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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI-PCR-COMMON PLEAS
Appeal from Richland County
Hon. William A. McKinnon, Circuit Court Judge

Appellate Case No. 2025-001597
Lower Case No. 2021-CP-40-01788

Ricardo L. Middleton, ... Petitioner,

vs

State of South Carolina,. . . . . Respondent

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

Question I: Did the Post Conviction Relief Judge err in failing to grant a new trial based upon the availability of the testimony of Marquez Johnson who aided Mr. Middleton's self defense claim and was not available to testify at Mr. Middleton's trial?

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Question VI: Did the Post Conviction Relief judge err in failing to hold trial counsel was ineffective for failing to request a self defense charge when the evidence supported such a charge?

Question VII: Did the Post Conviction Relief judge err in failing to find trial counsel was ineffective when he had not prepared Ricardo Middleton to testify, had developed no real theory of defense for the trial, and had failed to subpoena an important witness?

Statement of the Case

Procedural History

Ricardo Middleton was indicted in case №s 2017-GS-40-5852, 5854 and 5855. Mr. Marquez Johnson, a co-defendant, was indicted for the same charges in indictment №s 2017-GS-40-6536, 6535, 6537. In addition, Mr. Johnson was indicted for one count of misprison of a felony in indictment № 2017-GS-40-5857. The charges arose out of a shooting incident that occurred on July 27, 2017.

Mr. Middleton was tried on August 19-22, 2019. The result of his trial was he was convicted in indictment № 2017-GS-40-5854 for the murder of Syndi Collins. He was found not guilty in indictment № 2017-GS-40-5852 for the attempted murder of Ricky Montgomery. The jury was unable to reach a verdict in indictment № 2017-40-5855 as to the death of Aaron Collins. On September 26, 2019, Mr. Middleton was sentenced to life in prison. Post trial motions were held on February 21, 2020.

Mr. Middleton filed a Notice of Appeal on March 2, 2020. He voluntarily withdrew his appeal on December 21, 2020 and the Court dismissed his appeal on December 23, 2020. He then filed his Post Conviction Relief Action on April 16, 2021.

A Post Conviction Relief hearing was held on September 26, 2024 before Judge Mark T. McKinnon. On July 15, 2025 Judge McKinnon dismissed the application for Post Conviction Relief. Mr. Middleton filed his Notice of Appeal on August 11, 2025.

Factual History

The trial

On July 27, 2017, a shooting occurred at the intersection of Parkland Road and Claudia

Drive. In the shooting Aaron Collins and Syndi Collins were killed. The state alleged that the shooting arose from a dispute a week before when Mr. Middleton approached Jayrell Johnson, a member of the 27/7 Boyz, which is a support club of the Outcast Motorcycle Club. App. 217, ll 5-20. The State, however, produced no testimony that Mr. Middleton and Mr. Johnson had any serious disagreement the week before the shooting. One witness stated, "It was not an aggressive conversation, and then Rells [Mr. Johnson] got in his car and left." App. at 315, ll 7-9.

On the night of the shooting, a fight had broken out at a bar and restaurant named My House Bar and Grill. This fight did not involve Mr. Middleton. App. at 310, ll 11-15. The fight was between two females. App. at 326, ll 5-12. After the fight, Mr. Middleton was seen walking around the parking lot. He was not talking to many people. App. at 309, l 24 to 310, l 3. No one testified Mr. Middleton had any words or conversation with Aaron Collins or Syndi Collins.

Mr. Middleton, as a member of the Thunderguard Motorcycle Club, had received a text message about possible trouble at My House Bar and Grill. Ronnie Scott, the vice-president of the Thunderguards, after receiving the same text message, went to the location. App. at 349, ll 13-23. He testified that as it turned out, everything was OK. App. at 350, ll 15-17. Mr. Scott went to check on Marquez Johnson. While at the location he also saw Ricardo Middleton. He did not speak to Mr. Middleton but simply noticed him standing in the parking lot. App. at 352, ll 7-22.

Mr. Scott, the Collins, Ricky Montgomery, Marquez Johnson, Phillip Coates and Mr. Middleton left My House headed in the same general direction, but not together. Mr. Scott and Mr. Middleton were in vehicles. The others were on motorcycles. Eventually all of these people ended up at the intersection of Parkland Road and Claudia Drive. At the intersection, Mr. Coates

and Mr. Johnson were in the extreme right lane with Mr. Coates being on the outside. To the left of Mr. Johnson were the Collins on one motorcycle. Mr. Montgomery was to left of the Collins in the same lane as them. To the left of Mr. Montgomery was Mr. Middleton in his automobile in the left turning lane. They all came to a stop at the red light. Directly behind Mr. Johnson and Mr. Coates was the truck driven by Mr. Scott. From his position, Mr. Scott observed Mr. Johnson and Mr. Collins exchanging words. He did not testify as to hearing the words. App. at 353, ll 3-6.

