutes
17 since we left, if we could adjourn perhaps to chambers to
18 have a discussion about some -- some matters that I believe
19 are ---

20 THE COURT: Have you had a chance to -- to let Ms.
21 McCallister ---

22 MR. SHUPPER: Well ---

23 THE COURT: --- or did it just happen?

24 MR. SHUPPER: It's information that I was -- just
25 brought to my attention ---

1 THE COURT: Okay.

2 MR. SHUPPER: --- Mr. ---

3 THE COURT: Sure.

4 MR. SHUPPER: --- that Mr. -- Mr. Rutherford had that
5 I -- I did not have details about.

6 THE COURT: Okay. Yeah.

7 MR. SHUPPER: And ---

8 THE COURT: And I -- I ---

9 MR. SHUPPER: --- and ---

10 THE COURT: --- don't know what we're talking about,
11 but in -- absolutely.

12 MR. SHUPPER: Okay.

13 THE COURT: Y'all -- I will -- you know ---

14 MR. SHUPPER: Thank you.

15 THE COURT: --- where you're going and I'm learning.

16 MR. SHUPPER: Thank you, Your Honor.

17 THE COURT: Let's see you in -- in a -- in a couple.

18 And so we'll just be at ease for just a few moments.

19 MR. SHUPPER: Thank you, Your Honor.

20 THE COURT: All right.

21 (Whereupon, the Court went off the record at 10:36 a.m.)

22 (Whereupon, the Court went on the record at 11:36 a.m.)

23 THE COURT: All right. We, of course, have finished
24 the conference in chambers. Counsel for Mr. Price was
25 present, as well as the attorney general.

1 And now, I think you had concluded everything you
2 needed to tell me; is that right?

3 MS. MCCALLISTER: I think for now, Your Honor.

4 THE COURT: I think so too.

5 MS. MCCALLISTER: And I was ---

6 THE COURT: Yes. And now I'm listening to you.

7 MR. SHUPPER: Thank you, Your Honor.

8 THE COURT: Yes.

9 MR. SHUPPER: May it please the Court. Your Honor has
10 the record before as to the applicant's reply and
11 affidavits and memorandum of law in opposition to the
12 attorney general's motion.

13 Your Honor, the -- the state Supreme Court has ruled
14 in *McCoy v. State* in 2013, which dealt with the summary
15 dismissal of a second postconviction relief on the grounds
16 it was successive, untimely, and failed to prove a newly-
17 discovered-evidence claim -- essentially, the same claims
18 that were made in Price's case by the attorney general in
19 their motion for dismissal.

20 The -- the *McCoy* courts found that a genuine issue of
21 fact existed as to whether the petitioner's claim was
22 successive under 17-29 --- 27-90. And in the pleadings
23 submitted by the applicant, we have submitted an affidavit
24 -- well, a letter that was received by Mr. Price. It's
25 Exhibit A ---

1 THE COURT: And that's the document that the -- that
2 the state objects to because it is not in affidavit form,
3 correct?

4 MS. MCCALLISTER: Correct, Your Honor. This --
5 Exhibit A is just a letter. It's completely -- it's
6 complete hearsay, and we would object. And that's what --
7 the reason we were asking for that to be stricken and -- at
8 least as far as considering the merits of the motion,
9 because this is not proper evidence to prove the claim.

10 THE COURT: All right. And what of that?

11 MR. SHUPPER: Well, Your Honor, it is the -- one basis
12 ---

13 THE COURT: Uh-huh.

14 MR. SHUPPER: --- for the applicant filing a PCR based
15 on newly-discovered evidence. Mr. Price was in custody
16 when he received this letter. The -- the AG had complained
17 that it was beyond -- his PCR was filed beyond the one-year
18 statute of limitations. I -- I kind -- had a little
19 difficulty following that argument in their motion, when
20 the -- the letter is dated August 4th, 2013. And his --
21 and -- and the letter from Joshua Hamilton, which I will
22 refer to as the Hamilton letter.

23 While Mr. Price was in custody, the letter states that
24 (as read): "You don't know me." But he saw a -- it
25 recounts how he had seen an episode of *Gangland* that

1 supposedly depicted this incident for which the applicant
2 was tried and convicted in 2003. He goes on and it's in my
3 -- my reply that he recounts that he did not know Price,
4 but he was present to the club the night of the shooting.
5 Hamilton adds: "The story they told on *Gangland* wasn't the
6 honest truth. I witness you and another young man
7 wrestling in the hallway. The young man you was wrestling
8 with was a big guy with a blue button-up. Same guy walked
9 toward you and the other guy in blue. He saw another guy
10 who was a codefendant" ---

11 THE COURT: Yeah. The question -- the question was:
12 The -- there's -- as I understand it, there's an objection
13 to that being at least double hearsay as being towards the
14 merits. And you were going to share with me why you think
15 it is admissible.

16 MR. SHUPPER: Well, Your Honor, it was the first of
17 two notifications that the applicant received that
18 suggested there were witnesses who had not -- who had been
19 present but had not been interviewed nor had a -- the --
20 been presented at trial. They were unknown. And it was
21 only after the -- the episode of *Gangland* was seen by two
22 of these persons, Mr. Hamilton in his letter and Mr.
23 Lawrence, who is here, that it triggered their reaching out
24 and revealing that they were witnesses.

25 THE COURT: Okay.

1 MR. SHUPPER: It's not in affidavit form, Your Honor.
2 I concede that. But I would think that it's -- the -- the
3 -- the language that Mr. Hamilton used (as read): "Mr.
4 Price, as God is my witness, you was fighting for dear life
5 but that's passed. The truth should be known."

6 It's not an affidavit, Your Honor. But I think it
7 might qualify as a declaration under oath because he says
8 "by God as my witness." And I think substance is critical
9 in this case. And -- and I -- I ask the Court not to exalt
10 form over substance because of the critical importance that
11 this newly-discovered evidence had upon the -- the attorney
12 general's argument.

13 They're saying one, it wasn't -- the PCR is
14 successive. And -- and ---

15 MS. MCCALLISTER: Your Honor, just let me clarify that
16 before we get too far down that road. The issue is that
17 there are -- Mr. Price has pled multiple issues in his PCR.
18 He's pled newly-discovered evidence, and then, he pled,
19 like, six or seven other issues that have to do with
20 ineffective assistance of counsel and trial error and all
21 of those things.

22 We are saying that those issues are successive. They
23 are barred by the statute of limitations. And I think we
24 raised *laches*. And they're not issues that can be -- some
25 of them are not issues that can be raised in PCR. That's,

1 like, one bucket that we're saying those -- for those
2 reasons, those allegations should be dismissed.

3 As far as the newly-discovered-evidence claim, we did
4 not, in our motion to dismiss, say that it should be
5 dismissed based on a statute of limitations or
6 successiveness argument. We're saying, though -- we're
7 saying it doesn't meet the five-factor test for newly-
8 discovered evidence. We're not saying that it is barred by
9 the statute of limitations.

10 So I just want to clarify that. We're saying the
11 statute of limitations ---

12 THE COURT: Okay.

13 MS. MCCALLISTER: --- applies to the other ---

14 THE COURT: Yeah.

15 MS. MCCALLISTER: --- issues.

16 THE COURT: Right. Right.

17 MS. MCCALLISTER: Okay.

18 THE COURT: Right. And so let -- let's do -- let --
19 let's see if we can begin in this form or fashion. Set
20 aside the newly-discovered-evidence issue for -- for a
21 moment, okay?

22 MR. SHUPPER: Yes, Your Honor.

23 THE COURT: And address the other issues of
24 ineffective assistance -- ineffective assistance of
25 appellate counsel, and then, the concerns with regards to

1 the -- the trial court. It seems that those are three
2 categories of the -- of the other concerns, which are
3 addressed by Mr. Price.

4 I want to set aside the newly-discovered evidence.
5 Tell me: How do the other issues -- not the newly-
6 discovered evidence, but the other matters -- how do they
7 survive statute of limitations/successive-PCR issues?

8 MR. SHUPPER: Your Honor, I think it's apparent that I
9 did not argue those other ---

10 THE COURT: Okay.

11 MR. SHUPPER: --- issues in my reply.

12 THE COURT: Yes, sir.

13 MR. SHUPPER: I did plan to have Mr. Price address
14 those issues because he's got a much better grasp on them
15 and perhaps a different view than -- than I have. But I
16 did not raise and argue against the allegations on
17 successive on the ineffective assistance of counsel. But
18 it also did include PCR counsel. And because of the long
19 history of this case, I -- I -- I didn't feel that I could
20 properly argue or focus on those other issues ---

21 THE COURT: Okay.

22 MR. SHUPPER: --- because I thought the most critical
23 issue and the best issue in this matter, this PCR where
24 he's seeking relief from Court, based on newly ---

25 THE COURT: On the ---

1 MR. SHUPPER: --- discovered ---

2 THE COURT: --- other -- okay.

3 MR. SHUPPER: --- evidence ---

4 THE COURT: All right. And so ---

5 MR. SHUPPER: --- was the newly-discovered ---

6 THE COURT: I understand.

7 MR. SHUPPER: --- evidence claim.

8 THE COURT: I understand. So let's shift, then, to
9 the newly-discovered evidence.

10 MR. SHUPPER: If -- if -- so if ---

11 THE COURT: And you're ---

12 MR. SHUPPER: --- we could ---

13 THE COURT: --- going to address the five factors for
14 me.

15 MR. SHUPPER: Yes, Your Honor. If I might have a
16 moment?

17 THE COURT: Sure.

18 (Off the record briefly.)

19 MR. SHUPPER: Your Honor, the -- the courts have
20 outlined the five factors in -- in -- in numerous
21 decisions: *Clark v. State*; as I mentioned, *McCoy v. State*,
22 a 2003 case from the Supreme Court; and -- and in *Renwick*
23 *Mose*, a -- a 2017 case in the Supreme Court. All of them
24 dealt with newly-discovered evidence. And ---

25 (Off the record briefly.)

1 MR. SHUPPER: Your Honor?

2 THE COURT: Yes.

3 MR. SHUPPER: Mr. Price can't reach. Could -- could
4 we ask that his handcuff be removed so he can ---

5 THE COURT: He does ---

6 MR. SHUPPER: --- write me ---

7 THE COURT: --- need to be ---

8 MR. SHUPPER: --- a note?

9 THE COURT: --- able to write.

10 If you all -- you're right-handed, Mr. Price?

11 THE APPLICANT: Yes, ma'am. Yes, ma'am.

12 THE COURT: Okay.

13 He needs to be able to -- to utilize his right hand to
14 make some notes.

15 (Off the record briefly.)

16 MR. SHUPPER: I know Your Honor is familiar with the
17 five factors those ---

18 THE COURT: Yes.

19 MR. SHUPPER: --- enunciated in *Clark* and *McCoy* and
20 *Mose* (as read): "To obtain a new trial based on after-
21 discovered evidence, a party must show that the evidence
22 would probably change the result if a new trial was held --
23 is had; has been discovered since trial; could not have
24 been discovered before trial; is material to the issue of
25 guilt or innocence; and is not merely cumulative or

1 impeaching."

2 Certainly, I -- I would argue that the -- the
3 affidavit of Mr. Price and the affidavit of Mr. Lawrence
4 and the letter of Mr. Hamilton all raise doubts, material
5 issues that are material in disputed facts as to what
6 actually occurred on the night in question.

7 As to probably changing the result of the -- if a new
8 trial is had, you have two eyewitnesses not previously
9 known to anyone. And what -- the prosecution, from what
10 I've reviewed, nor the defense that, if they were known,
11 they would've been called to testify and would probably
12 change the result of a new trial.

13 It -- this case was a -- a very close case, Your
14 Honor. And -- and -- and -- and -- and this -- the -- on
15 direct appeal, the -- the -- the gravamen of the state's
16 prosecution is that he was a gang member and a gang leader.
17 And it was -- all of that evidence was introduced to the
18 Court through testimony of a Richland County deputy who was
19 identified as a gang expert.

20 And, in fact, on direct appeal, Justice Toal found
21 that he was -- it was inadmissible hearsay, his testimony.
22 However, she concluded that any error was harmless. So the
23 conviction stood.

24 But the key witness was a Mr. Jones ---

25 (Off the record briefly.)

1 MR. SHUPPER: --- Marcus Jones. At -- this -- this
2 incident occurred in a nightclub, Your Honor, at a
3 fraternity party with -- attended by a lot of USC football
4 players and basketball players, athletes.

5 The key witness was Mr. Jones. He was what I would
6 call a "roadie" for the DJ. He assisted in setting up the
7 -- the mics, the sound equipment, the -- and -- and at the
8 end of the evening, he was involved at the time of the
9 shooting with gathering wires and -- and picking up the
10 equipment that had been used during the -- the performance
11 by the DJ.

12 He is a witness that testified that, if I might, from
13 what I gather from the transcript, was some distance away
14 from where the shooting occurred. He heard a single pop
15 and then looked up and he claims that he's -- it was a lot
16 of fog and smoke, but he claims that he saw what I can try
17 to reconstruct, not being there, was the applicant firing
18 down to someone laying down on the ground.

19 This -- the substance of Mr. Hamilton's letter and Mr.
20 Lawrence's affidavit, are not just merely cumulative or
21 impeaching, but go right to the -- in -- the issue of guilt
22 or innocence because it supports a self-defense claim.
23 They both talk about two men, Mr. Price being about five-
24 foot-six or five-seven, and the other fella that was a -- I
25 think he was a lineman for the Gamecocks.

1 I think his -- he was described as huge, a -- a giant,
2 you know. I would -- I -- I don't know his exact
3 dimensions but probably a foot taller and maybe a hundred
4 and fifty pounds more than Mr. Price, where the -- the
5 witnesses describe an upright struggle. And then they
6 describe seeing two flashes and hearing two booms. And
7 they -- I think everybody turned and ran after that.

8 But that certainly would've been valuable if presented
9 in trial and might well have helped the jury get a clearer
10 picture. Mr. Jones's testimony is sketchy. It was -- he
11 -- his -- his -- the -- the main discrepancy would be he
12 described seeing the -- the -- whoever it was -- because I
13 don't think he ever identified Mr. Price from a lineup. So
14 he couldn't recognize him.

15 And I -- it -- but he -- he did describe -- and the
16 solicitor enacted a -- I guess, did a demonstration at
17 trial, where it appears that it was a -- standing over,
18 shooting a guy already laying on his -- on the ground. And
19 then, these witnesses' testimony disputes that. I think
20 that would've been very valuable. Ms. Rushing will testify
21 to that information.

22 In fact, if I'm not mistaken, the -- the -- Jones said
23 he -- he said his common sense told him someone was being
24 shot on the floor. There -- if -- if you look at the
25 testimony, it's -- I think it raises doubts about what he

1 could see, particularly under -- by his own admissions, it
2 was foggy and smoky. And -- and he was a great distance
3 away.

4 He -- I -- I think that it -- there are some
5 contradictions in -- in his -- if I recall, in one point,
6 he said he saw a pop, but then later said he heard it. I
7 think the solicitor, in questioning him, said he heard a
8 pop and then he -- he saw flashes and heard two booms. So
9 a -- my -- my -- my impression of the roadie's testimony,
10 based on reviewing the -- the transcript, is that he wasn't
11 paying any attention until he heard the pop; and then when
12 he heard the pop, he looked up. I think there are some
13 discrepancies in his -- in his testimony. But that -- that
14 could be resolved on a new trial and clarified.

15 Aside from that, I think these -- these two items
16 submitted as newly-discovered evidence, the Hamilton letter
17 and the Lawrence affidavit, would probably change the
18 result if a new trial was had. And as I said, Ms. -- Ms.
19 Rushing will address that issue.

20 Has been discovered since trial: I think it's
21 unquestionable that it was discovered since trial. Mr.
22 Price submitted an affidavit in -- that was included with
23 the applicant's reply and memorandum of law, where he
24 outlines exactly how he came to view and become aware of
25 Mr. Hamilton being a witness. He didn't -- he states he

1 didn't know Hamilton. Hamilton states: "I don't know you,
2 Mr. Price. But I saw this episode of *Gangland* that -- and
3 it triggered my recollection that I was in that club that
4 night. And what I'd saw on that video, that is not what I
5 saw in person."

6 And he'd never come forward. And to my knowledge, he
7 would -- never interviewed by anybody. So he was unknown.
8 It was discovered since trial. And it -- it -- the PCR was
9 filed within one year, which is the exception to the first
10 part of the statute -- said one year from trial then or
11 from the discovery.

12 So the -- and that's what had happened in these other
13 cases. The -- the PCR courts overlook the discovery-rule
14 section and denied the PCRs and they were reversed because
15 of the exception that says within the -- what's known as
16 the discovery. And I -- Your Honor, I know you know all
17 this.

18 THE COURT: Now, let ---

19 MR. SHUPPER: But ---

20 THE COURT: --- me ask you this question. And, of
21 course, I -- I just got here today. So you -- you all are
22 very -- you've reviewed, no doubt, the transcripts. My
23 question is: Was self-defense raised at the trial?

24 MR. SHUPPER: Yes, Your Honor.

25 THE COURT: Okay. And so tell me the reason why this

1 evidence from Mr. Lawrence, Mr. Hamilton, could not have
2 been discovered before trial.

3 MR. SHUPPER: Nobody knew he was there. The -- the --
4 even Lt. Smith, Stan Smith from the major-crimes division
5 of the sheriff's department who's now a major, said that
6 we're -- we're -- they didn't have a lot of witnesses
7 coming forward.

8 THE COURT: Okay.

9 MR. SHUPPER: And -- and so -- and the unique
10 circumstances of the event, I think, provide some
11 explanation as to why it wasn't discovered before. You had
12 a big fraternity party at a off-campus place on Garners
13 Ferry Road known as the Voodoo Lounge or something like
14 that. It's now some kind of a -- a church but --
15 ironically.

16 But they -- the -- a fraternity did -- included a
17 bunch of football players and -- had a party. They
18 advertised it with flyers. They had a DJ. The place was
19 packed, according to the testimony of virtually everyone
20 involved.

21 Place was packed. There was dancing. There was some
22 arguments and altercations. There were -- a description of
23 some prior conflicts between people at the party that were
24 all broken up without any serious damage.

25 But I think it's the total agreement that about 2

1 a.m., the music stopped and the lights went up and
2 everybody left -- was exiting. And one of the witnesses
3 describes them counting money, and they're basically
4 getting all the patrons out.

