THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Robin B. Stilwell, Circuit Court Judge

App. Case No. 2017-002002

Rashaun Jamine Sobers, Petitioner,

vs.

State of South Carolina, Respondent.

PETITION FOR WRIT OF CERTIORARI

Tricia A. Blanchette
Post Office Box 2147
Leesville, SC 29070
(803) 908-3266
Attorney for Petitioner

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STATEMENT OF ISSUE ON APPEAL

I. The lower court erred by failing to grant a new trial due to counsel's handling of the gang evidence and testimony at trial.

PROCEDURAL HISTORY

During the November 2009 term of the Spartanburg County Grand Jury, Petitioner was indicted for murder (2009-GS-42-6427). App. p. 603. On September 7, 2010, a trial was convened at the Spartanburg County Courthouse in front of the Honorable J. Derham Cole. Petitioner was represented by N. Douglas Brannon, Esquire, Timothy Ryan Langley, Esquire, and the late Brac H. Turnipseed, Esquire. Harold W. Gowdy, III, Esquire, and Barry J. Barnette, Esquire, represented the State. On September 9, 2010, Petitioner was found guilty as indicted. Judge Cole sentenced Petitioner to imprisonment for a term of life. App. p. 605.

A notice of appeal was timely filed, and Robert M. Dudek, Esquire, perfected the appeal. The South Carolina Court of Appeals affirmed the conviction and sentence. State v. Sobers, Op. No. 5146 (filed June 26, 2013). App. p. 658. The Remittitur was issued on July 15, 2013.

On February 24, 2014, Petitioner filed an Application for Post Conviction Relief. App. p. 664. A Return was filed on September 10, 2014. App. p. 682.

On August 12, 2016, Petitioner filed an amendment alleging ineffective assistance of trial and appellate counsel as follows:

1. Ineffective assistance of trial counsel for failure to conduct a reasonable investigation prior to trial.

2. Ineffective assistance of trial counsel for the handling of the motion to dismiss related to and the admissibility of the video evidence obtained from the State's witness's phone.

3. Ineffective assistance of trial counsel for failure to present a reasonable defense at trial.

4. Ineffective assistance of trial counsel for failure to properly prepare Applicant to testify both in camera and in front of the jury at trial.

    a. Ineffective assistance of trial counsel for failure to utilize Applicant's testimony at the Jackson v. Denno hearing and during the in camera hearing regarding the gang testimony and evidence.

    b. Ineffective assistance of trial counsel for failure to properly prepare and utilize Applicant while on the stand at trial.

5. Ineffective assistance of trial counsel for failure to utilize witnesses and/or request a continuance to locate all necessary witnesses.

6. Ineffective assistance of trial counsel related to matters concerning the testimony and evidence related to gang activity and/or gang affiliation of the victim and the State's witnesses, including but not limited to:

    a. Ineffective assistance of trial counsel for failure to obtain a duly qualified expert to assist both pre-trial and during the trial on matters related to gang affiliation, evidence of gang activity and the specific evidence and/or testimony in the case at hand.

    b. Ineffective assistance of trial counsel for failure to properly prepare Applicant to testify to matters related to his knowledge of the gang activity and gang affiliation as it related to self-defense.

    c. Ineffective assistance of trial counsel for failure to make the use of the term "gang" or the testimony and evidence regarding gang activity and gang affiliation relevant through the in camera or direct testimony of Applicant. Specifically, failure to establish that Applicant was "more fearful because the mob was part of a gang," as held by the South Carolina Court of Appeals.

7. Ineffective assistance of trial counsel for failure to object to the Court's opening comments to the jury and closing charge. Transcript p. 90, lines 16-21, 561, lns. 16-20, 568, lns. 14-18. See State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012).

8. Ineffective assistance of trial counsel for failure to fully cross-examine and impeach the State's witnesses.

9. Ineffective assistance of trial counsel for failure to request all reasonable jury charges in favor of the defense.

10. Ineffective assistance of appellate counsel for failure to raise all meritorious issues on appeal.

    a. Motion for Dismissal regarding the phone video evidence. Transcript pp. 45-55.
    b. Objection to burden shifting during the State's closing argument. Transcript pp. 551-2.

App. p. 688.

Petitioner filed an additional amendment on September 8, 2016, which alleged:

1. Ineffective assistance of trial counsel for failure to object to the State's closing argument.

App. p. 690.

On June 27, 2017, an evidentiary hearing was convened at the Spartanburg County Courthouse in front of the Honorable Robin B. Stilwell. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Valerie G. Giovanoli, Assistant Attorney General. Petitioner testified and called Dr. Marjie T. Britz and N. Douglas Brannon, Esquire, to the stand. Respondent called Barry J. Barnette, Esquire, to the stand. The court had before him a copy of the Spartanburg County Clerk of Court's records, the records from the South Carolina Department of Corrections, appellate records, post conviction filings, Petitioner's exhibits 1-12, and Respondent's exhibit 1.