Mr. Scott observed Mr. Middleton getting out of his automobile and approaching Mr. Montgomery. Mr. Middleton struck Mr. Montgomery. App. at 353, ll 6-9. He then observed Ms. Collins get off the motorcycle she was sharing with her husband and started "reaching into her vest, vest [sic] very aggressively. From that point, muzzle flash and there was a lot of gunfire I definitely heard at that time." App. at 353, l 24 to 354, l 1. Upon the beginning of the shooting, Mr. Scott ducked down until the shooting stopped.

When the shooting stopped, Mr. Scott looked up and saw Mr. Johnson trying to crank his motorcycle. As the motorcycle would not start, he pulled up beside Mr. Johnson and told him to get in his truck. App. at 355, ll 7-9. He and Mr. Johnson returned to My House. Upon returning to My House, Mr. Johnson left R. Scott's truck and returned to pick up his motorcycle, a distance of approximately .4 of a mile.[1] Upon the return of Mr. Johnson, Mr. Scott took Mr. Johnson home and he continued on to work.

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[1] The South Carolina Supreme Court, in an appeal, has taken judicial notice of distances by the use of Rand McNally's Road Atlas. "Rand McNally's Road Atlas indicates Gray, Tennessee, is about ten miles from Johnson City, Tennessee." *State v. Arnold*, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004). Counsel used Google Earth for this calculation.

Phillip Coates, as a member of Thunderguards, had received the same text message as Mr. Scott and came to My House. App. at 371, ll 2-14. He did not see anyone he knew at My House. As he was riding home on Parkland Road, he did encounter Mr. Johnson. App. at 371, ll 18-22. He was on the right side of Mr. Johnson when they stopped at the red light. At the light he observed Mr. Johnson talking to "somebody on a bike." App. at 371, l 25 to 372, l 1. When he heard the shot, he took off on his motorcycle. He did not observe the shooting. Shortly afterwards, Mr. Johnson came to Mr. Coates house and they returned to retrieve the motorcycle of Mr. Johnson. Mr. Coates did not see Mr. Middleton that evening.

As a result of the shooting, Aaron and Syndi Collins were killed. Ms. Collins received two bullet wounds. One was to her chest and one to her face and neck area. Both were fatal shots. App. at 440, ll 7-9. Ms. Collins was found on her back in the road. "Her right hand had a Glock handgun . . . ." App. at 237, ll 12-13. The testimony from the ballistics experts stated that a bullet had been fired from the weapon held by Ms. Collins. A shell casing matching the firearm held by Ms. Collins was found on the ground near the body. App. 490, ll 5-24.

The testimony of other witnesses that described the shooting was at time conflicting. For example, Natasha Coad identified Mr. Middleton as being on a motorcycle and shooting Mr. Collins. App. at 330, ll 7-13. Even the State in its closing argument admitted Ms. Coad was "confused." App. at 596, ll 14-17. The investigation uncovered testimony that individuals involved in the shooting had come from a black SUV. App. at 512, ll 9-14. This was later proven not to be true. Despite there being some motion activated video near the scene, none showed the actual shooting.

The State argued in opening and closing that Mr. Middleton walked over to Ms. Collins

and shot her in the face. App. at 218, ll 14-16; 588, ll 20-22. No witness nor video confirms this action. While the bullet wound to the face did not penetrate the body, Dr. Amy Durso never testified as to any shored gunshot wound. A shored wound would have indicated that the body was pressed against a firm surface that prevented the bullet from exiting the body. The State had a theory, but it was not the only theory.

Mr. Middleton left the scene and returned to his residence in Monks Corner. He was arrested in Summerville, SC several days later. App. at 522, l 21 to 523, l 1. When arrested he denied being in the Columbia area on the night of the shooting. App. at 549, ll 22-24.

The Post Conviction Relief Hearing

At the Post Conviction Relief hearing Mr. Middleton testified he was at the scene of the shooting on July 27, 2017. He stated he had received the same text message mentioned by Mr. Scott and Mr. Coates. When he arrived at My House, he did not see any members of the Thunderguards other than Marquez Johnson. They talked briefly and then left. App. at 25, ll 12-20. He took a different route from Mr. Johnson leaving My House, but they both ended up on the Parkland Road headed in the same direction.

He testified that when he stopped at Parkland Road and Claudia Drive, he saw Marquez Johnson engaging in what appeared to be a heated exchange with Mr. Collins. App. at 27, ll 10-18. He stated he went up to Mr. Montgomery in an effort to solicit his aid in defusing what appeared, to Mr. Middleton, to be a confrontation between Mr. Johnson and Mr. Collins. When he approached Mr. Montgomery, he was cussed at and saw Mr. Montgomery pull a firearm. At that point he struck Mr. Montgomery knocking him to the ground. App. at 30 ll 8-15. Upon striking Mr. Montgomery, he observed a woman who was off the motorcycle fire a gun. At that

point he returned the fire. App. at 30, l 21 to 31, l 6. After the shooting he returned to his automobile and left. App. at 31, l 25 to 32, l 2.