5 So -- so my -- my -- following -- following the lights
6 going on and the music stopping, people were congregating
7 outside in the parking lot. A lot of people were in the
8 parking lot. But there's no -- I think the testimony was
9 there were hundreds of people in this place.

10 But when the shooting started, the lights were on; the
11 music had stopped; and there weren't many people in there.
12 That's why Mr. Jones, the roadie, described his packing up
13 the -- winding up the -- the mics and -- and the cords for
14 the microphones and the speakers and such.

15 And, Your Honor, I can give you some reference from
16 Lt. Smith on page 53 of the transcript and page 512 of -- I
17 believe it's the appendix. Kind of hard, Judge. I got all
18 these different -- I've got different binders with
19 different -- the same testimony.

20 But I have a copy of -- that I could provide you, Your
21 Honor, where Lt. Smith says (as read): "I learned there
22 weren't a lot of witnesses readily available at that point
23 in time." And he got there shortly after shooting. And
24 that's on page 53 or 512 of the -- in the big, bold numbers
25 on the other record.

1 Marcus Jones's -- I have some excerpts from Mr.
2 Jones's testimony. I -- I'd just say that it goes from 140
3 to 161. It's 163. And in those passages, he describes --
4 that -- that's where Solicitor Pascoe did a demonstration.
5 Again, Your Honor, it -- it -- not having any diagrams
6 where they're -- they're referring to photos and diagrams
7 that aren't available, so it was very hard to reconstruct
8 in my mind what happened.

9 But it's -- the -- the pertinent parts is that the --
10 Mr. Jones on direct, on page 140 (as read): "Tell the jury
11 what you saw when -- as you looked to the door."

12 "After I heard the first shot, it was very foggy. But
13 after that, I saw two more shots. I saw the gunfire."

14 And then, it goes on: "You actually saw the shots?"

15 "The gunfire" -- answer.

16 "And you saw the gunman?"

17 Answer: "Vaguely. From the smoke and stuff. I could
18 see his feet, put it like that."

19 Pretty sketchy ID, Your Honor, I would submit.

20 "Did you see the victim?"

21 "I could see his feet. I really couldn't see the
22 victim very good. But I knew somebody was being shot,
23 though."

24 "Let me ask this: What was the lighting like inside
25 the club at the time of the shooting?"

1 "The lights were on. But from it being so hot in the
2 club, like, you open the door and from it being cool
3 outside, there's a lot of fog and smoke coming back in the
4 club from the front and the back. So at that time it was
5 kind of foggy inside the club."

6 Your Honor, I think that description speaks for
7 itself, in terms of maybe being dubious as to how accurate
8 his observations were. Whereas in Mr. Hamilton's letter
9 and Mr. Lawrence's letter, the -- they're talking about
10 being nearby and -- and observing something totally
11 different, which is essentially two men -- a -- a big guy
12 and a little guy -- struggling.

13 And apparently, Price had had a -- from his own
14 testimony, had a gun in his waistband that -- that they --
15 that -- that the deceased rushed him; pressed him against
16 the wall; and he was struggling, as Mr. Hamilton says, for
17 his life. And there -- Hamilton didn't say he's -- see the
18 gun, but he saw a guy approach while the two -- Price and
19 the deceased were struggling. And he'd saw Mr. Price's
20 codefendant approach with a silver object in his hand, and
21 he fired the shot.

22 So that's what Hamilton describes as a pop. Then he
23 ran. And he heard -- and Hamilton describes hearing two
24 booms and two flashes. But at that time they were standing
25 upright, engaged in a struggle over the gun.

1 Believe there was also testimony about gunshot residue
2 being discovered on the deceased person following his
3 postmortem or -- fully ---

4 (Off the record briefly.)

5 MR. SHUPPER: His -- his left hand tested positive.
6 So I think those factors alone support that it would've
7 probably changed the result of a new trial. And it -- by
8 the -- the nature of their statements, Hamilton says: "I
9 don't know Price. Price didn't know me, but I'd saw this
10 episode of *Gangland* and that's what triggered me reaching
11 out."

12 And -- and the envelope -- the letter is dated August
13 4th, 2013. The envelope is postmarked August 7th. For
14 some reason -- and I believe that this -- I know why --
15 Price's mail was being screened by the SCDC Correspondence
16 Review Committee.

17 So instead of this letter postmarked August 7th,
18 mailed from -- from Charlotte and -- and with Joshua
19 Hamilton's address from Kannapolis, North Carolina, it was
20 -- got -- it was stamped received August 30th, three weeks
21 later, in the headquarters office of correspondence review.
22 It was ultimately forwarded to Mr. Price, and his testimony
23 was that he received it, I think, about the -- early in
24 September.

25 But as to the timeliness issue, he filed in July,

1 within one year, so within the exception under the
2 discovery rule of the PCR statute. It couldn't have been
3 discovered before trial because Price didn't know Hamilton
4 and Hamilton didn't know him.

5 The only thing that triggered this appearance was this
6 episode of *Gangland* that had been seen by Mr. Hamilton and
7 by Mr. Lawrence. And I think SCDC may have used it for a
8 training film; I don't know. But it's certainly caused
9 repercussions for Mr. Price.

10 Is material to the issue of guilt or innocence: I --
11 I -- I -- you have eyewitness testimony that the jury
12 didn't have the benefit of. I think that's material. The
13 eyewitness testimony supports the claim of self-defense.

14 So it's not merely cumulative or impeaching. It --
15 it's -- and Ms. -- Ms. Rushing will testify as to what they
16 would've done, had they known about these witnesses and
17 will go further into that.

18 Again, Lawrence did not come forward. And his
19 affidavit states why. He was married. He -- he didn't
20 want his wife to -- it was his wife's birthday or the day
21 after his wife's birthday, something to that effect, and he
22 didn't want his wife to know he had gone to the club that
23 -- at that hour. So he didn't -- he didn't come forward.

24 The same episode of *Gangland* triggered his
25 recollections. He ended up, as I recall, some nine years

1 later, I think, in 2011/2012, he ended up -- his -- with
2 his -- I've -- I think his grandfather's death, his wife
3 leaving him, his getting fired, and getting arrested and he
4 had seen this *Gangland* episode. And it -- it -- he
5 reflected and talked to his family about reaching out to
6 Price.

7 So that was the second item that could not have been
8 discovered because nobody knew that Lawrence was there that
9 night. Now, if the investigators knew that Lawrence and
10 Price lived in the same apartment complex and been friends
11 and went to high school together -- they -- they rounded up
12 a bunch of his high school associates. And -- but nobody
13 ever interviewed him and determined that he was a witness.

14 He was asked -- and I -- I would expect that he was --
15 he did have a conversation with law enforcement. But it --
16 they kept asking: "Do you know where Price is? Do you
17 know where Price is?" Nobody ever asked him if he was
18 present. And he didn't volunteer it because of the reasons
19 set forth in his affidavit, and which he'll explain.

20 THE COURT: And tell me, because I -- I'm looking at
21 the transcript and -- and there is testimony with regards
22 to Mr. Price being pinned against the wall, about being
23 rushed. And that was presented to this jury. It -- it
24 does appear that the self-defense defense was presented.

25 So one of the concerns that Ms. McCallister has

1 articulated is that this testimony would be cumulative. Do
2 you want to address that also? Why isn't this cumulative?
3 Because that ---

4 MR. SHUPPER: That -- well ---

5 THE COURT: --- it was ---

6 MR. SHUPPER: --- Your Honor ---

7 THE COURT: --- presented ---

8 MR. SHUPPER: --- the testimony ---

9 THE COURT: --- to the jury.

10 MR. SHUPPER: --- you just mentioned ---

11 THE COURT: Uh-huh. Yes.

12 MR. SHUPPER: --- about Price being rushed was from
13 his codefendant and -- well, and from Mr. Price. But this
14 is from an independent source, which I think, when -- when
15 a jury is determining who to believe and who not to
16 believe, they -- they -- they -- they -- they do an
17 equation, a calculation. Each juror would determine if --
18 who -- as you know, it -- they can believe all or none of
19 what a witness says and some in part or -- and had the jury
20 had the benefit of the testimony contained in the Hamilton
21 letter and that Lawrence affidavit, it would've been
22 corroborated.

23 And it would've been from someone other than the
24 defendant or his codefendant, who admitted to firing the
25 first shot. So to me, that would put it in a -- a

1 different category being more -- likely being more
2 trustworthy than what the accused said and what the
3 codefendant said and -- and as I said, independent
4 eyewitness testimony, Your Honor, with people not involved
5 in the crime. I think it would've clearly been beneficial
6 and -- and could've easily affected the outcome of the
7 trial.

8 THE COURT: Okay.

9 MS. MCCALLISTER: Your Honor, if I could respond?

10 THE COURT: Yes.

11 MS. MCCALLISTER: Thank you. Your Honor, the state
12 submits that this is cumulative evidence. There was -- Mr.
13 Price testified and gave his story of self-defense. Mr.
14 Brooks, who was the codefendant, also testified.

15 There was a third person, Jason Woods, who was an
16 acquaintance of Mr. Brooks and Mr. Price. He was called to
17 testify. His statement was similar to this description
18 given by Mr. Brooks and Mr. Price of what happened that
19 night.

20 The defense called several expert witnesses, including
21 and expert witness who said that there was gunshot residue
22 on the victim's hands and an expert witness talking about
23 -- essentially, that to refute the testimony that -- that
24 there was someone on the ground; that he could not have
25 been shot when he was on the ground, based on the bullets

1 and that sort of thing.

2 So there was a very vigorous defense of self-defense
3 that was presented at trial. And I don't think it's fair
4 to say I -- that, you know, there was only one witness who
5 said the -- who said these things. There were multiple
6 witnesses. Yes, one was the codefendant.

7 It was essentially -- the testimony at trial is
8 essentially what Mr. Price says it was: that they were in
9 a hallway and they were fighting over this weapon. And to
10 the jury just needed to believe whether that -- the
11 ultimate killing of the victim was done in self-defense or
12 not.

13 The -- the evidence at trial was that the victim did
14 not have a gun. Mr. Price and his codefendant, by their
15 own admissions, left the club, went to two different cars,
16 retrieved two different guns, and came back into the club.
17 And both ended up shooting the victim.

18 So just because they like this evidence better or --
19 it doesn't mean that it wasn't presented at trial. The
20 defense was always self-defense. That was clearly the
21 defense at trial.

22 The jury had that evidence in front of them to
23 consider. And this evidence doesn't do anything to advance
24 that defense, other than being another person. And that's
25 exactly what being cumulative is.

1 And so this evidence -- and I still don't know if
2 we're talking about Hamilton or not. I'm sorry. But I --
3 I -- I -- I don't want to waive my objection to his -- to
4 his letter coming in, because I don't think it's -- it's
5 proper evidence.

6 But, I mean, you know, they're talking about seeing
7 this episode of *Gangland*. And obviously, what's presented
8 and reenacted on a TV show is not what was presented
9 necessarily at trial. And just because they saw something
10 on TV that doesn't look like what they thought happened
11 doesn't mean that's what the jury was shown at trial.

12 The jury was shown -- was presented with self-defense,
13 and the jury rejected it. And all that this evidence does
14 is say exactly what the jury was told at trial. And that
15 was not enough for Mr. Price.

16 And so for -- for those reasons, we do not believe
17 that this would have changed the result at trial or that it
18 is anything other than being cumulative. And -- and so it
19 should be -- it fails. He fails on those two things. He
20 fails on those two prongs to make a *prima facie* showing
21 that he's entitled to go forward with an evidentiary
22 hearing on this.

23 THE COURT: All right. So there was -- there was
24 another individual, Mr. Woods, that testified ---

25 MS. MCCALLISTER: Yes, Your Honor.

1 THE COURT: --- and was ---

2 MR. SHUPPER: Your Honor, I -- I'm searching for -- I
3 -- I didn't see any reference to Mr. Woods ---

4 MS. MCCALLISTER: Jason ---

5 MR. SHUPPER: --- being the ---

6 MS. MCCALLISTER: --- Jason Woods. I believe his
7 testimony starts somewhere around page 349/350 of the
8 transcript, Your Honor.

9 THE COURT: Okay.

10 MS. MCCALLISTER: I'm not -- it may be -- the
11 transcript is a little confusing. It's two volumes. And I
12 think they're not numbered consecutively, like each volume
13 starts at one. So I'm not sure if he's in the first or
14 second ---

15 THE COURT: Okay.

16 MS. MCCALLISTER: --- volume.

17 THE COURT: And tell me the page number again?

18 MS. MCCALLISTER: It's 349/350.

19 THE COURT: 349?

20 (Off the record briefly.)

21 MS. MCCALLISTER: Your Honor, I don't want to have
22 misspoke. I -- and I may have. It -- the -- it may not
23 have been testimony from Mr. Woods, but his statement was
24 admitted into evidence.

25 THE COURT: Okay.

1 MR. SHUPPER: It -- Your Honor, I found it. Woods
2 doesn't say he was a witness. Woods testifies that he got
3 a phone for Mr. Price after the fact and that he had
4 contact with him. And he claims, as -- apparently, his
5 statement to the police was that Price said that he shot.

6 But he wasn't a witness. He didn't see it. That's
7 vastly different than Hamilton and -- and Lawrence's
8 testimony.

9 THE COURT: So ---

10 MR. SHUPPER: He -- yes ---

11 THE COURT: So ---

12 MR. SHUPPER: --- Your Honor.

13 THE COURT: --- Ms. McCallister, what you were telling
14 me is that the -- the -- the evidence, the witnesses that
15 were offered in support of the self-defense defense were
16 the -- the codefendants at trial.

17 MS. MCCALLISTER: Mr. Price and his codefendant, Mr.
18 Brooks, did testify.

19 THE COURT: Okay.

20 MS. MCCALLISTER: And I've found it now, Your Honor.
21 I'm sorry.

22 THE COURT: All right.

23 MS. MCCALLISTER: Mr. -- Mr. Wood did testify.

24 THE COURT: Yes.

25 THE COURT: And his statement came into evidence. And

1 I'm trying to find the piece of the statement that I wanted
2 to ---

3 THE COURT: Okay.

4 MS. MCCALLISTER: --- point out, if you'll just bear
5 with me just one moment.

6 (Off the record briefly.)

7 MS. MCCALLISTER: So he says he "heard the gunshot and
8 Ryan Brooks ran out of the club, got in the truck with us,
9 and said 'Go,' and we left. He had a gun in his hand. Mr.
10 Brooks had a gun in his hand."

11 And then, he's testified that he -- sorry.

12 MR. SHUPPER: Your Honor, that would put Mr. Woods in
13 the car at the time of the shooting. And Mr. Brooks, the
14 first shooter, jumped in the car with him. He wasn't a
15 witness, Your Honor ---

16 MS. MCCALLISTER: That ---

17 MR. SHUPPER: --- as -- as to anything about Mr.
18 Brooks fleeing the club and having a gun with him. Doesn't
19 have anything to do with Price.

20 MS. MCCALLISTER: It does have to do with Mr. Price.
21 He then -- he then later testifies that -- did -- it -- the
22 police asked Mr. Woods in his statement: "Did -- did
23 Jeroid tell you anything specific about what happened at
24 the club?" And he, essentially, in his statement told the
25 police that Price had told him the gun was trying to take

1 his gun from him and that's why they shot -- that's why
2 they shot. So ---

3 MR. SHUPPER: All right. If ---

4 MS. MCCALLISTER: --- that testimony came in through
5 Mr. Woods's statement.

6 MR. SHUPPER: I -- I'm sorry. I don't see that.
7 Where ---

8 MS. MCCALLISTER: That's on ---

9 MR. SHUPPER: --- where is ---

10 MS. MCCALLISTER: --- page ---

11 MR. SHUPPER: --- that?

12 MS. MCCALLISTER: --- 349 and 350 of Volume 1. And I
13 think I was saying Woods plural. But in the transcript,
14 it's -- it's Jason Wood, no "s."

15 THE COURT: It is both, actually. Yeah.

16 MR. SHUPPER: If -- if Your Honor pleases?

17 THE COURT: Uh-huh.

18 MR. SHUPPER: Are -- are you talking about the big,
19 bold numbers that -- Ms. McCallister, 349?

20 MS. MCCALLISTER: Mine does not have that number on
21 it. My -- I'm talking about this number, I think.

22 MR. SHUPPER: Okay. And it's . . .

23 (Off the record briefly.)

24 MR. SHUPPER: Your Honor, it appears most of his
25 testimony is about Mr. Brooks and that he brought his cell

1 phone for Mr. Price after the fact. I -- I don't think
2 it's evidence that he witnessed the shooting. He testifies
3 about Brooks jumping in the car with a gun. So he was in
4 the car when the shooting occurred.

5 And he -- he made a statement and as far as the -- on
6 -- I don't -- do you have the big numbers or little
7 numbers, Your Honor?

8 THE COURT: I wish I could help you. I have one
9 number. And I'm looking at 350.

10 MR. SHUPPER: Okay.

11 THE COURT: If -- if this helps -- this may be
12 helpful. If you look at the page, it's on the -- the left-
13 hand side. It's on the internal part of the page. And of
14 the right-hand side, it is on the external, upper
15 ---

16 MR. SHUPPER: Okay.

17 THE COURT: --- part of the page, if ---

18 MR. SHUPPER: Yes, Your Honor.

19 THE COURT: --- that's helpful.

20 MR. SHUPPER: Thank you.

21 THE COURT: Uh-huh.

22 MR. SHUPPER: At the bottom of that page -- and -- and
23 -- and I -- I don't know if Your Honor had -- had a chance
24 to read the other portions of his testimony where he's
25 talking about Brooks getting in the car, Brooks having a

1 gun. It -- they -- they -- there was reference to his
2 statement.

3 And -- and -- and with regards to his statement, on
4 page 343 (as read): "Do you remember giving a statement to
5 police on December 17th?"

6 "I guess it was the 17th."

7 Question: "Do you remember telling him you learned
8 the next day that Price and Brooks may have been involved?"

9 Certainly, not witness information.

10 "I don't remember that. But, you know, if I said
11 that, I said it. I don't remember that. But if I did, you
12 know, maybe I did."

13 "You told the police on December 17th that you learned
14 by Sunday, December 8th, that the defendants may have been
15 incident in a shooting, right? That was what you told
16 police."

17 "I don't know."