At the conclusion of the evidentiary hearing, the court took the matter under advisement. Thereafter, the court requested that the State submit a proposed Order. An Order of Dismissal with Prejudice was signed on August 2, 2017 and filed on August 7, 2017. App. p. 853. Thereafter, Petitioner timely filed a Motion, pursuant to Rule 59, South Carolina Rules of Civil Procedure. App. p. 882. An Order denying Petitioner's Motion was signed on August 29, 2017. App. p. 886.

STANDARD OF REVIEW

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact but deference is not given to conclusions of law.[1] The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling on findings of fact. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984). Questions of law are reviewed *de novo*, and the appellate court "will reverse the decision of the PCR court when it is controlled by an error of law." Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). Where an application for post conviction relief alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied

[1] Recently, in Smalls v. State, 810 S.E.2d 836 (2018), this Court held: "In numerous cases, this Court has incorrectly stated an appellate court "gives great deference to the PCR court's . . . conclusions of law." See, e.g., Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). The court of appeals repeated our misstatement, quoting Porter. Smalls, 415 S.C. at 496, 783 S.E.2d at 820. We clarify that appellate courts review questions of law *de novo*, with no deference to trial courts. While we uphold the analysis and result of the following decisions, we now direct that none of these decisions should be read to suggest an appellate court gives any deference to a PCR court's conclusions of law: Gonzales v. State, 419 S.C. 2, 10, 795 S.E.2d 835, 839 (2017); Gibbs v. State, 416 S.C. 209, 218, 785 S.E.2d 455, 459 (2016); McHam v. State, 404 S.C. 465, 473, 746 S.E.2d 41, 45 (2013); Hyman v. State, 397 S.C. 35, 42, 723 S.E.2d 375, 378 (2012); Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011); Edwards v. State, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011); Robinson v. State, 387 S.C. 568, 574, 693 S.E.2d 402, 405 (2010); Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010); Terry v. State, 383 S.C. 361, 371, 680 S.E.2d 277, 282 (2009); Jones v. State, 382 S.C. 589, 595, 677 S.E.2d 20, 23 (2009); Davie v. State, 381 S.C. 601, 608, 675 S.E.2d 416, 420 (2009); Miller v. State, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008); Lomax v. State, 379 S.C. 93, 100, 665 S.E.2d 164, 167 (2008); Harris v. State, 377 S.C. 66, 73, 659 S.E.2d 140, 144 (2008); Lorenzen v. State, 376 S.C. 521, 529, 657 S.E.2d 771, 776 (2008); Smith v. State, 375 S.C. 507, 515, 654 S.E.2d 523, 528 (2007); Watson v. State, 370 S.C. 68, 71, 634 S.E.2d 642, 643 (2006); Porter, 368 S.C. at 383, 629 S.E.2d at 356; Simpson v. Moore, 367 S.C. 587, 595, 627 S.E.2d 701, 705 (2006); Bright v. State, 365 S.C. 355, 358, 618 S.E.2d 296, 298 (2005); Winns v. State, 363 S.C. 414, 417, 611 S.E.2d 901, 903 (2005); Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005); Sellers v. State, 362 S.C. 182, 187, 607 S.E.2d 82, 84 (2005); Magazine v. State, 361 S.C. 610, 615, 606 S.E.2d 761, 763 (2004); Huggler v. State, 360 S.C. 627, 632, 602 S.E.2d 753, 756 (2004); Green v. State, 351 S.C. 184, 192, 569 S.E.2d 318, 322 (2002); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)."

upon as having produced a just result." Id. 466 U.S. at 686; see Butler v. State, 286 S.C. 441 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 691. The applicant must overcome this presumption in order to receive relief. Bell v. State, 321 S.C. 238 (1996); see also Cherry v. State, 300 S.C. 238 (1989); Rule 71.1(e), SCRCP.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117 (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117–18.

I. The lower court erred by failing to grant a new trial due to counsel's handling of the gang evidence and testimony at trial.

Towards the beginning of trial, a motion hearing was conducted regarding the State's motion to suppress testimony and evidence regarding gang activity. App. pp. 69-79. The defense indicated that they had only received the motion a couple of minutes ago, and one member of the defense team was going to pull case law. App. p. 69. In response, the State explained that the motion had been prepared over the lunch period since the defense had shared some pictures from Facebook a couple of minutes ago. App. pp. 69-70. The defense explained that they intended to question every lay witness about photos with gang symbols.

explained that they intended to question every lay witness about photos with gang symbols. App. p. 71. Thereafter, the parties and the court undertook a discussion regarding the relevancy of the evidence in question. App. pp. 71-77. After the lengthy discussion, the court found that he would revisit the matter. Specifically, he reasoned: "I just haven't understood the relevance as of yet. But, as I say, you will have the opportunity to present your case. And if it needs to be taken up outside the presence of the jury, we'll do so, and I'll rule on it." App. pp. 78-81, 79, lns. 3-6.

