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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
The Honorable Clifton Newman, Circuit Court Judge
Appellate Case No. 2026-002249

THE STATE, Petitioner,

v.

ANTONIO VASHON BARNES, JR., Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

W. JOSEPH MAYE
Assistant Attorney General
S.C. Bar No. 100851

Post Office Box 11549
Columbia, S.C. 29211-1549
(803) 734-6305

THE HONORABLE BYRON E. GIPSON
Solicitor, Fifth Judicial Circuit

ATTORNEYS FOR PETITIONER

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on September 15, 2026.

PETITIONER'S QUESTIONS PRESENTED

I. **Did the Court of Appeals err in its application of Rule 5(a)(1)(A) and *Lawton*, wherein it failed to address the State's lack of the prosecution's possession, custody, and control over Respondent's rap videos and where the record demonstrates that Respondent was put on notice of the State's intent to use the lyrics of his publicly accessible rap songs as a subject for cross-examination?**

STATEMENT OF THE CASE

On February 7, 2019, at approximately 8:55am, Respondent shot and killed his roommate, Antonio Dash (hereinafter referred to as Mr. Dash), and his friend Eric Griffin (hereinafter referred to as Mr. Griffin). Antonio Barnes (hereinafter "Respondent") was indicted for two counts of murder and possession of a weapon during the commission of a violent crime. (2021-GS-40-1292; 1293; 1294). Respondent was represented by attorneys: Caroline E. Latimer, Brian R. Shealey, Luke A. Shealey, and Laura W. Young. Senior Assistant Solicitor Christopher Dale Scott, along with Assistant Solicitors Nicolas A Fowler and Paul Walton prosecuted the case. Pursuant to the Protection of Persons and Property Act, Respondent first proceeded to an immunity hearing before the Honorable Deandrea Gist Benjamin on March 30-31, 2022. After hearing the evidence and Respondent's theory of self-defense, the trial court took the matter under advisement and permitted the parties to present proposed orders. Immunity was denied and Respondent proceeded to a jury trial on December 5 – 8, and 13, 2022, before the Honorable Judge Clifton B. Newman. At the conclusion of the trial, Respondent was found guilty of the murder of Eric Griffin and for the possession of a weapon during the commission of a violent crime; Respondent was found not guilty of murder for the killing of Mr. Dash. Respondent was then sentenced to 35 years imprisonment for murder and 5 years imprisonment for the possession of a weapon charge, to be served concurrently. (App. p. 1215-1216; 1220).

Respondent appealed his conviction. On August 5, 2026, the Court of Appeals reversed, holding the trial court error in admitting Respondent's rap lyrics. *State v. Barnes*, No. 2023-001390, 2026 WL 2253864 (S.C. Ct. App. Aug. 5, 2026). A Petition for Rehearing was filed by the State on August 19, 2026, but was later denied by the Court of Appeals on September 15, 2026. The State now submits this Petition for Writ of Certiorari.

STATEMENT OF FACTS

The Trial

On the morning of February 7, 2019, Mr. Griffin was in the car with his fiancé, Ieasha Washington, and his mother, Wanda Griffin. They dropped off his daughter at the babysitters, but before heading to his mother's workplace to drop her off, he asked his fiancé to stop by the apartment of his friend, Respondent. Mr. Griffin got out of the car, walked up to the apartment, knocked on the door, and went inside. (App. p. 521-526; 556-561). Mr. Griffin appeared to be in a happy mood when he exited the vehicle, and he was not in possession of a firearm. (App. p. 527; 543-544; 562). Approximately five to six minutes passed. Then, at about 8:54am, Ms. Washington and Ms. Griffin heard what they thought might be multiple gunshots; Ms. Griffin heard three shots and Ms. Washington heard between five and seven. (App. p. 532; 563-565). They walked up to the apartment door and knocked three times over the course of a few minutes before Respondent finally answered the door. Respondent opened the door enough to slip outside the apartment, and he then closed the door behind him while he spoke with Ms. Washington. Ms. Griffin soon opened the door herself and went inside where she found victims' bodies. (App. p. 530-536; 563-564). In response, Ms. Washington dialed 911. (App. p. 551).

Ms. Washington spoke briefly with Respondent prior to the women entering the apartment. She testified that he shook her and asked: "What are they doing here? They were fighting. Who let them in?" He then claimed he was asleep. (App. p. 575-576). However, he never informed them that he had committed the shooting.