18 "That's what you said."

19 "And then, you admit that you were anything but
20 forthright?"

21 Well, I think that was kind of par for the course or
22 -- from a review of Lt. Smith's testimony. People didn't
23 want to come forward. Wasn't easy to find witnesses.

24 And -- and then, it says -- I think -- he testifies
25 later on about -- well, he says he's not a Blood; he denies

1 being a Blood. He does admit to buying a cell phone for
2 Mr. Price. He -- he didn't tell the police about it. And
3 the police came back and reinterviewed him.

4 I -- I think one thing -- (as read): "You don't
5 remember telling police that he said the guy was trying to
6 take his gun from him and B.D. -- B.D. shot him in the
7 side?"

8 Again, that -- hearsay at best. If it -- it's -- it's
9 -- it's not consistent with his prior statements. I don't
10 know how much -- and I -- I think that fact that Woods was
11 -- had given inconsistent statements diminishes any value
12 his testimony had, in terms of contributing to the self-
13 defense claim of applicant. I don't -- I don't think it
14 has -- you -- he is -- he admits that he assisted by giving
15 him a phone; that he gave statements ---

16 THE COURT: Well, now, on 359 at line -- it really
17 begins line 4, they're talking about a statement that's
18 been put into evidence. And it says: "I believe you told
19 them -- and I'm reading from State's Exhibit 68 -- that,
20 quote, yes, I spoke to B.D., end quote."

21 And it -- the -- it -- and the answer of Mr. Wood is:
22 "That's his name, his street name."

23 Question: "Okay. That's Brooks." And it goes back
24 to the statement. "The next day and he told me that J.P.
25 and the victim were having words at the front door and the

1 victim saw that J.P. had a gun in his waist. B.D. said
2 that the guy rushed J.P. and was trying to take his gun
3 away from him."

4 And the answer: "Correct."

5 Question: "Did you tell them that?"

6 Answer: "Correct."

7 "Okay. And B.D. -- that's Brooks, quote, said that he
8 then pulled his gun and shot the victim in his hip."

9 Answer: "Correct."

10 "And that's what he told you?"

11 "B.D. then said that after he shot, he then turned and
12 went out the door. Right."

13 Question at line 24 of page 359: "Okay. And you told
14 the agent on December 17th; is that right?"

15 At 360 -- page 360, line 1: "Yes, I did."

16 And line 2: "Okay. And that's what Brooks told you
17 the day after you were at the Voodoo Club?"

18 "Either Saturday or Sunday, one of the two."

19 Now -- and then, I think it's important at page 360 at
20 line 17: Question: "And, Mr. Woods, you didn't see
21 anybody shoot anybody that night?"

22 Line 19: Answer: "I did not see anybody."

23 Question at line 20: "You just heard shots; you
24 didn't see anything?"

25 Line 22: "All I heard was the shots, and I saw Brooks

1 run and get in the car. That's it."

2 So what is coming into evidence is a statement, not
3 that Mr. Woods -- or Wood saw anything. He is talking
4 about -- he being Mr. Wood -- is talking about what he was
5 told by B.D., or Mr. Brooks, the day after the event, as I
6 understand it. It's a statement.

7 MS. MCCALLISTER: That's correct, Your Honor. It is
8 his statement, but it corroborates the -- the testimony of
9 Mr. Brooks and Mr. Price at trial. Because he's saying
10 that that's what they told him shortly after the shooting:
11 that it was self-defense and they were in the hallway,
12 struggling over the gun. That's what they then came and
13 testified to at trial.

14 And so there is at least this third person who has
15 some knowledge of that. And I would point out, Your Honor,
16 that this is being asked on cross-examination, that -- on
17 page 359. So they -- the defense obviously felt that this
18 was helpful testimony, because they're the ones who
19 elicited it. So they obviously felt that Mr. Wood provided
20 something that went towards Mr. Price's defense of self-
21 defense.

22 MR. SHUPPER: If I understand Your Honor, Mr. Woods
23 was charged with obstruction of justice. He -- he was --
24 if I recall some of the testimony I glanced at, he was
25 trying to make points because he had a charge. He had

1 clearly given inconsistent statements in his -- his
2 testimony; became suspect, I think, during the questioning,
3 where he -- he was faced with what he stated on earlier
4 interviews. And later, he came back and tried to correct
5 his -- his statements. And -- and certainly, he was
6 charged as an accomplice or as -- for lying during the
7 course of the investigation.

8 I don't think -- I -- that that testimony would be as
9 reliable as testimony for someone that was not charged, was
10 not suspect, was not aiding and abetting, or was not
11 charged in trying to diminish his role. I -- I think
12 giving a statement where he'd said he heard someone say
13 that he heard this is -- is not the same as eyewitness
14 testimony, where a witness will say, "I saw this. I
15 haven't talked to police. The police have never heard this
16 before. I haven't talked to any investigators or
17 attorneys. This -- what I'm telling was never heard
18 before."

19 And that's essentially what Hamilton's letter and
20 Lawrence's affidavit state: "Nobody knew we were there.
21 We were eyewitnesses. It -- we're not codefendants. And
22 we're not charged with being accessories or having lied
23 previously."

24 So I think, if we're going to look at the -- the
25 testimony where they discussed his statement and his

1 hearsay, that because there's a reference that there was a
2 struggle, I think, is -- is not the same as eyewitness
3 testimony that: "I saw a struggle." One is: "I heard
4 there was a struggle." This is -- one of the -- one of the
5 guys who had a gun and was -- shot this guy said that: "I
6 heard there was a struggle."

7 I mean, because I think it's pretty clear. Brooks
8 fired the first shot. He -- Brooks' testimony was -- he
9 says that he saw the struggle and that when he saw the gun
10 pointed towards him, that's when he fired and he turned
11 around and left.

12 So I don't think he witnessed what happened after
13 that. I don't think he was competent to testify as to the
14 position of the two -- Mr. Price and Mr. Smalls, because he
15 fired a shot and turned around and ran and jumped in the
16 car with -- with Woods and friends.

17 He -- so he -- even Brooks's testimony was limited to
18 essentially what he saw during the struggle where he fired
19 the shot and turned and left. But at -- he didn't -- there
20 were two bangs, two flashes after that. And if -- my
21 understanding is Brooks was on his way to the car with his
22 gun to get the hell out of Dodge -- excuse me, Your Honor.

23 But -- but I -- I -- I -- I think that testimony and
24 -- is -- is certainly less convincing than eyewitness
25 testimony that we would offer that -- from persons not

1 previously known who the jury hadn't had the benefit of
2 their testimony, who said: "I was an eyewitness. I didn't
3 tell anybody. And I saw two guys struggling and upright
4 and saw flashes and heard a boom and then -- then saw Price
5 leave."

6 But nothing close to what the demonstration in the
7 courtroom was about, essentially, an execution for after
8 the first shot was fired, that -- that the roadie, Mr.
9 Jones, claims that he saw him pointing a gun down and
10 firing two shots in the guy laying on the ground.

11 I -- I -- I think that the -- the quality of the
12 testimony, the -- the lack of doubts about the truthfulness
13 stands apart from what was presented at trial. That -- it
14 -- it -- it's -- it's -- well, Your Honor, I just think
15 that it's not merely cumulative or impeaching, but it is
16 testimony never heard before that could affect the outcome
17 of the trial. Because it describes not just the shooting.
18 It's -- it goes beyond what -- what Woods testifies and
19 what -- beyond what Brooks says.

20 Because Brooks says he fired and left and Woods says
21 Brooks told him this stuff when he jumped in the car with a
22 gun. But that -- when you get beyond that, what he said
23 about what Brooks told him, or B.D. told him, I think, it
24 -- it -- the -- the -- it becomes more suspect. And I
25 think that suspect nature of his testimony is why, if a new

1 trial were granted and Lawrence and Hamilton would testify,
2 that the jury would've had untainted witnesses, not tainted
3 by the charge of being accessories or aiders and abettors
4 and -- and would've well made a difference in the outcome
5 of the trial.

6 It's -- it's -- it's -- Your Honor, I mean, it goes
7 that -- I concede that attorney general's claim that self-
8 defense was raised. But -- but the nature of the evidence
9 the jury heard was vastly different, in my view. I would
10 submit that there's a big difference between hearsay
11 evidence from a codefendant or a person charged with lying,
12 aiding and -- obstruction and testimony from witnesses who
13 had no role in it; didn't know the parties.

14 Certainly, Hamilton says: "I don't know you, and you
15 don't know me. But I saw this on this *Gangland* show, and,
16 you know, I -- I saw you engaged in a struggle."

17 MS. MCCALLISTER: And, Your Honor, if I could -- if I
18 could sort of respond to that piece in particular, I'm not
19 responding to the Hamilton letter because I -- I'm -- I'm
20 talking about even Mr. -- Mr. Lawrence, who -- the witness
21 who's actually here, and that was an actual affidavit.

22 But even in his affidavit, all that he says is that
23 the *Gangland* video did not accurately depict what he
24 observed that night at the club. That's fine. The
25 *Gangland* video was not in evidence. That has nothing to do

1 with this trial.

2 He observed Mr. Price in a struggle with a much bigger
3 man when shots were fired. Mr. Price and Mr. Brooks both
4 testified to that. In addition, there -- and he -- and saw
5 -- he says that he saw both men involved in the struggle
6 when shots were fired.

7 And that's all that he says. That is completely
8 cumulative. So if that's all that he can offer, that is
9 100 percent cumulative to the testimony of Mr. Price and
10 Mr. Brooks, as well as the other witnesses that the defense
11 called.

12 They also called expert witnesses to show that there
13 was a struggle and that the victim had gunshot residue on
14 his hands, on the backs of his hands. I believe the expert
15 actually testified that if -- if you're holding a gun, then
16 you expect to have more residue on the backs of the hands
17 than on the palms. And that's what they had in this case.

18 So there was other evidence to support this self-
19 defense claim, other than just eyewitness testimony. And
20 this -- this testimony from Mr. Lawrence in his affidavit
21 adds nothing to what was presented.

22 MR. SHUPPER: Your Honor, I would respectfully
23 disagree because the testimony of the others, they were
24 tainted by being charged as codefendants ---

25 MS. MCCALLISTER: Well, I ---

1 MR. SHUPPER: --- or ---

2 MS. MCCALLISTER: Mr. Brooks was a codefendant at the
3 time. I don't believe the record reflects that Mr. Wood
4 was a codefendant at the time he testified. I don't
5 believe the jury was told that information. I could be
6 wrong. The transcript will speak from itself but -- for
7 itself.

8 But Mr. Brooks was, certainly. He's correct about
9 that. The -- the jury knew that Mr. Brooks was a
10 codefendant. I don't believe that Mr. Wood had been
11 charged at that point in time. So I don't believe the jury
12 was told anything about Mr. Wood, specifically ---

13 MR. SHUPPER: Your Honor ---

14 MS. MCCALLISTER: --- about criminal charges, anyways.

15 MR. SHUPPER: Well, the -- aside from there not being
16 reference to him being charged, Mr. Price would --
17 indicated he was charged. But that -- the ---

18 THE COURT: Mr. Shupper, let me ask you this question:
19 Why have you been unable -- if you believe that this
20 information from Mr. Hamilton that is in this letter is so
21 important, why have you not been able to obtain an
22 affidavit from him or some -- something that is
23 evidentiary? I mean, you -- you obviously are aware that
24 for me to consider it, it's got to be admissible.

25 So why -- not to -- not to fuss -- because I'm not

1 fussing; I'm -- I just wanted to know. Why hasn't that
2 happened? Is he not reachable, this gentleman, Mr.
3 Hamilton ---

4 MR. SHUPPER: It ---

5 THE COURT: --- not the Hamilton that testified, but
6 the other Hamilton.

7 MR. SHUPPER: It ---

8 MS. MCCALLISTER: The Hamilton who wrote the letter.

9 THE COURT: Yes.

10 MR. SHUPPER: Yes, Your Honor. I reached out to the
11 -- I -- I attempted to contact Mr. Hamilton ---

12 THE COURT: Okay.

13 MR. SHUPPER: --- by contacting the -- using the phone
14 number in there and the ---

15 THE COURT: Okay.

16 MR. SHUPPER: --- e-mail address.

17 THE COURT: Okay.

18 MR. SHUPPER: And I could not make contact via e-mail.
19 I did speak to someone at [REDACTED] Plymouth who, when I
20 identified myself and ---

21 THE COURT: Yes.

22 MR. SHUPPER: --- the nature of my inquiry ---

23 THE COURT: Right.

24 MR. SHUPPER: --- told me to call someone else. I --
25 I was later informed that -- by someone that I've -- was a

1 relative living in Georgia, that Mr. Hamilton was not
2 available at that time; he was out of the country. I have
3 since, as this matter proceeded, had an investigator and
4 conducted a background check that we're -- there's so many
5 contacts that my investigator's still searching to find out
6 where he may be now, because this letter was sent in 2013.

7 But we have a long trail of people associated with the
8 address on the letter, the return address, and with some
9 cross-information about the phone number that my
10 investigator's still trying to track down. These days, you
11 -- and -- you -- people don't -- tend not to answer the
12 phone if they don't know -- recognize the number and -- and
13 leave voice messages, which you may or may not get a
14 response to their -- my investigator has been diligently
15 searching to try to track down these other numbers. But
16 there's about 70 pages in the report on Mr. Hamilton with
17 -- that lists numerous relatives. And we're still
18 searching for ---

19 THE COURT: Okay. Your ---

20 MR. SHUPPER: --- for ---

21 THE COURT: --- client, I think ---

22 MR. SHUPPER: --- him.

23 THE COURT: --- needs you, Mr. Shupper.

24 (Off the record briefly.)

25 MR. SHUPPER: Okay. Your Honor, could we take a -- a

1 brief break so Mr. Price can use the facilities?

2 THE COURT: Of course. Of course. We'll take a --
3 we'll take about a ten-minute comfort break.

4 MR. SHUPPER: Thank you, Your Honor.

5 (Whereupon, the Court went off the record at 12:49 p.m.)

6 (Whereupon, the Court went on the record at 1:02 p.m.)

7 THE COURT: All right. Now, talk to me about Corie
8 Lawrence about this affidavit. This -- the event occurred
9 in 2002. Yes?

10 MR. SHUPPER: Yes, Your Honor.

11 THE COURT: Do you know the date of the release or the
12 showing or the airing of this show, *Gangland*, where this
13 was depicted? Have you -- what is that date?

14 MR. SHUPPER: Your Honor ---

15 THE COURT: Uh-huh.

16 MR. SHURPER: --- I believe that show is of a nature
17 that it was run on TV as well as the Internet. So it was
18 reviewable via different media.

19 THE COURT: So you ---

20 MR. SHUPPER: And I ---

21 THE COURT: --- don't know?

22 MR. SHUPPER: --- think it was -- I think it was ---

23 MS. MCCALLISTER: Your Honor, I just ---

24 MR. SHUPPER: --- presented in 2011.

25 MS. MCCALLISTER: I just quickly Googled it. I have

1 -- and I have the DVD if Your Honor would like to see it.
2 But it's -- on IMDB, it says that it aired in January of
3 2010. That was when the initial episode aired, it looks
4 like.

5 THE COURT: Okay.

6 MS. MCCALLISTER: That's just quick Google, like I
7 said, but ---

8 THE COURT: I understand.

9 That is -- I mean, that's not evidentiary either. So
10 the scenario with Mr. Lawrence is that -- all right. These
11 events occurred in 2002. And Mr. Lawrence remembers the
12 connection because he went to high school with Mr. Price
13 and they lived in the same apartment complex.

14 MR. SHUPPER: Yes, Your Honor. That's correct.

15 THE COURT: But -- okay. I guess Mr. Price did not
16 recognize him or see him or remember that he was there the
17 night of these events.

18 MR. SHUPPER: That's correct, Your Honor.

19 THE COURT: Okay. And so in 2002 these events
20 occurred. Ten years later, this gentleman gets -- gets
21 extradited back to South Carolina and stays for four years
22 in the detention center in Richland County. And then --
23 then he goes to Kirkland and then -- is it Broad River --
24 and in 2016.

25 So I -- I guess he sees this show, *Gangland*, somewhere

1 at some point. And in 2018 -- January of 2018, which is 16
2 years later, wants to come forward and say he was at the
3 club; knows Mr. Price; saw the *Gangland* show.

4 And now, tell me why this is -- I should believe that
5 this is going to change the outcome of the trial in the
6 face of the -- the expert testimony, testimony of -- of --
7 that was offered up that evening.

8 MR. SHUPPER: Your Honor ---

9 THE COURT: I mean, during the trial that -- about
10 that evening.

11 MR. SHUPPER: The -- the -- the affidavit is dated in
12 2018 was because that's -- I -- I -- I didn't even have
13 anything to do with this case until June of 2017. I didn't
14 know anything about this case.

15 THE COURT: Well, I'm ---

16 MR. SHUPPER: And -- and -- and ---

17 THE COURT: Okay.

18 MR. SHUPPER: --- during the course of my getting
19 involved, I -- naturally, aside from reading the record, I
20 was trying to get Mr. Price brought back from New Mexico.
21 And I was informed that Mr. Lawrence had reached out
22 through family members to Mr. Price's family. And so I was
23 told that Mr. Lawrence was a potential witness; that he was
24 an eyewitness that night but nobody knew about it until he
25 reached out in 2000 and -- I -- I don't know whether it was

1 2017 or -- or when.

2 But as soon as I heard about him, I looked him on the
3 locator. I think I may have sent him a letter, saying:
4 "I'd like to come talk to you." And then I went out to
5 talk to him.

6 And then, in the course of my discussing matters with
7 him, I asked if he would submit an affidavit. And
8 indicated he would. So I drafted something based on my
9 interview with him at the prison and then had to return to
10 -- to get him to review it and see if it was accurate and
11 get it notarized and then submit it. So that's -- that's
12 how that went.

13 As to why is it different, it -- that was one of the
14 matters I wanted to respond to from Ms. McCallister's last
15 speaking because she indicated it merely adds this and
16 that. But it also explains the reason why he did not come
17 forward: because he was fearful and he didn't want his
18 wife to know.

19 At the time it occurred, he started a new life. He
20 was -- he was -- had a family and he was working. He
21 wasn't in any trouble. He didn't want to get in trouble
22 with his wife shortly after they had gotten married and
23 around the time of her birthday, he didn't want her to know
24 that she -- he had gone out to that club that evening.