After the testimony of Phoenix Fielder, defense counsel argued that he needed to be able to cross-examine witnesses on gang activity. App. p. 157, lns. 5-8. Again, the trial court ruled that the defense was not permitted to address gang activity until relevancy was established. App. p. 157. In response, defense counsel argued that the Sixth Amendment gives a defendant the right to confront witnesses; therefore, he needed the opportunity to fully confront the witnesses. App. p.158. The trial court responded: "You get to confront them all you want to, but you don't get to ask witnesses questions that are not relevant to the case. Those are the rules of evidence." App. p. 158, lns. 5-7.

When Petitioner took the stand, he described a crowd of people that ran to his car following the fight captured on cell phone video, involving the victim and another individual. He described how "Trey" tried to forcibly remove him from his car, hearing his doors being opened, being scared, firing his gun, and "just trying to get away." App. p. 344, ln. 116 – p. 346, ln. 3. Defense counsel asked Petitioner about the number in the mob or crowd, and Petitioner responded that he did not know the number in the crowd. App. p. 350, ln 16. Petitioner attempted to try to point out the mob in video. App. p. 371. During re-cross

examination, Petitioner was extensively questioned regarding omission of the "angry mob" from the sketch and initial story. App. pp. 401-4.

After the jury was sent out, Rocky R. Watts was proffered as an expert by the defense. Mr. Watts offered his qualifications, which included sixteen years in the Greenville County Sherriff's Department and his current position as owner of Surveillance Resource and Investigations. App. p. 431. He detailed his gang training with law enforcement and an independent study he had conducted on gangs. App. pp. 433, 435, 437. He admitted that he had not previously been qualified or attempted to be qualified as an expert in gang activity. App. p. 436, ln. 23 – p. 437, ln. 5. He further testified that he had not authored or contributed to any published works regarding gangs nor taken or taught any courses. App. pp. 440.1. He also conceded that he did not have any special certifications in gang activity. App. p. 439, ln. 24 – p. 440, ln. 1.

Thereafter, counsel made brief argument in support of Mr. Watts being qualified as an expert. App. pp. 441-2. In response the court ruled:

> Well, having considered the testimony of the witness, I do not find that there has been established by his testimony sufficient education, training, experience or otherwise certification that would qualify him to be an expert in the field of whatever gang activity is. I'm not certain what you're trying to elicit by way of testimony as to his – what you consider to be his expertise.
>
> But I'm going to allow you to proffer his testimony. But I do not find based upon the testimony provided that he should be qualified as an expert in that field.

App. p. 442, lns. 3-13.

Following the court's ruling, defense counsel proffered the testimony of Mr. Watts. He testified that he conducted an investigation, canvassed the area, and determined that gang activity was present. App. p. 443. He identified photos pulled off Facebook and explained

how he gained access to Trey Gentry's Facebook page. App. p. 445, 447. From the pictures, he identified gang signs (N.S.G. and S.S.G.) App. p. 449. He opined that Quita, Ricky, Trey Gentry and victim are/were gang members and that northside and southside gangs are one in the same. App. pp. 451-2.

After the court inquired if there was additional proffer to be made, counsel called four additional witnesses to the stand. App. p. 452.

During his proffered testimony, Travoris Gentry (Trey) identified the Facebook picture with Jay Red "throwing stuff up." App. p. 454. When asked what that meant, he replied: "We's just going like that. I don't really know." App. p. 454, lns. 4-9. When asked about the initials appearing on the pictures, he responded that he is not a gang member, and the initials are where his people are from. App. p. 455. He admitted that some of his people are in a gang, but none of the one hundred fifty to two hundred people present were in a gang. App. p. 456, 459.

When called for his proffered testimony, Ricky Smith acknowledged that he was throwing up north side signs in the picture with Jay Red. App. p. 461. He admitted it is a gang symbol. App. p. 462. He testified that Trey was throwing up south side in the Facebook picture. App. p. 463. He also testified that the letters on the Facebook photographs stand for southside and northside gangs. App.p. 464. He identified pictures of the victim doing northside signs and Quita doing southside signs. App. pp. 466-7. He admitted that they were all there and "throwing up signs" the night the victim died. App. p. 467. He testified that he is not in a gang, but he agreed people in gangs throw up signs. App. p. 468.

During Quita Gentry's proffered testimony, she said the photos depicted her communicating with her hands. App. p. 469. She testified that she does not know what NSG or SSG stands for. Ap. p. 470.

