STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Honorable R. Knox McMahon, Circuit Court Judge
Appellate Case No. 2012-212696

THE STATE,

Respondent,

vs.

DAQWAN MARQUELL JOHNSON,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the court erred by ruling the case would have to go to trial where the defense objected to the state controlled docket, which was held unconstitutional in State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012), and where the defense objected to the refusal to grant a continuance given the complexity of the case, and the number of witnesses involved?

2. Whether the court erred by ruling the defense opened the door to evidence appellant was in a gang simply by agreeing in its opening statement that, while the murder committed by others may have been gang related appellant was not at the scene of the shooting, and evidence appellant was in a gang constituted highly prejudicial impermissible bad character evidence?

COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether the trial judge abused his discretion by denying Johnson's motion for a continuance based on the complexity of the case and the number of witnesses involved or the subsequent motion based upon the Solicitor controlling when the case was called, where Johnson's attorney had been on the case for two years; the case had been previously scheduled for trial a number of times and was continued at counsel's request when the case was called for trial on May 21, 2012; trial counsel admitted that he was ready to go to trial four days after making his continuance motion; the law in effect at the time of Johnson's trial, and as applied by the trial judge, was that the Solicitor controlled the docket; and the Supreme Court's subsequent declaration that this practice is unconstitutional in *State v. Langford*, 400 S.C. 421, 735 S.E.2d

471 (2012), was predicated upon ensuring the right of defendants to speedy trials, as opposed to permitting the further continuance and delay of criminal cases?

II. Whether the trial judge abused his discretion by ruling that the defense opened the door to the presentation of evidence that he was in the Folk Nation gang; and evidence of his gang affiliation was independently admissible as part of the *res gestae* of the crimes charged, it was probative of why a prosecution witness recanted a statement to law enforcement identifying Johnson as one of the shooters and his disavowal of that statement at trial, and it was probative of motive, identity, intent (and premeditation), and a common scheme or plan under Rule 404(b), SCRE?

STATEMENT OF THE CASE

Appellant, Daqwan Marquell Johnson (Johnson), a/k/a "G-man," is currently incarcerated in Kirkland Correctional Institution, where he is serving a fifty year sentence for the murder of Gary Reese, and a thirty year sentence for the attempted murder of Lamettress Stevens.[1] The Richland County Grand Jury indicted him in February 2011 for murder (2011-GS-40-0863) and attempted murder (2011-GS-40-0885). **R. pp. 868-71**. Assistant Richland County Public Defenders Gregory B. Collins and John Clarke Newton represented him in the trial court. Senior Assistant Fifth Circuit Solicitor Kathryn Luck Campbell prosecuted the case, along with Assistant Solicitors Meghan L. Walker and Jeremiah Joseph Shellenberg, II.

The case was called for trial on May 21, 2012, but it was continued on Johnson's motion. **R. pp. 2-15**. Following a motions hearing before the Honorable R. Knox McMahon on July 26, 2012, Johnson received a jury trial on July 30 - August 3, 2012. The jury convicted him of both offenses. **R. pp. 865-66**. On August 8, 2012, Judge McMahon sentenced him to fifty years imprisonment for murder and thirty years, concurrent, for attempted murder. **R. p. 867, lines 16-23**. Johnson timely served and filed a Notice of Appeal. This appeal follows.

STATEMENT OF FACTS

The direct and circumstantial evidence presented at trial, viewed in the light most favorable to the State, reasonably tended to show that Johnson and his co-defendants were involved in a gang-related dispute that resulted in four shootings in roughly twelve or thirteen hours of June 19-20, 2010. At the very heart of these incidents were Johnson (a/k/a "G-man), his co-defendants, Johnson's Buick LeSabre, and members or associates of the rival gang, the

[1] *See* S.C. Code Ann. § 16-3-29 (Supp. 2013) ("A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder"). Thirty years imprisonment is the maximum punishment authorized for this felonious offense. *Id.*

Bloods.

The charges of murder and attempted murder stemmed from the third shooting, which occurred that night and was the result of the ongoing and escalating violence. Armed with assault rifles and other semi-automatic weapons, Johnson and his co-defendant accomplices went to a Columbia, South Carolina apartment complex that was in Bloods territory. They then unleashed a virtual maelstrom of gunfire, firing approximately forty shots at anyone who happened to be present. One of these shots struck unarmed murder victim Gary Reese, a Blood, in the back, and another shot grazed the attempted murder victim, Lamettress Stevens, an innocent bystander.

Twenty year old Marquez "Noonie" Prophet, Johnson's friend and co-defendant, denied that he was a gang member, but he admitted that he knew and "hung with" people in gangs. He testified that Terrance Patterson, whom he knew as "T.," and Johnson, or G-man," were both in the Folk Nation gang. Prophet characterized Johnson as "my home boy," meaning that Johnson was his "[f]riend, [an] associate I hang with." (Sic). **R. p. 297, line 13 – p. 298, line 22; p. 304, line 3 – p. 305, line 6.**

Prophet also hung out with Patterson, Detrick Walker, and B. K. Campbell. He had met Campbell thorough Johnson. Johnson drove a Buick, and Campbell was the only other person whom Johnson let drive it. Prophet also knew an individual nicknamed "Weeny." While he did not know whether Weeny was in a gang, he knew that G-man and Weeny had a fight "over a gang." **R. p. 305, line 4 - p. 307, line 6; p. 308, line 2 – p. 309, line 4; p. 310, line 11-p. 311, line 6.**

Twenty-one year old Detrick "Shark" Walker testified that he was friends with Johnson, Prophet, Patterson and B. K. Campbell. He denied that they were members of Folk Nation but admitted that they were associates of members of that gang. According to Walker, the Folk

Nation and Bloods gangs do not "get along." He also confirmed that Johnson drove a silver Buick. **R. p. 343, line 22 – p. 348, line 10; p. 350, lines 8-16; p. 377, lines 18-20.**

The first shooting occurred on the afternoon of June 19, 2010. Kenneth St. John and Whitney Wilson testified that they saw a silver, or tan, colored four-door Buick LeSabre pull into their Columbia, South Carolina, apartment complex, which had children outside of the apartments. The passenger in the Buick leaned out the window and fired several shots at Wilson, as he was taking out his trash. Wilson then he ran into his apartment and stayed there for hours. The Buick drove a short distance, made a U-turn and waited for several minutes, before it sped away from the scene. **R. p. 130, line 17 – p. 132, line 16; p. 133, line 14 – p. 135, line 17; p. 254, line 5 – p. 255, line 24.**[2] Wilson saw but did not recognize the car's driver. When police showed him a photographic lineup (State's Exhibit 142), however, he circled three individuals and Johnson's photograph was one of the pictures that he circled. **R. p. 255, lines 5-8; p. 257, line 20 – p. 259, line 1; p. 614, line 24 – p. 615, line 9; p. 709, lines 3-22.**

Mr. Kenneth St. John testified that the Buick returned roughly thirty minutes later. This time a female was driving but there was a male in the back seat. The car's occupants spoke to Whitney and others who were present in the apartment complex. Mr. St. John heard the disparaging term "doughnuts" exclaimed by a person in the apartment complex to one of the occupant's in Johnson's car. **R. p. 135, lines 12-17; p. 778, lines 4-14.**[3]

Brittany Russell was living at the apartment complex where the June 19th shootings occurred. On the night of June 19, 2010, she had planned to go out with a group of people that

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[2] The attempted murder victim, Lamettress Stevenson, was in her apartment at the time of this shooting and heard "two or three" shots fired. **R. p. 151, lines 20-25.**

[3] The State's gang expert, Sgt. Scoggins, explained that members of the Folk Nation consider this term disrespectful because one of the founders of that gang was murdered in a doughnut shop. **R. p. 778, lines 4-14.**

included the murder victim, Gary Reese. On cross-examination, she testified to the following details of the first shooting:

> The first one was when the dude named Whitney, he was taking the trash out, and a silver Buick came in my parking lot, did a U-turn. And when they did a U-turn, I guess they -- I don't know -- they was (sic) on my side. I heard gunshots, looked out the window, and that's when I seen the silver Buick speeding out the parking lot.

R. p. 371, line 19 – p. 392, line 2.

A second shooting occurred later on the afternoon of the 19th. Prophet and Walker testified that Weeny shot at them, as they were riding with Campbell on Farrow Road.[4] None of the men in the Buick were injured, but several bullets hit Johnson's car. When Campbell notified Johnson of the incident, he became angry. Prophet testified that Johnson told them to bring him his car at his girlfriend's residence off of North Main St. **R. p. 307, line 20 – p. 309, line 5; p. 309, line 21 – p. 312, line 19; p. 348, line 16 – p. 354, line 5.**

They went to her residence, picked up Johnson and headed to find Patterson. They either met Patterson at an apartment of a girl who lives on Medical Dr., or they saw him on Two Notch Rd. and all five men went to the girl's residence. Once there, Patterson gave his friends weapons. Prophet got a .380 caliber pistol; Johnson got a .233 semi-automatic weapon; Campbell got an SKS assault rifle; Patterson got an AK47 assault rifle; and Walker had his handgun. Prophet testified that their plan was to "shoot up on the Vic." **R. p. 313, line 22 – p. 314, line 25; p. 317, line 2 – p. 318, line 19; p. 354, line 3 – p. 360, line 2.**

Johnson told his co-defendants that he knew the apartment complex where they could find the blue Crown Victoria that Weeny drove. Johnson and his co-defendants then headed to the same apartment complex where the first shooting had occurred, which is near North Main St.

[4] Both indicated that B. K. Campbell was driving. According to Walker, he and Prophet had been "chilling," drinking and smoking marijuana earlier that day. **R. p. 348, line 16 – p. 351, line 3.**

They were in Johnson's Buick. Prophet testified that G-man directed the group; but Walker testified that Weeny had called and taunted Campbell several times while the men were at the apartment on Medical Dr., and that it was Walker's idea to go where Weeny and his cousin, Wilson, lived. **R. p. 315, line 1 – p. 316, line 6; p. 317, line 2 – p. 318, line 19; p. 354, line 3 – p. 360, line 19.**

The group parked the Buick in an apartment complex adjacent to the complex where they were headed, and they walked through a cut behind this complex to their intended destination.[5] Prophet testified that he stopped by the first or second building after they entered the complex, because he saw people come out of a unit. However, Johnson, Patterson, Campbell and Walker "went their own separate ways." Prophet thereafter heard gunshots but he could not see who fired the shots. After the shooting, the group ran back to the Buick and drove back to the home of Johnson's girlfriend. Along the way to her residence, Patterson bragged that "[h]e let his chopper loose," meaning that he had fired his AK47 assault rifle. **R. p. 316, line 14 – p. 317, line 14; p. 318, line 20 – p. 323, line 11; p. 334, lines 4-18.**

Prophet testified that the group hid the weapons at the residence of Johnson's girlfriend. They later went to Studio 54, unarmed, and celebrated her birthday. They all left Studio 54 when "[a] lot of guys ... came [to the club] and started fighting." The club "kicked everybody out," following yet another shooting. Prophet went home and he did not know where his co-defendants went. **R. p. 321, line 12 – p. 325, line 24.**

He later learned that a rival gang member, Reese (a/k/a G-50), had been killed but he did not go to the police until he saw himself on the news and learned that he was a murder suspect.