Mr. Kevin Archie was working at the Willow Run apartments as a maintenance and HVAC technician when he heard the gunshots while outside of building 17. (App. p. 586). When called by some ladies to come help, he ran to Respondent's apartment in building 14. He knocked on

Respondent's door and testified that Respondent's reaction was to say, "What, what, what?" Mr. Archie saw the bodies in the entryway, and as a result of Respondent's reaction, tone, and volume, he turned and ran from the building. He then reported the shooting to the apartment complex office. (App. p. 586-589). Before leaving, Mr. Archie recalled seeing two other individuals, Shakihla Smalls (hereinafter "Ms. Smalls") and Richard Charles, at the apartment but noted that Ms. Smalls seemed to "disappear real fast during the chaos." (App. p. 598).

Shortly after leaving the apartment Respondent spoke to Mr. Archie again. Mr. Archie testified that Respondent attempted to explain what happened to him but gave three separate explanations. First, Respondent told him that he simply did not know what happened. Second, he told Mr. Archie that they were trying to rob him. Third, he said "I'm gonna tell ya what happened. They were in there fighting." Mr. Archie also noted that as part of Respondent's various explanations, he claimed that "they was in there fighting. I just came out blasting." (App. p. 595-596). Respondent told Mr. Archie to tell the police this explanation. During cross examination, Mr. Archie was asked what he told the police Respondent's explanation was, to which he responded: "I told the police what he told me to tell them." (App. p. 593; 602). Javontae Davis also testified, and provided yet another version of Respondent's explanation, noting that he was "saying something about somebody tried to kick his door or something like that." When shown his previous statement to refresh his memory, he added that Respondent told him that "he was asleep or something, and they was on the floor dead." (App. p. 622; 625-626; 632). Again, Respondent did not inform Mr. Davis that he was responsible for the shooting.

Samuel Thomas, Respondent's other roommate, testified that he was friends with Respondent, Mr. Dash, and Mr. Griffin, but noted that Mr. Griffin and Mr. Dash had been having a disagreement regarding a firearm that had gone missing. (App. p. 657-661). The disagreement

had developed two days prior and had led to the two having a confrontation that Respondent ultimately diffused. (App. p. 668-675). Regarding the shooting on February 7, Mr. Thomas was not present at the time of the crime, but he had an opportunity to speak with Respondent by phone about an hour after the shooting. Mr. Thomas testified that Respondent's explanation was that he was asleep and was woken by a boom in the apartment; he thought he was being robbed and he did not realize it was Mr. Dash and Mr. Griffin until after he had shot them. (App. p. 683-684). Mr. Thomas acknowledged that he only received Respondent's explanation of events, he was not there to witness the shooting. (App. p. 691). He further testified that Respondent is not friends with Ms. Smalls. (App. p. 688).

At approximately 10:47am, Respondent returned to the scene and informed officers that he was the shooter. He was interviewed briefly at the scene by Officer Ryan McIntyer, who initially thought Respondent was merely a witness. (App. p. 635-636). Respondent gave his explanation about being awoken by a loud boom, believing he was being robbed, and committing the shooting. (App. p. 637-642). Respondent also offered an explanation for why he supposedly believed he was being robbed; Respondent noted that his roommate had recently been robbed, and he confessed to dealing drugs and having marijuana in the apartment. Respondent explained that he thought he was being robbed of his weed. (App. p. 643; State's Exhibit 71). Respondent was taken to the station for further questioning, but he was not yet placed under arrest. (App. p. 644).

During the subsequent interview, Respondent gave law enforcement the version of his story about being awoken by the loud boom, coming down the hall thinking he was being robbed, and shooting at the two individuals on the floor before knowing who they were. He also informed law enforcement about the missing firearm that had caused a "beef" between Mr. Griffin and Mr. Dash. When asked where the gun used in the shooting was, Respondent explained that shortly after the

shooting took place Ms. Smalls came up to the apartment and snatched his gun out of his hand and walked off. Critically, Respondent's statement to law enforcement suggested that he barely knew Ms. Smalls, and he explicitly denied having her phone number; he only had her Facebook profile to show to police. (State's Exhibit 71; App. p. 650-654). In contrast, the data from Respondent's phone revealed that there were fifteen (15) calls going "back and forth between he and a Shakihla Smalls," between 10:10am and 10:29am on February 7, 2019. This was barely more than an hour after the shooting took place. (App. p. 876). Nevertheless, even after this information was presented, Respondent still testified on direct examination that he did not know Ms. Smalls' phone number to provide to police, despite having his phone with him during the interview. (App. p. 932-933; 939; 1024). Law enforcement's investigations provided additional evidence to the case. Pursuant to a search warrant, the 9-millimeter firearm used in the shooting was found underneath the mattress in Ms. Smalls' apartment. The clip inside the gun had a seventeen round capacity and was found to contain six rounds of ammunition in addition to the one round in the chamber.[1] (App. p. 743-747).