After he was arrested, he retained Tivis Southerland as his attorney. He testified he did not discuss any trial strategy with Mr. Southerland. He testified his lawyer stated the burden was on the government. The theory of defense was "Let them prove it." App. at 33, l 20.

He further stated neither of the motorcycle clubs involved in the altercation was a motorcycle gang. He stated he believed the use of the word "gang" in the trial unduly prejudiced him. As he stated, "[I]t painted me as a bad person." App. at 34, l 25.

He further stated he would have liked to have used Mr. Johnson as a witness on his behalf, but he was not allowed to speak to Mr. Johnson. App. at 61, l 24 to 62, l 6. He noted that both he and Mr. Johnson had the exact same charges.

After the trial, Ricky Montgomery filed a civil suit against Mr. Middleton. As part of the civil suit an affidavit of Natasha Coad was filed with the suit and was provided to him. This affidavit was introduced as Exhibit 1 by Mr. Middleton. The affidavit gave a version of the events that was strikingly different from her trial testimony. The differences were significant as in the affidavit she stated Mr. Middleton got out of the passenger side of the automobile. The affidavit further stated Mr. Middleton hit Mr. Montgomery with the car door. Mr. Middleton believed that this affidavit could have been used to impeach the testimony of Ms. Coad.

Part of the theory of the state was Mr. Middleton had had a previous run in with a member of the Outcast Motorcycle Club. Mr. Middleton noted that the discovery provided to him in this case contained an affidavit from Jayrell Johnson with whom Mr. Middleton had had a previous run in. The affidavit from Mr. Johnson established that he and Mr. Johnson resolved

their differences and shook hands. App. at 754-759. Mr. Middleton believed that the testimony from Mr. Johnson would have helped establish that there were no hostilities between him and the other club and with Mr. Johnson in particular. His attorney did not subpoena Mr. Jayrell Johnson.

During the presentation of evidence by the state, Tivis Southerland testified. He stated his memory is he went over all the discovery with Mr. Middleton, but as he stated, "This is Ricks [sic] case. So, his memory is probably going to be better than mine." App. at 56, l 4-6. He stated his defense was a case of misidentification. As he stated, "That it was just misidentification. That he was there because everybody's there . . . ." App. at 56, ll 23-24 . As to his discussion with Mr. Middleton, he stated, "but our discussions were that he wasn't there and that it was misidentification." App. at 57, ll 8-9. On cross-examination he also stated he has no recollection of where Mr. Middleton told him he was if he was not at the scene. His file contained no notes as to another location for Mr. Middleton. App. at 57, ll 5-10.

His defense was to try and place the blame for the shooting on Ronnie Scott. App. at 58, ll 17-19. He stated he did not use self-defense because his position had always been that Mr. Middleton was not there and it was a case of misidentification. As to his cross-examination of Mr. Scott, his theory was, "[Y]ou're up here throwing him [Middleton] under the bus because you did it, is the way I looked at it." App. at 58 ll 17-19. He denied Mr. Middleton ever told him he was present or that he shot in self-defense.

Mr. Southerland attempted to talk to the co-defendant, Mr. Johnson, but Mr. Johnson's lawyer would not permit him to be interviewed. App. at 61, l 24 to 62, l 6.

Mr. Southerland acknowledged that he should have objected to the use of the word

"gang" when the state was referring to the two motorcycle clubs. The state also referred to the word "gang" in its closing argument. App. at 76, l 20 to 77, l 1. He admitted he considered this a close case, apparently meaning the jury could have decided it either way. As the jury acquitted Mr. Middleton of the attempted murder and was unable to reach a verdict on the death of Mr. Collins, the belief appears justified.

He agreed that as the record established Syndi Collins fired first, he would have a plausible self defense case.[2] He stated his defense was "It wasn't him, he wasn't there," so he did not request a self defense charge. App. at 74, l 24 to 75, l 3

When shown the affidavit of Natasha Coad Mr. Middleton received after his trial, he agreed the statement would have been helpful. Ms. Coad had previously given several contradictory statements. The after discovered affidavit would have been another means of impeaching her.

Mr. Southerland's attention was called to the testimony of Tiama Jordan who testified as to motorcycle gangs members not wanting to talk to the police. He agreed he was giving an opinion. He admitted Mr. Jordan had not been qualified as an expert and he did not object. He finally concluded, "I shouldn't have let him run." App. at 79, ll 6-7.

In his closing argument, Mr. Southerland made a reference to the fact that in England, the failure of a defendant to testify can be used against the defendant. He stated he used the argument because he wanted to compare how other countries treat defendants as opposed to how

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[2] The record establishes Ms. Collins fire a weapon before she was killed. The record contradicts the closing argument by the state that "she was shot before she could get a shot off." App. at 589, ll 10-11. The state also argued Mr. Middleton "pistol whipped Ricky Montgomery." App. at 588, ll 19. No testimony supports that claim.

our country treats defendant. He finally stated, "It could have been a bad idea." App. at 81, l 24.

