THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	FOR THE EIGHTH JUDICIAL CIRCUIT
COUNTY OF GREENWOOD	)	
	)	Case No.
THE STATE,	)	2020-GS-24-01062, 01063, 01064;
Plaintiff,	)	2021-GS-24-00382, 00383, 00384;
	)	2021-GS-24-01230, 01231, 01232;
vs.	)	2021-GS-24-01695, 01696, 01715;
	)	& 2022-GS-24-01153, 01154.
Narkevious Reid, Xayvion Hill, and	)	
Dashawn Chazz Hurley,	)	**Joint Reply to State's Response to Joint**
Defendants.	)	**Motion for New Trial or, in the Alternative,**
	)	**Motion to Reconsider Sentence**
	)	
	)	

On September 6, 2022, Narkevious Reid, Xayvion Hill, and Dashawn Chazz Hurley jointly moved for this Court to order a new trial or, in the alternative, to reconsider the sentences ("Motion"). On September 23, 2022, the State responded to portions of the motion ("Response"). This joint reply follows.

A. The State acknowledges its discovery violation, and this Court should reject the State's efforts to minimize the due process violation and order a new trial to correct the due process violation.

As the threshold matter, the State acknowledges it did not disclose the gang-retaliation theory until the email on August 4, 2022. Response, at 1-2. Rather, the State wants to minimize the due process violation by arguing:

> The initial incident reports indicated that both victim Alston's mother as well as Hill's mother told law enforcement that the incident was gang-related. Those incident reports were provided to Defendants at least a year and a half prior to trial. Also, the gang-related nature of the shooting was relayed to the Court (and Defendants) during multiple previous bond hearings over the course of two years leading to trial. Although the prosecution was not aware of the Adams/Parker connection until shortly before the email on August 4th, it is implicit that "gang-related" shootings are retaliatory. Finally, the evidence of retaliation came from Defendant Hill's own Facebook page, which was "liked" by Defendant Reid. A publicly available Facebook post made BY a Defendant is certainly as available to the defense as it is to the State.

Id. This Court must reject the State's minimization of its responsibility for the discovery violation for the four reasons discussed below.

First, the State's argument represents a fundamental misunderstanding of its due process role in the discovery process. The new trial motion argues:

> Mr. Reid, Mr. Hill, and Mr. Hurley have a due process right for the State to disclose materials necessary for preparation of a defense. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, (1995), *Brady v. Maryland*, 373 U.S. 83, (1963), *Roviaro v. U.S.*, 353 U.S. 53 (1957), and *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006). Rule 5, SCRCrimP, is our state's mechanism for the prosecution complying with its due process obligation. Rule 5(1)(1)(C) specifically requires the State to disclose materials "which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial."

Motion, at 8. In *Kyles*, the Supreme Court of the United States held:

> [T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

514 U.S. at 437-38 (internal citations omitted). The Supreme Court of South Carolina echoed this holding in *Riddle*, 369 S.C. at 44, 631 S.E.2d at 73 ("The burden is on the solicitor to disclose material evidence which is exculpatory or impeaching.") and *State v. Durant*, 430 S.C. 98, 109, 844 S.E.2d 49, 55 (2020) ("Shifting the burden to defense counsel lessens the State's duty to disclose exculpatory evidence and has the risk of adding an additional element to *Brady*). The Supreme Court reiterated the importance of the State complying with its Rule 5, SCRCrimP obligations—including producing inculpatory evidence necessary to prepare a defense—in *State v. Lawton*, 382 S.C. 122, 675 S.E.2d 454 (Ct. App. 2009) (reversing convictions because accused was prejudiced by prosecution's failure to produce evidence in response to Rule 5 motion). The evidence discovered during the pre-trial hearings revealed that local law enforcement has a

longstanding "Hooveresque" practice of maintaining files on citizens of Greenwood, and the State used these files to develop the gang-retaliation theory. Solicitor Stumbo acknowledged knowing about this "Hooveresque" practice since he took office in 2013. That the State did not avail itself of this information until the eve of trial does not absolve it of its discovery obligations.