When Joshua Fuller was called to the stand, he admitted that he goes by the name "Jay Red," and he identified the Facebook picture of him with his father's hand guns. App. p. 473. He explained that they were just posing in pictures since they were all kin. App. p. 474. When asked about the initials appearing in the pictures, he responded that he did not know what the initials meant. App. p. 475.

After offering the proffered testimony, the defense argued in support of the admission of the testimony and expert. App. 479. Counsel argued: "Any evidence that can reasonably be linked or legitimately tending to support Mr. Sobers' theory of self-defense is admissible. And this certainly goes to show his fear at the time." App. p. 480, lns. 407. Thereafter, the court ruled Mr. Watts not sufficiently qualified. App. p. 480. He further found that the witnesses were all members of different gangs or the same gang now, but there was no connection to what happened on April 21, 2009. App. p. 481.

While waiting for a witness, Phoenix Fielder was recalled for further proffered testimony. App. p. 483. When asked about the signs in the photographs, he explained that they were merely throwing up signs for side of town they are from, but the signs were also gang signs. App. p. 485. He explained that the letters stand for and that the people in the pictures (Quey, Quita, Trey and Ricky) are kind of "gangsters." App. p. 486. Then, he retracted and said they are not in a gang. App. p. 487. He later admitted that he is also sort of a "gangsta," in that he just reps for his side of town. App. p. 489.

Defense counsel offered further argument and requested the opportunity to recall Mr. Watts. App. p. 492. The court found that Mr. Fielder's testimony did not alter his prior ruling and denied the request to recall Mr. Watts. App. p. 492.

In closing, the State argued that only Petitioner stated there was a mob. App. p. 545, ln. 19. The State further argued that you must believe there was a "mob" to believe self-defense. App. p. 558, lns. 4-5. The State reiterated that the only shred of evidence regarding a mob came from Petitioner. App. pp. 550-51.

After the jury returned a guilty verdict, an appeal was perfected by the Robert M. Dudek, Chief Appellate Defender for the Office of Appellate Defense. The following issues were briefed:

1. The court erred by excluding the testimony of Travoiris Gentry, Ricky Smith, Quitha Gentry, Joshua Fuller, and Phoenix Fielder about gangs and gang signs being made at the scene of the shooting since this was relevant to appellant's self-defense case because appellant's fear, his apprehension, and his state of mind at the time he fired the gun was affected by the fact of gang involvement.

2. The court erred by refusing to allow former veteran Greenville County Narcotics Officer rocky Watts to testify as an expert witness, where he was qualified by experience and education and his testimony that gangs typically now videotape their gang activity and that he was familiar with the north side gang and the south side gangs after his investigation since this evidence was relevant and probative in this case.

App. p. 607.

In response the State argued:

1. The trial judge did not abuse his discretion in barring defense evidence suggesting gang associations of the victim and witnesses as irrelevant where no witness ever testified to, nor did any evidence otherwise suggest, a gang related aspect of the fatal shooting.

2. Appellant's issue two – that the trial judge abused his discretion in finding Mr. Watts was not qualified as an expert in gang activity – need not be addressed where the defense failed to show the substance of the proffered evidence of gang associations or activity was relevant and admissible. At any rate, Mr. Watts candidly testified that he

did not have specialized training or experience in gang activity. Therefore, the trial judge did not abuse his discretion in declining to qualify Mr. Watts as an expert.

App. p. 629.

As to the first issue raised on appeal, the South Carolina Court of Appeals held:

> We find the trial court did not abuse his discretion in finding the evidence suggesting gang associations of the victim and witnesses was not relevant. We note that although the trial court left open the possibility Sobers could offer gang evidence if he could establish the requisite relevancy, Sobers never testified the mob that surrounded his car was part of a gang. According to Sobers, the mob action caused him to fear for his life and fire his gun, but he never testified that he was more fearful because the mob was part of a gang. Thus, Sobers never introduced evidence that would make gang activity more relevant.

App. p. 662.

Regarding the second issue involving the qualification of Mr. Watts, the Court of Appeals found: "Based upon our decision to affirm the trial court's exclusion of testimony regarding gang activity, we need not address this argument." App. p. 663.

Thereafter, Petitioner filed an Application for Post Conviction Relief and via Amendment alleged:

1. Ineffective assistance of trial counsel related to matters concerning the testimony and evidence related to gang activity and/or gang affiliation of the victim and the State's witnesses, including but not limited to:

    a. Ineffective assistance of trial counsel for failure to obtain a duly qualified expert to assist both pre-trial and during the trial on matters related to gang affiliation, evidence of gang activity and the specific evidence and/or testimony in the case at hand.

    b. Ineffective assistance of trial counsel for failure to properly prepare Applicant to testify to matters related to his knowledge of the gang activity and gang affiliation as it related to self-defense.

    c. Ineffective assistance of trial counsel for failure to make the use of the term "gang" or the testimony and evidence regarding gang activity and gang affiliation relevant through the in camera or direct testimony of Applicant. Specifically, failure to establish that Applicant was "more fearful because

> the mob was part of a gang," as held by the South Carolina Court of Appeals.