Mr. Southerland admitted he had not prepared Mr. Middleton to testify. App. at 82, ll 6-8. He stated he and Mr. Middleton had a serious and heated discussion at the end of the state's case as to whether he would testify. He stated he told Mr. Middleton, "Man, you're gonna blow it." App. at 83, l 8. He finally admitted he had not had a serious discussion as to whether Mr. Middleton would testify. App. at 84, ll 6-11.

The final witness for the state was Lama Fyall, one of the prosecutors in the case. He stated the state's theory was Mr. Middleton and Marques Johnson were operating together to get back at the members of the other club. App. at 89, l 18 to 90, l 4. The state's belief was Mr. Middleton struck Ricky Montgomery and shot and killed Syndi Collins. Mr. Collins was killed by Marques Johnson. App. at 90, ll 8-9.

He further testified the state wanted Jayrell Johnson to testify. He believed the testimony fit into the state's theory about a run in at the bar the previous week. He further advised Mr. Johnson was avoiding the subpoena. App. at 93, ll 13-16.

He agreed that the state made a conscious decision to limit the use of the phrase "biker gang' of the word "gang." He further agreed that the word and phrase would be prejudicial. App. at 100, ll 5-6. He further believed that while the word and phrase would be prejudicial, he deemed them to be more probative than prejudicial. He admitted the state did not introduce any evidence that either the Outcast Motorcycle Club or the Thunderguard Motorcycle Club was a gang. He did not explain how the use of the word "gang' or the phrase "biker gang" was more probative than prejudicial.

Standard of Review

As to issues, the standard of review is abuse of discretion. "Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Mr. Middleton contends there are no facts to support the factual findings of the Post Conviction Relief judge.

Argument

Question I

Did the Post Conviction Relief Judge err in failing to grant a new trial based upon the availability of the testimony of Marquez Johnson who aided Mr. Middleton's self defense claim and was not available to testify at Mr. Middleton's trial?

Prior to Mr. Johnson's hearing pursuant to South Carolina Code § 16-11-410 he was a co-defendant of Mr. Middleton and not available to testify. As a result of the hearing, commonly called a "stand your ground" hearing, Mr. Johnson had his charges dismissed as he effectively established to the satisfaction of the judge hearing the case, that he fired his weapon in self defense. The testimony of Marquez Johnson qualifies as after discovered evidence as he was not available as a witness for Mr. Middleton. Mr. Southerland testified he attempted to interview Mr. Johnson but was unable to do so. App. at 61, l 24 to 62, l 2. The testimony of Mr. Johnson obviously would have been helpful to Mr. Middleton. He clearly testified Ms. Collins was off the bike and raising her hand before any shots were fired. This statement supported Mr. Middleton's testimony that Ms. Collins fired a shot before he fired a shot. The testimony at trial established that Ms. Collins most likely would not have been able to draw and fire her pistol after she was hit with either shot. This made Mr. Middleton's statement that he fired after Ms. Collins fired plausible, if not highly probable. Had the jury heard the testimony of Mr. Johnson, the result

of the case easily could have been different. The testimony established the Glock firearm was found in the hand of Ms. Collins. App. at 237, ll 12-15. Later testimony established she had fired her pistol. App. at 492, ll 8-10[3]

This conclusion is true for several reasons. First, Mr. Johnson's testimony established that this case was not a "hand of one is the hand of all" case. Second, the testimony supported Ms. Collins being the initial aggressor in the shooting by getting off the bike and drawing her pistol. The trial judge in Mr. Johnson's trial found his testimony credible and dismissed the charges against him. The record in this case provides no reason not to accept Mr. Johnson's testimony as credible.

As to a new trial on after discovered evidence, our court has said:

> In order to prevail in this new trial motion, appellant must show the after-discovered evidence:
> (1) is such that it would probably change the result if a new trial were granted;
> (2) has been discovered since the trial;
> (3) could not in the exercise of due diligence have been discovered prior to the trial;
> (4) is material; and
> (5) is not merely cumulative or impeaching.
> *State v. Spann*, 334 S.C. 618, 619–20, 513 S.E.2d 98, 99 (1999)

The testimony of Mr. Johnson qualifies under all five requirements. The testimony easily could have changed the result of the trial. The testimony lends support to the testimony of Mr. Middleton that Ms. Collins was off her motorcycle and armed. The testimony, notwithstanding the effort of Mr. Southerland to obtain the testimony was not available. Mr. Southerland also used due diligence to try and obtain the testimony, but he was without means to compel the testimony. The testimony is very material to Mr. Middleton's defense. As no other witness

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[3] The testimony was State's exhibit 116, the Glock belonging to Ms. Collins, had fired State's exhibit 19, a .40 Smith and Wesson cartridge case.

provided such testimony, it is not cumulative nor is it merely impeaching.

Question II

Did the Post Conviction Relief Judge err in failing to rule the affidavit of Natasha Coad giving a version of the facts different from her trial testimony is after discovered evidence which entitled Ricardo Middleton to a new trial?