[5] Prophet had previously been to this apartment complex, but he did not hang out there because Weeny and his gang lived there. **R. p. 318, line 23 – p. 319, line 10.**

He later surrendered and told police what had happened. He was arrested and charged with murder and attempted murder. He had not received any deals in exchange for his testimony. **R. p. 325, line25 – p. 331, line 23.**[6]

Walker's account generally corroborated Prophet's testimony as to how the group reached the apartments where the shooting occurred. **R. pp. 360-61**. Also, when shown the apartment complex video, he identified the five people going into the complex, in the order in which they had entered: Prophet was first. He was followed by Walker, Johnson, Patterson and Campbell. **R. p. 373, line 12 – p. 375, line 18**. However, Walker testified that Weeny was a Blood and that the complex where the shooting occurred was in Bloods' territory. **R. p. 360, lines 14-25**. Also, he testified that, once in the apartment complex, he went to the left. Johnson and Patterson went to the right, Prophet went a different direction, and Walker did not know where Campbell went. **R. p. 361, lines 1-22**.

The biggest discrepancy between Walker's version of what occurred and that testified to by Prophet was his claim that:

> When we got around the corner, they was (sic) in the parking lot. I guess they seen us coming around the corner. When they seen (sic) us come around the corner, they opened fire. .... When they opened fire, we turned around and ran. By the time we made it back to the car, Johnson was behind me.

R. p. 361, line 23 – p. 362, line 24.

Also, Walker testified that neither he nor Johnson had fired shots that evening. He also claimed that he did not know whether Prophet or Campbell had fired any shots and that he had heard the sound of an assault rifle but did not know whether Patterson had fired it. **R. p. 362, line 25 – p. 363, line 25**. Yet, this portion of his testimony was inconsistent with that provided by

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[6] Prophet currently is serving a seventeen year sentence for murder and attempted murder. http://public.doc.state.sc.us/scdc-public/inmateDetails.do?id= 00353493.

other eyewitnesses, the ballistic evidence and the video from the apartment complex for that night. *See* State's Exhibit 2.

Walker also testified that he saw Johnson's gun jam. **R. p. 364, line 20 – p. 365, line 1.** Walker testified that the group went to his house immediately after this incident and he changed clothes. Although Walker kept his handgun, Patterson took the remaining weapons and hid them at the residence of Patterson's girlfriend. **R. p. 365, line 2 – p. 366, line 9.**

Everyone then went to Studio 54 and celebrated the birthday of Johnson's girlfriend. As they were driving to the club, Walker's mother called him and she told him that G-50 had been killed. This excited Patterson. Later, "some Blood gang members came in and got into an altercation." When Walker and his friends went outside, "they was (sic) waiting on us ... and there was another shootout." Walker admitted that he participated in this exchange of gunfire, which resulted in someone being shot. **R. p. 366, line 15 – p. 368, line 23.**

On Thursday, June 24th, someone called Walker and told him that there was a SWAT team at his home, which he confirmed in a conversation with his mother. He turned himself in at the Sheriff's Department and was taken into custody by officers from the City of Columbia Police Department on June 27th. Walker was facing charges of murder and attempted murder at the time of Johnson's trial, and there were no deals in exchange for his testimony. **R. p. 369, line 7 – p. 372, line 11; p. 381, lines 11-23.** [7]

Mr. St. John, a "stay at home parent," was one of the many residents from the apartment complex who was outside when the shooting began. He testified that he heard between thirty and forty gunshots on the night of June 19, 2010, and that the shooting lasted "three or four minutes." As soon as the shooting began, he hit the ground. Then, he went inside, checked on his children

[7] He is currently serving a twenty-three year sentence for voluntary manslaughter and attempted murder. See http://public.doc.state.sc.us/scdc-public/.

and called 911. He saw "saw a couple of guys with guns" but was unable to identify any of these men, other than to say that "they all had on black" and wore masks. **R. p. 128, line 12 – p. 130, line 16; p. 135, line 23 – p. 137, 1.**

In June 2010, Lamettress Stevenson, the attempted murder victim, lived in the apartment complex where the shooting occurred. She testified that she was outside that night, along with a lot of other people. When she started back to her apartment, sometime between 11:30 p.m. and 12:00 a.m., she heard gunshots. "Then I went in, slammed the door, telling the kids to get down, and just heard gunshots, gunshots, gunshots[. I] got on the phone and called 9-1-1."[8] **R. p. 148, line 8 – p. 150, line 20; p. 153, lines 3-10.**

While she did not realize it when the shooting occurred, she later felt a burning sensation in her shoulder that was caused by a bullet grazing it. She was treated at the apartment complex and did not go to the hospital. She did not know how many shots were fired that night but repeatedly testified that it was "a lot." Asked how long the shooting had lasted, Lamettress testified that "[i]t seemed like all night but it was maybe a few seconds." **R. p. 150, line 21 – p. 151, line 19; p. 152, lines 1-16.**

On the night of June 19th, Whitney Wilson was outside of his apartment and standing on the sidewalk next to a small park in the complex, when he heard a series of "rapid fire" gunshots. The shooting lasted for "a good minute and a half." The shots came from "a field across from the park," as well as from "the little alleyway" or "cut" that ran between the building in which Wilson lived and the next building. **R. p. 254, lines 18-21; p. 255, line 25 – p. 256, line 19.** Wilson "couldn't see the faces." He "just saw the gunfire from the flame from the muzzles." He also saw that the shooters were firing "[a]ssault rifles." After the shooting began, he initially

[8] The "kids" to whom she referred were her children and others who lived in the complex. **R. p. 150, lines 17-20**

ducked behind a car but soon got up and ran between two buildings. He remained there until the shooting ended. **R. p. 256, line 20 – p. 257, line 11**.

Brittany Russell testified that she and a group of her friends, including Loree Johnson and Gary Reese, had planned to go out on the night of June 19th A large group of people were standing outside of their apartments. As Brittany was leaving her apartment, she heard "nine or ten" gunshots. She did not know how long the shooting lasted because, as soon as it began, she ran back into her apartment, ushered her son inside with her and closed the door. **R. p. 386, line 3 – p. 388, line 13**.

Moments later, Gary Reese "slammed my door straight open" and said, "Sis, I got hit." Brittany was in shock because the victim was "nonstop bleeding" on her front door and on the living room floor. Also, a trail of blood formed from her living room to the bathroom, after a friend picked up the victim and carried him into her bathroom. In all five or six friends ran into Brittany's apartment and she immediately called 911. **R. p. 388, line 13 – p. 389, line 25**.

Paramedics eventually arrived and the victim was removed from the scene. Brittany had not seen from where the shoots came. However, "they shot up my [TV] and everything." So, she thought the shots had come from the field. Her testimony that Gary Reese did not have a gun that night was circumstantially corroborated by evidence that the gunshot residue test on his hands was negative for the presence of metals associated with recently firing or handling a firearm. **R. p. 390, line 1 – p. 391, line 4; p. 393, lines 16-17; p. 412, line 25 – p. 413, line 23; p. 422, line 11 – p. 430, line 9;** State's Exhibit 149.

Lamanda Smith testified that in June 2010, she and her husband lived in front of the apartment where the shooting happened. They were returning home "around 11:00 [p.m.], maybe a quarter to 12:00 [a.m.]" when they heard multiple gunshots. Shortly thereafter, they saw four

people "running from behind my apartment complex with guns in their hands, like A.K.s or something."[9] The men got into a gray Buick and drove away from the scene. **R. p. 441, line 9 – p. 444, line 3.**

Sgt. Walter Rose, a crime scene supervisor in the City of Columbia Police Department, arrived at the apartment complex where the June 19-20, 2010 shooting occurred around 1:00 a.m. on the 20th. He met with Officer Gilliard, another member of the crime scene unit who was already present. After a walk through the large crime scene, they processed it together. **R. p. 156, lines 13-21; p. 31; p. 160, line 1 – p. 162, line 24; p. 166, lines 16-20.**

The officers found shell casings in five areas around the complex. They found more shell casings in the parking lot in front of another complex across the road. Specifically, on the Northeast side of Building 24 they found twenty-one 7.62 x 39 mm shell casings (items 1-21). They also found five .40 caliber shell casings on the Southwest side of Building 24 (items 22-26); two unfired .223 cartridges (Items 27-28, State's Exhibit 125), as well as two bullet fragments and a shell casing (State's Exhibit 127) on the Northeast side of that building; eight more .40 caliber casings on the West side of the same building (items 29-36); five .45 casings (items 37-41) on the Northwest side of the playground; two bullet fragments (items 43 & 46) and a projectile inside (item 45) of two of the apartments; and a .40 caliber casing (item 44) on the breezeway for Building 24. **R. p. 162, line 25 – p. 184, line 4; p. 177, line 25 – p. 188, line 8; p. 191, line 16 – p. 201, line 13; p. 203, line 14 – p. 208, line 5; p. 228, lines 13-25; p. 233, lines 1-6; State's Exhibits 3-4 (aerial diagrams of complex); State's Exhibits 132, 136, 152.**

Two or three vehicles in the apartment complex were also damaged that night and had bullet holes in them. A blue car, which still had food from a fast food restaurant on the hood, was

[9] The men were coming from the complex where the shooting happened.

one of them. Lamettress Stephenson's Caravan was another. Officers did not locate either projectiles or bullet fragments in those vehicles. **R. p. 179, lines 3-19; p. 201, line 14 – p. 203, line 13; p. 208, line 6 – p. 213, line 24.**

Inv. David Collins, of the Richland County Sheriff Department's forensic services laboratory, is an expert in forearms examination and identification. **R. p. 486, line 25 – p. 489, line 1.** He examined the various weapons, cartridges, shell casings and bullet fragments that the City of Columbia Police Department recovered in this case. He opined that the .223 semi-automatic pistol retrieved from under Johnson's bed, which was a Eubanks Model EMAKN, had fired items 4-23 (or twenty shell casings);[10] that State's 150, the .45 caliber handgun recovered from Gary Reese's gravesite, fired all five of the .45 caliber casings (items 37-41) found at the scene; that a .40 caliber Smith and Wesson had fired items 24-28. 30-36, 43 and 47; and that a Norenko Model SKS had not fired any items submitted in this case. He further opined that the two unfired .223 cartridges (Items 27-28, State's Exhibit 125) found at scene were consistent with the ammunition that was in the weapon seized from under Johnson's bed; that this ammunition, which was imported from Korea; was "unusual;" and that he had never seen it in the thousands of examinations that he had done. **R. p. 491, line 7 – p. 527, line 4; p. 528, line 10 – p. 536, line 24.**[11]

Inv. Kevin Reese, of the City of Columbia Police Department supervises investigators investigating homicides and other violent crimes against persons. Sgt. Arthur Thomas was his partner in 2010. On June 23, 2010, he became aware of the shooting at studio 54 and he spoke to investigators from the Sheriff's Department who were investigating that case. Based upon

[10] He explained that the weapon was "unusual" because, although classified by ATF as a pistol, it uses a rifle-type mechanism." **R. p. 497, lines 21-25.**

[11] The .40 and the SKS were found in a search of the apartment of Patterson's girlfriend.

information that was provided by those officers, the City located Johnson's Buick. Sgt. Reese also obtained the records for three phone numbers, two associated with Johnson and one associated with Campbell. **R. p. 595, line 25 – p. 599, line 13; p. 608 , lines 22-25; p. 609, line 19 – p. 610, line 2; State's Exhibits 139-41**.

Inv. Kelvin Griffin, of the Richland County Sheriff Department's gang unit, testified that he responded to the apartment where Johnson lived on June 24, 2010, and arrested Johnson there. Johnson was sitting in a car. Channel Snowden was seated in the front passenger's seat and Campbell was in the back seat of the same car. After obtaining consent to search Johnson's bedroom from his grandmother, officers searched the bedroom that she indicated was his. When they saw a weapon (State's Exhibit 113) protruding from other his bed, they immediately backed out of the residence and notified the City of Columbia Police Department of Johnson's arrest and what they had found. **R. p. 543, line 17 – p. 544, line 24; p. 554, line 18 – p. 558, line 13**.