25 So that's why he didn't go forward. That's one reason

1 I think it's -- it's -- explains why it couldn't have been
2 discovered before, because he didn't want anybody to know
3 he was a witness.

4 But when he did see this episode and think about it,
5 he decided to reach out. And that's where the discovery
6 came in that he was a witness.

7 And what makes it different is he's an eyewitness,
8 Judge, who's not tainted by being a codefendant who's --
9 has not given prior ---

10 THE COURT: Let me ask ---

11 MR. SHUPPER: --- statements -- inconsistent
12 statements. And so ---

13 THE COURT: The ---

14 MR. SHUPPER: --- the quality -- I would submit that
15 the quality of his testimony would be far more believable,
16 credible than the testimony of codefendant Brooks ---

17 THE COURT: Let me ---

18 MR. SHUPPER: --- or ---

19 THE COURT: --- ask you this question.

20 MR. SHUPPER: --- or the accused.

21 THE COURT: Let me ask you this question. Mr.
22 Lawrence is present; is that correct?

23 MR. SHUPPER: Yes, Your Honor.

24 THE COURT: All right. Well, what is the prohibition
25 against hearing the testimony of Mr. Lawrence for the sole

1 purpose of ascertaining whether or not I believe that
2 there's a possibility that his testimony could make the
3 outcome of this trial different?

4 Let me hear first from you, Ms. McCallister.

5 MS. MCCALLISTER: Your Honor, I -- I think if that's
6 what you want to do, I don't know that there is a
7 prohibition on that. I mean, the state's argument is just
8 that he -- you know, if we're talking about making a *prima*
9 *facie* case about whether he should even get to be heard on
10 this, that this affidavit alone is -- is not sufficient.

11 He could've explained himself in this affidavit. He
12 had an opportunity to. And he didn't. And it's their
13 burden, and they're the ones who are bringing this case.
14 And he didn't -- he didn't do that.

15 THE COURT: Yes. Well, I think I'd like to have the
16 -- I'd -- I think I'd like to hear his testimony, as I make
17 that determination.

18 I -- I don't believe that at this point Mr. Hamilton
19 -- if -- if Mr. Hamilton exists/is alive, he's -- there's
20 no indication to me that -- that realistically, he would be
21 a witness. Or -- and -- and I have not read the statement,
22 because it's not a statement. It's -- it's nonevidentiary.
23 And -- and of greater concern is that I don't know if it's
24 realistic that he would ever be a witness, quite frankly.

25 Mr. Lawrence, while I certainly see a lot of problems

1 with his affidavit, I'd like to give Mr. Price every
2 opportunity to make a showing, quite frankly. And that
3 would be the reason that I would like to hear his testimony
4 and hear the cross-examination.

5 Because I think the issue is: Could it -- is it
6 likely, under the -- the test, that it could make a
7 difference in the trial. And I've got to consider that, as
8 opposed to pretty compelling, if you will, expert
9 testimony. I'd like to hear it, I think.

10 And everybody needs to have a little bit of lunch.
11 But I know that -- that that is testimony that we would all
12 like to get -- to get heard. And I don't know it will take
13 a long time. So can y'all hang tight till about 2? And
14 then, I think that would conclude today; is that right? If
15 -- yes?

16 MS. MCCALLISTER: And -- and I just want to make sure
17 I'm clear. You're not denying the motion to dismiss; you
18 want to hear the testimony to see what you decide about
19 that ---

20 THE COURT: The motion ---

21 MS. MCCALLISTER: --- one ---

22 THE COURT: --- to dismiss.

23 MS. MCCALLISTER: --- the one prong.

24 THE COURT: Correct.

25 MS. MCCALLISTER: Okay.

1 THE COURT: That's ---

2 MS. MCCALLISTER: Okay.

3 THE COURT: --- absolutely correct.

4 MS. MCCALLISTER: Okay.

5 THE COURT: I'm satisfied with the other ones. The
6 other ones are successive. The statute has run for the
7 other issues. This is the remaining issue.

8 I don't believe that the letter of Mr. Hamilton,
9 particularly given the circumstances of -- that it's not an
10 affidavit, nor do I have any confidence that -- that there
11 would be an affidavit, I am not considering -- I don't
12 think it would be proper to consider Mr. Hamilton and --
13 and his letter. However, I -- I would like to very fully
14 hear from Mr. Lawrence.

15 So -- and I'd like to do that now, if y'all -- is Mr.
16 Lawrence ---

17 MR. SHUPPER: As -- as ---

18 THE COURT: --- up here? Did ---

19 MR. SHUPPER: --- you wish ---

20 THE COURT: --- y'all invite him up?

21 MR. SHUPPER: --- Your Honor.

22 THE COURT: Huh?

23 MR. SHUPPER: As you wish, Your Honor.

24 THE COURT: All right. Yeah.

25 MR. SHUPPER: The deputies ---

1 THE COURT: And ---

2 MR. SHUPPER: --- can go downstairs and get him.

3 THE COURT: Yep.

4 MR. SHUPPER: Thank you ---

5 THE COURT: Where's ---

6 MR. SHUPPER: --- Your Honor.

7 THE COURT: Where -- where are my people from -- that
8 can go invite Mr. Lawrence to come in? If y'all will go
9 get him, that'd be great.

10 (Whereupon, the Court went off the record at 1:13 p.m.)

11 (Whereupon, the Court went on the record at 1:24 p.m.)

12 THE COURT: All right. If you'd please call Mr.
13 Lawrence.

14 MR. SHUPPER: Mr. Corie Lawrence, please.

15 THE COURT: All right. Come on around, Mr. Lawrence.
16 And I'm going to ask you to -- Mr. Lawrence, you're --
17 you're -- you're fine right there.

18 (Whereupon, the witness came forward.)

19 THE COURT: Good afternoon.

20 THE WITNESS: Good afternoon, Your Honor.

21 CORIE LAWRENCE, having been first duly sworn,
22 testified as follows:

23 THE COURT: Thank you so much, Mr. Lawrence. If you
24 would be seated.

25 THE WITNESS: (Complied.)

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1 THE COURT: And I'm going to ask you to state your
2 name and spell your name. This is as much as a sound check
3 as it is a -- the information. We'll ---

4 THE WITNESS: That's fine.

5 THE COURT: --- we need both.

6 THE WITNESS: My name is Corie Kendell Lawrence.
7 Corie, C-o-r-i-e; Kendell, K-e-n-d-e-l-l; Lawrence,
8 L-a-w-r-e-n-c-e.

9 THE COURT: Thank you very much.

10 THE WITNESS: Thank you.

11 THE COURT: Your witness, Mr. Shupper.

12 MR. SHUPPER: Thank you.

13 DIRECT EXAMINATION

14 BY MR. SHUPPER:

15 Q Good afternoon, Mr. Lawrence. Thank you for being ---

16 A Good afternoon.

17 Q --- here. Mr. Lawrence, in -- did you and I meet
18 before?

19 (Off the record briefly.)

20 Q Did you and I meet before?

21 A Yes.

22 Q Okay. We meet a few times?

23 A Yes.

24 Q Did we talk about Mr. Price?

25 A Yes.

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1 Q Do you know Mr. Price?

2 A Yes.

3 Q Did -- have -- have you seen this affidavit marked
4 Exhibit C?

5 A Yes.

6 MR. SHUPPER: Your Honor, may I provide a copy for
7 him?

8 THE COURT: Yes.

9 Q Oh, no hands. Okay.

10 MR. SHUPPER: Your Honor, I don't think he's in max
11 custody. Could he have a hand free, please, to handle this
12 ---

13 THE COURT: It's -- it -- if he needs one to -- to be
14 able to move the pages, or else they can do that for him.
15 You ---

16 MR. SHUPPER: Yes, sir.

17 THE COURT: --- may proceed.

18 MR. SHUPPER: If they can free one hand, he's -- they
19 -- they told me downstairs that security measures are
20 related to the color of the jumpsuit. That's more
21 security; that's less security.

22 CORRECTIONAL OFFICER: He's still in maximum security.

23 THE COURT: You know ---

24 MR. SHUPPER: Lawrence?

25 CORRECTIONAL OFFICER: Yes. He's in Level 3.

1 MR. SHUPPER: He's in the population, right?

2 CORRECTIONAL OFFICER: Yes.

3 MR. SHUPPER: He's in population, as ---

4 THE COURT: You didn't ---

5 MR. SHUPPER: --- opposed to a ---

6 THE COURT: Mr. Lawrence ---

7 MR. SHUPPER: --- secure unit.

8 THE COURT: --- if -- Mr. Lawrence, they're going put
9 those -- that affidavit is two pages. They're going put it
10 right where you can see it, okay?

11 THE WITNESS: (No audible response.)

12 THE COURT: And if you need to do otherwise, you let
13 me know, now, okay?

14 THE WITNESS: (No audible response.)

15 THE COURT: Thank you.

16 Q Mr. Lawrence, if you can take a moment to look at
17 that. Is that your signature?

18 A Yes.

19 Q How long have you known Mr. Price?

20 A Close to 30 years.

21 Q Were you -- did you go to high school together?

22 A Yes.

23 Q Live in the same community?

24 A Yes.

25 Q Play basketball?

1 A Yes.

2 Q And I think his -- his aunt set up the basketball for
3 you guys to play in.

4 A That's correct.

5 Q Out there in Broad River, right?

6 A Uh-huh.

7 Q Okay. Let me just recount this. You were extradited
8 from Richland County in the summer of 2012?

9 A To Richland County.

10 Q Yes. To ---

11 A From Charlotte ---

12 Q I'm sorry.

13 A --- Mecklenburg.

14 Q And you spent about 44 months in Richland County?

15 A Correct.

16 Q Then you went to the Department of Corrections?

17 A That's correct.

18 Q And you obtained your GED in Richland County?

19 A Yes. At ---

20 Q In pre ---

21 A --- Alvin S. Glenn.

22 Q --- pre -- pretrial detention.

23 And you went to Kirkland about August 18th, 2016?

24 A That's correct.

25 Q And you've been there ever since, right?

1 A Yes.

2 Q You worked in the kitchen?

3 A Absolutely.

4 Q In 2002, when this incident for which Mr. Price is
5 sitting here occurred, you were married, right?

6 A Yes.

7 Q Had you just been married?

8 A Yes.

9 Q And you were working as a maintenance technician?

10 A Yes.

11 Q And you did that for about ten years?

12 A Yeah, roughly. Last ten years.

13 Q In 2012 you lost your job?

14 A Uh-huh.

15 THE COURT: That's a "yes"?

16 THE WITNESS: Yes. I'm sorry.

17 Q Your ---

18 THE COURT: That's okay.

19 Q --- your wife divorced you?

20 A Correct.

21 Q Your grandfather passed away?

22 A Correct.

23 Q Were you close to your grandfather?

24 A Extremely.

25 Q And you were returned to South Carolina to face

1 charges?

2 A Correct.

3 Q And you indicated you lived in St. Andrews Pointe
4 Apartments while attending high school and for a few years
5 thereafter; is that correct?

6 A That's correct.

7 Q You saw an episode of *Gangland* that reportedly
8 depicted what happened in the club the night of the
9 incident that resulted in Jeroid Price being charged with
10 murder, correct?

11 A That's correct.

12 Q You were present in the club that night, correct?

13 A That's correct.

14 Q And you knew Mr. Price, correct?

15 A Correct, yes.

16 Q And your families lived in -- in the same complex?

17 A Yes. In the same neighborhood.

18 Q And when the *Gangland* video did not jibe with what you
19 recollect from your observations in -- on the night of --
20 in question ---

21 A Of the depiction itself was just false, in my opinion,
22 from my ---

23 Q Your ---

24 A --- point of view.

25 Q Okay. And you stated you observed Price in a struggle

1 with a much bigger man when shots were fired; is that
2 correct?

3 A That's correct.

4 Q And both men were standing involved in the struggle.

5 A That is correct.

6 Q When the shots were fired.

7 A (No audible response.)

8 Q Okay. You stated you didn't come forward in 2002
9 because the shooting happened right after your wife's
10 birthday; is that correct?

11 A That's correct. I technically wasn't supposed to be
12 there in the first place. So I didn't really want her to
13 know that I'd chosen to hang out instead of be with her on
14 her birthday.

15 Q Okay. Is everything you said in this affidavit true?

16 A Absolutely.

17 Q Have you had time to reflect upon what you saw and
18 what you remembered from that night since we met and you
19 gave this affidavit?

20 A As much as I possibly could. I mean, this was well
21 over ten years ago.

22 Q Okay. Can -- can you tell the Court what you recall
23 about the night in question, about your observations in the
24 Club Voodoo and the struggle you described in this
25 affidavit?

DIRECT EXAMINATION BY MR. SHUPPER - CORIE LAWRENCE 68

1 A Well, from my observation, from where I was standing,
2 I heard two men, what sounded like an argument. You know,
3 you have to understand: There was music in the background
4 as well. Then a struggle ensued.

5 And in the midst of, I guess, everybody trying to back
6 up, I went to, you know, sort of kind of look to see who
7 was around me. And that's when I heard the shots.

8 Q Okay. And what -- and you saw -- who did you see
9 engaged in a struggle?

10 A Mr. Price and the -- the larger gentleman.

11 Q Do you have any other recollections that aren't
12 included in this affidavit as to . . .

13 A At this time, no. Because I do -- like I said, I do
14 remember the -- the -- the struggle itself. And they were
15 both standing one from another. And then there shortly
16 after that, the -- the gunshots went off.

17 Q What did you do after the gunshots ---

18 A I ---

19 Q --- went off?

20 A --- ran.

21 Q And where did you go?

22 A To the car.

23 Q Did you then go home?

24 A Yes.

25 Q Did you ever tell the police that you were a witness?

1 A No. Unfortunately, I didn't do that because then that
2 would've resulted in me having to tell my ex-wife the
3 truth.

4 Q Well, you -- ten years later or so -- well, let --
5 let's see. You -- you saw that *Gangland* movie.

6 A Correct.

7 Q And did that lead you to take any action? Did that --
8 did that ---

9 A Yes. But ---

10 Q --- remind you -- go ahead.

11 A Yes. Because it -- it -- the -- well, there were a
12 lot of things wrong with that depiction. But that was more
13 that hit close to the home, because I actually know Mr.
14 Price.

15 Q And -- and how did it make you feel that you were a
16 witness to this shooting that resulted in him getting
17 convicted and that you didn't come forward?

18 A Well, it was somewhat difficult for me. I mean, after
19 Mr. Price arrest, you know, we all have lived our lives and
20 have lived in a number of different states after that. But
21 for the most part, it -- it was kind of disturbing because
22 here I felt that -- that he didn't get his just due, as far
23 as the -- the -- the court systems and, you know, between
24 the way that they were making the depiction itself.

25 Q And is that -- did you reach out to your family or

1 Price's family to try to ---

2 A Yes. I had a -- a cousin of mine reach out to one of
3 his family members.

4 Q Okay. So is it fair to say you felt bad about his
5 situation?

6 A At -- well, absolutely. Especially now, being that
7 I'm incarcerated myself. And I understand that -- that --
8 you know, what this type of life is like. You know, prior
9 to that, you know, I had never been incarcerated before --
10 or in trouble, for that matter. But spending a few years
11 in the Department of South Carolina, you tend to change
12 that point of view.

13 Q So you didn't have any prior record in 2002 when this
14 happened?

15 A No felonies.

16 Q Yeah. And -- and ---

17 A Well, nothing violent, I should say.

18 Q You were -- and -- well, what -- you -- I think your
19 answers suggest that there may have been something or what
20 -- what may have -- in terms of prior convictions, did --
21 did you have up until 2002?

22 A Well, the cases with dispositions were the ABC
23 violation, simple possession of marijuana, driving under
24 suspension -- you know, simple -- simple things like that.
25 It was nothing -- nothing ---

1 Q Nothing ---

2 A --- violent ---

3 Q --- punishable by more than 30 days.

4 A Yes.

5 Q Magistrate-level offenses.

6 A Yes. Those charges with dispositions.

7 Q Ultimately dismissed?

8 A Yes.

9 Q So you said no felonies. And for the next ten years,
10 you were a family man until ---

11 A Correct.

12 Q And -- and was it a close sequence of events between
13 your grandfather's death and your wife ---

14 A All within that same year.

15 Q Okay. So 2012 was a lousy year for you.

16 A Extremely difficult.

17 Q Your -- your wife left you?

18 A Uh-huh. Correct.

19 Q Your -- your -- your grandfather, whom you were close
20 to, passed away?

21 A Correct.

22 Q And you ended up in jail.

23 A Correct.

24 Q Okay. And do you recall when you saw that *Gangland*
25 episode?

CROSS-EXAMINATION BY MS. MCCALLISTER - CORIE LAWRENCE 72

1 A Well, the first time that I originally seen it, they
2 were actually showing it, I want to say, A&E when I was
3 locked up in Charlotte -- Charlotte/Mecklenburg County.
4 And then I seen it a second time, sitting in the dayroom.
5 And they showed it on another channel. I don't think it
6 was A&E.

7 But it -- the second -- ultimately, the second time
8 when I seen it basically cleared up what -- the thoughts
9 that I was having that that just wasn't right, the whole
10 entire depiction.

11 Q Okay.

12 MR. SHUPPER: Just a moment, Your Honor.

13 THE COURT: All right.

14 (Off the record briefly.)

15 Q Please answer any questions that the attorney general
16 or the Court might have for you. Thank you, Mr. Lawrence.

17 CROSS-EXAMINATION

18 BY MS. MCCALLISTER:

19 Q Mr. Lawrence, you testified that back in 2002/2003,
20 you were newly married, correct?

21 A Correct.

22 Q Okay. And you -- that's the reason why you didn't
23 come forward, is because you were out at the club on your
24 wife's birthday and you did not want to get in trouble with
25 her.

1 A Correct.

2 Q And if you told the police what you had seen or had
3 come to be a witness at trial, your wife was going to find
4 out.

5 A Correct.

6 Q And you didn't want that to happen.

7 A Correct.

8 Q Okay. You testified about your record a second ago.
9 And you said those were the charges with dispositions. Did
10 you have pending charges in 2002 and 2003?

11 A I -- no, not in 2003. There were some charges that
12 came up after that, that I never went to court for. So
13 they had no disposition, so I had an attorney get them
14 expunged.