The other aspect of after discovered evidence was the new affidavit of Natasha Coad. The existence of this affidavit was not known to Mr. Middleton until he was served in a civil suit after his conviction. The affidavit was supplied as part of that suit. Neither Mr. Middleton nor Mr. Southerland had any basis for knowing of the existence of that affidavit at the time of the trial. The affidavit was dated before the trial but had not been disclosed.[4] Also, Mr. Middleton had no basis for knowing of the existence of the affidavit.

The legal analysis of the affidavit of Ms. Coad is slightly different. As after discovered evidence, it does not meet requirement number five as it impeaching testimony. As after discovered evidence, this may not qualify. In the context of this case however, this court should consider the affidavit in conjunction with the other after discovered evidence. The testimony of Ms. Coad was impeached at trial. Her testimony was inconsistent with other witnesses. The jury easily could have concluded that she was simply mistaken and had confused Mr. Johnson with Mr. Middleton. The affidavit she gave in the civil case, however, would enable the jury to conclude she had actually lied. A jury concluding a witness for the state had lied rather than was simply mistaken, could have impacted the credibility of other members of the same club who testified against Mr. Middleton. Certainly there is a reasonable probability the new statement by Ms. Coad would have had the impact stated.

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[4] No evidence exists that the State knew of this affidavit of Ms. Coad.

Our court has held that the failure of the state to produce in discovery impeaching testimony can require a new trial. *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006); *Gibson v. State*, 334 S.C. 515, 514 S.E.2d 320 (1999). In this case, as this impeaching affidavit is looked at in conjunction with the after-discovered evidence of Mr. Johnson's testimony, relief should also be granted on the basis of the affidavit. When the two new pieces of evidence are viewed together, a stronger argument can be made that the two pieces of after discovered evidence would have supported a different result. As Mr. Southerland stated, "This was a close case."

Question III

Did the Post Conviction Relief judge err in failing to award Ricardo Middleton a new trial when both the State and defense counsel made numerous references to the two motorcycle clubs being gangs or outlaw clubs when no evidence established such facts?

Mr. Middleton has alleged Mr. Southerland failed to object to the use of the phrase "biker gang," the word "gang" or "outlaw club." The troubling aspect of the gang reference or the outlaw club reference, is the State in the testimony at the Post Conviction Relief hearing admitted they knew the reference to gang was prejudicial. The witness stated, "We didn't have a motion or a hearing about it. We sort of made a determination ourselves not to overuse it." App. at 92, ll 6-8.

As a result of this prejudice, the State testified they elected to use the word "gang" sparingly. If the testimony is prejudicial, knowingly using it sparingly is not a reason to use the known prejudicial term. The other concern is the State further testified that the term was more probative than prejudicial. The State, however, failed to establish of what the testimony was probative. Nor can the answer be found in the trial testimony. The State admitted that neither club involved in this altercation was a motorcycle gang. The testimony was:

Q. (By Mr. Wise) Did you introduce or did you intend to introduce any evidence that the Outcast Motorcycle Club was a gang?
A. (My Mr. Fyall) No. I think they were both described as Outlaw Motorcycle Clubs or One Percent Clubs or something like that.
App. at 101, 4-9

No testimony as to either club being a gang existed in the record of the trial. Notwithstanding this, the word "gang" appears in the transcript at least nine times. Five references are in the closing argument. The word is not inadvertently mentioned by a witness. Instead, the State interjected the word "gang" in its opening statement. The assistant solicitor stated in opening, "[Y]ou don't approach the support club of another biker gang, but that is what Mr. Middleton did on July 20, 2017 . . . ." App. at 217, ll 10-12. Mr. Middleton's own lawyer told the jury this was a biker gang fight. In opening he said, "So, it's not beyond imaging that maybe there's an idea to throw somebody under the bus from the other rival biker gang in that fashion." App. 225, ll 15-18. Both the State and the defense in opening told the jury the case was about biker gang rivalry. When both side told the jury the shooting was gang related, then the jury will assume the fact to be true. That fact became the Gospel of the case.

The State four times in closing argument made reference to motorcycle gang or gang. App. at 594, ll 16-17; 595, ll 10-12; 596, ll 19-21. "Outlaw motorcycle" was used App. at 361, l 19, 392, l 8; Perhaps the most egregious comment was when the assistant solicitor said, "And, ladies and gentlemen, we're dealing with outlaw motorcycle gang culture and we can't make people like Jayrell Johnson come in and testify if they don't want to." App. at 595, ll 10-12. These comments were prejudicial to Mr. Middleton as the state did not offer any proof of the case being about a biker gang rivalry. The jury was misled by both sides that the shooting was motorcycle gang related.