In June 2010, Sgt. Arthur Thomas investigated homicides. He responded to the scene of the murder on June 19th and began his investigation, as others from his agency processed the scene. Sgt. Thomas spoke to Brittany Ruffin and learned that the only reason that Reese had been at the apartment complex was because the victim and his girlfriend were planning to go out that evening with Brittany. Sgt. Thomas also spoke with Ms. Stevenson and learned of her injury and he spoke to Whitney Wilson. The following day, he interviewed Mr. St. John. **R. p. 611, line 20 – p. 615, line 16; p. 616, lines 2-10; p. 617, line 18 – p. 618, line 14**.

On June 21st, Sgt. Thomas acquired the apartment complex's video surveillance footage from the property manager.[12] This gave him "an idea of what transpired in the melee of gunfire

[12] The complex had both still motion cameras and cameras that were activated by motion detectors. **R. p. 616, line 22 – p. 617, line 3**.

that night." Of particular benefit was a night vision camera aimed at the cut where the shooters had entered the complex. The video cameras had also recorded some of the events surrounding the shooting that afternoon. **R. p. 140, line 10 – p. 141, line 18; p. 143, line 5 – p. 144, line 23; p. 616 line 11 – p. 617, line 17; State's Exhibit 2.**

The video (State's Exhibit 2) was published to Johnson's jury.[13] It depicts Wilson taking out his trash at roughly 3:27 p.m. on the afternoon of June 19th. A silver, four door Buick LeSabre pulls up beside him as he is emptying his trash. People in the car apparently draw weapons and fire at him, and Wilson runs away from the car. The Buick drives a sort distance, turns around, and briefly waits. When Wilson does not return, the car speeds away from the scene. **State's Exhibit 2.** *See also* **R. p. 618, line 21 – p. 619, line 17; 621, line 16 – p. 623, line 12.** As to the shooting that happened that night, the video shows that there were a people outside of the apartments when the shooting began. The camera with night vision shows five men entering the complex through the "cut," beginning at roughly 23:10:54 on the video. Once the shooting starts, Reese and several other people scramble to take cover. Reese initially ducks, but he eventually tries to run to the apartment building where he was later found. **State's Exhibit 2; R. p. 623, line 13 – p. 625, line 15.** The gang members start exiting through the cut at about the 23:11:44 mark on the video. At roughly the 23:12:05 mark, the five suspects are seen exiting through the cut. One of them fires back at the complex before he retreats. The muzzle flash from the his weapon is clearly visible on the video. **State's Exhibit 2; R. p. 625, line 15 – p. 626, line 3.**

The information developed in the City of Columbia Police Department's investigation

[13] For the Court's information, when counsel for Respondent viewed this video at the Richland County Clerk of Court's Office, it would not play on a DVD player and it had to be played on a laptop computer. Also, it was a series of video files, instead of one continuous video.

suggested that the shooting in this case was part of an ongoing dispute between members of the rival gangs, the Bloods and Folk Nation. So, on June 23, 2010, Sgt. Thomas and Inv. Reese met with the investigators from the Richland County Sheriff's Department who were investigating the Studio 54 shooting. It was determined that the Studio 54 shooting was in retaliation for the shooting at the apartment complex. In this meeting, Sgt. Thomas also told the Richland County investigators that they were looking for a silver Buick that was missing some molding on the driver's side. Later that day, officers from Richland County telephoned Sgt. Thomas and told him that a vehicle matching the description that he had given them had been located at a towing company off of Two Notch Rd. **R. p. 626, line 18 – p. 629, line 13.**

When Sgt. Thomas and Inv. Reese went to the towing company, they found the vehicle. The also learned that the vehicle belonged to Johnson and his mother, Mia Johnson. The car "was riddled with bullet holes," and Sgt. Thomas directed the crime scene team to process it. **R. p. 629, line 14 – p. 630, line 22.** When Sgt. Rose processed it on June 24th, he found paperwork with Johnson's name on it. Also, photographs (*e.g.*, State's Exhibits 90-107) reflect that the Buick had at least eight bullet holes or indentations caused by bullets to the doors on the driver side and the roof, and that it was missing molding on the driver's side. **R. p. 209, line 25 – p. 213, line 24.**

On June 24th, Rontrell Henderson gave a statement implicating Johnson in the shooting and he selected Johnson's picture when shown a photographic lineup. Also, Sgt. Thomas learned that the Sheriff's Department had arrested Johnson that day and that a weapon had been found under Johnson's bed. **R. p. 630, line 23 – p. 632, line 11.** Sgt. Rose seized the weapon, which he described as "an A.K rifle chambered with .223" bullets. The weapon's magazine was loaded and a round was "in the chamber ready to fire." **R. p. 215, line 19 – p. 219, line 2.** On July 1,

2010, Lt. Frieda Wyatt, of the Richland County Sheriff's Department recovered a .45 caliber handgun from Gary Reese's gravesite. Several persons were at the gravesite when she seized the weapon, including Kendrick Mann. **R. p. 447, line 21 – p. 451, line 10.**

Dr. Bradley Marcus, the forensic pathologist who performed an autopsy on Reese (**R. p. 400, line 11 - p. 401, line 11**), opined that the victim died from a single "through and through" gunshot wound that had entered his right back, passed through his body and exited his right chest. This bullet perforated the victim's "lungs and his subclavian vessels, causing him to bleed out." Dr. Marcus opined that it was a distant gunshot wound because neither stippling nor soot was associated with this wound. Dr. Marcus also saw where a bullet had grazed the victim's finger and opined that this could have been caused by the bullet that went through the victim's body or another bullet. **R. p. 403, line 2 - p. 411, line 13.**

ARGUMENT

I. The trial judge did not abuse his discretion by denying Johnson's motion for a continuance based on the complexity of the case and the number of witnesses involved or the subsequent motion based upon the Solicitor controlling when the case was called, where Johnson's attorney had been on the case for two years; the case had been previously scheduled for trial a number of times and was continued at counsel's request when the case was called for trial on May 21, 2012; trial counsel admitted that he was ready to go to trial four days after making his continuance motion; the law in effect at the time of Johnson's trial, and as applied by the trial judge, was that the Solicitor controlled the docket; and the Supreme Court's subsequent declaration that this practice is unconstitutional in *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012), does not require a different result.

Johnson first argues that the trial judge erred by denying his motion for a continuance based upon the complexity of the case, the number of witnesses and the Solicitor's control over when this case was called for trial. Respondent submits that the trial judge did not abuse his discretion by denying Johnson's *motions* for a continuance, where Johnson's attorney had been on the case for two years; the case had been previously scheduled for trial a number of times and

was continued at counsel's request when the case was called for trial on May 21, 2012; trial counsel admitted that he was ready to go to trial four days after making his continuance motion; and the law in effect at the time of Johnson's trial, and as applied by the trial judge, was that the Solicitor controlled the docket. Further, the Supreme Court's subsequent declaration that this practice is unconstitutional in *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012), does not require a different result because (1) the Court did not indicate in *Langford* that its holding was to be applied to cases where the direct appeal was not final at the time the decision was rendered; (2) there is no sound reason for appellate courts to apply *Langford* to cases that were tried before the date of that decision but where the direct appeal was not decided because applying *Langford* in that fashion could potentially undermine the validity of *every* General Sessions case that was tried before the date *Langford* was decided; (3) the decision in *Langford* was predicated upon ensuring the right of defendants to speedy trials, as opposed to permitting the further continuance and delay of criminal cases; (4) the Court in *Langford* addressed a claim of the denial of the right to a speedy trial, and not a continuance; (5) the Court in *Langford* held that a defendant must show prejudice from the Solicitor's control of the docket and concluded that Langford did not make that showing; and (6) Johnson has failed to show prejudice.

A. The trial judge's denial of Johnson's continuance motion.

The State originally called this case for trial on May 21, 2012. Following jury selection, Johnson's trial counsel moved for a continuance based upon uncertainty as to whether certain swabs of ammunition had been tested for the presence of touch DNA and whether Johnson was excluded. **5/21 R. pp. 2-16; 17-21**. The trial judge granted his motion. **5/21 R. pp. 21-23**. The case was then called for trial on the week of July 30, 2012.

The trial judge held a motions hearing on July 26, 2012. At that hearing, trial counsel

Collins moved for a continuance. Counsel noted that the case had been set for trial on May 21, 2012, but that the defense's request for a continuance was granted after an issue arose as to whether the swabs had been tested or touch DNA. On July 12, 2012, the defense received "the full D.N.A. report with all the buccal swabs of all the codefendants. He also made the disingenuous representation that "roughly about 200 pages of miscellaneous discovery" had been provided since July 12th. **R. p. 25, lines 4-21; p. 31, line 15 – p. 32, line 2.**

Counsel stated that "the main issue that we have … from the defense's standpoint" was a recent federal indictment returned against thirty-seven members of the Bloods gang in Richland County, following a two year investigation. "A number of the names listed in that indictment are specifically referenced in the discovery of this case and are potential witnesses [who] possibly have information" that could be used in Johnson's defense or for impeachment. Counsel admittedly was "not sure" that the defense could obtain anything useful from the federal investigation and indictment. However, he noted that these witnesses were also involved in a shooting at Studio 54, a Richland County nightclub, several hours after the victim in this case was shot. The witnesses that he listed were Titus Bowman, Darryl Austin, Craig Austin, Bernard Breland, Torrian Sims, Antwon Brisbane, [and] Michael Taylor." **R. p. 25, line 22 – p. 27, line 1; p. 30, lines 4-20; p. 31, lines 8-14.**[14]

Counsel believed that this was important because the individuals he listed had been under surveillance, and he contended that it was "a very likely scenario that as they are making phone calls and assembling before they do a retaliatory shooting, they are talking about: Who just shot Gary Reese and who just shot at them and what is going on." Counsel asserted that if there was a

[14] None of these men testified at trial, and none of them were mentioned by any prosecution witnesses as having a role in the shooting that gave rise to the charges against Johnson.

recording or wiretap of such a conversation, it would be "invaluable" for the defense to obtain a copy. He stated that the defense had already begun the lengthy, mandatory process to obtain any such information directly from the Assistant United States Attorney General prosecuting the case. "We just really want to get our hands on it and see if something is relevant." **R. p. 27, line 2 – p. 28, line 15; p. 30, lines 4-20.**

Counsel further asserted that the State had informed him July 24th or 25th that prosecution witness Rontrell Henderson, who gave a statement to police identifying Johnson as shooting a gun at the Gable Oaks Apartment victims, had been arrested the previous weekend. When the Solicitor's Office thereafter spoke to him, he admitted making an earlier statement to the police, but he claimed that his statement was not true and that "[h]e made it up completely." Following Henderson's arrest, the Public Defender's Office was appointed but the case was turned in "for conflict review." Although private counsel will be appointed for him, no one had been appointed, yet, Counsel had not been able to interview him and wanted to do so. **R. p. 28, line 16 – p. 29, line 18.**

Counsel also noted that he wanted to get a transcript of the May 21st proceedings but admitted that he was hoping to receive it that evening via email. **R. p. 29, line 19 – p. 30, line 4.** Additionally, he claimed that "there was an issue with the [Crime Stopper] tip reports," which were subpoenaed in May 2012. Chris Cowan, with that agency, had sent an e-mail to counsel and he was going to send counsel an "official letter. From their review, there was only one Crime Stopper tip report given. "That is not an issue anymore." **R. p. 30, line 21 – p. 31, line 7.** After reemphasizing the amount of discovery provided recently, counsel claimed that "this is getting rushed together" and he asked for more time so that he could effectively represent Johnson. **R. p. 31, line 15 – p. 32, line 2.**