Second, that the initial incident report said that Mr. Hill's mother and Alston's mother thought this was gang related does not relieve the State of its discovery obligations and burden of proof. Nor does it follow that those expressions of opinion are accurate. As this Court is aware from the multiple bond hearings in this case, the prosecution often contradicted itself about its own view of the evidence. For example, in one of the bond hearings, Assistant Solicitor Josh Thomas called this incident a "shootout." During the trial, the prosecution distanced itself from the "shootout" theory, even though the evidence supports it.

Third, just because an event may be gang related, does not mean it is "implicit" that the incident is retaliatory for another incident. As this Court is aware from the multiple bond hearings in this case, the prosecution often contradicted itself about its own view of the evidence. For example, in one of the bond hearings, Assistant Solicitor Josh Thomas called this incident a "shootout." During the trial, the prosecution distanced itself from the "shootout" theory, even though the evidence supports it. The State did not present any direct evidence of retaliation to the jurors. The State never proved that the two groups of people knew the people in the other group. Nor did the State prove that any person in either group had any problem with any person in the other group.

Fourth, assuming *arguendo* that Mr. Hill wrote the Facebook post, and assuming *arguendo* that Mr. Reid "liked" the post, this Court ruled that nobody at trial was qualified to translate and interpret the Facebook post and excluded the post from evidence. Regardless, Rule 5 places a due

process obligation on the State to produce the evidence necessary for an accused to present a defense, regardless of whether that evidence is inculpatory or exculpatory. In *Lawton,* the prosecution failed to disclose a letter written by the accused, negatively impacting his credibility, until the State's cross-examination of the accused. The Court held the letter "was clearly relevant and should have been provided by the State in response to Lawton's Rule 5 request," and "The State's strategy in failing to disclose the letter and instead surprising Lawton with it during cross-examination clearly prejudiced Lawton." *Lawton*, 382 S.C. at 128, 675 S.E.2d at 457. The State cannot evade its due process discovery obligations regardless of "whether the prosecution acted in good or bad faith." *Durant*, 430 S.C. at 107, 844 S.E.2d at 54.

B. This Court should reject the State's allegation that the "recitation of the facts is incorrect" in the joint post-trial motion because the State has not identified the specific facts it considers to be incorrect.

The State argues the Motion's "recitation of facts is incorrect" and insists "the State did present substantial circumstantial evidence that there were four people in the black Camry prior to the shooting and that all four aggressors (Defendants and victim Alston) were together at the scene" and "the evidence presented to the jury clearly showed that Hill, Reid, Alston and Hurley drove to the scene together for the purpose of shooting Goode and parks." Response, at 2. The Motion, at 4-5, listed fourteen facts Mr. Reid, Mr. Hill, and Mr. Hurley believe this Court must accept as true. The State's Response did not identify even a single one of these facts that it claims to be "is incorrect." Rather, the State makes conclusory arguments that it satisfied its burden of presenting substantial circumstantial evidence. This Court must reject these conclusory statements for three reasons.

First, the State did not present any direct evidence that "there were four people in the black Camry prior to the shooting." The most people any witness saw in the car was three people. This

testimony is summarized in the Motion as part of the fourteen facts this Court must accept as true. Jameel Wilson testified he saw three people in a black car—two in the back seat and one in the front seat. Mr. Wilson was wrong when he claimed to hear only nine gunshots. Stephanie Moss testified she saw three people in a black car—two in the front seat and one in the back seat. Mr. Hill certainty was not in the car after the shooting when Mr. Reid and Mr. Hurley took Mr. Alston to the hospital.

Second, the State did not present any direct evidence that Mr. Reid, Mr. Hill, Mr. Hurley, and Mr. Alston were together at the scene. No witness testified about four people being present at the scene. No witness testified that Mr. Reid, Mr. Hill, Mr. Hurley, and Mr. Alston were all four together at any time that day.