15 Q Okay.

16 A But those charges were felony charges, but I ---

17 Q Those charges ---

18 A --- was never ---

19 Q --- were -- were they pending in 2002 or 2003?

20 A No.

21 Q Okay. And you testified a little bit about what you
22 saw. You said that you saw two men in an argument, but
23 there was -- there -- you couldn't hear what the argument
24 was about because there was music in the background? Did
25 -- did ---

CROSS-EXAMINATION BY MS. MCCALLISTER - CORIE LAWRENCE 74

1 A Correct.

2 Q --- I understand that right?

3 So is it your testimony that the club was, like, still
4 -- the music was still going on? things were still going on
5 in the club when this happened?

6 A I mean, the music was still going. Yes.

7 Q Okay. Were people still in there?

8 A Yes.

9 Q Okay. Did -- did what you saw occur in the actual
10 club itself or somewhere, like, out in a parking lot or
11 where were you?

12 A No. This was inside the club.

13 Q Okay. And after you heard the shots, you ran to your
14 car and went home.

15 A Correct.

16 Q But at the time, you knew that it was Mr. Price
17 involved in that, correct?

18 A Not more so until all the commotion started. Then I
19 realized who it was.

20 Q What do you mean, all the commotion started?

21 A Like, when the -- and this is just in my opinion --
22 when the conflict first started, it was more or less a
23 tussle. And when you're ---

24 Q Okay.

25 A --- in a club, a lot of times, I mean, that could've

1 been, you know, mistaken for just about anything else.

2 Because, you know, you got people dancing ---

3 Q Okay. I ---

4 A --- so forth and so forth. So it wasn't until the
5 crowd reacted that I understood what was going on.

6 Q Okay. So that's what I was trying to ask. At the
7 time in 2002, though, you knew that it was Mr. Price who
8 was involved in the shooting, because you knew him,
9 correct?

10 A Yes.

11 Q Okay. So when you left the club that night, you knew
12 that Mr. Price was involved?

13 A Yes.

14 Q Okay. And do you recall -- I think you said you --
15 the first time you saw the episode was when you were in
16 Charlotte?

17 A Yes, I believe so.

18 Q When was -- do you know when that was?

19 A Oh. 2000 and -- 2012.

20 Q Okay. So that was in 2012. And you didn't come
21 forward to tell Mr. Price anything about it until 2017?

22 A While he was incarcerated.

23 Q Okay. And you weren't at trial; you didn't testify;
24 you didn't attend trial.

25 A Not at all.

REDIRECT EXAMINATION BY MR. SHUPPER - CORIE LAWRENCE 76

1 Q So you don't know if what the jury was told at trial
2 is different than what was depicted in *Gangland*?

3 A No, I don't.

4 Q Okay. And is it your testimony that the only two
5 people you saw, like, in a tussle or in this shooting is
6 Mr. Price and another man?

7 A Correct.

8 Q You didn't see any third person?

9 A Not that I can recall.

10 Q Okay. And how many shots did you hear? Do you know?

11 A I would say three.

12 Q Okay. You heard -- and you just heard them and ran.

13 A Yeah.

14 Q Okay.

15 MS. MCCALLISTER: Beg the Court's indulgence, Your
16 Honor.

17 THE COURT: Okay.

18 (Off the record briefly.)

19 MS. MCCALLISTER: I think that's all I have for Mr.
20 Lawrence.

21 THE COURT: Redirect?

22 MR. SHUPPER: Just -- just briefly, Your Honor.

23 REDIRECT EXAMINATION

24 BY MR. SHUPPER:

25 Q When you said you heard music, was it -- were the

1 lights on? Was the crowd leaving? Was the DJ on the
2 stage?

3 THE COURT: Please don't ---

4 MS. MCCALLISTER: Well ---

5 THE COURT: --- lead ---

6 MS. MCCALLISTER: --- yeah.

7 THE COURT: --- Mr. Shupper.

8 MR. SHUPPER: Pardon me.

9 THE COURT: If you're going to ask him what he saw ---

10 MR. SHUPPER: Okay.

11 Q What do you recall about the -- the crowd? You talked
12 about the crowd rushing.

13 A Uh-huh.

14 Q What do you recall was -- in terms of -- what was
15 actually going on in the auditorium, as opposed to the area
16 you were standing?

17 A Well, from my recollection, when the tussle ensued,
18 you had people that were just looking. And then when you
19 heard that clap, you heard everyone -- everybody -- I mean,
20 I saw everybody disburse after that.

21 Q Were the -- were the lights up?

22 A No -- well, I mean, you have your strobe lights that
23 are in the club. And then, you know, you have the regular
24 lights. The regular lights weren't on. It was more or
25 less like the -- whatever strobe lights or whatever that

REDIRECT EXAMINATION BY MR. SHUPPER - CORIE LAWRENCE 78

1 they had going on in there. It wasn't direct light, I
2 should say.

3 Q When -- when you ran, were there a lot people outside
4 in the parking lot?

5 A I mean, yeah, somewhat. I mean, it's -- there were so
6 many people going in so many different directions, you
7 know, it's kind of hard to say who was actually in the
8 club, who came from the club, and who was actually just
9 there and just running.

10 Q Is it fair to say you were pretty shook up ---

11 A Yes.

12 Q --- by what you witnessed?

13 A Absolutely.

14 Q Would you ---

15 A Absolutely.

16 Q --- would it be fair to describe the situation as
17 chaotic?

18 A Yes, very. Extremely.

19 Q Okay. And you had just witnessed a shooting?

20 A That's right. Correct.

21 Q And your friend was involved?

22 A Correct.

23 Q And you fled?

24 A Correct.

25 MR. SHUPPER: Nothing further, Your Honor.

1 THE COURT: All right. Any recross?

2 MS. MCCALLISTER: No, Your Honor.

3 THE COURT: Okay. Thank you so much, sir.

4 MR. SHUPPER: Thank you, Mr. Lawrence.

5 (Whereupon, the witness exited the witness stand.)

6 (Off the record briefly.)

7 THE COURT: All right. Folks need to get some lunch.

8 There are couple things that I'd like to do over lunch.

9 What time are the hearings this afternoon?

10 MS. MCCALLISTER: This is -- this is the only one

11 today, Your Honor. Oh, we were going to do the two ---

12 THE COURT: Uh-huh. That was with Mr. Waller, is my
13 understanding.

14 MS. MCCALLISTER: Yes. And so there's sort of been
15 one complication with that.

16 (Off the record briefly.)

17 MS. MCCALLISTER: And -- and, Your Honor, I -- I don't
18 know what you'd want to do and what else you want to hear
19 from us, but I would at least ask to sort of have like a
20 little bit of argument or something about the testimony
21 that we just heard before you make a decision. I -- that
22 can be after lunch or I -- we're fine ---

23 THE COURT: I think I'm ---

24 MS. MCCALLISTER: --- but ---

25 THE COURT: --- going do it after lunch. There's some

1 things I want to read and spend that time doing. So let's
2 take an hour for lunch; let folks get some lunch; and then
3 we'll reconvene. It's about -- it's almost two. Let's say
4 at three o'clock.

5 MS. MCCALLISTER: Okay.

6 THE COURT: And that will give me an opportunity to --
7 to read what I -- what I'd like to read that I haven't had
8 an opportunity to do. And then, I'll see you guys back
9 here and figure out where we go from there. Thanks.

10 MS. MCCALLISTER: Thank you.

11 MR. SHUPPER: Thank you, Your Honor.

12 THE COURT: Uh-huh. Absolutely.

13 (Whereupon, the Court went off the record at 1:48 p.m.)

14 (Whereupon, the Court went on the record at 3:05 p.m.)

15 THE COURT: All right. Closing comments for your
16 motion to dismiss and your summary judgment motion?

17 MR. SHUPPER: If Your Honor please?

18 THE COURT: Uh-huh.

19 MR. SHUPPER: Could -- I -- I had alluded to Ms.
20 Rushing's testifying earlier during the presentation of
21 this. And I would -- if the Court would allow, I'd like to
22 have the benefit of hearing from her briefly ---

23 THE COURT: Oh.

24 MR. SHUPPER: --- as to the impact that these -- this
25 particular Mr. Lawrence's statement and testimony would've

1 had on trial strategy in her view of how it would've
2 probably resulted in a different verdict. I mean, she was
3 there. She knows more than I do about what occurred and
4 ---

5 MS. MCCALLISTER: I mean, I don't think she can
6 testify to that. That's a legal determination for Your
7 Honor to make. If Your Honor thinks that it would've
8 changed the verdict, then we go on to an evidentiary
9 hearing and we can hear from Ms. Rushing.

10 But if you don't, then I -- I don't think Ms. Rushing
11 can get up there and testify that she thinks it -- I mean,
12 that's just not proper, I don't think. I think it's --
13 it's asking her for a legal conclusion that she -- that's
14 not her role to make. It's your role to make.

15 (Off the record briefly.)

16 THE COURT: As I understand it -- I'm happy to hear
17 from -- from each of you. But as I understand it, when you
18 have testimony like this, necessarily, it always -- newly-
19 discovered evidence, by its very nature, you are always
20 looking at a trial that has already occurred.

21 And so as I understand the law, you have a trial; you
22 then have newly-discovered evidence. And what's relevant
23 is -- for the Court is to look at the five factors. But if
24 the evidence that exists now, you believe would have
25 changed the outcome of the trial, then -- or would change

1 the outcome of the trial, then you -- that's the instance
2 where you have a new trial and allow it to be heard.

3 But I don't think that you go back and have a -- yeah.
4 I mean, it exists when it exists. In other words, given
5 this testimony as it has now come to fruition, do I believe
6 that that would change the outcome of the trial; not if it
7 had existed back then, would have changed the outcome of
8 the trial. I -- I don't -- I'm not so sure that -- that
9 that's what that means.

10 MR. SHUPPER: Well ---

11 THE COURT: Let -- let me hear from you ---

12 MR. SHUPPER: Yes, Your Honor.

13 THE COURT: --- with that in mind.

14 MS. MCCALLISTER: I'm trying to make sure I'm
15 following. You're saying -- you're saying ---

16 THE COURT: I know it ---

17 MS. MCCALLISTER: --- that you ---

18 THE COURT: --- was kind of confusing. I'm so sorry.
19 In other words -- in -- in other words, people testified.
20 They have testified. And we've now heard from this
21 gentleman ---

22 MS. MCCALLISTER: Yes.

23 THE COURT: --- who testified. And the question is:
24 Do you look at the circumstance when you would have -- if
25 you would have had this person at the time of trial? In

1 other words, would you have called certain witnesses?
2 Would people have testified differently if you had had the
3 benefit of this testimony? Or do you look and -- or do you
4 look at what you have in the existing trial and then look
5 at the newly-discovered evidence and look at both as they
6 exist and decide whether or not this newly-discovered
7 evidence causes you not to have confidence in the outcome
8 of the trial?

9 MS. MCCALLISTER: Okay. So I'm ---

10 THE COURT: You see ---

11 MS. MCCALLISTER: --- following you now.

12 THE COURT: --- the difference?

13 MS. MCCALLISTER: Yes, Your Honor. And my
14 understanding is that it's the second one.

15 THE COURT: It has to be.

16 MS. MCCALLISTER: Correct.

17 THE COURT: Because it's newly-discovered evidence.

18 MS. MCCALLISTER: Correct.

19 MR. SHUPPER: It ---

20 THE COURT: Yes?

21 MR. SHUPPER: Your Honor?

22 THE COURT: Yes.

23 MR. SHUPPER: I guess one reason I wanted Ms. Rushing
24 to testify is because there's five prongs on the test. And
25 -- and the first few prongs -- Would it have changed the

1 outcome? Why wasn't it -- is it truly newly-discovered and
2 such? -- I think Ms. Rushing's testimony could establish
3 that it wasn't known; that they didn't know these
4 witnesses. I mean, right now that's -- that's just what
5 I've submitted in the application. But there hadn't been
6 any testimony as to ---

7 THE COURT: Well, that would ---

8 MR. SHUPPER: --- whether ---

9 THE COURT: --- be ineffective assistance of counsel,
10 right, is what you're -- at that point? And that's already
11 been tried.

12 MR. SHUPPER: No. No, Your Honor. What I'm getting
13 at is -- is does the -- would Ms. Rushing's testimony
14 clarify that and establish that this is truly newly-
15 discovered evidence; it couldn't have been discovered
16 through due diligence. There's been no testimony as to due
17 diligence, investigation, trial strategies, and -- and I
18 think her testimony would help the applicant meet the first
19 few prongs of the test, particularly as far as is it truly
20 newly discovered? Was it known at the time of trial? And
21 that's what I was getting at, Your Honor.

22 MS. MCCALLISTER: So and -- I -- I mean, my response
23 to that, Your Honor, is that when an applicant files and
24 application and alleges that there is newly-discovered
25 evidence and -- and you're requesting a new trial on that

1 basis, you have to show five factors: that it would
2 probably change the result if a new trial was had; has been
3 discovered since trial; cannot -- could not, by the
4 exercise of due diligence, have been discovered before
5 trial; is material to the issue of guilt or innocence and
6 is not merely cumulative or impeaching.

7 And in order to get -- this is -- this is not a first
8 PCR. If it was, we would've just had a merits hearing and
9 called all these witnesses. But this is a successive PCR.
10 And he's alleging new evidence.

11 And so in order to get to an evidentiary hearing, he
12 has to make some kind of showing that he's even entitled to
13 be heard on this issue. And he was trying to do that
14 through the affidavit of Mr. Lawrence and the letter from
15 Mr. Hamilton. I think the Court has ruled or decided that
16 the letter from Mr. Hamilton is not competent evidence to
17 do that.

18 So that left us with Mr. Lawrence. And I think, out
19 of an abundance of caution, you allowed Mr. Lawrence to
20 testify in addition to sort of supplement his affidavit to
21 see if we're even going forward with the -- the full-blown
22 evidentiary piece.

23 And so, Your Honor, the state would argue that at this
24 point, he has to show all five favors have been met. If he
25 fails on any one of them, then there's no point in having

1 an evidentiary hearing. And it's the state's contention
2 that where this clearly fails so -- to the point where we
3 don't even need to have an evidentiary hearing on it is
4 that it -- it -- it was such that it would not change the
5 result at trial.

6 And I think I argued earlier today that his -- what's
7 in his affidavit is cumulative. I think, once he
8 testified, I'm not sure that it's cumulative. I think it's
9 so not credible, based on the -- the other testimony at
10 trial, including what Mr. Price himself said happened, that
11 it just is so clearly not changing -- going to change the
12 result at trial, that we don't even need to move forward
13 with hearing from the other witnesses.

14 And so we would ask that our motion to dismiss be
15 granted on -- for those reasons.

16 THE COURT: Yeah.

17 MS. MCCALLISTER: So I -- that's my position. I'll
18 let Mr. Shupper respond to that.

19 THE COURT: I understand.

20 Yes, sir.

21 MR. SHUPPER: Well, Your Honor, there hasn't been any
22 testimony about due diligence or why the evidence wasn't
23 presented. Is it truly newly-discovered evidence, other
24 than my assertions -- assertions in the application. The
25 ---

1 THE COURT: The gentleman testified to it.

2 MR. SHUPPER: Pardon me?

3 THE COURT: The gentleman testified to it: said he
4 didn't come forward because he didn't want his wife to know
5 that rather than celebrating the -- her birthday, if he
6 chose to go out to the club and that he -- you know, faced
7 with the circumstance of allowing his bride to find out
8 that he did not spend her birthday with him, he decided he
9 would not tell anyone that he had been at the club so --
10 and didn't want to tell law enforcement because he didn't
11 want that to -- to get back to his -- to his bride, as I
12 understand what he testified to. So that's the reason he
13 didn't -- he didn't tell anyone, is what he -- is what I
14 recall him testifying to.

15 So I think you -- I think you -- there is evidence in
16 the record of why. Because -- because he said he didn't
17 tell anyone.

18 MR. SHUPPER: I -- I -- I follow Your Honor. I just
19 felt that since the burden is on the applicant, other than
20 Mr. Lawrence testifying as to why he didn't come forward, I
21 -- well, it -- I'm ---

22 THE COURT: And here's my concern. If you call Ms.
23 Rushing, Ms. Rushing is going to testify to one thing, one
24 or the other: She's either going to testify that he was
25 available; she new about it; and she chose not to call him,

1 which is retrying ineffective assistance of counsel, which
2 is ---

3 MR. SHUPPER: Right.

4 THE COURT: --- going be your position. And you've
5 already conceded that it would be successive and the
6 statute of limitations has run.

7 So we -- if we're not going try that case, a
8 successive -- which we're not going do, then her testimony
9 would be: "I didn't know it."

10 MR. SHUPPER: Well, the -- I -- I -- yes, Your Honor.
11 And that's -- that's testimony that I would expect. But
12 the Court hasn't heard it. And -- and -- and that's why I
13 was asking for her to be heard on that: because we've got
14 five prongs to satisfy. And -- and ---

15 THE COURT: Well, I tell you what: If you want -- if
16 you want, I guess, to submit -- you know, I -- you know, I
17 -- I really don't want to get into -- I'm not -- I -- I
18 don't want to retry a PCR.

19 MR. SHUPPER: Yes, Your Honor.

20 THE COURT: I -- I really don't. Then, there's only
21 -- if -- if I'm not going retry the PCR, I can only presume
22 that you would be calling her for one reason, and that
23 reason would be for her to say: "I did not know about Mr.
24 Lawrence's potential testimony; I didn't know about Mr.
25 Lawrence. I didn't know that that potential evidence

1 existed." I -- I mean, I -- I presume that.

2 MR. SHUPPER: That -- that's exactly why I wanted to
3 call her, Your Honor ---

4 THE COURT: I understand.

5 MR. SHUPPER: --- because that's part of my burden to
6 meet ---

7 THE COURT: Yeah.

8 MR. SHUPPER: --- the test of why it wasn't
9 discoverable through due diligence.

10 THE COURT: Well, I -- I understand. Because
11 otherwise, it's -- it's -- it would potentially be
12 ineffective assistance of counsel ---

13 MR. SHUPPER: And if ---

14 THE COURT: --- would ---

15 MR. SHUPPER: --- on my back.

16 THE COURT: No, sir. I would -- no. Not on your
17 behalf; on -- I -- I would presume that -- that that would
18 be your position: that you ought to be allowed to go
19 forward and try ineffective assistance of counsel. And it
20 would be successive; the statute's run on that.

