

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Post Conviction Relief

SEP 24 2018

S.C. SUPREME COURT

Honorable Robin B. Stilwell, Circuit Court Judge

App. Case No. 2017-002002

Rashaun Jamine Sobers,

Petitioner,

vs.

State of South Carolina,

Respondent.

APPENDIX
VOLUME II OF II

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1 around?

2 A The markers that you see here, that's the painted
3 markers placed on the ground as to where the four tires of
4 a vehicle were setting. And it is my understanding that's
5 the vehicle in which the deceased was sitting in.

6 Q Okay.

7 A I placed markers at each one of these on top of that
8 where I could clearly see those.

9 Q When you say markers, you're referring to what?

10 A Paper yellow envelopes standing up.

11 Q Almost like cones?

12 A Yes, sir. I didn't have cones. I had those to make
13 the markers where I could see where those painted marks
14 were.

15 I entered from -- from this direction here into Basil
16 Court, turned through here and made this turn here in this
17 particular fashion, in other words, staying to the left
18 here next to the left-hand side of the cul-de-sac. And the
19 front of my vehicle reached approximately here as I came
20 around.

21 Q How many feet from the cones would you approximately
22 say that your vehicle came?

23 A It was somewhere between 6 and 8 feet. And I actually
24 performed this on -- at four different times just to ensure
25 that I was not getting close, that sort of thing and --

1 Q More importantly, tell the jury what type of vehicle
2 you were using.

3 A I was using a 2007 Honda Accord.

4 Q Is this a 2-door vehicle or a 4-door vehicle?

5 A It's actually a 2-door vehicle, but it's one of the
6 larger Honda Accords. It's a 2007.

7 Q 2007 Honda Accord. And how many times did you perform
8 this?

9 A Four times on this occasion.

10 Q And any -- have a seat.

11 (Whereupon, the witness returned to the stand.)

12 Q And on any of those four occasions did you touch one
13 of those cones, one of those orange markers?

14 A No, sir. I did not.

15 Q And you placed those markers on -- on the -- the
16 painted lines on the road, correct?

17 A Yes, sir, yes, sir. Where I could clearly see where
18 those mark were.

19 Q And how much clearance did you have with your
20 mid-sized sedan?

21 A Between 7 and 8 feet.

22 Q Okay. Answer any questions the prosecutor may have.

23 MR. BARNETTE: Thank you, Your Honor. May it please
24 the Court. Just a couple.

25

1 CROSS-EXAMINATION

2 BY MR. BARNETTE

3 Q Mr. Hice, you said you used cones?

4 A I used a regular Manila size, like a yellow, folder
5 like you have there. And I had them setting up and setting
6 on each one of these painted marks.

7 Q So you didn't use an actual car. You didn't use an
8 actual car in that spot.

9 A Oh, no, sir, no, sir.

10 Q Well, wouldn't you agree with me that that's where the
11 tires are marked, the car goes that much farther after the
12 tire -- on the back side depending on how much and how much
13 on the front.

14 A They would be a portion of the vehicle in the front
15 and in the rear of those marks.

16 Q Yes, sir. You would agree with me that would not be a
17 fair representation if you didn't use a car in that
18 situation.

19 A It would not. There would not be a vehicle setting
20 there in that spot, no, sir.

21 Q Okay. And there wasn't people out there.

22 A No, sir. I didn't observe any. People looked at me
23 from their homes, but no one was in the cul-de-sac.

24 Q This car wasn't broken down right there at that same
25 spot either, was it?

1 A No, sir, it was not.

2 Q So that car wasn't there when you did your maneuver
3 either, was it?

4 A No, sir. There were other vehicles parked well inside
5 their driveways, but no more in the actual cul-de-sac.

6 Q And that car was not there today, was it?

7 A No, sir.

8 Q As a matter of fact --

9 THE COURT: Be careful of the microphone, please.

10 Q -- the trash can that's been shown here wasn't out
11 there either, was it? The trash can shown in earlier
12 pictures.