There were no signs of forcible entry into the apartment. (App. p. 699). There was no artificial lighting on in the apartment, however the lighting provided by the windows provided enough light for responding Officer Joseph Dwyer to be able to see the entire apartment. (App. p. 610).

Mr. Dash and Mr. Griffin were each shot with multiple rounds of ammunition, and each had gunshot wounds that were of significant forensic focus. The gunshot wound that impacted the back of Mr. Griffin's "upper neck, lower head" was testified to by Dr. Monroe as being a "contact gunshot wound." (App. p. 829; 830). He testified that the wound possessed an abrasion border,

[1] In total, the firearm was capable of holding a maximum of eighteen (18) rounds of ammunition. (App. p. 771).

partial muzzle imprints, and a contusion; he testified that this type of wound is the result of the gun being placed directly in contact with Mr. Griffin's head when the bullet was discharged. (App. p. 821-823). Mr. Dash's bullet wounds displayed "stippling" which was informative as to the range at which Mr. Dash was shot. According to Dr. Monroe, a gunshot wound displaying stippling could be fired anywhere between 6 inches and 3.5 feet from the victim.

Seven total shell casings were recovered from the crime scene. Two were by the doorway and five were amongst the bodies, but none were in the hallway where Respondent claimed to commit the shooting. (App. p. 710-712). There were no signs of bullet holes in the walls or laminate flooring. (App. p. 708-709). All seven shell casings were matched to the recovered 9-millimeter pistol. (App. p. 757-758). Four of the recovered projectiles were conclusively matched to the 9-millimeter firearm. (App. p. 759-760). Two bullet fragment jackets were consistent with the 9-millimeter cartridge and were matched to the firearm. One fragment was consistent with being ammunition within the "nominal .38 caliber family" (which includes 9-milimeter ammunition) but further detail was not available for a more specific finding. (App. p. 762-763). The remaining fragments were either too small, too damaged, or lacking sufficient markings for analysis. (App. p. 764).

Respondent testified in his own defense and noted that he had been friends with Mr. Dash and Mr. Griffin for a long time, though Mr. Dash appeared to be the closer of the two friends. Respondent testified that on the morning of the crime he heard a loud boom in the front room. He waited a minute or two to see if he could hear what was happening, but all he could hear was feet moving around. He believed the boom could have been his door being kicked in and did not think his roommates were home. He next heard what he thought to be the TV falling. He testified that he did not want anyone to reach his room, so he grabbed his gun and walked down the hallway

keeping to the wall. When he reached the end of the hallway he turned to start shooting at the area where he was hearing the commotion. He claimed that his body was still moving forward as he began shooting and that he did not see any faces at first. However, after shooting he saw that one of the individuals was Mr. Dash and that the other was Mr. Griffin. (App. p. 913-919).

Contrary to others' testimony, he testified that Mr. Griffin was on top of Mr. Dash. He testified that he was crushed that he had shot his friend Mr. Dash. He next heard knocks at the door. He claimed that he let Ms. Washington and Ms. Griffin inside immediately and does not remember talking to Ms. Washington. (App. p. 922). Respondent next offered contradictory testimony. First, he stated that after the two women came into the apartment, he went back to his room to get his phone and call 911. (App. p. 923). Later, Respondent testified that he was going to get his phone from his room to call the police and used such testimony as an explanation for why it took him so long to respond to Ms. Washington's and Ms. Griffin's knocking. He then testified that they never knocked on the door, he just let them in immediately. (App. p. 923; 976).

He next testified about Ms. Smalls coming into the apartment and snatching his gun out of his hand. He testified that he never asked her to take the gun and did not stop her from doing so. (App. p. 924-925). Respondent admitted to leaving the apartment but testified that he immediately identified himself to police. However, in the process of identifying himself to the police he *did not* indicate to police that he committed the shooting. (App. p. 928). In the immediate aftermath of the shooting Respondent went to the apartment of his friend Wesley Wright, who was two parking lots over. They later went to get cigarettes from the store. Only after they returned did Respondent turn himself into police as the shooter. (App. p. 929-931).