Defense counsel, perhaps reluctantly, admitted he should have made an objection. The reference to gang or biker gang was not admissible. The courts of our state have often held the failure to object to improper prejudicial testimony is a ground for granting post conviction relief. As the court of appeals has said, "Accordingly, we hold trial counsel erred in failing to object to several portions of the challenged testimony." *Vail v. State*, 402 S.C. 77, 87, 738 S.E.2d 503, 509 (Ct. App. 2013)

The last witness for the state at trial was Taima Jordan. Without an objection, he was permitted to testify, "So, being as I was assigned to the Gang Unit, myself and several other investigators attended that party in a covert manner." App. at 544, ll 8-11. This testimony told the jury that members of the "Gang Unit" were investigating the Thunderguards. No evidence relating to this case came from the officers attending the Thunderguard party. An objection should have been made to this prejudicial testimony. The jury would assume, and logically so, that members of the Gang Unit would be investigating a gang. As they were told in opening by both sides this was a gang shooting, this testimony further amplified the gang involvement. No other logical implication could be made. No need existed to testify as to the Thunderguard party as nothing came from it. This was simply gratuitous, prejudicial testimony the state placed in the case and trial counsel failed to object. The failure to object to the numerous uses of "gang" and "biker gang" were unduly prejudicial to Mr. Middleton.

In a New Jersey case, an officer inadvertently made reference to a gang. The trial judge instructed the jury, "Now, Detective Crawley mentioned gangs a few minutes ago, unintentionally. I tell you now there's no information in this case whatsoever there's any gangs involved in this case whatsoever. Nothing whatsoever. You've heard nothing beforehand, you've

heard nothing now, and that statement by Detective Crawley obviously was unintentional . . . ." *State v. Herbert*, 457 N.J. Super. 490, 500, 201 A.3d 691, 696 (App. Div. 2019). In reversing the case the court said. "The question before us is not whether comprehensive and well-targeted instructions could have cured the taint of the inadmissible references to gangs and to defendant's gang membership. The instructions did not fully and clearly address the prejudicial aspects of the testimony." *Id.* at 512, 201 A.3d at 704.

In addressing gang related evidence, the South Carolina Supreme Court reversed a conviction stating:

> Because the gang-related evidence presented at Robinson's trial was not slight, was not logically relevant to prove any motive or intent behind Victim's murder, and the dangers of unfair prejudice and confusion it produced substantially outweighed any probative value, we find the trial court erred in denying Robinson's motion to suppress such evidence."
> *State v. Robinson*, 438 S.C. 421, 439, 882 S.E.2d 883, 893 (Ct. App. 2023), reh'g denied (Feb. 9, 2023).

In reviewing such an error, the court has said, "In deciding the prejudice prong in this PCR action, we examine the following factors, which are the same ones analyzed in deciding on direct appeal whether a similar error is harmless beyond a reasonable doubt." *Edmond v. State*, 341 S.C. 340, 348, 534 S.E.2d 682, 686 (2000). As a result, this court cannot find the error was harmless beyond a reasonable doubt. Mr. Middleton is entitled to a new trial because of the improper reference to gangs, biker gangs and outlaw clubs.

The failure of trial counsel to object to the use of the words "gang" and "outlaw club" deprived Mr. Middleton of effective assistance of counsel as guaranteed by the Sixth Amendment to the Constitution of the United States of American and Article I, § 14 of the Constitution of the State of South Carolina.

Question IV

Did the Post Conviction Relief Judge err in failing to provide for a new trial for Ricardo Middleton when trial counsel failed to object to a witness for the state giving opinion testimony as to why a witness did not testify when the effect of the testimony was to explain the absence of a witness and to vouch for the credibility of another witness?

Taima Jordan also testified as to his opinion as to whether the One Percent biker culture likes to talk to the police. App. at 546, ll 1-21. This testimony was apparently given in part to explain the reluctance of some witnesses to come forward and to vouch for the testimony of Ronnie Scott. This testimony was opinion testimony to which no objection was made. As Officer Jordan had not been qualified as an expert, opinion testimony under Rule 702 of the South Carolina Rules of Evidence was not proper. Nor did this testimony qualify under Rule 701, Opinion Testimony by Lay Witness.

The Fourth Circuit addressed the issue of the government failing to qualify a witness as an expert. In reversing the conviction, the court said:

> Because Agent Smith was not proffered as an expert, Johnson argues that his testimony was only admissible as lay opinion testimony. Yet, Johnson asserts that because Agent Smith's opinions regarding the calls were not based on his own perception, but rather on his experience and training, his testimony cannot be considered a lay opinion for purposes of Rule 701. *United States v. Johnson*, 617 F.3d 286, 292 (4th Cir. 2010).

The Fourth Circuit properly held as the officer was not qualified as an expert, his opinion was not admissible. Further the court held his testimony not admissible as lay opinion testimony. The same rule should be applied here.

Telling the jury that One Percenters do not work with the police simply told the jury that the testimony of Ronnie Scott was more reliable as he had at first not given a statement and later did. This opinion testimony had no place in this trial. Even if Officer Jordan had been qualified

as an expert, this testimony would not have been admissible. It was simply a form of vouching which has long been prohibited. "Accordingly, we find there is evidence in the record to support the PCR court's finding that trial counsel was deficient in failing to object to the solicitor's repeated vouching for Victim's credibility." *Tappeiner v. State*, 416 S.C. 239, 252, 785 S.E.2d 471, 477 (2016). Whether the vouching is done directly by the solicitor or through a witness the solicitor elects to call is of no importance. The improper vouching occurs in either case.

