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STATE OF SOUTH CAROLINA
In the Supreme Court

FEB 24 2014

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2013-000928
Circuit Court Case No. 2011-CP-32-2954

SAMUEL HARMON, #328335,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT IN REPLY

- I. **The PCR court erred in finding that defense counsel was not ineffective for failing to object to irrelevant and prejudicial testimony that the Petitioner belonged to a gang.**

- II. **The PCR court erred in finding that defense counsel was not ineffective for failing to object to the portions of the Solicitor's closing argument where the Solicitor argued that the Petitioner was the shooter because he was a gang member.**

In its Return, the Respondent essentially argues that defense counsel was not deficient in failing to object to gang references—made by witnesses or by the prosecution—because any such objection would “likely” be “unsuccessful.” Return at 10. However, the Respondent makes no overt argument as to why the gang references would have been admissible. Instead, the Respondent obliquely argues that “[t]he facts surrounding the initial altercation at the U.S. #1 were necessary as a foundation for the second, fatal altercation at the Barnyard,” and that the testimony “was part of the res gestae of the crime.” Return at 9. Taken these assertions to their logical, though unspoken, conclusion, the Respondent believes that jury needed to hear that the Petitioner was a member in a gang in order for the jury to fully understand the initial altercation at the U.S. Highway One Flea Market. This is simply incorrect. There was no evidence presented at trial that demonstrated that the basis for the U.S. Highway One Flea Market altercation was gang-related. Moreover, the gang references were not necessary for the jury to possess a complete understanding of the subsequent Barnyard Flea Market altercation or the fatal shooting, as there was also no evidence presented at trial that the Barnyard Flea Market altercation or the fatal shooting were gang-related.

The blatant references to the Petitioner's membership in a gang were purely irrelevant because they did not “make any fact that is of consequence to the determination of the action

more probable or less probable than it would be without the” references. Rule 401, SCRE. The only possible probative benefit of the admission of the gang references would be to show that since the Petitioner was in a gang, he would be more likely to commit a homicide in this manner than any of the other co-defendants.¹ Even if this miniscule probative benefit would be sufficient to admit the evidence under Rules 401 and 402, SCRE, such an inference is explicitly prohibited by Rule 404, SCRE.

Consequently, under no circumstances were the gang references admissible. The fact that the Respondent cannot even provide a modest reason for their admissibility only further demonstrates the impermissibility of the gang references. The Petitioner respectfully submits that this Court should find that defense counsel was deficient for failing to object to the gang references.

With regard to any other arguments advanced by the Respondent as to why this certiorari petition should be denied on these issues, the Petitioner would rely upon his arguments advanced in his certiorari petition.

¹ This was precisely the argument made by the Solicitor in his closing argument. See App. p. 524, lines 2-5.

III. The PCR court erred in finding that defense counsel was not ineffective for failing to object to Solicitor Myers making himself a witness during his cross-examination of Hope Frick.

In its Return, the Respondent argues that “[i]t is clear from the Solicitor’s questions that he was asking whether the Solicitor’s Office could prosecute cases without an indictment or have made a plea deal when a sentence sheet is marked that a guilty plea was without negotiation or recommendation.” Return at 13-14. The Respondent further argues that it is “farcical to believe that” the Solicitor made himself a witness through his questioning of Hope Frick. In response, the Petitioner would point out that the following questions were asked of Frick by the Solicitor:

Q: And I can’t try anybody unless the Grand Jury indicts them for a crime; can I?

Q: And the Grand Jury never issued a murder indictment for George Mack; did they?

Q: And it’s got on [Mack’s sentencing sheet that] the State didn’t make any negotiations or recommendations.

Q: So the State didn’t make any promises to George Mack.

Q: So we didn’t have anything to do with the sentencing.