Senior Assistant Solicitor Campbell stated that she had contacted the United States Attorney's Office (USAO) and an attorney from that Office told her that no wiretaps were "in place until June of 2011," which was almost a year after the murder in this case. Also, the defense had not contacted the USAO until the afternoon before the motions hearing. Nevertheless, the USAO was attempting to provide counsel with the information that he had requested on fifteen individuals. Using a chart[15] with the names of the individuals named in the federal indictment, Ms. Campbell explained that only three of those people were involved in the shooting at Studio 54, which had been resolved by one person pleading guilty to it. Ms. Campbell explained the facts surrounding this case and the Studio 54 shooting,[16] and she explained that the defense already had the information relating to that crime, including any information in the USAO's case. **R. p. 32, line 5 – p. 35, line 12.**

Ms. Campbell added that she had spoken to two prosecuting attorneys and an FBI agent about the federal case. She was told that the federal case did not have any information relating to the murder and attempted murder in this case. She explained that Rontrell Henderson "was recently arrested. We interviewed him. He gave our investigators recanting or whatever you want to call it about the information." The State turned provided this information to the defense, and Ms. Campbell thought that the trial judge could solve any problem by appointing new counsel. **R. p. 35, line 13 – p. 36, line 14.**

With respect to counsel's claim that the State only recently provided the defense with a voluminous amount of discovery, Ms. Campbell explained that "I have a copy of what we turned over to them since the last hearing. The majority of that [is] some visitation records from the jail

[15] The State provided a copy of this chart to the defense the same day. **R. p. 55, line 23 – p. 56, line 12.**

[16] "[I]t was a retaliation shooting by the Bloods on the Folk or the Crips as a result of our murder." **R. p. 33, line 25 – p. 34, line 2.**

... [and] rap sheets on all our witnesses, which is what they are doing now. We have given them to them." The only exceptions were the DNA test results from the Richland County Sheriff's Department that did not inculpate Johnson and which was the reason for the last continuance, and an EMS report. Also, her understanding was that the gang information requested by the defense had been provided and she offered to hand the trial judge a copy of the discovery provided to the defense since May 21st. **R. p. 36, line 18 – p. 37, line 16.**

In response, trial counsel again stated that the delay in obtaining information related to the federal case was the result of the procedure necessary to obtain the information, which the defense had begun. He stated that the defense planned on using "the retaliatory shooting ... in different ways" in the defense to the present charges and that the defense needed this information before trial. **R. p. 39, lines 6-25**. However, Ms. Campbell stated, "[T]he only information that the feds have [about the Studio 54 shooting] ... they got from the County investigation, which he already has. There is no additional information. **R. p. 40, lines 2-6.**

When asked by the trial judge why he could not subpoena a federal investigator and obtained any possible information that he wanted *in camera*, counsel claimed that the defense did not know who the investigators were and that the procedure to subpoena such a person required the approval of the AUSA handling the case. **R. p. 40, line 7 – p. 42, line 12**. He acknowledged that he was only interested in seven of the people who had been indicted in federal court: Bowman, D. and C. Austin, Breland, Sims, Brisbane, and Taylor. The other individuals "could possibly have been part of the investigation that the feds did." These people were "mentioned heavily involved with [the Studio 54] case," and counsel argued that the Studio 54 shooting would be admissible as part of the *res gestae* of this offense. **R. p. 42, line 13 – p. 43, line 21.**

The trial judge denied the motion to continue the case based upon the federal indictment. He found that the connection between the federal indictment and this murder, which occurred over two years before the federal indictment, was too tenuous. Also, "I am … informed that the U.S. Attorney or assistant U.S. attorneys have advised the State that there were no wiretaps in place in June of 2010." Yet, the trial judge made clear that this ruling did not restrict Johnson's cross-examination and that Johnson could renew the motion if he obtained new evidence supporting it. **T. p. 44, line 4 – p. 45, line 2.**

When questioned, counsel admitted that he was hoping to receive a copy of the May 21st transcript that evening, via email. **R. p. 45, lines 4-15.** The trial judge later ruled that the motion based on the transcript was in abeyance, in light of counsel's representation. **R. p. 49, lines 14-22.** As to the recent discovery responses provided by the State, trial counsel conceded that: [t]he D.N.A. report was the bulk of it." Also, the State had provided "a number of records from the gang task force that were made available after our specific request. It was a little difficult to get through" because the "the e-mails were untitled and documents were mixed in and mixed up." However, the defense had sorted these emails and was "getting through it." **R. p. 45, lines 19-25.**

The other information that the State had recently provided were visitation records and, in response to the trial judge's inquiry, counsel admitted that that the prosecution had voluntarily provided these records, without a specific request and that no persons named in those logs were witnesses. **R. p. 46, line 1 – p. 47, line 40, line 9.** At the trial judge's request, Ms. Campbell handed up a notebook containing all of the discovery responses that the State had provided to the defense in July, except for the DNA report. **R. p. 47, line 12 – p. 48, line 4.**

The trial judge reviewed the documents in the notebook and then denied the continuance motion based upon the untimely discovery responses, as follows:

THE COURT: When you go through these tabs, the largest amount is behind the tab with video visitation request. Many of the names are duplicitous: Mia Johnson, Mia Johnson, Mia Johnson, Wanda Odom, Wanda Odom. There are some others, Angela Johnson.

There is other information in here concerning gang information on Bowman and Bethel, gang information on Bowman and Bethel. There is another tab, Chris Johnson and a[] note from Investigator Brown, membership status that you requested. I take it that would be in the database of membership in a gang, rap sheets.

Have you fully and completely complied with the discovery, Ms. Campbell, as far as Rule 5 and Brady?

MS. CAMPBELL: Yes, sir. We have met, I think with defense counsel, and gone through everything. As well as any requests they have come up with, we have tried to address [those] in a timely fashion.

THE COURT: As to the discovery motion, I am going to deny the motion. The discovery issue -- not on the other discovery issue you have that you e-mailed me about -- but the motion to continue, I will deny that on that grounds.

If there is specific information -- without, of course, revealing your defense -- if there is someone in there you particularly want to talk to, I will order the Solicitor's Office and their investigator to try to make that person available for you.

.... If there is someone particular you want to talk with and you need assistance in locating that person, I am willing to assist you in locating that person.

R. p. 48, line 5 – p. 49, line 13.

The trial judge had earlier discussed the appointment of counsel for Henderson with the parties. Following more discussion, he agreed to have the Chief Administrative Judge for General Sessions appoint counsel that day. Johnson did not request any further relief following the trial judge's statement. **R. p. 37, line 13 – p. 39, line 5; p. 49, line 23 – p. 50, line 12.**

Addressing the gang database provided by the City of Columbia and the Richland County Sheriff's Department, the defense admitted that they had received information about every

person about whom they had inquired, as well as all Bloods gang members in the County. **R. p. 50, line 15- p. 51, line 10**. The trial judge observed that he appeared to have a copy of the entire database and Assistant Solicitor Walker confirmed that the State had provided the entire database. **R. p. 51, line 11- p. 52, line 3**. The trial judge intended to compare the witness list against the database and against any witnesses who testified, in order to preserve a possible discrepancy for appellate review. **R. p. 52, lines 4-22**.

Counsel then questioned whether the information provided included members of the Folk Nation. Assistant Solicitor Walker stated, "I did not get the complete Folk Nation database after they told us that the specific people that Mr. Collins was talking about weren't in there. I can go ahead and get the Folk Nation database if Your Honor would like us to and turn that over as well to Your Honor." The trial judge directed her to provide any such information to the defense and she agreed to do so. **R. p. 53, line 11 – p. 55, line 12**.

When court reconvened on July 31st, Ms. Campbell stated that she had received an email from trial counsel Collins on Friday afternoon, July 28th, in which he accused her of prosecutorial misconduct by making false statements at the May 21, 2012 hearing, concerning when DNA testing was requested and performed. Because his email requested her to respond in writing, she then placed her response to his accusation on the record. At the conclusion of her response, counsel conceded that any potential discovery violation had been remedied, that the email asserted a matter for the "disciplinary board" (sic), as opposed to the trial of the case, and that her in-court response adequately addressed what he requested via the email. **R. p. 49, line 56 – p. 68, line 17**. *See also* **R. p. 70, lines 3-19**.

He then stated that "**we are ready to go forward with the trial today**. .... That is all I was asking for was the reasonable explanation for it. We have gotten that on the record and **we**

are ready to move forward." R. p. 68, lines 17-23. (Emphasis added).

B. The trial judge's ruling on the objection to the State determining when the case was called.

Only minutes after counsel's representation that the defense was prepared to go to trial, counsel made the following motion:

> Number seven, Your Honor, just to put it on the record, this case has been noticed for trial many, many, many, many times. Since dating back to the beginning of 2011, it has been scheduled for trial anywhere from six to eight different times.
>
> Discovery has continued to trickle in throughout the over two years of this case. As I mentioned before, we got a written statement yesterday that we did not have up until yesterday. The fact that the solicitors have complete control of the docket and decide when to schedule the case, we were not consulted with this trial date of July 30th.
>
> We have done everything in our power to get ready. We were noticed July 18th, technically ... outside the ten days notice required. However, we just want to put on the record we object to the solicitor-controlled docket, considering the complexity of this case, the number of potential witnesses.
>
> We were not consulted with on a specific trial date. We were just told 12 days before to be ready to go to trial. I just want to put on the record that we object to the solicitor-controlled docket for those reasons.

R. p. 93, line 22 – p. 94, line 20.

The trial judge denied this motion because S.C. Code Ann. § 1-7-330 (2005) provided, at the time of trial, that the Solicitor controlled the docket. **R. p. 94, lines 21-23.**

C. There was no abuse of discretion.

"The trial court's refusal of a motion for continuance in a criminal case will not be disturbed absent a clear abuse of discretion resulting in prejudice to the appellant." *State v. Smith*, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993). *See also State v. Meggett*, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct.App. 2012). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." *State v. Geer*, 391 S.C. 179, 189, 705

S.E.2d 441, 447 (Ct.App. 2010) (internal quotation marks omitted). It has been observed that "reversals of refusal of continuance are about as rare as the proverbial hens' teeth." *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957).

Respondent submits that Johnson cannot show an abuse of discretion. Although not readily apparent from the hearings on Johnson's request for a continuance, a subsequent exchange between the trial judge and counsel Collins makes clear that counsel had been on Johnson's case for two years. **R. p. 189, line 11 – p. 190, line 4**. Further, counsel's motion opposing the Solicitor controlling when the case was called reveals that the case had been previously scheduled for trial somewhere between six and eight times (**R. p. 93, line 22 – p. 94, line 1**), and the case was continued, at trial counsel's request, when it was called for trial on May 21, 2012.

Thus, there was no merit to trial counsel's argument that "this is getting rushed together" and that he needed more time so that he could effectively represent Johnson. **R. p. 31, line 15 – p. 32, line 2**. To the contrary, counsel twice admitted that he was prepared to go forward with the trial on the day it was called. **R. p. 68, lines 17-23**. Respondent submits that these representations, made by counsel as an officer of the court, belie the contention that the trial judge abused his discretion in denying the request for a continuance.