13 A I wasn't here, but there was no trash can in the
14 cul-de-sac.

15 Q So there wasn't any trash cans out there or anything.

16 A No, sir, not -- not in the actual roadway, no.

17 Q So you would agree with me it wasn't a fair
18 representation of what happened that night.

19 A There's not another vehicle in the cul-de-sac, sir.
20 And it's my understanding there was on that particular
21 night.

22 Q And excuse me one second.

23 (Pause.)

24 Q And how did you know where to start to turn at? How
25 did you know where the defendant's car was parked at to

1 start to turn?

2 A Well, I'm familiar with the actual file itself. And
3 there is a picture depicting where a vehicle was parked or
4 stopped on this other side. When I say the other side, the
5 opposite side from where these painted marks are.

6 As far as knowing exactly where to start the turn, I
7 wouldn't know that, sir.

8 Q So you don't know where the defendant started his turn
9 or anything like that, do you?

10 A No, sir.

11 Q And you don't know about the test thing where he
12 actually moved his car also, do you?

13 A No, sir.

14 Q Thank you.

15 MR. TURNIPSEED: A couple of follow-up questions, Your
16 Honor.

17 REDIRECT EXAMINATION

18 BY MR. TURNIPSEED

19 Q Mr. Hice, I'm going to show you what's been previously
20 marked as Defendant's Exhibit No. 3. Are you familiar with
21 that document?

22 A Not familiar with that exact document, no, sir.

23 Q The car on the right-hand side, that's the one
24 depicted as where the victim, Mr. Sebastian, was shot.

25 A Yes, sir.

1 Q The car on the left is the one driven by Ra-Ra.

2 A Yes, sir.

3 Q That would be as stated up there Ra-Ra. That's
4 Mr. Rashaun Sobers.

5 Are you satisfied that had a vehicle been placed inside
6 those marks that you could have made that turn today?

7 A Yes, sir. Being that that drawing is not to scale,
8 but, yes, sir, if a vehicle was parked there generally
9 where those driveways are off to the left, if it was parked
10 there it could have made that turn.

11 It could have either -- I don't know that it could
12 have sharply turned its wheels to the right and made the
13 turn, but as it was going forward slightly it could have
14 turned without being near this vehicle here.

15 Q Without even being near this vehicle.

16 A It would have come within the same 6 to 8 feet.

17 Q And that's even if an actual vehicle had been setting
18 there.

19 A In my opinion, yes, sir.

20 MR. TURNIPSEED: No further questions, Your Honor.

21 MR. BARNETTE: Just one question.

22 RECROSS-EXAMINATION

23 BY MR. BARNETTE

24 Q You'd agree with me it'd be easier just to back up in
25 the driveway and come back out, wouldn't you?

1 MR. BRANNON: Objection.

2 MR. TURNIPSEED: Objection, Your Honor.

3 THE COURT: Overruled.

4 BY MR. BARNETTE

5 Q It'd be as easy just to back up a car and make the
6 turn a lot easier that way, back up in one of the driveways
7 and get out, wouldn't it?

8 A I would -- I would suppose you could back up but...

9 Q But you talked about the sharp turn. It'd be almost
10 impossible to make a sharp turn like that. So you'd have
11 to make a round turn. And, like you said, you just had --

12 MR. TURNIPSEED: Objection, Your Honor. He's asking
13 for speculation again.

14 THE COURT: Overruled. Well, he's been out there. If
15 he can answer it, he will. If he can't, he can say he
16 doesn't know.

17 MR. TURNIPSEED: Yes, sir.

18 BY MR. BARNETTE

19 Q Because you was talking about making a sharp -- you
20 can make a sharp turn right here and turn those wheels,
21 could you? You just said that.

22 A You -- you actually -- you actually could make that
23 sharp turn, but based on this drawing, I mean, you -- it
24 doesn't depict the actual cul-de-sac.

25 Depending on how far or back, see, there's no exact

1 place where this vehicle started from. So there is the
2 possibility that you could turn -- turn the wheels sharp
3 then and move or maneuver without, you know, hitting this
4 mark, these marks of where this vehicle was. But I have no
5 way of knowing where exactly that car was starting from.