Third, the record does not support the State's argument that "the evidence presented to the jury clearly showed that Hill, Reid, Alston and Hurley drove to the scene together for the purpose of shooting Goode and Parks." No witness provided direct evidence supporting this argument.

This Court should convene a hearing, inquire of the State which fact recited in the Motion "is incorrect," and allow Mr. Reid, Mr. Hill, and Mr. Hurley an opportunity to respond.

C. This Court must reject the State's assertion about the factual conclusions to be drawn from the jurors' verdict.

The State argues "the jury clearly believed Defendants were present, as they were convicted of Attempted Murder and Conspiracy, and the State's evidence regarding Conspiracy was their presence together in the car before and after the shooting." Response, at 2. This argument is fatally flawed for four reasons. First, as discussed in Section A above, the State never presented any direct evidence that Mr. Reid, Mr. Hill, Mr. Hurley, and Mr. Alston were ever in the black car at the same time—let alone prior to the shooting. Second, there is no evidence—not even circumstantial evidence—that Mr. Hill was present in the car after the shooting. Third, the State's

admission that the only evidence of Conspiracy is its belief that Mr. Reid, Mr. Hill, Mr. Hurley, and Mr. Alston were present "together in the car before and after the shooting" supports this Court granting a new trial because even if the State proved this evidence, then it still would not support the conclusion that an agreement existed between the four. Fourth, the four people being at or near the location of the shooting is consistent with mere presence.

The State additionally argues, "[T]he fact that the jury acquitted Defendants of the murder of their co-conspirator could mean many things, including jury nullification regarding the death of a 'victim' who was also shooting at the time and as not a 'victim' in the traditional sense of the word." Response, at 2. The State, accordingly, argues jury nullification. Jury nullification is an improper argument. "[J[urors are presumed to follow the law as instructed to them." *State v. Grovenstein*, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (citing *State v. Ard,* 332 S.C. 370, 505 S.E.2d 328 (1998)).

The State's arguments on this point raises the troubling prospect that the jurors were influenced by this Court's uncorrected opening instruction that the juror's role in this trial was to determine the true facts, rather than decide whether the State met its burden of proof. *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018) (trial judge's preliminary remarks to the jury, that jury's role was to "search for the truth," determine "true facts," and render a "just verdict," were improper).

D. This Court must reject the State's reliance on the improperly admitted Gunshot Residue ("GSR") evidence.

The State next argues:

> Regarding the GSR testimony, Lt. Nates testified that there were many scenarios that could account for the presence or absence of the GSR. The possibilities were discussed *ad nauseum* before the jury and it was to the trier of fact to determine what weight, if any, to give the evidence.

Response at 3. This argument ignores the trial court's gatekeeping function. *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010); Rule 702, SCRE. In reality, Lt. Nates testified, more likely than not, to a reasonable degree of certainty, that she couldn't determine whether the GSR came from shooting a gun or being shot. When the expert cannot give an opinion more likely than not, then all the jury could do was speculate. Lt. Nance also testified that the South Carolina Law Enforcement Division no longer analyzes GSR evidence under the circumstances of this case. This Court should have excluded the testimony as it did not assist the trier of fact.

Admission of the GSR evidence under the circumstances of this case also raises the troubling possibility that the jurors attempted to determine the true facts rather than determining whether the State met its burden of proof. *Beaty, supra.* As the State pointed out, "[t]he possibilities were discussed *ad nauseum* before the jury." Under *Watson*, this Court never should have exposed the jurors to this rank speculation, as such rank speculation does nothing to assist the trier of fact. *See also* Rule 702, SCRE.

E. Resentencing.

1. "Gang Book."