21 Anything you want to add to that, Ms. McCallister?

22 MS. MCCALLISTER: Well, no. And I don't necessarily
23 object -- I mean, if -- if Your Honor decides you want to
24 hear from Ms. Rushing to -- on -- on that limited issue, I
25 think, is one thing. But I think earlier, he was saying he

1 wanted to put her up so she could say that it would've
2 changed the result and all of that. And that's what I was
3 objecting to, that I think that is beyond the scope of what
4 she can testify to.

5 THE COURT: At that point, it -- it -- that ---

6 MS. MCCALLISTER: It's just -- it's -- it would be ---

7 THE COURT: It would ---

8 MS. MCCALLISTER: --- speculation.

9 THE COURT: --- be -- (a) it would be speculation; and
10 (b) I didn't -- that's a decision ---

11 MS. MCCALLISTER: Correct.

12 THE COURT: --- that I have ---

13 MS. MCCALLISTER: So if ---

14 THE COURT: --- to make.

15 MS. MCCALLISTER: --- we're -- I mean, if it's limited
16 to the factual issue of, you know, whether she knew about
17 this man or not, then that's one thing. If we start
18 getting into the whole "it definitely would've changed the
19 result," I think that's where the state's objection comes
20 in. So that's all I wanted to say about that.

21 THE COURT: Yeah. Okay.

22 MR. SHUPPER: Given that, Your Honor, I -- the -- I --
23 I -- I -- I will concede that that was my intention: to
24 establish that this was not known at the time of trial;
25 that they had been diligent in preparing the case; and that

1 they didn't know about Hamilton or Lawrence. And -- and at
2 least, if you have the benefit of that, then I feel that
3 I've satisfied the -- the other aspects that I must show,
4 which was: it was some diligent effort to locate this
5 witness, because that's what the test is, is -- is the --
6 why it wasn't discovered ---

7 THE COURT: If you -- if you want to keep it limited
8 to that and you think that helps the record to be more
9 complete, I -- she can certainly come and testify. I think
10 the state has -- concurs with that. And -- but I really
11 don't want to retry another ---

12 MR. SHUPPER: No ---

13 THE COURT: --- another ---

14 MR. SHUPPER: --- Your Honor. That and ---

15 THE COURT: --- ineffective ---

16 MR. SHUPPER: --- that wasn't my intentions.

17 THE COURT: --- assistance ---

18 MR. SHUPPER: No. My ---

19 THE COURT: --- issue.

20 MR. SHUPPER: --- intention was meet the five prongs
21 and I ---

22 THE COURT: I understand.

23 MR. SHUPPER: --- think there's one that I ---

24 THE COURT: Sure.

25 MR. SHUPPER: --- haven't got any testimony about.

DIRECT EXAMINATION BY MR. SHUPPER - AMYE RUSHING

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1 THE COURT: All right. Very well.

2 Ms. Rushing.

3 (Whereupon, the witness came forward.)

4 THE COURT: Thank you. Ms. Rushing, when you get up
5 there, I'm just going to ask you to raise your right hand
6 for me.

7 AMYE RUSHING, having been first duly sworn,
8 testified as follows:

9 THE COURT: Thank you.

10 DIRECT EXAMINATION

11 BY MR. SHUPPER:

12 Q Good afternoon, Ms. Rushing. Thank you for being
13 here.

14 A Yes, sir.

15 Q You -- you've been hearing the discussion?

16 A (No audible response.)

17 Q You were on the defense team back in 2002 or 2003?

18 A That's correct.

19 Q And did you all conduct investigations?

20 A We did.

21 Q And did you know anything about Mr. Lawrence?

22 A We did not know anything about Mr. Lawrence. We had
23 investigators involved in the case. Obviously, we had the
24 information from the state as well. But I tried to track
25 down as many people as we could, but we were unaware that

1 Mr. Lawrence was there or a witness the night of the
2 shooting.

3 Q Do you have anything that you might have on the
4 subject of it being undiscoverable or unknown or newly
5 discovered?

6 A Well, obviously, a part of our investigation is that
7 we wanted an eyewitness. We wanted someone to back up our
8 -- our client's story. Having eyewitness testimony from
9 someone not involved in the case, someone not charged,
10 would've been ideal. Certainly, if we would've had a -- an
11 eyewitness, we -- we would've used him.

12 MR. SHUPPER: I have nothing further, Your Honor.

13 THE COURT: Thank you.

14 Cross-examination?

15 MS. MCCALLISTER: No questions, Your Honor.

16 THE COURT: All right. Thank you so much, Ms.
17 Rushing.

18 THE WITNESS: Thank you.

19 MR. SHUPPER: Thank you, Ms. Rushing.

20 (Whereupon, the witness exited the witness stand.)

21 MR. SHUPPER: Now, Your Honor, you ready for me to
22 reply to Ms. McCallister's argument?

23 THE COURT: Yes, if you are ready.

24 MR. SHUPPER: Thank you, Your Honor. The applicant
25 has submitted affidavits, a memorandum of law, which covers

1 the five factors to be considered. The -- whether it's the
2 Cort factors or the *McCoy* or *Mose* factors, I -- I think
3 that it's clear from those cases that there is an exception
4 to the one-year statute of limitations, which is the A.G.'s
5 return and motion had argued it wasn't timely.

6 I -- I couldn't see the separation of the -- the
7 ineffective-assistance issues from that because, as I read
8 the motion, they're saying this is untimely. It wasn't --
9 they even reference the Hamilton letter and claim that it
10 was not filed with one year of the last decision and as if
11 they overlook the discovery rule that we discussed earlier
12 that's an -- a -- outlined in *McCoy* and *Mose*.

13 And so to me, the state's contention that this was
14 untimely, based on the one-year statute of limitations,
15 must fail because the evidence you've heard today and --
16 and in the record, which is the Hamilton letter, which,
17 even though it looks like the Court's not going to consider
18 that as -- as credible evidence ---

19 THE COURT: Well, it's -- it's not whether it's
20 credible or incredible. It's -- it's not evidence. It --
21 it's a letter, but it's -- it's not an affidavit; it's not
22 sworn to. It's -- it's ---

23 MR. SHUPPER: Yes -- yes, sir.

24 THE COURT: --- you know ---

25 MR. SHUPPER: Yes, Your Honor. And -- and -- and ---

1 THE COURT: --- unless you can show me -- unless you
2 can show me case law that says that I could consider
3 something that is not authenticated, cannot be --
4 apparently cannot be authenticated; the author of the
5 supposed letter cannot be located; not an affidavit. If
6 you can find me something, now, I -- I will certainly do
7 otherwise.

8 MR. SHUPPER: And -- and -- you -- I -- I think I --
9 Your Honor, I'm -- at this point I'm not sure whether I
10 mentioned it in chambers or on the record that we've --
11 I've been unable to locate ---

12 THE COURT: You did.

13 MR. SHUPPER: --- Mr. Hamilton. I have -- and I think
14 that was in here.

15 THE COURT: It was.

16 MR. SHUPPER: As Your Honor knows from our discussions
17 before, I -- and the record shows that I'm -- I made a
18 notice of appearance in June of 2017. And the only reason
19 that I have anything to do with this case that was filed
20 pro se is because the Department of Corrections shipped him
21 to New Mexico without a hearing. And -- and -- and our
22 contention is that it was a violation of the -- several due
23 process/equal protection -- and -- and since then, they --
24 they have hindered his perfection of his PCR because they
25 -- they shipped him to New Mexico, where he -- he had to

1 hire counsel to -- to answer the roster calls, the docket
2 meetings.

3 I -- I -- I've -- I -- the -- Your Honor, this case
4 was filed in 2014 in July within one year of his discovery
5 of the Hamilton letter, which triggered this action that
6 we're here on today. So I would assert that it's timely,
7 within the statute; it meets the exception on the discovery
8 rule.

9 You know, I -- because the -- the Department of
10 Corrections saw fit to send him to New Mexico, they've
11 hindered his perfection of his appeal. I mean, it took me
12 close to a year to get somebody to order him returned to
13 SCDC. And when Judge Goldsmiths [sic] ordered him to be
14 returned, he was returned, but then he was put in
15 restrictive custody with death row prisoners, which I think
16 is improper and in violation of not only agency policies,
17 but several constitutional causes designed to ensure equal
18 justice, due process for everyone, even reputed gang
19 members; and that -- that for a year, he was basically
20 *incommunicado*, and yet he's expected to find this witness.

21 I -- upon acceptance of this case, I got a stack of
22 transcripts this high that I had to get with before I could
23 even launch an investigation as to where Mr. Hamilton might
24 be. And I -- I made an effort. I kind of picked up the
25 trail. I had some conversations with people reported to --

1 to be family members, and the information I got during that
2 instance was that he was out of the country and
3 unavailable.

4 I have, as is -- of course, when the Department of
5 Corrections sent Mr. Price back to New Mexico in July, they
6 knew I was on medical leave when I asked for the
7 continuance, because I gave them documentation. So there's
8 a two-month gap where I can't do anything. Can't continue
9 me -- even had to -- I think I was on medical leave when we
10 had that telephone conference to try to -- where -- where
11 the department then decided to seek amendment of the -- the
12 -- Judge Goldsmith's order to allow them to send him back
13 to New Mexico. I -- I can only see that as evidence of
14 obstruction.

15 THE COURT: And now, though -- you talking about the
16 conference that you had with Judge Benjamin.

17 MR. SHUPPER: Yes.

18 THE COURT: I understand.

19 MR. SHUPPER: No, no, not Judge Benjamin. Judge ---

20 THE COURT: Oh, I'm sorry.

21 MR. SHUPPER: --- Judge ---

22 THE COURT: Newman.

23 MR. SHUPPER: --- Newman.

24 THE COURT: Okay. Judge ---

25 MR. SHUPPER: Yes, Your ---

1 THE COURT: --- Newman.

2 MR. SHUPPER: --- Honor.

3 THE COURT: Thank you.

4 MR. SHUPPER: And -- and -- and -- and -- and -- and
5 how can I reasonably be expected to renew the search for a
6 witness that I've kind of got -- the trail got cold, but
7 then I renew my efforts to get my investigator and -- and
8 -- and then my client's in New Mexico again for ten weeks.
9 I can only view that as obstruction.

10 And -- and I don't know -- I really don't, Judge. If
11 -- if Mr. Hamilton turns out to be deceased, then I would
12 think that that letter where he invokes "with God as my
13 witness" could be considered a -- I don't know what -- what
14 condition he was in or not, but something akin to a dying
15 declaration.

16 But I -- I do believe that the State Department of
17 Corrections has hindered his attempts to his appeal, to
18 locate this witness because they've got me fighting to get
19 him brought back. Of course, they knew I was on medical
20 leave till August 1st. They shipped him two weeks before I
21 was to return to work. And my efforts were then focused on
22 trying to -- to get him back and pick up -- deal with some
23 of my other cases that had laid dormant for two months.

24 And so I -- since I returned to work, I -- I've been
25 playing catch-up and they know it. I -- I've only been

1 able to see him one time since he returned five or six
2 weeks ago. And -- and in the normal course of my
3 preparation for a hearing like this, I would've had far
4 more conversations with him. I would've been able to
5 explore -- do you know what -- I mean, do you have any
6 other ideas, for instance, what I could do?

7 I -- I just feel that the -- the -- the department has
8 hindered my investigation. But I've certainly made an
9 effort. And I -- my efforts continue. My investigator is
10 still tracking down all those numbers.

11 Your Honor, there was -- like I said, I think there
12 was 40 -- maybe 70 pages of -- with addresses and phone
13 numbers and contacts and family members. And it -- and the
14 thing that we find -- found corresponding was [REDACTED] Plymouth
15 Street in Kannapolis, which is the address on the envelope.

16 So it gives me some reasonable belief that that letter
17 was sent from the man that said that: "I'm Joshua
18 Hamilton, and I've discovered this by watching this." And
19 -- and -- and so I -- I -- I -- I'm -- I'm still searching
20 for him. But as of yet, I haven't found him.

21 Judge, you know, I -- I -- I mentioned this at -- at
22 -- as out of some frustration with the way that my client
23 has been treated. And -- and I know there's normal rules;
24 and then, there's certain authorities that courts have in
25 the interest of justice. And -- and -- and that's what

1 concerns me about Mr. Price's case.

2 The -- the -- the evidence at trial, as far as the --
3 the roadie's testimony -- it was dark and foggy -- he, you
4 know, it's -- as far as the -- the supposed reenactment of
5 the demonstration of shooting downward, that was very
6 sketchy. And -- and here we've discovered Mr. Price had
7 received only by virtue of him being -- his offense being
8 highly publicized by a -- a TV show, of all things, and --
9 and circulated widely so that all -- that Mr. Lawrence and
10 Mr. Hamilton saw it and said: "Well, I saw this."

11 That was what triggered this PCR, was those letters
12 and -- and the contacts from witnesses that were not
13 previously known; that were eyewitnesses. And as Ms.
14 Rushing said, eyewitness testimony, in -- in her view, was
15 -- was certainly better than codefendant testimony or
16 another person charged in the crime with obstruction of
17 justice.

18 Because first of all, the jury would normally have
19 doubts about somebody who gets up on the stand and is -- is
20 -- has submitted several different inconsistent statements.
21 And so the credibility is shot. So -- so the -- Mr.
22 Lawrence and -- and Mr. Hamilton, if we could find him,
23 would -- would present testimony that would allow the fact-
24 finders, the jurors, to consider in light of the other
25 evidence presented at trial.

1 Your Honor, the -- the five prongs, as you know, are:
2 would probably change the result of a new -- if a new trial
3 is had -- and, of course, we have to convince you, Your
4 Honor. And -- and has been discovered since trial: I
5 think there's no doubt about that issue, Your Honor. Could
6 not have been discovered before trial: I think we've
7 established that fact and Ms. -- with Ms. Rushing's
8 testimony.

9 Is material to the issue of guilt or innocence: Well,
10 the contrast between what the jury saw and heard and what
11 these -- the Hamilton letter and the Lawrence testimony and
12 affidavit is -- is clearly -- difference. And it does go
13 to a self-defense claim, because he was in -- he's a -- a
14 five-seven ---

15 I think you were, what, 135 at the time?

16 --- and -- and -- and this guy was a -- a lineman for
17 the Gamecocks. He's a big guy. You watch football on TV.
18 You know how big these guys are. And that alone, the
19 disparity in size, could give rise to legitimate use of
20 lethal force if he was in danger.

21 The testimony of Price -- although he did testify, he
22 was the accused. So there's some -- some perhaps suspect
23 that his testimony was self-serving. But an independent
24 eyewitness who was not previously known to me, that
25 testimony would've had a significant impact on -- on trial,

1 if -- if it had been known to the defense.

2 And -- and -- and finally, the -- at -- at I -- and --
3 and I don't think it's by accident, Your Honor. You know,
4 I -- I'm -- I'm an attorney. I'm -- I -- and I -- and
5 sometimes I have to second-guess what judges mean when they
6 write opinions. But I think, under No. 5, is not merely
7 cumulative or impeaching, means that it -- standing alone,
8 if you have evidence that's merely impeaching or -- or
9 cumulative, then -- then, you don't meet your burden.

10 But I think that if you meet the first four prongs and
11 -- then, merely has real meaning. It means if you get to
12 this step and what you've gotten is not merely impeaching
13 or cumulative, then you've met your test. And -- and so I
14 think -- I don't think it was accidental that -- that the
15 -- the Court said merely. I think it was to be looked
16 overall.

17 And a totality-of-circumstances argument, if I could
18 sense -- if I can use that phrase?

19 THE COURT: Well, I think what they're -- they're
20 addressing -- and I think this is what you are saying -- is
21 that if you had four people that testified these events
22 happened on Thursday at three o'clock and you've found
23 someone else that knew that the event happened on Thursday
24 at three o'clock, that's insufficient, even though maybe --
25 maybe the other elements would be met -- some of the other

1 elements. Obviously, if it's going to make a difference in
2 the trial, then -- then that's something different.

3 But I think that's what they mean by merely
4 cumulative; in other words, that what this witness could
5 add was -- there have been so many people that have
6 testified to it and it doesn't go to the heart of the
7 matter and it would merely -- you know, merely cumulative.
8 Even it was newly discovered, even if you didn't know about
9 it, it doesn't go to the heart, you know, of the matter.
10 And while that may be a very important fact to know, you've
11 already got three or four people that have already
12 testified to it.

13 I think that's what they're talking about. I -- I
14 don't think that this is the type of -- of evidence that
15 they're talking about being merely cumulative. I agree
16 with you, is what -- I guess is what I'm saying.

17 Because you -- the difference, as you see it, is that
18 this is a gentleman who is a -- some -- someone that you
19 could argue to a jury doesn't have a dog in the fight.
20 Although there may have been some other issues, your
21 position is: He got no dog in this fight.

22 MR. SHUPPER: It -- it -- that's exactly my position

23 ---

24 THE COURT: Yeah.

25 MR. SHUPPER: --- Your Honor.

1 THE COURT: Yeah. And I don't think -- I don't think
2 that type of -- of information would be merely cumulative.
3 I don't.

4 MR. SHUPPER: Okay.

5 THE COURT: So I -- I -- I agree with you on that.

6 MR. SHUPPER: All right.

7 THE COURT: Yeah.

8 MR. SHUPPER: And -- and -- and -- and in view of
9 what's been presented, Your Honor, I -- I respectfully move
10 that you deny the motion to dismiss ---

11 THE COURT: Dismiss?

12 MR. SHUPPER: --- and that we proceed ---

13 THE COURT: Be permitted to ---

14 MR. SHUPPER: --- to an ---

15 THE COURT: --- go forward ---

16 MR. SHUPPER: --- evidentiary hearing at some time as
17 Your Honor might decide, if -- if Your Honor agrees with
18 me.

19 THE COURT: Thank you so much.

20 MR. SHUPPER: Thank you, Your Honor.

21 THE COURT: I'm going consider the matter. I'm going
22 to ask for proposed orders, if you'd be so kind.

23 Now -- now, if you want me to hold this matter off for
24 60 days, if you are able to find this gentleman, Mr.
25 Hamilton, then I don't mind getting back together. That

1 ---

2 MR. SHUPPER: Thank you ---

3 THE COURT: --- gives you ---

4 MR. SHUPPER: --- Your Honor.

5 THE COURT: --- a little ---

6 MR. SHUPPER: I ---

7 THE COURT: --- more time, you know, in -- assuming
8 that your client, Mr. Price, agrees -- I don't want to -- I
9 don't want him to wait any longer than he is comfortable
10 waiting.