6 Q Exactly.

7 A Yes, sir.

8 Q Thank you.

9 MR. TURNIPSEED: No further questions, Your Honor.

10 THE COURT: Step down.

11 MR. TURNIPSEED: The defense rests, Your Honor.

12 THE COURT: Any reply?

13 MR. GOWDY: No, sir, Your Honor.

14 THE COURT: All right. Ladies and gentlemen, that is
15 all of the testimony or evidence to be offered in the trial
16 of the case. What remains to be done are the lawyers'
17 final summations, after which I'll instruct you on the law,
18 and then you can begin with your deliberations.

19 Because of the time we're going to recess for lunch
20 first. We'll resume this afternoon at 1:30, at 1:30 this
21 afternoon.

22 So you are now excused for lunch. Do not discuss the
23 case. Don't permit yourselves to be exposed to any type of
24 media coverage, and don't conduct any research or do your
25 own investigation.

1 Have a good lunch, and please be back in your jury
2 room at 1:30 this afternoon, 1:30 this afternoon.

3 (The following takes place outside the presence of the
4 jury.)

5 THE COURT: Any additional motions or other matters?

6 MR. BRANNON: Your Honor, I just want to make sure
7 that that video is properly admitted into evidence, the one
8 with the video.

9 I know we talked about it, but I just want to make
10 sure that it's substituted in, because what they marked was
11 the envelope, not the disc itself.

12 MR. BARNETTE: I think what they need to do, Your
13 Honor, is Defendant's Exhibit 1 needs to become State's
14 Exhibit 4 and just be substituted for that exhibit.

15 MR. BRANNON: That's fine -- that's fine. Okay. And,
16 Your Honor --

17 THE COURT: We'll take care of that before it goes
18 back. Y'all are going to have to cue it up for the benefit
19 of the jury.

20 MR. BRANNON: Your Honor, I would renew my motion for
21 a directed verdict with the same argument that was made at
22 the end of the state's case.

23 THE COURT: All right. That motion is denied.

24 MR. BRANNON: Thank you.

25 THE COURT: Jury instruction requests by the state?

1 MR. GOWDY: Your Honor's standard jury instructions
2 would be more than sufficient for the state.

3 THE COURT: Jury instruction requests by the
4 defendant?

5 MR. BRANNON: Self-defense, Your Honor.

6 THE COURT: Okay. Any others?

7 MR. BRANNON: We would ask for involuntary. Your
8 Honor, we'd ask that you charge -- it's something about you
9 cannot infer malice with the use of a gun, by the use of a
10 gun.

11 THE COURT: Are you requesting that instruction?

12 MR. BRANNON: Yes, yes.

13 THE COURT: Well, that would be an incorrect statement
14 of the law.

15 MR. BRANNON: Well.

16 THE COURT: But I'm -- but I'm not going to violate
17 the Belcher decision if I understand it correctly.

18 MR. BRANNON: You do -- you do, Your Honor. You do.
19 You understand that, and forgive me for misspeaking.
20 Self-defense, involuntary. Thank you, Your Honor.

21 MR. TURNIPSEED: As well as voluntary. Do we want to
22 do that?

23 MR. BRANNON: Yes, Your Honor. I would ask. I would
24 make that request as well.

25 THE COURT: All right. Solicitor.

1 MR. GOWDY: Your Honor, I'll take them in the order
2 that it first arose to them.

3 Involuntary. I will need the Court's help. I know
4 that there are two different ways to get there. There are
5 two prongs.

6 One is if you're doing a lawful act but in a reckless
7 way. The other is doing an unlawful act, I believe, that
8 is not calculated to cause death or serious bodily injury.

9 This defendant was doing an unlawful act. He
10 unlawfully had possession of a gun. So that's an unlawful
11 act. It is calculated to cause death or serious bodily
12 injury, which is the pulling of a trigger and firing at
13 somebody. How in the world can that be involuntary
14 manslaughter? It's either self-defense or it's nothing.

15 With respect to voluntary, it has to be a killing in a
16 sudden heat of passion without sufficient legal provocation
17 or upon sufficient legal provocation. Where's the passion
18 between he and Sebastian?

19 It's either self-defense or it's murder. It's not
20 involuntary; it's not voluntary. There's no passion.
21 There's nothing Sebastian did to provoke him. It's just a
22 shooting. He either shot in self-defense or he shot and he
23 murdered him. Those are the two options.