In support of his claim of error, Johnson states that "appellant asserted prejudice because this was a very complex case with many witnesses." **IBOA, p. 12**. While there were many witnesses called in the case, Respondent disagrees with his characterization of the case as complex. Rather, the facts of the case were fairly straightforward: they demonstrated that Johnson and his co-defendants were involved in a gang-related dispute that resulted in four shootings in roughly twelve or thirteen hours of one day. Johnson (a/k/a "G-man) and/or his co-

defendants, Johnson's Buick LeSabre, and members or associates of the rival gang, the Bloods were involved in each of these incidents.

The charges of murder and attempted murder stemmed from the third shooting that night. Armed with assault rifles and other semi-automatic weapons, Johnson and his co-defendant accomplices went to a Columbia, South Carolina apartment complex that was in Bloods territory. In roughly two minutes they unleashed a virtual maelstrom of gunfire, firing approximately forty shots at anyone who happened to be present. One of these shots struck the unarmed murder victim (a Blood) in the back, while another shot grazed the attempted murder victim, who was an innocent bystander.

Even if the Court finds that this was a "complex" case, denial of the continuance motion still was not an abuse of discretion. *See McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 479 S.E.2d 67 (Ct.App.1996) (where plaintiff informed defendant of significant change in medical condition, court did not abuse its discretion by denying defendant's motion for continuance three weeks before trial, even though case was very complex and difficult). Indeed, Johnson has only argued that three of the reasons advanced for a continuance in the trial court show error.[17]

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[17] In Johnson's "Statement of Facts," he also refers to the federal indictment and investigation, as well as the request for additional information concerning the Crime Stoppers tips received in this case. **IBOA, p. 5**. However, he did not argue either of these grounds in support of his Argument I. Therefore, neither ground is properly before this Court on appeal. *See* Rule 208 (b)(1)(D), SCACR; *First Savings Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994) (issues not argued in the brief are deemed abandoned and will not be considered on appeal); *Fields v. Fields*, 342 S.C. 182, 536 S.E.2d 684 (Ct.App.2000) (appellant included issue in statement of issues on appeal but failed to argue issue in body of brief); Numerous cases have held that where an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal. *E.g., State v. Tyndall*, 336 S.C. 8, 16, 518 S.E.2d 278, 282 (Ct. App. 1999); *Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct.App.2001); *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct.App.2000); *Welch v. Epstein*, 342 S.C. 279, 288 n. 1, 536 S.E.2d 408, 412 n. 1 (Ct.App.2000).

Even if these grounds were preserved for appellate review, they do not show that the trial judge abused his discretion by not continuing the case. There is nothing in the record to refute the State's representations that (1) there were no federal wiretaps in place until roughly a year after the crimes committed in this case; (2) "none of the people that they named were in any way implicated to be in any way involved in our murder case or anything to do with it;" (3) although three of the defendants in this case, including Johnson, were present at the Studio 54 shooting,

First, he points out that "[t]he defense was attempting to obtain data on a 'gang database' in Richland County for its trial preparation." However, the record demonstrates that this database information was provided to counsel. As demonstrated, counsel initially complained because the prosecution provided him with information of all of the Bloods in Richland County, which was too much. **R. p. 51, lines 2-7**. Yet, within minutes, he requested any information in the database for members of the Folk Nation. **R. p. 53, lines 2-8**. Also, the State agreed to and subsequently did provide this information to counsel. **R. p. 54, line 11 – p. 55, line 6; p. 738, lines 4-6**. The trial judge thereafter addressed Johnson's remaining objections pertaining to the information in the databank, in a manner that satisfied counsel.[18]

Likewise, Johnson cannot show prejudice from Rontrell Henderson's recantation of the statement that he had previously given to police, shortly before Johnson's trial and following Henderson's arrest on unrelated charges. First, it is extremely difficult to fathom precisely how Henderson's recantation of his earlier statement implicating Johnson and his identification of Johnson from a photographic lineup prejudiced Johnson in any fashion. If anything, it inured to his benefit.

Additionally, before Henderson testified before Johnson's jury, the trial judge heard and addressed the following, *in camera*: (1) the appointment of counsel to represent Henderson and

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they were not "named as victims in th[at] case;" (4) the Studio 54 shooting had been resolved by a guilty plea and the defense had been provided the discovery relating to that shooting; and (4) the defense already all of the information that federal investigators had concerning the Studio 54 shooting because the federal authorities got their information of that crime from the Richland County Sheriff's Office. **R. p. 32, line 5 – p. 35, line 24**.

Likewise, there is nothing to refute the State's representation that it had provided the only Crime Stopper tip in this case. Also, when trial counsel subsequently indicated he would like the Crime Stoppers involving the Studio 54 shooting, the State complied with his request and provided this information to him, to counsel's satisfaction. Nothing germane to this case or presented at trial was located. **R. p. 85, line 11 – p. 86, line 3; p. 154, line 21 – Supp. R. p. 1, line 2; p. 158, line 19- p. 159, line 18**.

[18] For instance, counsel complained that the prosecution had just provided "the key to how to read other gang reports" and requested additional time to review that key. **R. p. 738, lines 4-18**. Counsel later conceded that a luncheon recess before the gang expert's testimony provided sufficient time to review the key. **R. p. 773, lines 6-11**.

advise him about testifying in this case; (2) Henderson's testimony, in which he confirmed his recantation, he admitted giving police the statement implicating Johnson and selecting G-man from a photographic lineup but claimed that he had made up the information in the statement to police and his identification of Johnson, he stated that he did not want to testify at Johnson's trial and indicated that, if called to testify, he would assert his Fifth Amendment privilege against self-incrimination; (3) entertained arguments from both Johnson's counsel and Henderson's own attorney opposing his testimony on several grounds; (4) ruled on the State's grant of immunity to Henderson under *State v. Thrift*, 312 S.C. 282, 297, 440 S.E.2d 341, 349 (1994) (holding that the South Carolina Constitution requires that a person compelled to provide the government with self-incriminating testimony be granted immunity from any prosecution for a transaction or offense to which the person's testimony relates); (5) the testimony of the investigator who had interviewed Henderson relating to the voluntariness of information provided by Henderson and arguments from the parties concerning this issue; and (6) conducted a *Neil v. Biggers*, 409 U.S. 188 (1972), hearing. **R. p. 98, line 16 – p. 99, line 5; p. 432, line 20 – p. 439, line 20; p. 559, line 7 – p. 571, line 20; p. 576, line 22 - p. 595, line 5.**

Johnson has not presented this Court with any claim that the trial judge erred in ruling on any of the grounds that were raised in connection with his continuance motion, apart from the ruling that the State was erroneously allowed to present evidence of his gang membership or association. Also, he has not made any showing that any other evidence on behalf of the defendant could have been introduced, or that any other points could have been raised, if more time had been granted to prepare for trial. *See State v. Williams*, 321 S.C. 455, 459, 469 S.E.2d 49, 51-52 (1996); *State v. Squires*, 248 S.C. 239, 149 S.E.2d 601 (1966).

Johnson's claim that the State did not timely provide discovery is a red herring and

ignores that many of his discovery requests went far beyond anything required by either *Brady v. Maryland*, 373 U.S. 83 (1963), or Rule 5, SCRCrim.P. Nevertheless, the State complied with these requests. The absence of merit to his claim is underscored by his failure to present any argument on appeal based upon a discovery violation, or the timeliness of disclosure.

For the first time on appeal, Johnson argues that "counsel could have been prepared to handle the many issues that arose during this trial without the jury constantly being sent out of the courtroom" if the trial judge had granted the motion and that "[t]here is every reason to think the jury would conclude the defense was attempting to hide evidence from them because they were constantly being removed from the courtroom since these matters could not be resolved pre-trial because of the late discovery." **IBOA, p. 12**. However, his arguments are not properly before this Court on appeal because they were not presented to the trial judge. *See State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (a party cannot argue one theory at trial and a different theory on appeal). *See also State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error)) (same); Worse, these arguments ignore the contentious manner in which trial counsel handled the case, with a multitude of objections, motions and discovery requests, many of which morphed; his request for a hearing on the voluntariness of Henderson's statement and photographic identification; and his request for *Biggers* hearings on all witnesses who were shown a photo or video of Johnson under *State v. Liverman*, 398 S.C. 130, 727 S.E.2d 422 (2012) (*Liverman II*). He made the later request even for his co-defendants who testified, despite the fact they had known him well for a long time and were very close friends. *E.g.*, **R. p. 90, lines 9-23; p. 100, line 15 – p. 105, line 3; pp. 247-53; 264-96; pp. 432-39; pp. 466-74; pp. 545-54; pp. 559–71; pp. 576-95; pp. 599-608; pp. 653-57; pp. 701-08;**

718-25; 734-37. *See State v. Babb*, 299 S.C. 451, 455, 385 S.E.2d 827, 829 (1989) ("a party cannot complain of an error which his own conduct has induced") (citing *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984)); *see also State v. Robinson*, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991) (same); *State v. Washington*, 315 S.C. 108, 432 S.E.2d 448 (1993). His argument that could or would have tried the case differently if a continuance had been granted is also purely speculative.

Finally, Respondent submits that Johnson's reliance upon *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012), is misplaced for several reasons. First, the trial judge applied the then-current and correct law. *Cf. State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) ("the trial court is required to charge only the current and correct law of South Carolina") quoting *Sheppard v. State,* 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004)). Second, although the Court in *Langford* held that § 1-7-330 was unconstitutional because it violated the separation of powers provision of the South Carolina Constitution - S.C. Const. art. I, § 8 - by placing the control of the docket exclusively in the hands of the Circuit Solicitors, the Court did not indicate that this holding was to be applied to cases where the case had been tried but the direct appeal was not final at the time *Langford* was rendered. *See Langford*, 400 S.C. at 433-36, 735 S.E.2d at 477-79. *Contra State v. Belcher*, 385 S.C. 597, 612-13, 685 S.E.2d 802, 810 (2009) ("Because our decision represents a clear break from our modern precedent, today's ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved. .... Our ruling, however, will not apply to convictions challenged on post-conviction relief") (citations and footnote omitted).

Third, there is no sound reason for appellate courts to apply *Langford* to cases that were tried before the date of that decision but where the direct appeal was not decided because, unlike

the relatively few cases effected by *Belcher*, applying *Langford* in that fashion could potentially undermine the validity of *every* General Sessions case that was tried before the date *Langford* was decided, where the conviction has not yet become final. Respondent submits that this would be an absurd and undesirable result that the majority of the Court in *Langford* obviously did not intend. Fourth, the defendants in *Langford* brought the constitutional challenge to the Solicitor's control of the docket based upon the claim that it interfered with the right of criminal defendants to speedy trials, as opposed to permitting the further continuance and delay of criminal cases. *Langford*, 400 S.C. at 428-32, 436-46, 735 S.E.2d at 475-77, 479-86.

Fifth, the Court in *Langford* did not hold that the constitutional violation was reversible error, *per se*. To the contrary, the Court specifically stated that "[o]ur determination that section 1–7–330 violates separation of powers is not dispositive of Langford's appeal. To warrant reversal, Langford must demonstrate that he sustained prejudice as a result of the solicitor setting when his case was called for trial." *Id.* at 436, 735 S.E.2d at 479. The Court then rejected his claim that he had been denied a speedy by the Solicitor's control of the docket. *Id.* at 436-46, 735 S.E.2d at 479-86.

As shown, Johnson has not demonstrated prejudice from the denial of his continuance motion. Therefore, there was no abuse of discretion. *Williams*, 321 S.C. at 459, 469 S.E.2d at 51-52.