The testimony also explained the absence of the testimony of Jayrell Johnson. This was improper. In essence the witness said, "Jayrell Johnson did not testify because the gang culture prevented hm from testifying." Had Officer Jordan said this directly, instead of indirectly, the improper testimony is readily apparent.

Again, this court cannot say beyond a reasonable doubt this improper vouching would not have made a difference to the jury in this close case. Officer Jordan's testimony easily could have given credibility to a witness the jury had reason to be suspicious. Mr. Middleton is entitled to a new trial on this issue.

The failure to object to this type of testimony deprived Mr. Middleton of effective assistance of counsel as guaranteed by the Sixth Amendment to the Constitution of the United States of American and Article I, § 14 of the Constitution of the State of South Carolina.

Question V

Did the Post Conviction Relief judge err in failing to give Ricardo Middleton a new trial when the trial counsel called attention to Mr. Middleton not testifying when trial counsel stated in England the failure to testify is held against the defendant?

In his closing argument, trial counsel argued, "And speaking of our system being the worst except for all the others, in the United Kingdom, the country that we had the revolution

from and broke away from, if you remain silent, they hold it against you in court. They hold it against you." App. at 609, ll 4-8. Trial counsel failed to give an adequate explanation as to why this was closing argument helped his client. He simply noted he had done it before.

No good trial strategy was given as to why the jury should have been told other countries hold it against a defendant when they do not testify. This is especially true when the country is the United Kingdom, an ally of our country. Perhaps, and only perhaps, the argument would make sense if the argument was about how unfair the Russian, Iranian, or Chinese systems are because they hold it against a defendant who does not testify. The average juror would think of those countries as unfair to a defendant. No average juror is going to consider the United Kingdom as unfair to a defendant. Such a comment is prejudicial to a defendant. As stated before, this court cannot say beyond a reasonable doubt that this comment did not prejudice the defendant in the eyes of the jury. Certainly had the state made such a comment a defendant would have the right to make a successful objection. Illinois has held that the complete failure of defense counsel to make a closing argument is sufficient to grant a defendant a new trial. The court said, "It would be a rare case in which choosing not to make a closing argument in a jury trial would be sound trial strategy. Given the evidence here, this was not such a case." *People v. Wilson*, 392 Ill. App. 3d 189, 200, 911 N.E.2d 413, 422 (2009). Oregon has held in a post conviction relief case that trial counsel's closing argument was prejudicial to the defendant. The court said, "In the context of an entire trial, it will be the rare case in which a closing argument, even if done poorly, will be prejudicial. However, in this case, the standard is met." *Mitchell v. State*, 300 Or. App. 504, 514, 454 P.3d 805, 812 (2019). The same rule should apply in this case. Trial counsel never gave a valid reason to use the practice in the United Kingdom to undermine

the right of a defendant in our country not to testify. As defense counsel stated this was a close case, this court cannot determine this error was harmless beyond a reasonable doubt.

Question VI

Did the Post Conviction Relief judge err in failing to hold trial counsel was ineffective for failing to request a self defense charge when the evidence supported such a charge?

Trial counsel admitted he did not request a self defense charge as his entire defense consisted of Mr. Middleton was the victim of misidentification. His testimony shows he never seriously considered a self defense charge.

A defendant is not required to testify to obtain a self-defense charge. *Ohio v. Hawthorne*, 101 N.E.3rd 701 (Ohio Ct. App. 2018). A defendant can also assert inconsistent defenses. As the court said, "We have previously held that where there is evidence to support charging the jury on either of two offenses (or affirmative defenses), both offenses (or defenses) must be charged, even if the two seem inconsistent." *State v. Rogers*, 320 S.C. 520, 524, 466 S.E.2d 360, 362 (1996). A defendant can tell the jury "I was not there but if I were, I fired in self -defense."

As previously noted the facts establish that Ms. Collins fired a shot before she was killed. This is certainly evidence that whoever shot Ms. Collins did so in self-defense. When a defendant requests a jury charge, the evidence must be looked at in the light most favorable to the defendant. "To warrant a court's eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." *State v. Lowry*, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993). There is some evidence in the record to support a self defense charge.

Question VII

Did the Post Conviction Relief judge err in failing to find trial counsel was ineffective when he had not prepared Ricardo Middleton to testify, had developed no real theory of defense for the trial and had failed to subpoena an important witness?