Part of Respondent's testimony concerns his remorse, emotional state, and nightmares that resulted from his having committed the shooting. On cross examination, Respondent was asked

about being a rapper with the alias "Big Hood Lyfe" and some of the lyrics of his songs that directly referenced the shooting and victims in question. Respondent was adamant that the prosecutor had not correctly heard and recited his lyrics. Respondent also admitted the following:

> Q. Yeah. What if there's no danger? What's if it's your friend and roommate who are in the living room and you - - -
> A. Well, at the time you wouldn't be able to know if it was no danger. I was all the way in the back room sleep. So, I wouldn't even know, know if danger was imminent or not. It would be impossible for me to know.
> Q. Okay. Impossible?
> A. Yes, sir.
>
> …
>
> I didn't take no time to assess the situation. . . I didn't observe nothing. As soon as I got to the hallway, to the end of the hallway and I heard where the noise was coming from, I shot towards that area as I was still moving.

(App. p. 982; 1001-1002).

Respondent was asked repeatedly about the contact gunshot wound to Mr. Griffin's head. Respondent provided no explanation other than testifying that he did not remember committing that particular shooting. Despite this position, he did not dispute the contact gunshot wound and did not claim that he "black[ed] out" during the shooting. (App. p. 1011-1012; 1038).

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Elwell*, 403 S.C. 606, 609, 743 S.E.2d 802, 804 (2013). Therefore, this Court is bound by the trial court's factual findings unless the Respondent can demonstrate that the trial court's conclusions either lack evidentiary support or are controlled by an error of law. *Id*. "A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR.

ARGUMENTS

I. The Court of Appeals improperly applied Rule 5(a)(1)(A) and *Lawton* as its basis for reversal, due to its failure to consider the possession, custody, and control requirement under Rule 5, and its failure to properly consider the State's disclosure of the materials in question.

Issue as it was presented at trial

This matter was addressed first during the immunity hearing (regarding the Instagram rap video in physical possession of the prosecutor through the seizure of Respondent's phone), and subsequently in a pretrial motion in limine hearing that addressed additional videos of which the State had since become aware. The arguments by Respondent and the solicitor are both presented to the court. (App. p. 494-96). However, key to Respondent's later supposed dispute over Rule 5 disclosure, the solicitor explicitly noted that there are *multiple* rap songs in question and that one such song "specifically references him killing his two – the victims in this case. Other ones, he, he kind of – you've seen it from the bench, Your Honor. Some, some people seek a certain amount of clout from saying they've killed people." (App. p. 496). The facts here demonstrate that the solicitor made Respondent aware that he was in possession of the Instagram video that was discussed during the immunity hearing, *and* that he was also aware of additional rap videos on the internet relating to the same purpose. The trial court chose to reserve judgment on the issue until it arose in the context of the trial.

On direct examination, Respondent went into detail about his remorse, emotions, and nightmares that had resulted from this shooting. The solicitor began his cross-examination by confirming that Respondent's "rap name" was Big Hood Lyfe, and that whether Respondent wrote a rap song about this shooting. Objection was raised and the matter was addressed outside the presence of the jury. (App. p. 940-944)

Respondent raised objections on the basis of Rule 5 discovery obligations, SCRE 402, 403,

and 404(b), and First Amendment rights to free speech. The solicitor asserted that the song in question, along with 21 other songs, were found published on YouTube by Respondent between December of 2018 and August of 2022. The State argued that the lyrics he is creating and posting are explicit articulations of his thinking and mindset, and that such goes to proving malice. The solicitor acknowledged that the lyrics are prejudicial, but that the relevancy and probative value outweigh such. In support of his argument, the solicitor discussed some excerpts of the lyrics, which included:

> T.O.[2] was like my brother. When the time comes, everybody freeze but I'm cold with that cut.
>
> I heard you trying to jack. I heard you trying to rob me. I'm scared to take a loss. I'm a business thread your cross.
>
> My heart is as black as a kettle. No, I'm not a grave digger. Grave filler, that's my name.

(App. p. 944-947).