App. pp. 688-9.

At the evidentiary hearing, Petitioner, through counsel, called Dr. Marjie Britz as an expert in in the area of organized crime and criminal street gangs.

During qualification, Dr. Britz stated that her current profession was a professor at Clemson University in the Department of Sociology, Anthropology and Criminal Justice where she regularly teaches courses in criminal justice, computer crimes, criminal evidence and occasionally in policing, criminology and special topic courses. App. pp. 705-707. In referencing her curriculum vitae, which was provided to opposing counsel, she provided her educational background: a Bachelor of Science degree from Jacksonville State University in forensic science, a Master's Degree from Michigan State University in police administration, and a Ph. D. from Michigan State University in sociology and psychology. App. pp. 706-707. She explained that she is currently also on staff at Anderson University for a masters level program for police executives across the state and was previously a professor at the Citadel in Charleston, South Carolina. App. p. 706.

She provided the professional organizations she holds membership in: International Association for Chiefs of Police, Association of Criminology, Academy of Criminal Justice Sciences, Atlanta Electronic Crimes Task Force, National Coalition for Juvenile Justice, High Technology Crime Investigation Association, and several regional criminal justice associations. App. pp. 706-708. She also stated that she was a trained assessor for the Commission for Accreditation of Law Enforcement Agencies (CALEA) and formerly a member of the South Carolina Gang Investigator Association. App. p. 708.

Turning to professional training and licenses, she explained that she is a trained professor for CALEA, has completed forensics evaluations courses and has been certified by the National Center for White Collar Crime, TASC/Litton, Marsware Software, and New Technologies. App. p. 708. Referencing the extensive publications and books reflected on her curriculum vitae, she provided a list of those associated with the areas of organized crime and criminal street gangs. App. pp. 708-709. She further provided a list of courses or classes she had taught to professional organizations regarding gangs or organized crime. App. p. 709.

After Petitioner's counsel offered Dr. Britz as an expert in the area of organized crime and criminal street gangs, the State conducted *voir dire*. App. pp. 709-10. When asked, Dr. Britz testified that she had previously not been qualified as an expert. App. p. 710. In response to a number of questions, she explained she had little experience in relation to the local gangs of Spartanburg, but she had obtained knowledge regarding local gangs through her research involving "interviewing police officers, gang investigators, my association with the gang investigator association, those kinds of things." App. pp. 710-714, p. 710, ln. 24 – p. 711, ln. 2. She also explained her expertise involved "sociological factors associated with gang development, what gang and how gangs develop, what gangs mimic, and how they present themselves and how gangs communicate." App. p. 712, lns. 5-8. When asked about the difference between national and local gangs, she provided a lengthy response and stated in sum, "they're all related to one another." App. p. 713, lns. 8-21.

Thereafter, the State objected to Dr. Britz qualifications. Specifically, the State argued that Mr. Watts, as offered at trial and found to be not qualified by the trial court, was more qualified than Dr. Britz due to his real life experience. App. pp. 715-16.

Acknowledging her "impressive" and "extensive" resume, the State also argued that she lacked the "knowledge, training, education and skills to testify." App. p. 715, lns. 12-15.

In qualifying Dr. Britz as an expert, the lower court found that she was qualified as an expert in sociology and the social phenomenon of gangs. App. pp. 716-717. By way of the Order of Dismissal, the lower court acknowledged her qualification as an expert, yet the lower court offered the following, which was not stated at the evidentiary hearing: "This Court does not believe Dr. Britz was any more qualified to testify as an expert on gangs in this case than was Rocky Watts. Both possessed an increased knowledge of gangs, albeit from different methods and sources."[2] App. p. 863.

In the Order of Dismissal, the lower court acknowledged the case materials reviewed and researched by Dr. Britz, which she addressed at the evidentiary hearing. App. pp. 863, 718-19. In the brief paragraph addressing Dr. Britz, the lower ourt held: "She concluded, similar to Watt's conclusion, that the victim and eye witnesses were members or affiliated with a gang." App. p. 863. As is not properly reflected in the Order, Dr. Britz offered lengthy testimony regarding her findings. She addressed Facebook photographs and Facebook research she conducted, which depicted the State's witnesses from trial throwing gang signs, with tattoos common on gang members, and copious amounts of money. App. pp. 720-21. Regarding the autopsy report, she discussed items found on the right side of the decedent's body that were all red in color (bandana, phone, wallet and lighter) that were all indicative of

[2] This finding by the lower court stands in complete contradiction to the trial court's finding that Rocky Watts was not qualified, which was raised on appeal but not addressed by the South Carolina Court of Appeals. App. pp. 442, 480. Petitioner submits that the lower court was correct in finding Dr. Britz qualified, but his reasoning stands in error regarding Rocky Watts and serves to attempt to overrule the findings of another trial court judge. See Enoree Baptist Church v. Fletcher, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) ("One Circuit Court Judge does not have the authority to set aside the order of another.").

gang affiliation, as well as rosary beads that she explained were indicative of contemporary and Latino gangs. App. p. 722-23.