24 MR. BRANNON: Respectfully disagree, Your Honor. His
25 testimony was that -- I agree that he was unlawfully in

1 possession of a firearm. I agree with that part of what
2 Trey argued.

3 However, Your Honor, his testimony was that he simply
4 fired pointing at no one. He did not point the gun at
5 anyone, did not intend to kill anyone. It was done in a
6 self-defense mode.

7 However, Your Honor, you want to know where the
8 passion or the heat came from. It came from the mob that
9 was trying to pull him out of the car. And that's
10 testimony that came from the witness stand, Your Honor. So
11 I believe that we are entitled to all of those charges.

12 THE COURT: The heat of passion, the mob had heat of
13 passion?

14 MR. BRANNON: No, sir.

15 THE COURT: The defendant did? Because I didn't hear
16 that testimony.

17 MR. BRANNON: The heat of passion in this case would
18 be the fear, Your Honor, the fear. He was reacting out of
19 fear.

20 THE COURT: Okay.

21 MR. GOWDY: Your Honor, the Supreme Court just decided
22 the State vs. Norman Starnes. It's a case that I have some
23 familiarity with.

24 The defense argument there before the Supreme Court is
25 almost exactly what it is here, any time you allege

1 self-defense you also ought to get voluntary and
2 involuntary. And the Court specifically rejected that.

3 Just because you may be fearful does not mean that you
4 get a voluntary manslaughter charge. There's no passion.
5 He didn't testify that there was any passion. He testified
6 that he shot in self-defense. They're getting a
7 self-defense charge.

8 THE COURT: Yeah. They are. I'll reflect upon that
9 over lunch and let y'all know after lunch.

10 MR. BRANNON: I appreciate that, Your Honor. And I
11 know that I have worn on your patience. But, Your Honor,
12 your decision on charges will affect my close, so.

13 THE COURT: Well, be prepared.

14 MR. BRANNON: Thank you, Your Honor.

15 THE COURT: All right. Court's in recess until 1:30.

16 (Whereupon, a recess was taken.)

17 THE COURT: Mr. Brannon, I have reviewed quite a
18 number of cases that relate to your issue of whether or not
19 to charge voluntary manslaughter, as well as involuntary
20 manslaughter.

21 It appears from my review and refreshing my
22 recollection that clearly voluntary manslaughter requires a
23 killing in sudden heat of passion based upon sufficient
24 legal provocation.

25 In this case I don't find there's any evidence of

1 sudden heat of passion. You can argue there was
2 provocation, but there's no sudden heat of passion, it
3 would appear to me, because that would require the
4 defendant to have a criminal intent.

5 His testimony and the evidence reflects that if you
6 believe the facts to be as he stated -- as he testified
7 that he would have been acting in self-defense, which is
8 not a criminal act. It's not criminal intent. It's
9 justified.

10 So of course he is entitled to a self-defense
11 instruction. So there is no evidence of sudden heat of
12 passion.

13 With respect to involuntary manslaughter, involuntary
14 manslaughter can be established in two ways. One, it is
15 the unintentional killing of another without malice but
16 while engaged in an unlawful activity not naturally tending
17 to cause death or result in great bodily harm.

18 In this case the wielding of the firearm and
19 indiscriminate shooting of a firearm certainly is an act
20 which naturally tends to cause death or result in serious
21 bodily harm. So he's not entitled to an involuntary
22 manslaughter instruction based upon that definition.

23 The other definition is it is the unintentional
24 killing of another without malice but while engaged in a
25 lawful activity with a reckless disregard.

1 In this case the only lawful activity you could argue
2 that he would have been engaged in the use of the firearm
3 was acting in self-defense. And so if that's the lawful
4 activity that he was engaged in, the use of the firearm,
5 then he's not guilty of anything. He could not be guilty
6 of involuntary manslaughter where he's acting in
7 self-defense. He'd have to be found not guilty.

8 So based upon my review of the law it appears that
9 the -- an instruction for voluntary manslaughter, as well
10 as involuntary manslaughter, will not be appropriate, and
11 therefore those instructions are declined.