In response, Respondent first asserted that the rap lyrics should have been disclosed pursuant to discovery obligations under Rule 5 and cited to *State v. Lawton*. Respondent went on to argue that such would include reports, documents, written materials, or any information that they intend to use at trial that is material to the defense or is something they intend to introduce in their case-in-chief. Respondent next argued that the art behind rap lyrics is not tantamount to biographical information, and that the subject matter of killing and robbing is prevalent across the music genre. (App. p. 947-951). Respondent then cited to *State v. Cheeseboro* as a basis for excluding the lyrics. (App. p. 951-953).

The solicitor responded by noting that the lyrics' connection to this crime is clear, given

[2] T.O. is the nickname that Appellant uses for Mr. Dash.

that Respondent references one of the victims by his nickname, T.O. and that the lyrics appear to reference this case. He further noted that these rap videos were not the result of searching some law enforcement database or other limited access system; **he found them simply by typing in "Big Hood Lyfe" *into a google search.*** (App. p. 953-954). He argues that the lyrics are appropriate impeachment evidence in light of his testimony regarding his supposed remorse. (App. p. 958).

The matter was reconvened after lunch, and the trial court noted the arguments that Respondent had made in memorandum to the immunity hearing. It further noted that the *Cheeseboro* ruling was essentially that the rap lyrics were too vague and minimally probative to qualify as admissible in the state's case-in-chief. (App. p. 960-961). The trial court issued a ruling that the lyrics for which the defense had been provided notice were admissible for purposes of impeachment, in light of the distinguishing facts from *Cheeseboro*. This caused further dispute about which lyrics were being argued for admission and which had been noticed, and prompted a full recitation of the lyrics he had pulled from the video of Respondent's song "Let Me Explain":

> Nobody know what happened. But everybody got something to say. But if the shoe was on the other foot, would you feel the same way? An N word talking about robbing me. An N word run into my house and try to harm me. You know I fuck with both of y'all. But T.O. is like a brother to me. Everybody say what they going to do but they freeze. I'm cold with that cutter. Watch him fall. It don't matter if it's T.O. I'm going to stand on business forever and always. That gangster shit be making me shoot these N words. I swear to God --- Well, I might not mention this, but he says: I swear to God I'll beat the trial. I'm a soldier. I don't mean no truces. It's me against the rest of y'all. I'm a barber with a cutter. Watch me burn like alcohol.

(App. p. 962-964). Respondent appears to confuse the Instagram video on his seized cell phone as being the only thing he had been provided and disregards the fact that he was on notice of much more. **The record demonstrated that the solicitor and defense counsel had previously discussed the existence of Respondent's various published rap videos and that such were**

found by a simple google search. (App. p. 964). This discussion put the defense on notice of Respondent's YouTube rap videos, wherein the record demonstrates that the prosecution was not in possession of such, but had accessed the ability to view them through a public forum. After hearing this, the trial court interrupted the dispute and noted that it was sticking with its ruling. (App. p. 965).

When cross-examination resumed, the solicitor questioned Respondent about the lyrics and whether they pertained to his having killed the two victims. Respondent denied such and noted that what the solicitor had written down was incorrect. (App. p. 966). The Solicitor then proceeded to ask Respondent about the accuracy of each stanza, and Respondent testified that the solicitor's recitation of certain lines was incorrect or that other lines were omitted. (App. p. 966-974). After these various exchanges, Respondent then says that his little brother actually wrote the lyrics, he merely sang it and posted it to YouTube. (App. p. 974). At no time was the rap video actually published to the jury, nor was any exhibit pertinent to the rap lyrics offered into evidence.

Discussion

The Court of Appeals erred in its application of Rule 5 and *State v. Lawton* as a basis for reversal of the trial court's decision to admit the rap lyric evidence in this case. The Court of Appeals held that "the trial court abused its discretion in admitting the rap lyrics evidence over Barnes's Rule 5 objection pursuant to subsection (a)(1)(A) and *Lawton*." Under subsection (a)(1)(A), the duty applies explicitly to the defendant's statements that is "within the possession, custody or control of the prosecution." Rule 5(a)(1)(A), SCRCrimP. However, nowhere in the opinion does the Court of Appeals actually address this requirement as it pertains to the State. The Court of Appeals likewise did not fully consider the evidence of disclosure of the additional videos

set forth in the record. The reliance upon on Rule 5(a)(1)(A) and *Lawton* without addressing these matters is clear error warranting certiorari.