Turning to the video offered at trial, Dr. Britz opined that the fight reflected was mischaracterized at trial, and she found it representative of members of the same gang fighting to establish masculinity. App. p. 723. She further opined that it was not indicative of a "beating in," as was suggested at trial. App. p. 723, ln. 25 – p. 724, ln. 6. She explained that the fight was characteristic of gang behavior. App. p. 724, lns. 2-9.

Finally, she addressed the proffered testimony at trial and explained how the testimony established gang affiliation and gang activity. App. pp. 724-725. She opined that the testimony of Phoenix Fielder was "most compelling." App. p. 725, lns. 17-18.

She affirmed that she would have assisted counsel prior to trial and been willing to testify at trial. App. pp. 726-27. Thereafter, the following testimony was elicited:

> Question: And, Dr. Britz, what is your ultimate opinion as to whether there's indicators of gang activity and gang affiliation in this case?
>
> Answer: I would say that, without reservation, that there are clear indicators of gang relationship. Both through the trial court --- or I'm sorry, through the trial transcript and the video and through the Facebook images. I would say unequivocally that these individuals are associated and are active in gang life.

App. p. 727, lns. 4-12.

When Doug Brannon, Esquire, took the stand, he explained his understanding of Petitioner's case, as follows:

> My client's story to me, and it stayed consistent the entire time, was that there was a **gang** of individuals trying to pull him out of his car. Pretty much through the window. The driver's side window of his car. That somebody opened the passenger's side door. And that in an effort to get away from the people on the driver's side, he laid down, the gun was either under the seat or

> between the seats. And that he fired without aiming at anybody specifically, out the passenger side of his car.
>
> We were --- I mean, it was a self-defense case, it was a accidental shooting case. Certainly, it could have been involuntary but this was self-defense, accidental shooting.

App. p. 748, lns. 8-21 (emphasis added). He further explained that he believed that Petitioner was "responding out of fear." App. p. 749, ln. 12.

When asked about the State's motion to exclude gang evidence, Mr. Brannon responded that it was "absolutely" a surprise. App. p. 753, lns. 7-9. He explained that the prosecutors knew that they intended to "make gang activity an issue in this case" and multiple conversations where had with the prosecutors, so the motion caught him by surprise. App. p. 753, ln. 18 – p. 754, ln. 9.

Thereafter, counsel explained how the exclusion of the gang evidence and testimony impacted the defense, as follows:

> Well, it obviously weakened the self-defense defense. I mean, that was it. I mean, look I was told, if the word gang comes out of your mouth, I will declare a mistrial and sanction you. I changed the word gang for mob.
>
> I mean, it --- the exclusion of gang activity, dramatically weakened the self-defense case.

App. p. 754, lns. 13-21. On cross-examination, he opined that the "case hinged on the gang activity involvement in the case" and he shared his theory on the overall relevance. App. p. 788, lns. 9-11, pp. 792-3. 761-62. He also explained that the exclusion of gang testimony and evidence left the defense with their "hands tied behind their back" during the cross-examination of the State's witnesses. App. pp. After the State asked him why it mattered that the term mob was used instead of gang or that gang membership could not be mentioned, he explained: "It makes the mob of people significantly more fear causing." App. p. 793, lns. 5-

12. When asked whether he believed Petitioner, he responded: "Well, I believe Rashaun Sobers was afraid that day. And I believe that was a gang. I don't know much else matters." App. p. 786, lns. 15-19. At the conclusion of redirect, the following testimony was elicited:

> Question: And, my last question is, how important was the gang evidence to the self-defense in this case?
>
> Answer: I think it was vital. I mean, if you read the transcript, I tried every way I could for four days to get the word gang to come out of my mouth and, I mean, I couldn't get there.

App. p. 796, ln. 25 – p. 797, ln. 6.

Turning to counsel's failure to proffer the testimony of Petitioner to address relevancy, counsel responded that he did not have a "specific recollection of the decision making process there." App. p. 756, ln. 11-12. He went onto offer the question that if Judge Cole did not find the testimony proffered sufficient to establish relevancy how would Petitioner's "self-serving" testimony establish relevancy. App. p. 756, lns. 12-21. When asked specifically about the Court of Appeals reasoning regarding the relevancy and noting that Petitioner never testified that he was fearful because the mob was part of a gang, counsel responded that the relevancy was made "crystal clear" to the trial court. App. p. 757.