As a threshold matter, the State does not deny using information from the "Gang Book" during sentencing. Response, at 3. Rather, the State argues it "did not rely on any information that was not disclosed to the defense prior to trial." *Id.* Although acknowledging that it delayed disclosure of the gang-retaliation theory until at least August 4, 2022, the State ignores the fact that its disclosure of this theory continued even after the call of the case—including but not limited to the testimony of Officer Matt Blackwell that revealed the existence of the "Gang Book." Thus, it is incorrect that the State did not rely on evidence not disclosed prior to trial. Once Mr. Reid, Mr. Hill, and Mr. Hurley learned about the "Gang Book," they moved the Court to order its

immediate disclosure, but this Court abused its discretion by not even ordering Officer Blackwell to produce a copy of the "Gang Book"—which was located next door at the Greenwood Police Department—for an *in camera* review. *State v. Hughes*, 346 S.C. 339, 552 S.E.2d 35 (Ct. App. 2001) (trial court had the authority and discretion to require production of notes used by expert witness to refresh her memory prior to trial, although notes were located outside county in which trial was being held).

The State attempts to redefine this issue by arguing, "Counsel for Defendants knew or should have known, from the outset of this case, that Defendant's involvement in gang activity was a factor that would be brought up during sentencing – especially given the fact that the State was not shy about mentioning it during bond hearings." Response, at 3. This argument, once again, represents a fundamental misunderstanding of its due process role in the discovery process. As discussed, in Section A above, the State has a due process obligation to produce evidence it intends to rely on during the guilt/innocence and sentencing phases of a trial, regardless of the source from which it originates. *See, e.g., Brady* and *Lawton.* This argument also ignores the fact that undesigned counsel moved for immediate disclosure of the "Gang Book" once Office Blackwell disclosed the existence of the document.

Significantly, the State's late production and Officer Blackwell's testimony established that Mr. Hill, Mr. Hurley, and Mr. Alston were not considered gang members until the State's final preparation for trial. The State's late production and Officer Blackwell's testimony established that Mr. Reid was the leader of a rap group called Contraband Gang, but it failed to establish that Mr. Reid was the leader of a criminal gang.

Finally, while it is not improper for a sentencing court to consider a prior criminal history, fundamental fairness requires this Court to conduct a fact specific inquiry before imposing such a

large enhancement to Mr. Reid's sentence based on a one-year, carrying a pistol unlawfully misdemeanor from August 28, 2015.

2. *State v. Joseph Rapp.*

The State argues Mr. Reid, Mr. Hill, and Mr. Hurley "are misinformed regarding the facts and circumstances" of *State v. Joseph Rapp* (Response, at 3), even though counsel for Mr. Hill also represented Mr. Rapp. This Court should convene a hearing so that the record clearly reflects facts and circumstances of the *Rapp* case.

The State's argument, moreover, highlights its reliance on "gang affiliation" to enhance the sentences. Enhancing the sentence based on "gang affiliation" is improper under the facts and circumstances of this case. The jurors did not find "gang affiliation," at all, let alone beyond a reasonable doubt. This Court, moreover, ruled that the State had not proved "gang affiliation" by clear and convincing evidence, let alone beyond a reasonable doubt. As discussed in the Motion, at 22-26, reliance on "gang affiliation" to enhance the sentences violates the *Apprendi v. New Jersey*, 530 U.S. 466 (2000) line of cases.

F. Conclusion.

For the reasons set forth in the joint motion for a new trial and this pleading, this Court should order a new trial. In the alternative, for the reasons set forth in the motion to reconsider the sentences and this pleading, this Court should reconsider the sentences imposed on Narkevious Reid, Xayvion Hill, and Dashawn Chazz Hurley.

(signatures on next page)

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September 27, 2022
Greenwood, South Carolina

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	)	FOR THE EIGHTH JUDICIAL CIRCUIT
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Narkevious Reid, Xayvion Hill, and	)	
Dashawn Chazz Hurley,	)	**Joint**
Defendants.	)	**Motion for New Trial or, in the Alternative, Motion to Reconsider Sentence**
	)	
	)	

I certify that I have served a copy of this pleading on the State of South Carolina, by emailing at copy to counsel, at counsel's AIS email address, as reflected below:

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