In *Lawton*, the facts demonstrated that during cross-examination "the State produced a letter Lawton had allegedly written to his ex-wife" essentially admitting that his explanation of the crime was not truthful. The defense objected and argued that the letter should have been disclosed prior to trial under subsection (a)(1)(A) of Rule 5, SCRCrimP. The defense's argument correctly asserted that it was a relevant written statement "*within the State's control*." The trial court ruled it was admissible because it was being used for impeachment rather than the State's case-in-chief. On appeal, the Court of Appeals found that the letter was relevant and that the lack of disclosure prejudiced Lawton in changing the calculus of whether he would testify at trial.

Lawton is not a like-for-like roadmap for the case at hand. The factual differences between *Lawton* and the case at hand heavily impact the manner in which the law can be applied. Respondent Barnes did not face the same circumstances as Lawton, the State did not possess or control the rap video in question, and the failure to address the differences by the Court constitutes errors of both law and fact.

The first clear distinction is that in *Lawton*, the State was in *sole and exclusive control* of the one and only letter. Consequently, there was no way for defense counsel to learn of the letter and review its contents other than to receive it from the State *via discovery*. Here, the State exercised *zero* possession, custody, or control over the video content in question. It was merely a publicly accessible piece of artwork created by Respondent and exclusively controlled by Respondent on his own YouTube channel. There is an obvious factual distinction between possessing the sole copy of an incriminating letter and simply accessing published and publicly accessible YouTube videos. The Court of Appeals made no distinction, it in fact does not even

discuss the subject of whether access to the video equates to possession and control. Instead, the Court wrapped the question of possession, custody, and control into the question of "adequate" disclosure and made only the briefest of explanations by footnote. None of which presented controlling authority for its decision. See *State v. Barnes*, No. 2023-001390, 2026 WL 2253864, at *5 n.6 (S.C. Ct. App. Aug. 5, 2026).

Second, in *Lawton* the State did not disclose their possession of the letter, nor did they make their intent to use the letter for impeachment known to the defense. It is clear that Lawton was caught off guard by the existence of the letter and the State's use of it on cross-examination. Neither of these facts are consistent with this case, and these distinguishing facts are pivotal to the question of notice and to the question of Respondent having a fair opportunity to consider his decision to testify. Lawton received neither notice nor opportunity to consider such in relation to his choice to testify. Respondent received both notice and opportunity, and the State's awareness of multiple rap videos was made clear *before his trial even began*. (App., p. 496). The Court of Appeals did not consider the distinction at all.

The record demonstrates that defense counsel was put on notice of the rap videos and that the State's access to them was as simply reached via running a google search for Respondent's rap name – Big Hood Lyfe. This is borne out by the record from the motion in limine hearing where the solicitor disclosed its knowledge and access to Respondent's multiple rap videos and made the defense aware of the general subject matter believed to be relevant.[3] The record then demonstrates that both defense counsel and the solicitor had some discussions regarding these videos. Collectively, this was sufficient for establishing disclosure under the rule and for satisfying the purpose of Rule 5 discovery when the materials are under Respondent's complete control.

[3] Appellant's own brief on appeal acknowledges this reality. (Brief of Appellant, p. 36).

Rule 5 "is intended to enable a defendant to obtain prior to trial any of his own statements relevant to the crime charged against him so that he will be able to prepare properly to face the evidence that may be introduced against him at trial." *Earley v. State*, 418 S.C. 255, 266, 792 S.E.2d 226, 232 (2016) (quoting *United States v. Gleason*, 616 F.2d 2, 24 (1979) (discussing the underlying purpose of the similar federal rule). Respondent was already on notice that his rap videos may present an evidentiary problem for his case, as the subject of such was argued extensively during his immunity hearing. In light of that fact, he was likewise independently aware of and on notice by the prosecution that his other videos present similar evidentiary relevance. He failed to heed such concerns, *or* he chose to testify despite the risk of being cross-examined on these videos. But no reading of the record would suggest that he made a choice to testify without also knowing that his rap lyrics may become a subject of cross-examination.