12 I will instruct the jury on the charge of murder and
13 of self-defense.

14 All right. Anything else before the jury is brought
15 in?

16 MR. GOWDY: No, sir, Your Honor.

17 MR. BRANNON: No. Thank you.

18 THE COURT: Okay. Bring them in.

19 Let me see y'all up here while they are coming in.

20 (The following takes place in the presence of the
21 jury.)

22 THE COURT: Let's do this. We are not quite ready.

23 Let me ask the jury to go please back to your jury
24 room. I'll bring you back in just a few minutes. Okay.

25 (The following takes place outside the presence of the

1 jury.)

2 THE COURT: All right. All are present.

3 Now, I understand that the lawyers have conferred and
4 that there is an agreement to -- for the Court to charge
5 the jury on the lesser offense of voluntary manslaughter.

6 MR. GOWDY: Yes, sir, Your Honor.

7 MR. BRANNON: That's correct, Your Honor.

8 THE COURT: All right. Mr. Sobers, you heard me
9 earlier indicate that I was not going to charge the offense
10 of voluntary manslaughter, the lesser offense that is to
11 murder.

12 Your lawyers have asked me to, and the state has
13 consented to it.

14 Is that a trial strategy that you and your lawyers
15 have discussed, requesting me to allow the jury to consider
16 the lesser included offense?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: And are you in agreement with your
19 lawyers' decision to ask me to charge the jury the lesser
20 included offense of voluntary manslaughter?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: And you understand that if you did not
23 request it I may not do it.

24 THE DEFENDANT: Yes, sir.

25 THE COURT: But you and your lawyers have discussed

1 it. And y'all want me to do that?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Do you want the jury to be able to
4 consider that lesser included offense?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: And you've plenty of time to talk with
7 your lawyers about that decision and about your request?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: And you're satisfied with it?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Okay. All right. Any other matters?

12 MR. GOWDY: No, sir, Your Honor.

13 MR.. BRANNON: No, Your Honor.

14 THE COURT: Okay. Bring the jury back.

15 (The following takes place in the presence of the
16 jury.)

17 THE COURT: All right. Ladies and gentlemen, as you
18 know, all of the evidence has been received, and therefore
19 what remains to be done are the lawyers' final summations
20 after which I'll instruct you on the law. And then you can
21 begin with your deliberations in the case.

22 So please give the lawyers your attention now as they
23 give you their final summations.

24 Mr. Brannon.

25 MR. BRANNON: May it please the Court.

Closing arguments

1 THE COURT: Yes, sir.

2 MR. BRANNON: Ladies and gentlemen of the jury, on
3 behalf of my law partner, Brac Turnipseed, Ryan Langley,
4 and, most importantly, Rashaun Sobers I want to thank you
5 for your time and attention that you've paid during the
6 trial of this matter.

7 I am certain that you are tired, because I know how
8 tired I am. But I would like to quote my colleague, Mr.
9 Trey Gowdy, on a couple of the statements that he made
10 during his opening statement or presentation to the jury.

11 He said he just wanted you to use your God-given
12 common sense. And so for the next little while through my
13 close and Mr. Gowdy's close and then the judge's charge,
14 please just stick with us for a little while longer using
15 that God-given common sense.

16 And think about another thing that Mr. Gowdy said in
17 his opening. He said this was just a bunch of school kids
18 after school playing in a field.

19 In this case the first witness that was called was
20 Deputy Kesler. Now, Deputy Kesler's been on the witness
21 stand twice. But he was the first witness that was called.
22 And I'm certainly not going to go through everything that
23 each witness said, but I want to hit some points.

24 Deputy Kesler, again, was one of the first or the
25 first officer to arrive on Basil Court. This is a drawing

Closing arguments

1 that's been admitted into evidence. Not a drawing. It's a
2 picture that's been admitted into evidence.

3 And this is Basil Court right here, that little short
4 street with one, two, three, four, five houses around it.
5 And then of course there's two over here at the beginning
6 of it. But that's Basil Court.

7 Deputy Kesler was the first one that showed up, or one
8 of the first ones. And when he got there he told you that
9 the back door, the back driver's-side door, on this blue
10 Malibu -- on this blue Malibu right there, that back door
11 was open.