App. p. 483, lines 20-21; lines 24-25; p. 484, lines 7-8; line 13; line 17. What is “farcical” is the Respondent’s assertion that the Solicitor was asking these questions from an impersonal, procedural standpoint. These questions posed by the Solicitor go to the heart of the Solicitor’s prosecuting authority: what charges to present to the grand jury; what negotiations were made with Mack and his attorney; whether Mack would be taken to trial or would be permitted to plead to a lesser offense. Furthermore, the questions are asked from the perspective of *Mack’s case* by the prosecutor who signed Mack’s sentencing sheet and made those prosecuting decisions. The *only* individual who could give an actual answer to these questions was the

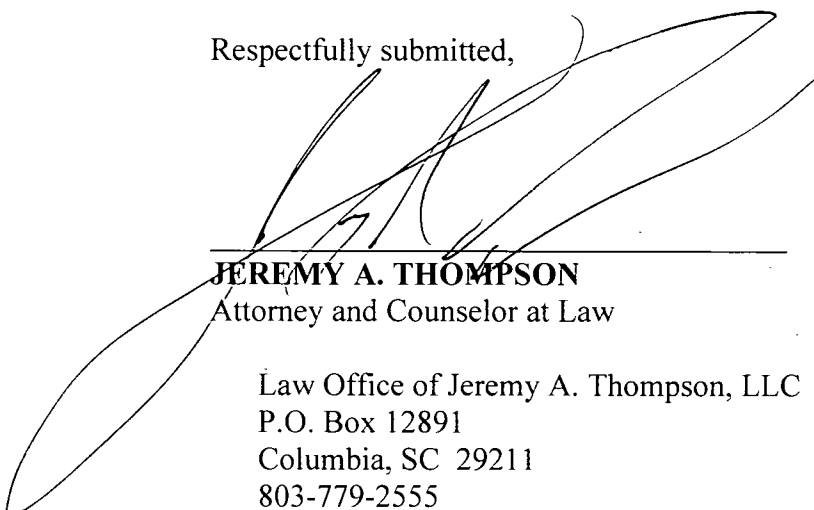
Solicitor. Accordingly, defense counsel was ineffective for failing to object to the Solicitor's insertion of himself as a witness in this case.

With regard to any other arguments advanced by the Respondent as to why this certiorari petition should be denied on this issue, the Petitioner would rely upon his arguments advanced in his certiorari petition.

CONCLUSION

For the reasons stated, the Petitioner asks this Court to grant the petition and to allow full briefing on these issues.

Respectfully submitted,



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This 20th day of February, 2014.

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2013-000928
Lower Court Case No. 2011-CP-32-2954

SAMUEL HARMON, #328335,

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v.

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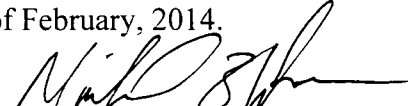
CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Reply to Return to Petition for a Writ of Certiorari has been served upon opposing counsel, Karen C. Ratigan, Senior Assistant Deputy Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 20th day of February, 2014.



JEREMY A. THOMPSON
ATTORNEY FOR THE PETITIONER

SWORN TO BEFORE me this 20th day
of February, 2014.



Notary Public for South Carolina

(L.S.)

My Commission Expires: 7/10/2022



LAW OFFICE OF
JEREMY A. THOMPSON
LLC

February 20, 2014

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FEB 24 2014

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211-1330

RE: Samuel Harmon, #328335 v. State of South Carolina; 2011-CP-32-2954
Appellate Case Number: 2013-000928

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of the Reply to Return to Petition for a Writ of Certiorari in the above-captioned matter. I would appreciate your filing the original and six copies of the certiorari petition, clocking the extra copy, and returning the clocked copy to me in the enclosed self-addressed, stamped envelope. With my thanks for the Court's assistance in this matter, and my best regards, I am,

Yours sincerely,

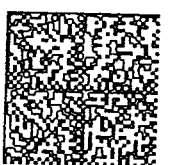

Jeremy A. Thompson
Attorney and Counselor at Law

JAT/
Enclosures

cc: Karen C. Ratigan, Senior Assistant Deputy Attorney General (w/ enclosure)
Samuel Harmon, #328335 (w/ enclosure)
Ann Binyard (w/ enclosure)

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The Honorable Daniel E. Shearouse
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