Also, unlike statements to police officers, statements recorded by law enforcement, or surveillance footage, where knowledge of and/or access to the evidence can only be achieved through the prosecution's permission, these videos were recorded and published by Respondent himself to the public domain. As they are *his* YouTube videos, he would also have the ability to access and remove these videos had he wished to do so. The record demonstrates that Respondent was not blindsided by this evidence; he was made aware of its existence and its nature, and he (and his counsel) clearly had access to the videos in question under Rule 5. "Rule 5(a), SCRCrimP requires disclosure of documents within the possession, custody, or control of the prosecution; it does not require production of documents in the possession, custody or control of a third person. *State v. Gulledge*, 321 S.C. 399, 468 S.E.2d 665 (Ct. App. 1996), aff'd as modified, 326 S.C. 220, 487 S.E.2d 590 (1997). In fact, the majority of state and federal courts which have interpreted similar rules have held if the prosecution does not have the material or evidence sought by the

defense actually in its possession, disclosure is not required; the only exception is where the evidence is in the possession of another governmental agency. *State v. Gulledge*, 321 S.C. 399, 468 S.E.2d 665 (Ct. App. 1996), aff'd as modified, 326 S.C. 220, 487 S.E.2d 590 (1997) (Supreme Court's opinion)." § 25:3. Criminal cases: State's duty of disclosure, Trial Handbook for South Carolina Lawyers § 25:3 (5th ed.).

The purpose of Rule 5 is to inform the defense as to what the State has at its disposal so as to ensure a fair trial – the state did so and Appellant and his counsel were freely able to review his posted rap content in preparation for trial. Possession, custody, or control is required to trigger Rule 5, but this Court has confused those requirements as being equivalent to awareness and accessibility, and it has excused the defense of any dutiful obligation of preparation for known matters. See *Hyman v. State*, 397 S.C. 35, 47, 723 S.E.2d 375, 381 (2012), abrogated on other grounds *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) (noting that compliance with Rule 5 is a fact-based inquiry, and *disclosure of the existence* of a drug sale videotape and making such *available for inspection* satisfied Rule 5)(emphasis added).

The Court of Appeals took mere footnote notice of the State's argument that Respondent was on notice as to his YouTube videos but found nothing to suggest that Rule 5 substantiated the argument. However, the *Hyman* Court's reference to disclosure and opportunity for review would demonstrate otherwise. In refuting the State's argument, the only referenced authority from the Court of Appeals was dicta in *Early v. State*, 418 S.C. 255, 268, 792 S.E.2d 226, 233 (2016). Dictum is not the law (*Gordon v. Lancaster*, 425 S.C. 386, 395, 823 S.E.2d 173, 177 (2018) (Few, J. concurring), and the Court's attempt to distinguish a lack of a *specific* mention of "YouTube," disregards the fact that the precise manner in which the State found *Respondent's videos* was to google *Respondent's* rap name – a fact made known to defense counsel in advance of trial.

The Court of Appeals has mistakenly treated the materials in question as some buried or obscure content that Respondent and/or his counsel could not find without precise instructions, when the reality is substantially different. The State was able to find these materials, easily, without knowing they even existed. The defendant could certainly find them, knowing precisely where, how, and why they exist. In the absence of a clear prohibition against applying Rule 5 in the manner the trial court did here, there is no precedent to articulate that trial court *abused its discretion* by admitting the lyrics. Respondent's rap content was collectively disclosed by the solicitor, and it was available for review by the defense. Whether the failure to review such evidence was by way of tactic, indifference, or mistake, the defense *chose* not to explore the content readily available to them and chose not to bring the pretrial disputed issue to the court's attention. The law does not reward failures in diligence.

Instead of rightfully charging the defendant with having the knowledge, access, and expectation that his rap videos[4] (which he left available to the prosecution, his own attorneys, and the public at large *after* learning of the State's interest in their impeachment potential) would *likely* become part of the case against him in relation to his mental impressions regarding the crime, the Court of Appeals reversed and remanded his case for a new trial under the premise that he was somehow surprised by these materials and the State's approach on cross-examination. The facts of

[4] Rights under *Brady* and Rule 5 emanate from different places, but they are joined the purpose of ensuring that a defendant receives a fair trial (*State v. Kennerly*, 331 S.C. 442, 454, 503 S.E.2d 214, 220 (Ct. App. 1998), aff'd, 337 S.C. 617, 524 S.E.2d 837 (1999)), and *Brady* has the commonsense limitation that it only applies to evidence which the prosecution has, but which is unavailable to the defendant. *Anderson v. Leeke*, 271 S.C. 435, 438-39, 248 S.E.2d 120, 122 (1978). *Brady* insists on a diligent defender, and it relieves the state of producing evidence equally available to the accused. *Id*. The possession, custody, and control language of Rule 5 hinges upon the same sentiment.

this case and the applicable law do not support this ruling and certiorari should be granted to review this issue.