Mr. Middleton has contended that his trial counsel did not properly prepare for trial. The testimony from the defendant's counsel on this issue is troubling. Mr. Sutherland testified his defense was that Mr. Middleton was not at the scene and that if he were, no one could identify him. Mr. Southerland testified Mr. Middleton told him he was not at the scene of the shooting. Notwithstanding this claim, Mr. Southerland had no notes or memory as to where Mr. Middleton was at the time of the shooting. Frankly, this statement tests credibility. A competent defense lawyer would not have a client tell him that the client was not at the scene of the crime and not ask the basic question, "Well, where were you?" To have trial counsel respond by saying, "I'm sure he said something about it, I can't remember" (App. at 67, ll 23-24), does not indicate defense counsel took his client seriously, had a serious conversation with the client about the case or adequately prepared for trial. As the United States Supreme Court has said, "In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions." *Strickland v. Washington* , 466 U.S. 668, 691 (1984).

In this case this inquiry shows defense counsel had no serious conversations with his client as to the defense to be used. A defense lawyer is required to fully consult with his client as to whether or not the client should testify. As the United States Supreme Court has said, "A defendant, this Court affirmed, has 'the ultimate authority' to determine 'whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.' Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of

action." *Florida v. Nixon*, 543 U.S. 175, 187 (2004); *see, also*, *Moore v. State*, 399 S.C. 641, 732 S.E.2d 871 (2012). The record in this case establishes that defense counsel did not fully and completely consult with his client as to whether the client would testify. When defense counsel admits the client was not prepared to testify at trial, the conclusion has to be reached the issue was never fully and properly discussed prior to trial. While Mr. Middleton has the right to testify, that right is useless at best and actually harmful if trial counsel has not prepared him to testify.

When a defense counsel does not prepare a client to testify before trial, then the decision was made by the defense counsel, and not the client, before trial. A reasonably competent defense attorney would know to discuss the pros and cons of a client testifying well before the trial started. The testimony shows this did not occur in this case. As the Fifth Circuit has said, "Informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are cornerstones of effective assistance of counsel. We agree with Judge Owens that in the circumstances of this case, trial counsel's failure to conduct an investigation adequate for the performance of these functions deprived petitioner of constitutionally effective assistance of counsel." *Gaines v. Hopper*, 575 F.2d 1147, 1149–50 (5th Cir. 1978). This applies to this case. When defense counsel admits that his client was not prepared to testify and did not discuss the case enough to even know where his client was at the time of the shooting, the defense counsel has failed to conduct a proper investigation.

Mr. Middleton stated he never had the opportunity to review all his discovery. This testimony by Mr. Middleton is supported by a letter he wrote and filed with the Clerk of Court for Richland County. The letter, dated August 5, 2019 was received and filed by the clerk on

August 9, 2019. This letter supports the testimony of Mr. Middleton that he did not fully review all the discovery, at least by August 5, 2019, some two weeks before his trial.

In the opening statement, the prosecution argued, "[I]n this culture you don't approach the support club of another biker gang, but that is what Mr. Middleton did on July 20, 2017, at an event called bike night . . . ." App. at 217, ll 10-13. At the time the solicitor made the comment, an affidavit existed from Mr. Johnson that stated Mr. Johnson and Mr. Middleton parted on good terms.

The affidavit of Jayrell Johnson was part of the discovery given to defense counsel. App. at 754-759. Trial counsel agreed the facts contained in the affidavit ran counter to the theory of the state that the shooting arose over a disagreement with Jayrell Johnson. He agreed the facts contained in Mr. Johnson's affidavit would have been helpful to the defense. App. at 80, ll 23-24. He gave no explanation for not interviewing or subpoenaing Jayrell Johnson. The affidavit shows his testimony would have refuted a big part of the theory of the State.

As to the duty of defense counsel to investigate all aspects of the case, the United States Supreme Court has said, "Because that testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies, we noted that 'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' But, we observed, 'a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.'" *Kimmelman v. Morrison*, 477 U.S. 365, 384, (1986)(internal citations omitted). Obviously the testimony of Mr. Johnson would have aided the defense. The failure to investigate and subpoena this witness hurt

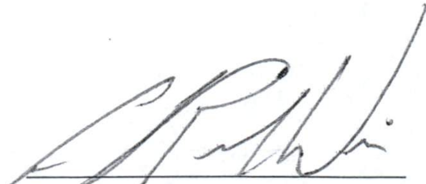
Mr. Middleton's defense. The affidavit of Mr. Johnson is sufficient to establish his testimony. As the supreme court has said, "At the PCR hearing, petitioner presented evidence as to the nature of the nurse's testimony by introducing her triage notes. This evidence is sufficient under *Glover*." *Pauling v. State*, 331 S.C. 606, 611, 503 S.E.2d 468, 471 (1998). The affidavit is certainly the equivalent of the notes of the nurse.

The failure of trial counsel to properly investigate the facts of this case and properly prepare Mr. Middleton for trial deprived Mr. Middleton of effective assistance of counsel as guaranteed by the Sixth Amendment to the Constitution of the United States of American and Article I, § 14 of the Constitution of the State of South Carolina.

Conclusion

For the foregoing reasons, this court should grant the Petition for Writ of Certiorari and reverse the conviction of Ricardo L. Middleton.

October 16, 2025



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