Regarding the matter of expert testimony, trial counsel testified that the State had ample notice of the defense expert, Rocky Watts. App. p. 760, ln. 6-8. When asked if he had any indication that the State took issue with the expert's qualifications, he answered:

> Well --- Tricia, your expert today wouldn't have been qualified as an expert in that trial, okay. I mean, look, Rocky Watts was a 16 year cop that had arrested hundreds of people for suspected gang activity. Your lady hadn't arrested one of them. I mean, I've seen Derham Cole admit a guy as an expert to auto mechanics because he rebuilt his own motor one time. And he wouldn't admit this guy as an expert with 16, 17 years law enforcement experience in gang activity. No, I didn't know that Trey had a problem with expert's qualifications. But, again, there wasn't going to be an expert qualified that day.

App. p. 760, lns. 9-21. On cross, he testified that the expert was identified "very early on" to the State. In contrast, Barry Barnette, Solicitor, testified that the State filed the motion to exclude gang activity only after a chambers meeting at the beginning of trial and that he only became aware of the expert at that point. App. pp. 838-841.

While Petitioner was on the stand, he was asked if his defense attorneys discussed or prepared him to offer testimony in camera regarding his fear and apprehension of the gang. App. p. 822. He responded that they never talked about it. App. p. 822, lns. 15-22.

Petitioner was directed to the appellate decision and explained that he did not mention that the mob was a gang during his testimony because he knew "it probably would cost me." App. p. 823, lns. 6-12. He recalled his attorney coming up with the word "mob" as a substitute for "gang." App. p. 823, lns. 12=3-16.

Thereafter, counsel asked him about the testimony he could have offered at trial:

Question: Did you have fear that day because of known gang affiliations of the State's witnesses and the people present in the cul-de-sac?

Answer: My fear was more of that I knew that these were gang members and I know what they were capable of.

App. p. 823, lns. 20-25. He went on to explain that his knowledge came from living in the neighborhood with them and specific instances where he witnessed their gang activity, including a shootout in a local mall. App. pp. 823-25. After Petitioner provided testimony regarding the events of the night in question and his fear and realization that he needed to get out of there, the following testimony was elicited:

Question: Was that fear connected to your knowledge that they were gang members?

Answer: Yes, ma'am.

Question: Was that fear connected to what you had just witnessed between the victim and another individual, the fight you had seen.

Answer: Yes, ma'am.

Question: And was it your understanding that fight had gang connotation to it?

Answer: Yes, ma'am.

App. p. 827, lns. 1-10.

By way of the Order of Dismissal, the lower court found that counsel was not deficient nor was Petitioner prejudiced by counsel's handling of the gang evidence and testimony at trial. First, the lower court held that trial counsel was not deficient for failure to obtain and utilize a duly qualified expert. In his reasoning, the lower court relied upon several cases and found that "it was reasonable for Counsel to believe Watts was qualified to testify as an expert on Spartanburg gang activity." App. p. 862. The court further bolstered this finding when he found contrary to the trial court that Mr. Watts was not any less qualified than the expert he qualified at the evidentiary hearing. What the lower court has clearly ignored in making his finding is that the trial court did find that Mr. Watts was not qualified and the lower court is not in a position to overrule that finding. App. 442, 480. See Enoree Baptist Church v. Fletcher, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) ("One Circuit Court Judge does not have the authority to set aside the order of another.").

Additionally, the lower court's findings fail to acknowledge the conflicting testimony regarding the notice provided to the State regarding the utilization of the expert and the clear evidence in the record that the defense team was surprised by the State's motion to exclude and objection to the expert. Such surprise was a major issue when defense counsel repeatedly testified that the entire case hinged upon the admission of the gang evidence and testimony.

In comparing the testimony of Mr. Watts and Dr. Britz, the record reflects that Dr. Britz found that the recorded fight was mischaracterized based upon her expertise. Unlike the proffered expert, she testified regarding specific evidence found on the decedent that were indicators of gang membership. She also offered testimony regarding the State's witnesses and the Facebook photographs. Finally, she offered her opinion that the people in question were unequivocally involved in gang life. App. p. 727, lns. 4-12.

It appears that the lower court excused away counsel's deficiency by finding that the gang evidence and testimony was not relevant and that Petitioner failed to establish prejudice. Petitioner submits that the lower court relevancy and prejudice findings require no deference and amount to errors of law, which are also not supported by the testimony elicited at the evidentiary hearing and the record. The lower court erred in excusing counsel's deficiency throughout the Order and by minimally addressing the obvious prejudice, which will be discussed further below.