Finally, there is no prejudice arising from this matter. The cross-examination reveals that Respondent was well prepared to discuss the text and meaning of his own lyrics. He provided innocuous explanations for the meanings of his songs and at times demonstrated that the solicitor was mishearing or misquoting his lyrics. The Court of Appeals missed the mark here as well. One's lack of evidence to support their theory of defense is not equivalent to a heightened risk of prejudice to credibility, and a weak case is not a crutch that a defendant can lean on to gain advantage in harmless error analysis. A weak case is simply a weak case, and the potential for prejudice is *less* where there is so little support for a defendant's position.

The record demonstrates the following facts:

- Rather than yell or plead for help, Respondent attempted to conceal his shooting of Victims from Ms. Washington and Ms. Griffin by carefully stepping outside his bloody apartment; (App. p. 530-536; 563-564)
- Respondent behaved similarly, and in truth, somewhat aggressively with the apartment's HVAC technician (Mr. Archie) who responded to hearing gunshots and knocked on Respondent's door out of concern; (App. 586-589)
- Respondent did not dial 911 after committing the shooting, despite learning that he had shot and killed his own supposed *friends;*
- Respondent's testimony on direct is self-contradictory, where he in one instance claims that he went to get his phone to call 911 after Ms. Griffin and Ms. Washington entered the apartment, he then claimed that he had already retrieved his phone and that this was why it took him so long to respond to the ladies'

knocking at his door, and he then claimed that the ladies never knocked at all, he just let them in immediately. (App. p. 922-923; 976)

- In quick succession, Respondent gave three conflicting stories to Mr. Archie after leaving his apartment. The changes in story came when Mr. Archie expressed doubt as to the prior story's plausibility; (App. p. 593-596)
- Respondent's version of the story told to Javontae Davis varied yet again; (App. p. 622-626)
- Respondent did not inform police of his involvement in the shooting, he instead fled the scene for two hours before returning and claiming self-defense in what he allegedly thought was a robbery of his home; (App. p. 569; 635-636; 929-931)
- Respondent lied about his connection with Ms. Smalls, who he claims simply walked in and took his gun from him and then hid it under her mattress, despite no instruction or request for her to do so.
- The record shows that despite his insistence that he barely knew Ms. Smalls and did not have her number – there were 15 phone calls shared between the two of them in the hours immediately following the shooting. Respondent also falsely denied knowing Ms. Small's phone number to police despite having his phone with him while being questioned; (App. p. 650-654; 876)
- Contrary to Respondent's version of events, there were no signs of forcible entry into the apartment, the apartment was not dark which belied the possibility of confusing his own friends' identities, and each victim sustained at least 6 gunshot wounds each. Victim Dash's wounds displayed stippling, indicating they were fired no more than 3.5 feet away. Respondent offered no explanation as to how these

gunshots were so close in proximity, if the victims were on the ground. (App. p. 699; 610; 804-819)

- Respondent's version of events provided no explanation for how a supposedly hasty and panicked shooting of two people on the ground with numerous rounds of ammunition, could result in no bullet holes to the floors or walls of the apartment; (App. p. 708-709)
- Victim Griffin sustained a contact gunshot wound to the lower head, indicating that Respondent had not hastily fired at Griffin while he was on the floor, but had pressed the pistol into contact with Victim Griffin's head when he fired. Respondent did not contest this evidence and he offered *no explanation* for how this could possibly have happened in his version of events; (App. p. 821-830)

When the totality of the evidence is taken into consideration, which the Court of Appeals failed to do, it is clear that well before his cross-examination on rap lyrics, there was no basis for the jury to find Respondent credible. While Petitioner argues that there was no underlying error, any finding of error would be harmless in comparison to evidence of guilt admitted at trial, and the evidence demonstrating Respondent's lack of credibility. The Court of Appeals erred in failing to reach this conclusion, and certiorari is warranted to review and reverse its holding.

CONCLUSION

Petitioner respectfully petitions this Court to grant certiorari so that the Court of Appeals' holding can be reviewed and critiqued.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

W. JOSEPH MAYE
Assistant Attorney General
S.C. Bar No. 100851

HON. BYRON E. GIPSON
Fifth Circuit Solicitor's Office
1701 Main Street
Columbia, SC 29201

BY: *s/ W. Joseph Maye*
W. Joseph Maye
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-6305

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