II. The trial judge did not abuse his discretion by ruling that the defense opened the door to the presentation of evidence that he was in the Folk Nation gang; and evidence of his gang affiliation was independently admissible as part of the *res gestae* of the crimes charged, it was probative of why a prosecution witness recanted a statement to law enforcement identifying Johnson as one of the shooters and his disavowal of that statement at trial, and it was probative of motive, identity, intent (and premeditation), and a common scheme or plan under Rule 404(b), SCRE.

Johnson also contends that the trial judge erred by ruling that the defense opened the door

to the introduction of evidence that he was in the Folk Nation gang, by urging in opening statement that, while the murder committed by others may have been gang-related, Johnson was not present when it occurred and was not involved in the shooting. He asserts that the evidence of his gang affiliation "constituted highly prejudicial impermissible bad character evidence." Respondent disagrees with Johnson's characterization of the trial judge's ruling and submits that he cannot show an abuse of discretion because the trial judge correctly ruled that that the defense opened the door to the presentation of evidence that he was in the Folk Nation gang. Also, evidence of his gang affiliation was independently admissible as part of the *res gestae* of the crimes charged, it was probative of why a prosecution witness recanted a statement to law enforcement identifying Johnson as one of the shooters and his disavowal of that statement at trial, and it was probative of motive, identity, intent (and premeditation), and a common scheme or plan under Rule 404(b), SCRE.

A. How issue arose at trial.

In the course of the July 26th motions hearing, Johnson's counsel argued that he was entitled to a continuance because evidence in the federal investigation pertaining to the Studio 54 shooting it might provide information that Johnson could use in this case. **R. pp. 38-43**. To support his claim, he explained to the trial judge that "[t]his was all in a three or four-hour time period. The whole reason for the nightclub shooting was the shooting of Mr. Reese. We believe it's all connected and would come in under res gestae or a number of other things." **R. pp. 43, lines 17-21**.

In spite of this concession, he subsequently made the following *in limine* motion:

> Number five, Your Honor, we are not asking that there be no mention of gangs in this case. We are asking that there be no mention of gang affiliation of Mr. Johnson unless they can establish a proper foundation for that without attacking

his character.

> If they have witnesses that will get up there and testify as to gangs, that is introducing his character evidence. We would object to that. We just want to make a motion in limine that he not be associated with a gang unless they can lay a proper foundation.

R. p. 90, line 25 – p. 91, line 5.

When the trial judge questioned counsel as to what he thought would be a proper foundation, counsel stated that the defense objected to testimony about any meetings that were not relevant to the case and testimony by the State's gang expert. Counsel observed that "they have him on the list without some kind of reason for it, [and] we would object to them claiming [Johnson] is in a gang at this point." **R. p. 91, lines 12-23.**

In response, Senior Assistant Solicitor Campbell explained that the State was not attempting to attack Johnson's character in the case. However, "[t]his whole case is premised on the fact that there were two rival gangs that were out to shoot each other." **R. p. 91, line 25 – p. 92, line 3.** She added that regardless of whether he was a gang member or affiliated with the gang, "it was Mr. Daqwan Johnson's beef that happened to be with the Bloods, who the ultimate victim ended up being, and that caused this whole thing to happen. ... [T]he whole motive in this case is gang involved." She did not understand how the parties could "mention gangs without at least affiliating him with a gang. Therefore, she did not understand what a proper foundation. **R. p. 92, lines 4-14.**

In response, Johnson's trial counsel stated, "[W]e can deal with it as it comes up." **R. p. 92, lines 16-18.**

Both parties agreed in their respective opening statements that the shootings in this case were "gang-related." Johnson, however, suggested that he was not present when the shootings

occurred and that the co-defendants, actual gang members, were lying to protect those above them in their gang hierarchy. *Compare* **R. p. 112, line 9 – p. 113, line 21** (opening by the Assistant Solicitor); *with* **R. p. 115, line 23 – p. 116, line 3; p. 116, lines 10-18; p. 117, lines 3-19; p. 118, lines 19-22; p. 119, line 23 – p. 120, line 8** (opening by Mr. Collins).

On direct examination of Marquez "Noonie" Prophet, Johnson's friend and co-defendant, Prophet denied being a gang member, but admitted that he knew people in gangs. One gang member he knows is "T.," whose real name is Terrance Patterson. **R. p. 297, line 13 – p. 298, line 10**. The State then asked him, "Who else do you hang with that's in a gang?" Prophet replied, "G-man" trial counsel objected and, following an unrecorded bench conference, the jury was removed from the courtroom. **R. p. 298, lines 11-22**.

In camera, counsel asked the trial judge to strike the question and Prophet's response, and to give the jury a curative instruction to disregard this evidence because it was impermissible evidence of Johnson's bad character. Apparently, the State had mentioned counsel's opening statement in the unrecorded bench conference. Counsel argued that "the State has said that we said in our opening that this was gang-related activities; however, we are saying our client wasn't involved in that." Counsel also noted the motion *in limine* to bar reference to his gang membership. **R. p. 298, line 11 – p. 299, line 25**.

Ms. Campbell, again, argued that the evidence of Johnson's gang membership was not offered "as [bad] character evidence." She observed that the defense in opening statement "got up here and said that the only reason that anybody is pointing at [Johnson] is because there was another gang member they are all scared of." (Sic). She felt that this statement had opened the door to present evidence of his gang membership or affiliation. She also observed that the defense talked about gangs throughout the entire opening statement. **R. p. 300, lines 2-13**.

Ms. Campbell then pointed out that she was merely asking Prophet to name persons of whom he had personal knowledge who were in a gang, which was permissible under this Court's decision in *State v. Liverman*, 386 S.C. 223, 687 S.E.2d 70 (Ct. App. 2009) (*Liverman I*), *aff'd. in result*, *State v. Liverman*, 398 S.C. 130, 727 S.E.2d 422 (2012) (*Liverman II*), and *State v. Price,* 368 S.C. 494, 629 SE2d 363 (2006). "It was a gang retaliation, which they openly admitted, and they are the ones that further went into the retaliation shooting at Studio 54 with one of the other witnesses."

The trial judge observed that, in accordance with question number 8 of Johnson's requested *voir dire* on the qualification of the jury, he had asked "Does any member of the jury panel have any knowledge of or connection to gang activity or affiliation that would affect your ability to be fair and impartial in this case?" He further noted that this "question was not asked in a vacuum." He recognized the defense's motion *in limine* but noted the problem that he had mentioned earlier about what would constitute a sufficient foundation to admit evidence of gang membership. He found that the State had merely asked questions that were proper for laying such a foundation **R. p. 300, line 25 – p. 301, line 24**.

The trial judge then observed that bad "[c]haracter evidence may not be admissible." However, simply because evidence is inadmissible on one issue, does not mean that it is cannot "be admissible on another issue." The trial judge's problem with Johnson's objection and motion *in limine* was that the defense could not "present to the jury that this was all [gang-related] by these forces, none of whom are in the courtroom, this unseen gangster;" yet, force the prosecution to "try this case in a vacuum." **R. p. 301, line 24 – p. 302, line 7**.

In response to counsel's statement that he objected to this evidence, the trial judge stated, "Object to gang. Why do you have it in openings and why do you have it in voir dire? I don't

mean that by way of fussing." **R. p. 302, lines 8-14.**

Rather than addressing this question, counsel asserted that Prophet could not have first-hand knowledge of Johnson's gang membership. The trial judge rejected this position and he noted that the jury might not believe anything to which Prophet testified. **R. p. 302, line 15 – p. 303, line 8.**

Although he did not expressly use the expression, the trial judge ruled that the testimony was admissible as part of the *res gestae* of the charged offenses, and he referenced Chief Justice Toal's dissenting Opinion in *State v. Smith*, 309 S.C. 442, 448-54, 424 S.E.2d 496, 500-03 (1992) (Toal, J., dissenting) (finding that evidence of murder defendant's prior cocaine use was admissible as part of the *res gestae* of charged offenses). He correctly stated that the dissent's theory of the *res gestae* in *Smith* is now the law. *See State v. Adams*, 322 S.C. 114, 121-22, 470 S.E.2d 366, 370-71 (1996). He then told counsel that "you can extract Mr. Johnson out of the gang. He's not a member. But you can't extract that out." **R. p. 303, lines 9-21.**

Prophet thereafter testified that both T. and G-man, Johnson were in the Folk Nation gang. Prophet characterized Johnson as "my home boy" or his "[f]riend, [an] associate I hang with." (Sic). He also hung out with T., or Terrance Patterson. **R. p. 304, line 3 – p. 305, line 6.**

Prophet thereafter testified that he also knew an individual nicknamed "Weeny." He did not know whether Weeny was in a gang but he knew that G-man and Weeny had a fight "over a gang." Weeny had shot at and hit Johnson's Buick LeSabre, as Prophet, Walker and Campbell were riding on Farrow Road earlier the day of the murder. The men notified Johnson of the incident, and ultimately led to the retaliatory shooting at the apartment complex. **R. p. 307, line 20 – p. 310, line 17; p. 311, line 7 – p. 323, line 2.**

The next witness after Prophet was Detrick Walker, a/k/a "Shark." Johnson did not

object to Walker's testimony that Walker, Johnson, Prophet, Patterson and Campbell were not members of Folk Nation but that they were associates of members of that gang. He likewise did not object to Walker's testimony that the Folk Nation and Bloods gangs do not "get along," that Johnson's beef was with Weeny, and that Weeny was a Blood. **R. p. 343, line 22 – p. 348, line 10; p. 360, lines 14-25**. *See also* **R. p. 377, lines 18-20**.

Johnson also did not object to the following testimony of Inv. Arthur Thomas, of the City of Columbia Police Department:

> As we continued this investigation, we found that the incident itself was gang related. The area which I just showed you is known as a Blood gang territory. All subjects in that area are Bloods, and they protect that area.
>
> We were receiving information that the perpetrators in this particular incident were Folk Nation members or associates and that there was an ongoing beef between them, ongoing shootings throughout the City and the County. So we decided to get with the task force and join together to look at it this particular situation.

R. p. 627, lines 2-13.

Johnson likewise did not object to testimony from the prosecution's gang expert, Sgt. Vince Scoggins, of the Richland County Sheriff's Department, even though his testimony had been the basis for Johnson's motion *in limine*. **R. pp. 774-81**. Sgt. Scoggins testified that the Bloods was a California street gang that was formed in the 1970's, "as a rivalry to the Crips street gang for protection purposes." On the other hand, the Folk Nation was an alliance of several Chicago based gangs that was formed in the prison system of Chicago. Collectively, these gangs are known as the Folk Nation. Both gangs have come to Columbia, South Carolina and Sgt. Scoggins has investigated them. **R. p. 777, line 15 – p. 78, line 3**.