12 He also told you that the back window or the window in
13 that back door was up. And we know because of the owner of
14 the car's testimony that window has not been broken. So
15 Kesler told you the door was open and the window was up.

16 He told you that there was between 150 and 200 people
17 on the scene when he got there. And then he went about and
18 secured the scene to make sure that no evidence was moved
19 or destroyed or anything like that.

20 After Deputy Kesler got off the stand they called
21 Quita to the witness stand. Quita was in the car. Quita
22 was in that group of people that was chasing Devon.

23 Quita told us that she was friends with Trey.
24 Actually he's her cousin. Friends with Mr. Smith; friends
25 with Sebastian; friends with Jayquan; friends with several

Closing arguments

1 of the others.

2 But she said she didn't know Devon. Didn't know
3 Devon. What she knew about my client was that they called
4 him Ra-Ra, but they weren't friends either.

5 Quita said that she was already in Ms. Smith's car,
6 that blue car. She was already in Ms. Smith's car when
7 Trey went over to Ra-Ra's car. She was already in the car
8 when Trey went over there.

9 Now, I want to take you back to Deputy Kesler. You
10 see, it was through Deputy Kesler that this document,
11 Defense 3, was admitted.

12 In this document if you look right in here it says,
13 "Trey was visibly upset. He was crying and had trouble
14 putting his sentences together. I asked him to have a seat
15 on the curb and tell me what happened. He stated that
16 Ra-Ra pulled up and he went to ask him why he called his
17 sister a -- he stated he went back to the car and started
18 hearing shots."

19 This document's going to be in. I'm not hiding
20 anything from you. You can read the whole thing. But that
21 document right there or that portion of that document,
22 along with Quita, when Quita said she was in the car when
23 she saw Trey go over to Ra-Ra's car, those two things match
24 up.

25 She also said that Jayquan went to Ra-Ra's car, all to

Closing arguments

1 ask about what my client allegedly said to Trey's sister a
2 week or so before April the 21st of 2009.

3 The next witness they called was Trey. Now, Trey's
4 the one that we know -- we know because of the video --
5 went to Ra-Ra's car at least once. We know he went there
6 once.

7 Importantly, what we know about Trey because he told
8 us is he knows about guns. Knows about them. He could
9 tell what kind of caliber it was just by looking at it.

10 Now, he also said in his statement and in his
11 testimony that when he walked up to the car he saw a gun.
12 But he -- he wasn't -- he wasn't scared of that gun. And
13 we know that because in a minute we're going to watch a
14 portion of that video. And you'll see him walk up to
15 Ra-Ra's car and then turn and walk away.

16 What you don't see is him going like this. You don't
17 see him tell anybody gun. You don't see anything. And
18 remember there's an audio on this disc too. So if he'd
19 have yelled gun we'd have known about it. But he wants us
20 to believe that when he walked over there he saw a gun, and
21 then he walked away. He watched a fight, and then he got
22 in the car to go away.

23 Now, it's also interesting that when Trey testified I
24 showed him his written statement that was taken on April
25 the 29th of 2009, and in his written statement he says, "I

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1 walked over and asked him why he called my sister a bitch.
2 And then I went and got in the car and we were leaving."

3 Well, the 13 of you and me know that that's not true,
4 because we've seen a video. And what we know is he went to
5 the car and then he went and watched a fight.
6 Unfortunately, the videographer stopped taking video.

7 Trey told us, just like Quita told us, that they
8 believed that Rashaun Sobers' car was parked facing theirs,
9 kind of like in a T. That's what they told us. But they
10 both also told us that he never moved his car until he
11 drove away.

12 Now, Quita also said she saw Ra-Ra sitting in the car
13 with a female, but she must have been mistaken because
14 there was never a female in that car.

15 Trey said I told the police what they wanted to know.
16 But he admitted that he didn't tell them about the fight in
17 his statement.

18 Then they called Jayquan. Jayquan was an interesting
19 guy because, you see, Jayquan admits that he too went to
20 Ra-Ra's car and asked him about that same incident a week
21 or two before.

22 But, more importantly, from Devon, the next witness,
23 we learned that Jayquan was the one that talked Devon into
24 coming back to man-up, come back and get your butt kicked,
25 boy, come back and man-up.