11 THE APPLICANT: I -- I ---

12 MR. SHUPPER: I think ---

13 THE APPLICANT: --- was ---

14 MR. SHUPPER: --- he ---

15 THE APPLICANT: --- I -- I'm ---

16 MR. SHUPPER: --- I think ---

17 THE APPLICANT: --- I'm ---

18 MR. SHUPPER: --- he's comfortable ---

19 THE APPLICANT: --- I'm comfortable ---

20 MR. SHUPPER: --- with waiting ---

21 THE APPLICANT: --- with that.

22 MR. SHUPPER: --- Your Honor.

23 THE COURT: Okay. Well, then, I will -- you know, I
24 will not -- you know, I'm going ask for proposed orders
25 from you. But if you can find him in 60 days, let me know.

1 MR. SHUPPER: I -- I'd be happy to, Your Honor. And I
2 -- thank you.

3 MS. MCCALLISTER: Okay. So, Your Honor, if -- if
4 that's what we're doing -- and not to get into the whole
5 SCDC thing again, but is he to be held in South -- I mean,
6 is he supposed to be held here for those 60 days or ---

7 THE COURT: You mean in Richland County or in the
8 state of South Carolina?

9 MS. MCCALLISTER: In the state of South Carolina.

10 THE COURT: You know ---

11 MS. MCCALLISTER: I know that SCDC would probably want
12 to talk to you about that.

13 THE COURT: Well, I would -- I don't think -- here's
14 what I -- here's -- this would be my position with regards
15 to that: I am not -- I am not going to get into the
16 security business of the South Carolina Department of
17 Corrections, as I've already talked to you. If it's a
18 matter involving SCDC, it's got to go to somebody else,
19 other than me, for the reasons I've already mentioned.

20 Having said that -- having said that, I would
21 certainly want the South Carolina Department of Corrections
22 to have -- at least minimally, have a conversation with the
23 chief administrative judge and, minimally, make some
24 showing to the chief administrative judge if they want to
25 -- if they want to move this gentleman. The reason is --

1 is that for -- when they choose to move this gentleman,
2 they -- they -- they tend to go an awfully long way away,
3 which is awfully expensive for the taxpayers of South
4 Carolina. And they may have a completely appropriate
5 reason for doing that.

6 It just seems to me that there's -- they sure have
7 gotten to go bumping over a whole lot of places between
8 here and New Mexico. And so given just the -- the great
9 expense, I would like for them to -- to have a conference
10 call and -- and present that to -- to -- to the chief
11 administrative judge, Judge Benjamin. And -- and ---

12 MS. MCCALLISTER: Judge ---

13 THE COURT: --- then, the ---

14 MS. MCCALLISTER: --- I'm sorry.

15 THE COURT: --- reason ---

16 MS. MCCALLISTER: Judge Newman?

17 THE COURT: Judge Newman.

18 MS. MCCALLISTER: Okay.

19 THE COURT: Judge Newman.

20 MS. MCCALLISTER: Because she's ---

21 THE COURT: I'm sorry.

22 MS. MCCALLISTER: --- common pleas.

23 THE COURT: Judge Newman.

24 MS. MCCALLISTER: Yeah.

25 THE COURT: Yeah.

1 MS. MCCALLISTER: Okay.

2 THE COURT: I think the -- the difference is we switch
3 in January, and I think maybe the switch in July. Yeah,
4 whatever.

5 So that's -- I would appreciate that a lot.

6 MS. MCCALLISTER: Okay.

7 THE COURT: And the reason is also because of the
8 practicality of it. Because I don't want to hold onto it
9 six months because he's in the desert; Mr. Price is hanging
10 out with cactus. I would much prefer, if -- if you are
11 able to find Mr. Hamilton, that we can reconvene
12 immediately ---

13 MS. MCCALLISTER: Okay.

14 THE COURT: --- and resolve this matter here. Mr.
15 Price has been waiting for a long time. And I'm sure the
16 victim's family, when they get these phone calls, you know,
17 they're heart-wrenching for matters that they think have
18 been dealt with and over. And they're heart-wrenching for
19 everybody's -- for your family, Mr. -- for everybody.

20 So I don't want it to linger. And -- and again, if
21 they got to go get him in the desert, that just -- that's
22 just -- seems to me like even if they have concerns, it
23 would be lovely if they could find a place maybe not quite
24 so far away. That's for SCDC and your chief ---

25 MS. MCCALLISTER: Okay.

1 THE COURT: --- administrative judge. But I would
2 like -- I mean, I would certainly appreciate and think
3 would be appropriate is that at least y'all have a
4 conversation about it.

5 MS. MCCALLISTER: Okay. And so, Your Honor, the
6 orders that you're requesting are: from the state, was it
7 granting the motion to dismiss; and for Mr. Shupper,
8 denying the motion to dismiss?

9 THE COURT: (No audible response.)

10 MS. MCCALLISTER: Okay. Well, so just on motion to
11 dismiss, not on necessarily the merits of the -- they're
12 kind of inextricable ---

13 THE COURT: I don't think ---

14 MS. MCCALLISTER: --- at this point, I feel like, a
15 little bit. But ---

16 THE COURT: But it is -- it -- it -- you know, one of
17 the -- the problem, would it make a difference? That's a
18 -- that's -- I mean, that -- necessarily, that goes into
19 the merits, if ---

20 MS. MCCALLISTER: Okay.

21 THE COURT: --- if you will, because it's important.
22 That's -- that's a very important prong. So I do think
23 that's important.

24 The -- I -- I think it is appropriate, if -- if you
25 would -- and I notice you have your scrivener. Don't you

1 like when you get to the point where you have a scrivener?

2 MS. MCCALLISTER: Yes, I am.

3 THE COURT: I remember, Ms. McCallister, when you were
4 the scrivener.

5 What I would appreciate, though, so we are all kept
6 moving forward, if we could do a -- a shorter order from
7 ---

8 MS. MCCALLISTER: Okay.

9 THE COURT: --- the state ---

10 MS. MCCALLISTER: That's what I was ---

11 THE COURT: --- but, of course ---

12 MS. MCCALLISTER: --- going to ask.

13 THE COURT: --- run it by you and get your approval --
14 the -- to handle those two issues: that we're going to
15 leave the matter open for 60 days to allow you to -- your
16 investigators to continue what I'm sure has been mammoth
17 work and continue that good work; see if Mr. Hamilton can
18 be located. I wanted to say Humphries -- Mr. Hamilton has
19 been located; and then, to ask SCDC if they do need to move
20 him away from South Carolina, that they at minimally have a
21 conversation with counsel with the chief administrative
22 judge, only because of the -- the need, if -- if we're able
23 to -- if you're able to find Mr. Hamilton so we can be
24 convened quickly.

25 MS. MCCALLISTER: Okay.

1 THE COURT: Okay.

2 MS. MCCALLISTER: And the 60 days that you're giving
3 him starts, I guess -- probably not today, but tomorrow or
4 starts ---

5 THE COURT: Yes.

6 MS. MCCALLISTER: Okay. It's to ---

7 THE COURT: Yes.

8 MS. MCCALLISTER: --- start immediately.

9 THE COURT: Well, tomorrow is -- yeah. Tomorrow is
10 Wednesday.

11 MS. MCCALLISTER: Okay.

12 THE COURT: Good time to call the P.I. Good time to
13 put him back at his job.

14 MR. SHUPPER: Thank you ---

15 THE COURT: Yes.

16 MR. SHUPPER: --- Your Honor.

17 THE COURT: Yeah, absolutely.

18 MS. MCCALLISTER: Okay.

19 THE COURT: Happy -- happy to do that.

20 MS. MCCALLISTER: And so ---

21 THE COURT: I think that's appropriate ---

22 MS. MCCALLISTER: --- just to ---

23 THE COURT: --- under these ---

24 MS. MCCALLISTER: --- be clear, we don't need Mr.
25 Sorenson for Friday; you want to take this ---

1 THE COURT: Mr. Sorenson ---

2 MS. MCCALLISTER: --- the motion ---

3 THE COURT: --- has many ---

4 MS. MCCALLISTER: --- under ---

5 THE COURT: --- things ---

6 MS. MCCALLISTER: --- advisement.

7 THE COURT: --- to be working ---

8 MS. MCCALLISTER: Okay.

9 THE COURT: --- on.

10 (Whereupon, the proceeding was concluded at 3:48 p.m.)

11 --- END OF TRANSCRIPT OF RECORD ---

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CERTIFICATE

I, the undersigned Maryann S. Nevers, CVR-M-CM, RVR, RVR-M, Official Court Reporter for the Eighth 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 hearing of the captioned cause, relative to appeal, in the Circuit Court for Richland County, South Carolina, on the 12th day of November, 2019.

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



Maryann S. Nevers, CVR-M-CM, RVR, RVR-M
Official Court Reporter

West Columbia, South Carolina
February 23, 2022

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Jeroid John Price, #298791,)

Case No.: 2014-CP-40-4524

Applicant,)

v.)

State of South Carolina,)

Respondent.)

**ORDER GRANTING STATE
MOTION TO DISMISS**

RICHLAND COUNTY
FILED
2019 AUG 31 PM 2:41
JENNIFER W. MCCOY
CLERK, S.C. & F.C.

This matter comes before the Court by way of an application for post-conviction relief filed July 21, 2014 by Applicant Jeroid John Price, SCDC # 298791, alleging he was entitled to a new trial based on various allegations of ineffective assistance of trial counsel, ineffective assistance of appellate counsel, trial court error, and newly discovered evidence. The State of South Carolina (Respondent) moved to summarily dismiss the application as successive to Applicant's prior post-conviction relief action, barred by the statute of limitations, and for failing to make a prima facie showing that he was entitled to relief based on newly discovered evidence. A hearing on Respondent's motion to dismiss was held before this Court at the Richland County Courthouse on November 12, 2019. At the conclusion of the hearing, the Court requested proposed orders from both parties. After review of the evidence presented at the hearing, the trial court record, and the arguments of the parties, this Court finds Applicant has failed to meet his requisite burden of proof and dismisses this action.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. During its May 2003 term, the Richland County Grand Jury indicted Applicant for murder (2003-GS-40-2295) following the

December 7, 2002, shooting death of Carl Smalls at the Club Voodoo nightclub in Richland County following an altercation between two rival gangs. Cameron B. Littlejohn, Jr., and Amye Rushing (Rushing) represented Applicant. David M. Pascoe, Jr.; Donald N. Sorenson; and Bryan Jeffries, all of the Fifth Circuit Solicitor's Office, prosecuted the case. On December 15, 2003, Applicant proceeded to a jury trial before the Honorable Reginald I. Lloyd, III, circuit court judge. The jury found convicted Applicant guilty as indicted and Judge Lloyd sentenced him to a term of imprisonment of thirty-five years.

Applicant, through counsel, filed a timely notice of Appeal. Applicant was represented on appeal by Chief Appellate Defender Joseph L. Savitz, III, of the South Carolina Commission on Indigent Defense – Appellate Defense Division and Rushing. On certification from the South Carolina Court of Appeals pursuant to Rule 204(b), SCACR, the South Carolina Supreme Court affirmed Applicant's conviction and sentence, finding an investigator's testimony that Applicant was a gang leader was inadmissible hearsay but the error in admission was harmless because the inadmissible hearsay was cumulative to other properly admitted evidence. State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006). The Remittitur was returned to the circuit court on May 5, 2006.

First PCR Action (2006-CP-40-7168)

Applicant filed his first application for post-conviction relief on December 4, 2006, alleging he was being held in custody unlawfully due to ineffective assistance of counsel for failure to object to a gang expert's testimony as a violation of the Confrontation Clause. Respondent made its return on May 14, 2007, requesting an evidentiary hearing. Applicant, through his attorney Charles T. Brooks, III, filed an amended application on April 30, 2008, alleging trial counsel was ineffective for failing to investigate the crime scene, failing to object to

a confrontation clause violation, and failing to object to improper closing remarks by the State,, as well as ineffective assistance of appellate counsel for failing to argue the prejudicial value of the improper hearsay testimony. An evidentiary hearing into the matter convened at the Richland County Courthouse on June 25, 2008, before the Honorable William P. Keesley. Applicant was present and represented counsel Brooks. Assistant Attorney General Brian T. Petrano of the South Carolina Attorney General's Office represented Respondent. By written order dated June 27, 2008, Judge Keesley denied relief and dismissed the application with prejudice.

Applicant then filed a timely notice of appeal of the denial of post-conviction relief and Appellate Defender Elizabeth Franklin-Best filed a petition for writ of certiorari was filed on his behalf by on June 15, 2009.

Respondent filed its return to the petition on August 31, 2009. The South Carolina Supreme Court transferred the case to the South Carolina Court of Appeal. On January 12, 2011, the Court of Appeals issued an order denying certiorari. The Court of Appeals issued a remittitur on January 28, 2011.

Applicant then filed a petition for writ of certiorari to the United States Supreme Court. The United States Supreme Court denied certiorari on June 13, 2011.

Federal Habeas Corpus Action (1:11-1172-JMC-SVH)

Thereafter, Applicant filed a *pro se* petition for a writ of habeas corpus in the United States District Court for the District of South Carolina on May 12, 2011. Respondent filed a motion for summary judgment on August 31, 2011, as well as a return and memorandum of law in support of the motion on the same date. On March 21, 2012, United States District Court Judge J. Michelle Childs issued an order adopting the report and recommendation of the magistrate judge,

granted the motion for summary judgment, and denied Applicant's motions for evidentiary hearings. The district court denied a certificate of appealability.

II. SUMMARY OF FACTS ADDUCED AT TRIAL

On the evening of December 6, 2002, Club Voodoo in lower Richland County hosted a sorority/fraternity party. December 15-16 Tr. pp. 250, 272, 282. Both Applicant and the victim, Carl Smalls (Smalls), attended the party. Applicant shot and killed Smalls during a gang-related altercation in the club's hallway after the party had ended and the club was shutting down. Applicant claimed the shooting was done in self-defense. December 17-19 Tr. pp. 290-384.

Smalls was a member of the Crips gang. December 15-16 Tr. p. 236. At trial, the State introduced significant circumstantial evidence that Applicant was a leader of a rival gang, the Bloods. Among the evidence seized from Applicant's apartment and admitted at trial were photographs depicting young men "throwing up" Blood hand signs and wearing Blood colors; a book of "different codes that [Bloods] would use like a dictionary;" an unusual amount of red clothing and hats of the type known to be worn by Bloods; and bullet-proof vests, worn by high-ranking gang members. December 17-19 Tr. pp. 311-12, 318-21, Police also seized a document containing a "pledge of allegiance" to the United Blood Nation. December 17-19 Tr. pp. 321-22. The pledge contained references to "Crip Killing Thugs." December 17-19 Tr. p. 328. Additionally, Applicant's codefendant, Ryan Brooks, told police Applicant was a Blood. December 15-16 Tr. p. 104.

Applicant and Smalls confronted each other during an altercation on the dance floor involving Bloods and Crips. December 15-16 Tr. pp. 173-75, 201, 229; December 17-19 Tr. pp. 276-77. The gang members were "throwing" gang signs and hand signals at each other and "flashing" their colors. December 15-16 Tr. pp. 277. Multiple witnesses testified Smalls was

“irate,” “acting wild,” and “beefing” with everyone that night. December 17-19 Tr. pp. 191, 389. After Smalls did the “Crip walk” and drew a line on the floor with his foot, Applicant “got in [Small’s] face” and told him, “You’re going to fall like ‘The Matrix,’” which, according to one witness, meant “I’m going to kill you.” December 15-16 Tr. pp. 275, 279, 286-87, 289. Witnesses then saw Applicant making hand motions like firing a gun, although Applicant denied this during his testimony. December 15-16 Tr. pp. 279-80.

Later, around 2:00 a.m. on the morning of December 7, the partygoers were leaving the club and congregating in the parking lot. A bystander, Joe Jones, saw Ryan Brooks heading purposefully from the parking lot back into the club carrying “steel” in his hand. December 15-16 Tr. pp. 200-02. Brooks, who is about 6’1” tall and weighs 200 pounds, wore his hair in braids and was not wearing a hat. December 15-16 Tr. pp. 89-90.

Brooks admitted he retrieved a pistol from a car, a chrome .380-caliber semi-automatic, then went back inside where he saw Applicant and Smalls in the hallway. December 15-16 Tr. pp. 94-95, 97-98. Brooks testified when he returned to the hallway, Applicant and Smalls were “having words.” December 15-16 Tr. p. 94. Brooks testified Smalls rushed Applicant and had Applicant pinned against the wall. December 15-16 Tr. pp. 122-23. Brooks also admitted shooting Smalls one time, because, Brooks claimed, Smalls managed to grab Applicant’s gun and pointed it at him, and Brooks was scared. December 15-16 Tr. pp. 95-98. Brooks testified he shot once when he saw Applicant and Smalls start “tussling,” and then he immediately fled back outside the building. December 15-16 Tr. p. 98.

Applicant testified the party had ended, the music had been turned off, and the partygoers had exited the club to the parking lot when the shooting took place. December 17-19 Tr. pp. 365, 369-70. Applicant claimed he left the club to retrieve his .40-caliber pistol from a car

because the man in charge of counting the money from the party, Ty, asked Applicant to watch his back while he did so.¹ December 17-19 Tr. pp. 336-67. Applicant testified when he returned to the club, Smalls confronted him in the hallway. December 17-19 Tr. pp. 314-15. Applicant then related a similar version of events as Brooks, claiming Smalls rushed him and pinned him against the wall; Brooks fired one shot and ran; and Applicant was then able to get his own gun and shoot. December 17-19 Tr. pp. 314-84.