Sgt. Scoggins also explained that gang members often are known by nicknames. He opined that Campbell's nickname, "B. K.," stands for "Blood Killer." Sgt. Scoggins further

opined that this "is typically the only time that you will see a Folk Nation gang member use B. without disrespecting them in some form or fashion," since the letter B is disrespectful in the eyes of Folk Nation's members. Sgt. Scoggins also opined that Johnson's nickname of "G-man" showed that "he is a gangster under the Folk Nation line." **R. p. 778, line 15 – p. 779, line 11.** According to Sgt. Scoggins, there has always been a rivalry between the Bloods and the Folk Nation. This was true in Richland County in 2010, and it remains true. **R. p. 780, lines 8-15.**

Finally, Johnson did not object to Senior Assistant Solicitor Campbell's reference to the gang-related nature of the case or her other reference to gangs and gang involvement in closing argument. **R. p. 802, line 1 – p. 804, line 11; p. 807, line 17 – p. 810, line 16; p. 815, lines 5-10.**

B. Discussion.

There is no error. First, the only objection preserved for this Court's review on direct appeal is Johnson's objection to the testimony by his friend and co-defendant, Marquez "Noonie" Prophet, that "G-man" (Johnson) was in a gang (**R. p. 298, lines 11-22**) because this is the only specific testimony to which he objected and he did not renew his motion *in limine* to exclude the testimony of gang expert Sgt. Vince Scoggins, of the Richland County Sheriff's Department when Sgt. Scroggins later testified. *See State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court"); *State v. Vanderbilt*, 287 S.C. 597, 340 S.E.2d 543 (1986) ("Issues not properly preserved at trial may not be raised for the first time on appeal"); *State v. Sullivan*, 277 S.C. 35, 45, 282 S.E.2d 838, 844 (1981); *United States v. Foster*, 652 F.3d 776, 787 (7th Cir. 2011) ("Appellants did not make a contemporaneous objection to this testimony and have waived their right to assert any error on appeal"); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) ("In order for an issue to be preserved for appellate review, it must

have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal"); *State v. Moses*, 390 S.C. 502, 511, 702 S.E.2d 395, 400 (Ct.App.2010) (" '[M]aking a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced' ") (quoting *State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001))); *State v. Wiles*, 383 S.C. 151, 156-57, 679 S.E.2d 172, 175 (2009) (same).

Addressing the issue that is preserved for review, it is clear that the trial judge's ruling must be affirmed. First, procedure, Johnson " 'cannot complain of an error which his own conduct has induced.' " *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984), citing *State v. Worthy*, 239 S.C. 449, 465, 123 S.E.2d 835, 843 (1962). *See also State v. Robinson*, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991); *State v. Washington*, 315 S.C. 108, 110, 432 S.E.2d 448, 448-49 (1993); *State v. Logan*, 279 S.C. 345, 347-48, 306 S.E.2d 622, 623-24 (1983). Indeed, the concept that a party may not take advantage of such "invited error" is well settled in both state and federal court. *Id. See also Miller v. City of Columbia*, 322 S.C. 224, 229-30, 471 S.E.2d 683, 686 (1996); *State v. Sullivan*, 277 S.C. 35, 45, 282 S.E.2d 838, 844 (1981) (appellant cannot complain of prejudice from admission of evidence if he opened the door to its admission); *State v. Culbreath*, 377 S.C. 326, 333, 659 S.E.2d 268, 272 (Ct.App.2008) (holding a defendant may open the door to what would be otherwise improper evidence through his own introduction of evidence or witness examination); *Drayton v. Evatt*, 312 S.C. 4, 10-11, 430 S.E.2d 517, 521 (1993); *United States v. Wellons*, 32 F.3d 117 (4th Cir. 1994); *Wilson v. Lindler*, 995 F.2d 1256 (4th Cir. 1993); *United States v. Falsia*, 724 F.2d 1339, 1342 (9th Cir.1983) ("where the defendant opens the door to an argument, it is 'fair advocacy' for the prosecution to enter");

United States v. Foster, 652 F.3d 776, 787 (7th Cir. 2011).

As this Court explained in *Floyd v. Floyd*, 365 S.C. 56, 92, 615 S.E.2d 465, 484 (Ct.App. 2005):

> The primary purpose for the rule is that of fairness and completeness of the information for making the decision. If a party chooses to forego the protection of a rule by introducing evidence the opposing party would not be permitted to go into, then it is unfair not to allow the opposing party to go into the matter and provide more information to the fact-finder.

Id. (quoting Danny R. Collins, *South Carolina Evidence* 2.9 (2d ed. 2000)). *See also Gibson v. Wright*, 403 S.C. 32, 43, 742 S.E.2d 49, 55 (Ct.App. 2013).

Thus, even if Johnson's gang membership or affiliation was otherwise inadmissible, the trial judge properly ruled that Johnson's opening statement had "opened the door" to the introduction of this evidence. In his opening, he argued that the killing was gang-related, but he suggest that he was not present when the shootings occurred and that his co-defendants actually were gang members who were willing to lie, to protect those above them in their gang hierarchy. **R. p. 115, line 23 – p. 116, line 3; p. 116, lines 10-18; p. 117, lines 3-19; p. 118, lines 19-22; p. 119, line 23 – p. 120, line 8**. As a matter of basic fairness, the State was properly allowed to present the challenged evidence. *Id. See also Worthy*, 239 S.C. at 465, 123 S.E.2d at 843; *Robinson*, 305 S.C. at 474, 409 S.E.2d at 408; *Sullivan*, 277 S.C. at 45, 282 S.E.2d at 844; *Foster*, 652 F.3d at 787.

Separate and apart from whether Johnson opened the door to introduction of his gang membership or affiliation, the trial judge properly found that the contested testimony was admissible as part of the *res gestae* of the charged offenses. Alternatively, it was admissible to explain the reluctance of witnesses to testify, as well as under Rule 404(b), SCRE, to prove motive, identity and a common scheme or plan, or as part of the *res gestae* of the indicted

offenses of murder and attempted murder.

This Court recently gave the following explanation of the *res gestae* theory of admissibility:

> "The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred." *State v. King*, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999). "The evidence admitted must logically relate to the crime with which the defendant has been charged." *Wiles*, 383 S.C. at 158, 679 S.E.2d at 176.
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> > One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context or the *res gestae* or the uncharged offense is so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ... [and is thus] part of the *res gestae* of the crime charged. And where evidence is admissible to provide this full presentation of the offense, [t]here is no reason to fragmentize the event under inquiry by suppressing parts of the *res gestae*.
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> *State v. Adams*, 322 S.C. 114, 122, 470 S.E.2d 366, 370–71 (1996) (alterations in original) (internal quotation marks omitted), overruled on other grounds by *State v. Giles*, 407 S.C. 14, 754 S.E.2d 261 (2014). "When evidence is admissible to provide this full presentation of the offense, there is no reason to fragmentize the event under inquiry by suppressing parts of the *res gestae*." *State v. Preslar*, 364 S.C. 466, 474, 613 S.E.2d 381, 385 (Ct.App.2005) (internal quotation marks omitted). Under this theory, the temporal proximity of the prior bad act should be closely related to the charged crime. *State v. Owens*, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001), overruled on other grounds by *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).
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> *State v. McGee*, 408 S.C. 278, 287-88, 758 S.E.2d 730, 735-36 (2014).[19]

[19] In *McGee*, this Court found that the danger of unfair prejudice did not substantially outweigh the probative value of evidence of defendant's theft of a tractor-trailer truck, and thus trial court did not abuse its discretion in admitting this evidence as part of the *res gestae* in defendant's trial on charges of murder and burglary: the truck was stolen on the night before burglary of victim's home and fatal attack on victim, truck was found the following day about a mile from victim's home, truck's owner testified that it would have contained a winch rod in its tool box, a winch rod with victim's blood on it was found across the street from victim's home, and pry marks on victim's door were consistent

Pursuant to Rule 404(b), SCRE, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." *See also State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). To admit evidence of prior bad acts, the trial judge must first determine whether the proffered evidence is relevant. *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). If the trial judge finds that the evidence is relevant, he or she must then determine whether the bad act evidence is admissible under Rule 404(b), SCRE. *Id.*

> To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing.... When considering whether there is clear and convincing evidence of other bad acts, an appellate court is bound by the [circuit] court's factual findings unless they are clearly erroneous.

Clasby, 385 S.C. at 155, 682 S.E.2d at 895 (citations and internal quotation marks omitted). Regardless of whether evidence is admitted as part of the *res gestae* or under Rule 404(b), the proffered evidence must also withstand a Rule 403 analysis. *See, e.g., McGee*, 408 S.C. at 288-89, 758 S.E.2d at 736.

While a number of cases from South Carolina involved testimony concerning a defendant's gang affiliation and several unpublished Opinions have upheld the introduction of this evidence,[20] neither this Court nor the South Carolina Supreme Court has expressly held that

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with the winch rod. *Id.* at 289, 758 S.E.2d at 736.

[20] *E.g., State v. Jones*, 2013 WL 8541487 (S.C. Ct. App., Oct. 16, 2013) (unpublished); *Robinson*, 305 S.C. at 474-76, 409 S.E.2d at 408-09 (appellant was not entitled to mistrial on grounds that witness' testimony that gang was involved in drug operations linked appellant to drug dealing; witness' testimony did not imply that appellant was involved in drug dealing merely because witness knew him during time that witness was dealing drugs, and appellant had opened door to such evidence by eliciting testimony from another witness that gang was involved in drug dealing); *State v. Holland*, 261 S.C. 488, 500-02, 201 S.E.2d 118, 124-25 (1973) (motion for directed verdict properly denied in murder case, where State presented evidence that defendants, who were members of or connected

the prosecution may introduce evidence of a defendant's gang membership or affiliation, in a published Opinion.[21] However, the United States Supreme Court and many other courts from other jurisdictions have upheld the admissibility of gang affiliation that activities associated with street gangs can be probative on the issues of identity, motive and other relevant maters. *See, e.g., United States v. Abel*, 469 U.S. 45, 49 (1984) (evidence showing that defendant and a defense witness were members of a prison gang and showing that this gang's tenets required its members to lie, cheat, steal and kill to protect each other was sufficiently probative of defense witness' possible bias toward defendant to warrant its admission into evidence in prosecution for

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with motorcycle gang, had combined, conspired and agreed to go to clubhouse of another motorcycle club to steal motorcycles and that a person present at the club when defendants arrived was murdered by one or more of the defendants as a probable and natural consequence of acts done in pursuance of the common design).

[21] In this Court's Opinion in *Liverman I*, the appellant asserted that the trial judge erred by allowing testimony by the prosecution's gang expert that "the hash marks on [the] appellant's back indicated he had bodies attributed to him, as this evidence placed his character at issue in violation of Rules 403 and 404(b), SCRE" *Liverman I*, 386 S.C. at 242, 687 S.E.2d at 79. However, this Court found that "[t]he precise argument appellant raises on appeal, that the hash mark testimony referred to prior homicides and thus violated Rules 403 and 404(b), was not raised to the trial judge and therefore is not preserved for review." *Id.* at 242, 687 S.E.2d at 80.

Alternatively, the Court found that "even if we assumed appellant's objection to the teardrop tattoo evidence as improper character propensity evidence, along with his general objection to any tattoo evidence, is sufficient to preserve his assertion on appeal that the hash mark evidence improperly placed his character in evidence and was unduly prejudicial, we find any error in the admission of this evidence to be harmless." *Id.* at 243, 687 S.E.2d at 80. Thus, the Court did not address whether the testimony was admissible. Further, the admissibility of this testimony was not raised on certiorari and was not addressed in *Liverman II*.

In *Price, supra*, the Court held that an officer's testimony that the appellant was a supreme or an officer within criminal street gang was inadmissible hearsay because the testimony was not based on his personal knowledge, but on information relayed to him by an informant. *Price*, 368 S.C. at 498-99, 629 SE2d at 365-66. It should be noted that the Court did not hold that a witness who had first-hand knowledge of a defendant's gang membership could not testify that the defendant was in a gang, provided his testimony was otherwise relevant.