Despite counsel's testimony that the entire defense depended upon establishing Petitioner's fear in connection to the gang involvement, relevancy of the gang testimony and evidence seems to have been the stumbling block at every level of this case. In the Order of Dismissal, the lower court appears to hang his hat on relevancy to justify overlooking deficiency. At trial, the lower court found the testimony and evidence was not relevant and thus excluded it from trial. Finally, the South Carolina Court of Appeals held:

> We find the trial court did not abuse his discretion in finding the evidence suggesting gang associations of the victim and witnesses was not relevant. We note that although the trial court left open the possibility Sobers could offer gang evidence if he could establish the requisite relevancy, Sobers never testified the mob that surrounded his car was part of a gang. According to Sobers, the mob action caused him to fear for his life and fire his gun, but he never testified that he was more fearful because the mob was part of a gang.

> Thus, Sobers never introduced evidence that would make gang activity more relevant.

App. p. 662.

Petitioner submits that the lower court erred by excusing counsel's deficiency that is also abundantly evident from his failure to proffer the testimony of Petitioner at trial. In the Order, the lower court found the testimony of Petitioner to be both self-serving and not credible. It appears the characterization of being self-serving came from trial counsel's testimony, but the characterization as not credible is in complete contrast to trial counsel's testimony regarding his belief in Petitioner's veracity and fear resulting from the "mob" actually being a gang. As far as excusing counsel's failure to utilize Petitioner because his testimony was self-serving, the Court of Appeals did not seem concerned about whether the testimony was self-serving, the Court of Appeals was concerned that it was absent from the record. At the evidentiary hearing, Petitioner explained exactly how he knew the mob was a gang and how that knowledge caused him to be more fearful, which is the exact testimony the Court of Appeals noted was absent from the record. Ironically, counsel admitted that he knew that Judge Cole was not going to admit his expert that day, yet he failed to utilize the expert on the facts sitting at the defense table with him – the Petitioner.

In the Order of Dismissal, the lower court held: "This Court disagrees with Applicant's assertion that membership in a gang would have strengthened his testimony in support of self-defense." Order pp. 12-13. The record of trial counsel's testimony, as is summarized in part above, is very straightforward and negates the lower court's minimal findings regarding prejudice. Trial counsel was adamant that the gang testimony and evidence was vital to Petitioner's self-defense claim. On appeal, counsel argued: "The judge successfully and unfairly sterilized the gang element out of this case to the detriment of

appellant's defense." App. p. 624. Petitioner urges this Court to find that trial counsel's deficiency unfairly removed the gang element from the Petitioner's defense in a case that he opined "hinged on the gang activity involvement in the case." App. p. 788, lns. 9-11.

As a result, Petitioner asks this court to find that that there is no evidence in the record to support the lower court's finding since the record establishes that trial counsel was deficient in his handling of the gang evidence and testimony at trial. Petitioner also asks this Court to find that the lower court reached erroneous conclusions of law in failing to grant a new a trial.

CONCLUSION

As is argued in detail above, Petitioner would respectfully request that this Court grant certiorari and allow Petitioner to further address the above arguments via brief and/or oral argument. Ultimately, Petitioner would respectfully request that this Court reverse the denial of relief by the lower court and/or remand as detailed above.

Respectfully submitted,

Tricia A. Blanchette – Bar # 74904
Post Office Box 2147
Leesville, South Carolina 29070
(803) 908-3266
Attorney for Petitioner

This 24 day of September 2018.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
SEP 24 2018
S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Robin B. Stilwell, Circuit Court Judge

App. Case No. 2017-002002

Rashaun Jamine Sobers, 342645, Petitioner,

vs.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Petitioner, hereby certify that a copy of the Petition for Writ of Certiorari and Appendices, were hand delivered to Jordan A. Cox, Assistant Attorney General, this 24th day of September 2018 at the following address:

Office of the Attorney General
ATT: Jordan A. Cox, Ast. AG
1000 Assembly Street, 5th Floor
Columbia, SC 29201

Tricia A. Blanchette
S.C. Bar No. 74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266

September 24, 2018

LAW OFFICE OF

TRICIA A. BLANCHETTE

RECEIVED

SEP 24 2018

S.C. SUPREME COURT

September 24, 2018

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Rashaun Jamine Sobers v. State; App. Case No.: 2017-002002

Dear Sir:

For filing in the above referenced PCR appeal, attached please find an original and six copies of the Petition for Writ of Certiorari, unbound original and one bound copy of the Appendices and Certificate of Service.

I appreciate your assistance. Please contact me if anything further is needed.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Jordan Cox, Asst. Attorney General
Rashaun Sobers

PO Box 2147 • Leesville, SC 29070

803.908.3266 • blanchettelaw@gmail.com