Marcus Jones worked for the party's DJ and testified the party ended around 2:00 a.m. December 15-16 Tr. pp. 135, 137. Jones testified the DJ had turned off the music and turned the club lights on to let the partygoers know the party was over, and they should exit the club. Tr. pp. 137-38. Jones further testified he was packing up the DJ equipment when he heard the first gunshot and looked up. December 15-16 Tr. p. 138, 166. Jones testified the club's lights were on when the shooting occurred. December 15-16 Tr. p. 140. Jones stated he saw the gunfire of the second and third shots, but it was difficult to see the gunman or the victim because the club doors were open and the cold air from outside had created fog inside the warm club. December 15-16 Tr. pp. 139-41. Jones also testified there was no one else in the area except for the gunman and the victim, and the victim was on the ground. December 15-16 Tr. pp. 144, 147. Jones described the gunman as being around 5' 5" and not very heavy. December 15-16 Tr. p. 143. He testified the gunman was wearing a "red, black, and white pinwheel hat." December 15-16 Tr. p. 142. Marcus Jones later picked Applicant out of a photo lineup as the gunman with the pinwheel hat. December 15-16 Tr. pp. 154-57.

Damien Martin was also present at the party on the night of the shooting, working for the DJ. December 15-16 Tr. p. 172. Martin saw the victim in a confrontation with another group of

¹ Ronald Hamilton, the club's promoter, testified he never asked Applicant to assist with security. December 17-19 Tr. pp. 388, 395.

guys on the dancefloor, which Martin testified he believed was gang-related. December 15-16 Tr. pp. 173-74, 178. Martin testified he heard the first shot and ducked down. December 15-16 Tr. p. 175. When the shooting stopped, he and Jones continued packing up the DJ's equipment and left the club approximately fifteen minutes later. December 15-16 Tr. p. 175.

Shonte Boyd was also still inside the club counting money at the time of the shooting. She testified the party had ended, the lights were on and the DJ was packing up his equipment. December 17-19 Tr. p. 220. According to Boyd, only people from the fraternity and sorority, the DJ, and the club employees were still in the building at the time of the shooting. December 17-19 Tr. p. 220. Boyd testified the shooting took place in the hallway, which was a small, narrow area leading into the main club. December 17-19 Tr. pp. 221, 223. Boyd further testified she ran and hid when she heard the first shot, and when she did she got a glimpse inside the hallway. She did not see anyone in the hallway except the victim. December 17-19 Tr. pp. 222-23.

Smalls died on the hallway floor, after calling 911 on his cell phone at 2:14 a.m. December 15-16 Tr. p. 185; December 17-19 Tr. pp. 107-09. Evidence collected at the crime scene, including bullet fragments recovered from an indentation in the floor, was consistent with the victim having been shot while lying on the floor. December 15-16 Tr. pp. 384-85. Marcus Jones testified Smalls did not appear to have a weapon and the gunman's life was not in danger when he killed the victim. December 15-16 Tr. p. 148.

Although he could not rule out other possibilities (i.e., that the victim fired a weapon), Lieutenant Joseph Powell testified the gunshot residue test performed on Smalls' left hand² was "most consistent" with Smalls being in a defensive posture and within five feet of a weapon that he did not fire. December 15-16 Tr. p. 408. Dr. Ronald Burns, the pathologist who performed

² Testimony established Smalls was right handed. December 17-19 Tr. p. 107.

the autopsy, likewise could not opine conclusively whether Smalls had been lying down when Petitioner shot him, but testified that his wounds were consistent with that scenario. December 17-19 Tr. p. 22. Spent .40-caliber and .380-caliber cartridges were recovered near the body. December 15-16 Tr. pp. 376-77.

III. CURRENT ACTION BEFORE THE COURT

On July 21, 2014, Applicant filed this current application for post-conviction relief—his second application and third collateral challenge to his conviction. He filed amendments September 27, 2016. In this application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Newly discovered evidence of self-defense based on a new eyewitness;
 - a. Mr. Price alleges he is also in possession of the letter he contends is newly discovered evidence, which also includes a typewritten statement by Mr. Price alleging the letter meets the requirements of McCoy v. State, 737 S.E.2d 623 (S.C. 2013) and Clark v. State, 434 S.E.2d (1993). This letter was dated August 4, 2013.
2. Ineffective assistance of counsel pursuant to Missouri v. Frye;
3. Unconstitutional jury charge on hand of one hand of all;
4. IAC PCR claim - “Counsel was ineffective for failing to object that the Judge erred in finding Petitioner was not prejudice by trial counsel’s failure to object to the charge on the inference of malice from the sue of a deadly weapon. *Gibson v. State* decided May 11, 2016.”
5. “The Judge abused his discretion when he allowed the State’s key witness (aunt) to be qualified and be seated as a juror after she disclosed her relationship to the State’s key witness during the proceedings.”
6. Ineffective assistance of appellate counsel.

On November 7, 2017, Respondent filed a Return and Motion to Dismiss, seeking summary dismissal of this application as successive and barred by the statute of limitations as to all claims beyond newly discovered evidence and for summary dismissal of the newly discovered evidence claims for failure to make a *prima facie* showing that he was entitled to relief because the purported evidence did not meet the five-factor test for newly discovered evidence. On November 13, 2017, Honorable L. Casey Manning, acting in his capacity as Chief

Administrative Judge for Common Pleas for the Fifth Judicial Circuit, signed and filed a Conditional Order of Dismissal provisionally dismissing the application but allowing applicant twenty days to provide sufficient reasons why the matter should not be summarily dismissed.

Applicant, through his counsel John Shupper, filed a Response to the Conditional Order of Dismissal along with a memorandum of law on January 22, 2018, requesting a hearing and addressing only the claim of newly discovered evidence. In this response, Applicant claims he is entitled to a new trial based on the following after discovered evidence:

- A letter purportedly from a Joshua Hamilton from Kannapolis, North Carolina who asserts he saw an episode of the television show "Gangland" featuring Applicant's case and disputes the portrayal of the shooting based on his presence at the club

- An affidavit from Applicant that his sister told him a man named Cor[ie] Lawrence has information about his case

- An affidavit from Corie Lawrence, who also avers he was present at the club during the shooting and has seen the episode of "Gangland" and similarly disputes the accuracy of the portrayal

Applicant asserts he filed this present action within one year of the discovery of this purported evidence and there is a genuine issue of material fact necessitating a hearing on these newly discovered evidence claims.

A hearing on Respondent's motion to dismiss convened at the Richland County Courthouse before this Court on November 12, 2019. Applicant was present alongside counsel Shupper. Respondent was represented by Assistant Deputy Attorney General Lindsey A. McCallister.

At the beginning of the hearing, Respondent moved to dismiss all claims except the newly discovered evidence issue as those issues were not addressed in Applicant's response to the Conditional Order. This Court agrees Applicant has not presented any explanation or

justification to why the Conditional Order should not become final as to those issues, and, accordingly, these allegations are summarily dismissed for the reasons set forth in the Conditional Order of Dismissal. As a result, these allegations will not be addressed below in this Court's order.

In response to the State's motion to dismiss the newly discovered evidence claims, Applicant presented the testimony of Corie Lawrence (Lawrence), an inmate within the South Carolina Department of Corrections who asserted he witnessed the shooting; and trial counsel Rushing. Applicant also attempted to introduce into evidence a letter allegedly written by a person named Joshua Hamilton (Hamilton), who also claimed to have witnessed the shooting and disputed the portrayal of the incident he saw on an episode of the television show "Gangland." The State objected to the letter's admission during the hearing because it was not a sworn statement, and Hamilton was not present at the hearing to testify.

The Court held the record open, at Applicant's request, for an additional sixty days until January 13, 2020, to allow Applicant further time to locate Hamilton. On January 13, 2020, the parties agreed to an additional fifteen-day extension until January 28, 2020. On January 28, 2020, Applicant again requested a further fifteen days, and the State objected. However, because the Court did not rule prior to the expiration of the fifteen days, Applicant was essentially granted the extension through February 14, 2020, by default. This Court has now closed the record, as Applicant has had an additional ninety days to locate Hamilton, but he has been unable to do so. The Court sustains the State's objection to Hamilton's letter and will not consider it as evidence in ruling on the issues before the Court.

Corie Lawrence's Testimony

Lawrence testified he has known Applicant for approximately thirty years and that they both lived in the same apartment complex (the Saint Andrews Apartment Complex) prior to the murder. He testified he has spoken to Applicant and Applicant's counsel since Applicant's conviction and incarceration. Lawrence affirmed his affidavit, submitted as an attachment to Applicant's reply to the Conditional Order of Dismissal and a part of this record, was signed by him and is truthful.

Lawrence testified he was present at the club the night of the shooting and has had time to reflect on the shooting over the past seventeen years. He acknowledged he has also viewed the episode of the television show, "Gangland," which features Applicant's case and the murder, on more than one occasion. Lawrence testified that on the night of the shooting, he heard an argument while the music was still playing in the club and then saw men struggling followed by gunshots. Lawrence testified he recalled the struggle and that the men were standing facing each other. On cross-examination, Lawrence reiterated that when he saw the struggle, the music was still playing, the party was still going, and people were still inside the club. Lawrence testified he did not know Applicant was involved in the struggle until after the crowd reacted to the gunshots. Lawrence testified he heard three gunshots, then ran from the club and went home.

Lawrence testified that despite being a witness to the shooting, he never contacted law enforcement about the incident after he learned Applicant was arrested for murder. Lawrence claimed he never came forward because he was a newlywed at the time of the incident, and he did not want his wife to know he was at the club on the evening of the shooting because she had asked him to stay home. Lawrence testified he and his wife got divorced in 2012, and,

accordingly, he is no longer concerned with her knowing he was at the club on the night in question.

Lawrence testified in the years since the murder, he has watched the "Gangland" episode portrayal of the murder, and he believes the portrayal is inaccurate. Lawrence stated he first saw the episode when he was in Charlotte in 2012. Lawrence stated he later watched the episode again, and, after his second viewing, was convinced that the television portrayal was incorrect. Specifically, Lawrence testified based on his personal observations, Applicant and the victim were struggling when shots were fired and both men were standing.

Lawrence testified the television portrayal of the incident on the "Gangland" episode disturbed him because he felt Applicant did not "get his just do" because the television show portrayed Applicant as a cold-blooded murderer. Lawrence stated the "Gangland" episode made him feel bad about Applicant's situation. On cross-examination, Lawrence admitted he did not know if the television portrayal of the incident in "Gangland" was accurate based on the evidence presented at trial. Lawrence was not a witness or otherwise present during Applicant's trial.

Lawrence testified that in 2002, he did not have any violent convictions on his record. Lawrence stated that at the time, he only had minor convictions of simple possession, driving under suspension, and "ABC" out of the State of Georgia, but no felony convictions that would have been useful for impeachment purposes. On cross-examination, Lawrence clarified that everything serious on his record prior to trial had been expunged. Lawrence testified he was brought back to South Carolina in 2012 and served forty-four months in the Alvin S. Glenn Detention Center as a pre-trial detainee. Lawrence recalled he was transferred to the custody of the South Carolina Department of Corrections, specifically the Kirkland Correctional Institute, in

August 2018 and has been housed there ever since. A review of the South Carolina Department of Corrections website reveals he is serving an aggregate twenty-year sentence for armed robbery, first-degree burglary, two counts of kidnapping, and escape.

Trial Counsel Amye Rushing's Testimony

Rushing, who acted as a second chair at Applicant's trial alongside lead counsel Cameron B. Littlejohn (who has since passed away), testified the defense team was unaware of Lawrence as a potential eyewitness to the shooting. Rushing testified the defense team wanted a neutral eyewitness to the shooting, and if they had been able to locate such a person, that person would have been called as a defense witness at trial.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the evidence presented at the hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony and evidence accordingly in its discussion below. Further, this Court has reviewed the entire record of this case, including Applicant's general sessions records (including the trial transcript), Applicant's appellate records, Applicant's earlier collateral challenge records (including his first post-conviction relief action, the appeal of that action, and the subsequent federal habeas corpus action). This Court has also considered the legal arguments presented by both parties. After a thorough review of the records, evidence, and arguments presented, this Court finds Applicant has failed to meet his requisite burden of proof necessary for post-conviction relief based on his claim of newly discovered evidence and denies and dismissed this action with prejudice. Set forth below are the relevant findings of fact and conclusion of law as required by section 17-27-80 of the South Carolina Code of Laws.

The Uniform Post-Conviction Relief Act states a person may institute a post-conviction relief action if “there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.” S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C).

“Traditionally, in South Carolina, to obtain a new trial based on after discovered evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching.” Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014) (internal citations and quotations omitted); see also Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979) (setting forth the five factors to be analyzed when considering a newly discovered evidence claim). The granting of a new trial based on after-discovered evidence is disfavored. State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011).

Moreover, section 17-27-70(c) of the South Carolina Code of Laws authorizes this 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.” As an initial matter, this Court finds the testimony of Corie Lawrence as to the events at the club to be wholly lacking in credibility, and as discussed above, Applicant has failed to secure any admissible testimony from Joshua Hamilton, the other

witness discussed in his application for relief. Therefore, this Court finds Applicant has failed to make a prima facie case that any newly discovered evidence – that is, evidence that is material to Applicant’s guilt or innocence which would probably change the result if a new trial were had – exists.

Lawrence’s testimony appears to have primarily been formed based on his recent viewings of a television portrayal of the murder rather than an actual eyewitness account of the altercation from seventeen years prior. Clearly, the passage of time and the more recent viewings of the television portrayal have colored his recollection, which is inconsistent with the testimony presented from numerous witnesses at trial, including Applicant himself. For example, Lawrence contends the altercation and shooting happened on the dancefloor of the club while the party was on-going, whereas numerous witnesses at trial—including Applicant—all testified the party was over and the DJ and his associates were in the process of packing up their equipment when the altercation occurred in a hallway. At trial, the jury was presented with the testimony of Applicant and his co-defendant, Brooks, who testified the shooting was in self-defense and described what happened on the night in question – namely, that Applicant was acting in self-defense when the shots were fired. Additionally, the jury had a statement from Jason Wood, a friend of Applicant and Brooks, who did not witness the shooting, but who told law enforcement shortly after the shooting that Brooks told him they shot in self-defense after the victim rushed Applicant. Lawrence’s testimony simply does not comport with this evidence presented at trial or Applicant’s self-defense assertions, and this Court finds Lawrence’s version of events is not credible.

Moreover, and more importantly, this Court finds Lawrence’s testimony fails to establish or advance Applicant’s assertion of self-defense in any way. Lawrence testified only that he saw

a struggle and saw both men standing up facing each other when the gun shots went off. Crucially, Lawrence did not offer any testimony indicating Applicant was not the aggressor in the confrontation or Applicant was “without fault in bringing about the difficulty,” that Applicant had reason to fear for his life, or that Applicant could not have avoided the danger in any other way.³ In fact, an equally plausible interpretation of Lawrence’s vague testimony – if it is to be believed at all – is that Applicant and the victim were involved in a struggle because Applicant was the aggressor who was menacing the victim with a gun.

Accordingly, although Ms. Rushing credibly testified the defense would have used testimony from an independent eyewitness who could corroborate Applicant’s version of events, this Court finds Lawrence is not such a witness. This Court finds Lawrence’s testimony is not credible nor does it corroborate the testimony of Applicant and his codefendant or advance Applicant’s defense of self-defense. The Court finds Lawrence’s recollection of the events that night has been distorted by his repeated viewing of the “Gangland” episode, and his testimony did not accurately convey the actual events that took place on the night of the shooting based on the record from trial and the evidence previously presented in this case, including, most importantly, Applicant’s own version of events. Indeed, the Court finds farfetched Applicant’s argument Lawrence would have been presented as a witness at all, as his testimony contradicts Applicant’s testimony about what happened and could easily be interpreted as supporting the

³ To establish self-defense in South Carolina, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger. State v. Slater, 373 S.C. 66, 69-70, 644 S.E.2d 50, 52 (2007).

State's theory of Applicant as the aggressor. Accordingly, this Court finds the testimony of Corie Lawrence is not newly discovered evidence of self-defense, and the Court is firmly convinced the result of Applicant's trial would not have been different had Lawrence been presented as a witness. Therefore, this Court finds this application must be denied and dismissed with prejudice.

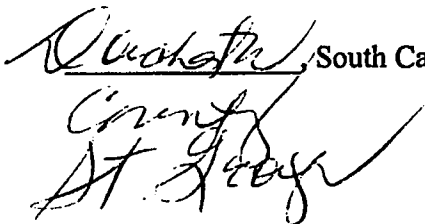
IT IS THEREFORE ORDERED:

1. The State's motion to dismiss is granted, and the application is denied and dismissed with prejudice.
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to serve the remainder of his sentence.

AND IT IS SO ORDERED

This 18 day of March 2020.


 DIANE SCHAFER GOODSTEIN
 Presiding Judge
 Fifth Judicial Circuit


 South Carolina.
 County
 St. George

WITNESSES

(S) DAMON ROBERTSON - RCSD

S/JS Smith RCSD

ARREST WARRANT NUMBER

H283316

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date:

VERDICT

Guilty

Foreperson of Petit Jury
Date: 12-19-03

DOCKET NO. 2003-GS-40-2295

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

MAY TERM 2003

82

THE STATE
vs.

JERIOD JOHN PRICE

Indictment for

MURDER

SC Code: 16-3-10
CDR Code: 0116
Class FEL/EXM(V)

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I 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.

CERTIFIED TRUE COPY
OF ORIGINAL FILED
Jannette W. W. Wade
C.C.C.P. & G.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on May 21, 2003, the Grand Jurors of Richland County present upon their oath:

MURDER

That Jerrod John Price did in Richland County on or about December 7, 2002, feloniously, wilfully and with malice aforethought, kill one Carl Felder Smalls by means of a gunshot wound and that the said victim died as a proximate result thereof. All in violation of SC Code of Laws § 16-3-10.

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

CERTIFIED TRUE COPY
OF ORIGINAL FILED,
Jeannette W. McBride
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

Warren B. Giese
Warren B. Giese, SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

AKA:

Race:

Sex:

Age:

DOB:

SS#:

Address:

City, State, Zip

DL#

SID#

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

A/W#:

Date of Offense:

S.C. Code §:

CDR Code #:

☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: MURDERin violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 011116☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 35 days/months/years or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION ☐ Heard, ☐ Waived, ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ set by SCDPPPS

PTUP

days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pnmts. of \$ beginning\$ paid to Public Defender FundOther: ☐ Appointed PD or appointed other counsel, \$35.13 TP Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

Court Reporter:

Clerk of Court/ Deputy Clerk

CERTIFIED TRUE COPY
OF ORIGINAL FILED

C.C.C.P.&G.S.

RICHLAND COUNTY

SOUTH CAROLINA

White - Clerk

Green - Corrections

Canary - Probation

Pink - Defendant

SCCA/217 (7/2003)