In *State v. Spears*, 403 S.C. 247, 742 S.E.2d 878 (Ct.App. 2013), the trial court found that gang affiliation evidence was relevant and that the probative value of the gang affiliation evidence was not substantially outweighed by any danger of unfair prejudice it might have caused. *Id.* at 250, 742 S.E.2d at 879. However, that aspect of the trial judge's ruling was not challenged on appeal. *Id.* at 252, 742 S.E.2d at 880. Finally, in *State v. Sobers*, 404 S.C. 263, 268, 744 S.E.2d 588, 590-91 (Ct.App. 2013), this Court held that the trial judge did not abuse his discretion in finding that defendant's evidence, suggesting gang associations of murder victim and witnesses, was not relevant to show the defendant's state of mind and fear of being killed by mob that he contended had surrounded his car, when he fired his gun, since the trial judge "left open the possibility [that the defendant] could offer gang evidence if he could establish the requisite relevancy but the defendant never testified that the mob was part of gang, or that fact the mob was allegedly part of a gang made him more fearful."

bank robbery); *State v. Romero*, 178 Ariz. 45, 870 P.2d 1141, 1147-48 (1993); *State v. Vickers*, 159 Ariz. 532, 768 P.2d 1177, 1182 (1989) (evidence of membership in prison gang probative of bias); John E. Theuman, Annot., *Admissibility of Evidence of Accused's Membership in Gang*, 39 A.L.R.4th 775 (1985).[22]

Here, Prophet's testimony that "G-man" was in a gang and that Prophet "hung out" with him was admissible as part of the *res gestae* of the crime charged because it was "so intimately connected with and explanatory of [the murder and attempted murder for which Johnson was on trial] and [was] so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story" of the indicted offenses. *See Adams*, 322 S.C. at 122, 470 S.E.2d at 370-71. Specifically, it put all four shootings that occurred on June 19-20, 2010, in context and it explained why over sixty bullets were fired in less than thirteen hours: Johnson (a/k/a "G-man) and his co-defendants were involved in a fierce and ultimately deadly dispute

[22] *See also People v. James*, 117 P.3d 91, 94 (Colo.App. 2004) (Evidence regarding gang culture and evidence of gang retaliation may be admissible to explain a witness' change in statement or reluctance to testify); *People v. Gonzales-Quevedo*, 203 P.3d 609, 615 (Colo.App. 2008) (evidence of gang membership may be admissible to show bias or as *res gestae* evidence, to show motive and the particular circumstances of the crime); *Garibay v. State*, 275 Ga.App. 170, 174, 620 S.E.2d 424, 428 (Ga.App. 2005) (evidence of defendant's gang membership, whose affiliation was noted by number "13" was admissible as part of *res gestae* of crime, and evidence of defendant's gang membership was admissible to show motive); *People v Olivier*, Ill.App.3d 872, 874-77, 279 N.E.2d 363, 365-67 (Ill.App. 1972); *People v. Mendez*, 221 Ill.App.3d 868, 164 Ill.Dec. 321, 582 N.E.2d 1265, 1267 (1991) (defendant's membership in gang relevant to motive for drive-by shooting against rival gang); *State v. Garcia*, 99 N.M. 771, 664 P.2d 969 (1983) (prison gang membership relevant to motive in stabbing inmate who had insulted gang); *State v. Ruof*, 296 N.C. 623, 252 S.E.2d 720 (1979) (defendant's association with motorcycle gang relevant to motive for shooting victim who had come into bar in gang's territory and identity); *People v. Hairston*, 10 Ill.App.3d 678, 294 N.E.2d 748 (1973) (evidence of membership of defendant and victim in rival gangs relevant to drive-by shooting); *Vasquez v. State*, 67 S.W.3d 229, 239 (Tex. Crim.App. 2002) (holding evidence of defendant's gang affiliation was relevant and admissible to show motive for gang-related crime); *Butler v. State*, 120 Nev. 879, 889, 102 P.3d 71, 78 (Nev. 2004) ("This court has repeatedly held that gang-affiliation evidence may be relevant and probative when it is admitted to prove motive"); *Schunueringer v. State*, 2014 WL 819462, 2-3 (Nev., Feb. 27, 2014) (concluding that district court did not abuse discretion by admitting gang-affiliation evidence because it was admissible as part of the *res gestae*); *State v. Foxhaven*, 163 P.3d 786 (Wash. 2007) ("ER 404(b) is not designed 'to deprive the State of relevant evidence necessary to establish an essential element of its case,' but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged") (citation omitted); *State v. Boot*, 950 P.2d 964, 968-69 (Wash. App. 1998) (in addition to motive, gang evidence may be relevant to show "the context in which the murder was committed," premeditation, and under the *res gestae* exception " 'to complete the story of the crime on trial by proving its immediate context of happenings near in time and place' ") (citation omitted).

with members of a rival gang, the Bloods. The hatred of these two gangs was so intense that Johnson and his co-defendants were willing to fire over forty shots, randomly, at residents and apartments of in a complex where some rival gang members lived. They thereby endangered the lives of many men, women and children who were not Bloods but innocent bystanders, and whose worst offense was that they lived in the complex under attack. *Id.*; *State v. Dennis*, 402 S.C. 627, 635-37, 742 S.E.2d 21, 25-27 (Ct.App. 2013) (testimony that defendant, charged with assault and battery with intent to kill and possession of a firearm during the commission of a violent crime, offered to sell stolen gun to buy crack cocaine shortly before shooting was admissible under *res gestae* theory, where motive was highly contested at trial and testimony at issue was necessary to aid fact-finder in understanding context in which crime occurred). *See also, e.g., Schunueringer*, 2014 WL 819462 at 2-3 (concluding that district court did not abuse discretion by admitting gang-affiliation evidence because it was admissible as part of the *res gestae*); *Boot*, 950 P.2d at 968-69; *Gonzales-Quevedo*, 203 P.3d at 615 (evidence of gang membership may be admissible to show bias or, as *res gestae* evidence).

Indeed, without evidence of his gang affiliation, which circumstantially corroborated other prosecution evidence that Johnson and his co-defendants conspired to commit the crimes, the almost military-styled assault on the apartment complex resulting in the indicted offenses was devoid of context and made little, if any, sense. Likewise, the challenged evidence tended to disprove Johnson's claim in opening statement that he was not a gang member but that the prosecution's witnesses were gang members and that those witnesses were lying to protect a higher ranking individual within their gang. Additionally, this evidence helped to explain Rontrell Henderson's pretrial recantation of his statement to law enforcement identifying Johnson as one of the shooters and his disavowal of that statement at trial. **R. pp. 714-18; 726-**

31. *See James*, 117 P.3d at 94.

Alternatively, evidence of Johnson's gang membership was probative of motive, identity, intent (and premeditation), and a common scheme or plan under Rule 404(b), SCRE. First, the challenged evidence provided the answer to the question of why the shooting occurred: the motive was to strike at members of a rival gang, who had shot up Johnson's car in retaliation for him shooting at Whitney Wilson, a member of the Bloods, in the same apartment complex where the murder later occurred and where other members of the Bloods lived, on the afternoon of June 19th. *E.g.*, *Garibay*, 275 Ga.App. at 174, 620 S.E.2d at 428 (evidence of defendant's gang membership was admissible to show motive); *Beltran v. State*, 99 S.W.3d 807, 811 (Tex.App 2003), *pet. ref'd.* (finding admission of evidence regarding appellant's gang affiliation absolutely necessary to show motive for the crime); *Vasquez*, 67 S.W.3d at 239 (evidence of defendant's gang affiliation was relevant and admissible to show motive for gang-related crime); *Butler v. State*, 120 Nev. at 889, 102 P.3d at 78 ("This court has repeatedly held that gang-affiliation evidence may be relevant and probative when it is admitted to prove motive"). *See also State v. Johnson*, 306 S.C. 119, 125-26, 410 S.E.2d 547, 551 (1991) (evidence of defendant's murder of owner of RV, whose body was still in RV defendant was driving when present murder occurred, was properly admitted to show motive; no limiting instruction was necessary, since this evidence constituted part of the *res gestae*).

Secondly, this evidence was probative on intent and that the shooting was premeditated. *See Boot*, 950 P.2d at 968-69; *State v. Gilmore*, 396 S.C. 72, 83, 719 S.E.2d 688, 694 (Ct.App. 2011) ("We believe the trial judge acted within her discretion to conclude the statements were not offered for the prohibited purpose of proving Gilmore's character 'in order to show action in conformity therewith,' but rather were offered to prove intent"). Thirdly, the challenged evidence

was also *very* probative on who the perpetrators were - *i.e.*, the identity of the shooters who committed the charged offenses, including Johnson - because it circumstantially corroborated testimony from Prophet and Detrick "Shark" Walker that those men, Johnson, B. K. Campbell, and Terrance Patterson acted in concert and conspired to commit the offenses. Prophet and Walker were either gang members or associated with gang members and this evidence added credibility to their testimony. See *People v. Contreras*, 144 Cal.App.3d 749, 192 Cal.Rptr. 810 (1983) (defendant's gang membership relevant to motive for assault and attempted robbery and identity of perpetrator); *State v. Fonseca*, 383 S.C. 640, 649, 681 S.E.2d 1, 5 (Ct.App.2009) (when motive or intent is a material issue, admitting evidence of prior bad acts is not error). Identity was strongly contested by Johnson, as was the credibility of his co-defendants who identified him. Other than their eyewitness identification, the evidence of identity was limited to witnesses who could describe the men involved and Johnson's vehicle, either from the shooting in the afternoon or in the night of June 19th.[23]

Finally, Prophet's testimony was relevant under the common scheme or plan exception, since it helped to circumstantially tie the shooting on the afternoon of June 19th to the indicted offenses and it was probative on why all of the shootings occurred that fateful date. *See Olivier*, Ill.App.3d at 874-77, 279 N.E.2d at 365-67 (evidence of the defendants' common membership in a gang properly admitted in order to show a common design).

Nor was the probative value of this evidence substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE. *See also State v. Alexander*, 303 S.C. 377, 401 S.E.2d

[23] Public policy supports admission of this type of testimony. As the various cases cited in this argument, and the headlines of virtually every media source make abundantly clear, gangs and gang-related crimes are escalating. The problems associated with gang violence are no longer the problems of only the major cities in America. Rather, those problems have spread throughout our Nation and are increasingly prevalent in South Carolina. Although this Court must obviously protect the rights of anyone accused of a crime, to hold that testimony such as that given in this case is inadmissible would simply reward organized criminal activity.

146 (1991). Again, Johnson's defense was predicated on the theory that the offenses were gang-related but that he was not in a gang and he did not commit the charged crimes. Obviously, the burden of proof rested with the State to disprove his defense and Prophet's testimony was very probative on refuting the veracity of this defense. Likewise, his testimony was *very* probative on motive, identity, and intent. It was also circumstantially probative on a common scheme or plan, explaining why the revolving door of escalating violence occurred.

Moreover, this evidence was not very prejudicial, in the meaning of Rule 403, SCRE, given Johnson's defense. Further, there was a great deal of evidence concerning his gang membership to which he did not object in the trial court. Thus, the evidence was properly admitted.

Even if not properly admitted, he cannot show prejudice, since Prophet's testimony could not reasonably have affected the result of the trial. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial"); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result"). At worst, his testimony was cumulative evidence to the other evidence of his gang membership to which he did not object. *See State v. Kirton*, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct.App. 2008) ("The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence"). The absence of prejudice is underscored by the overwhelming proof of Johnson's guilt. *State v. Bryant*, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) (error "is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached").

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that his Court should dismiss certiorari as improvidently granted or affirm the decision of the Court of Appeals and the judgment of conviction.

Respectfully submitted,

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November 19, 2014.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Honorable R. Knox McMahon, Circuit Court Judge
Appellate Case No. 2012-212696

THE STATE,

Respondent,

vs.

DAQWAN MARQUELL JOHNSON,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 19th day of November, 2014.

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CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Robert M. Dudek, Esq., South Carolina Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 19th day of November, 2014.

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