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1 So we know. We know that Trey and Jayquan were at
2 that car, were at Ra-Ra's car.

3 They called Devon. Devon's the one that you saw on
4 that video get beat up. He admitted that he was running
5 initially in that first segment of video because he was
6 afraid of getting beat up. He ran for his safety. He ran
7 for his life. And that mob, that group, chased him.

8 But, ladies and gentlemen, they did more than that,
9 and we know it to be true. They split up. Mr. Smith was
10 in the mob that chased. The videographer drove the car.
11 They split up. They worked together. They chased Devon --
12 Devon who was running because he was afraid for his safety.

13 All Devon did was smack him in the head and maybe
14 smack him in the face. Don't know. They said different
15 areas of the smack.

16 Devon said he was a friend of Sebastian. He was his
17 friend, and all he did was this or this. And he got beat
18 down for it, because another one of his friends, Jayquan,
19 said come back, man-up.

20 Trey, Quita, Jayquan, Mr. Smith. They all gave
21 written statements on April the 29th of 2009. But Devon,
22 the guy who got beat down, there is no statement, none
23 whatsoever. Keep that in mind.

24 Ricky Smith. They were driving. They were driving
25 his mama's car, and he was in that mob. He was in that

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1 group of people, but he didn't drive his mama's car over to
2 Basil Court. No. He let somebody else drive it over to
3 Basil Court because he was running to see the fight. And
4 then I asked him you mean you were chasing, and he said
5 yes. So, you see, he was in the chase mob.

6 Again, Catina Smith was the owner of the car. That's
7 Mr. Smith's mother. She was on the witness stand very
8 briefly. That back window has never been broken, never
9 been broken.

10 Then we get Officer Davis on the witness stand.
11 Officer Davis was called as a witness to talk about some
12 photographs that had been taken, these photographs right
13 here.

14 He indicated that that doweling, that doweling rod,
15 was put in an indentation in the front of that blue -- in the
16 front door of that blue Malibu, and it was used to show
17 direction and trajectory.

18 I asked him if that -- if that strike -- the
19 trajectory of that bullet was in an upward angle. And he
20 said, yeah, kind of. But he was called to introduce these
21 two photographs into evidence so that you could see them.

22 Then they called David Hogsed to the witness stand.
23 Mr. Hogsed is a deputy, a fine gentleman. He's one of
24 those C. S. I. guys.

25 And I asked him questions about the evidence that had

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1 been collected in this case and different photographs and
2 stuff like that. And he processed most of the scenes.

3 And the question that I asked him that was most
4 interesting, at least to me, was where's the bloody
5 clothing except for that of Sebastian. And he said to my
6 knowledge there was none collected.

7 This is a picture of the back seat of that blue
8 Malibu. You can see the seatbelt there, and it's
9 bloodstained. But that area right there is a blood stain.
10 And right up along here are blood stains.

11 You're going to have all of these pictures back there
12 in the jury room when you go back to deliberate. Take a
13 look at that picture, because, you see, the witnesses, the
14 lay witnesses, the eye witnesses that testified, they all
15 want you to believe that they were in that car.

16 Remember. You got Mr. Smith driving. You've got the
17 photographer Phoenix on the passenger side in the front.
18 You've got Sebastian on the driver's-side back. You've got
19 Quita in the middle, and you've got Trey on the
20 passenger-side back seat.

21 Okay. They're all in the car according to their
22 statement. Where's Quita's bloody clothes? They're not in
23 evidence. They weren't collected. But yet Quita was there
24 on Basil Court the night of April the 29th -- 21st --
25 excuse me. They didn't ask her for her clothes. They

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1 didn't ask to see them. There were no bloodstains taken
2 from any clothes that she had on, because she wasn't in the
3 car. She doesn't have bloody clothes because she wasn't in
4 the car.

5 After Deputy Hogsed they called Investigator Taylor.
6 And he's a fine gentleman, a great witness. But basically
7 what he did was go to Charlotte and arrest my client. He
8 didn't know anything about the investigation. He just
9 drove to Charlotte and got him.

10 Then they called Ms. Simmons, the SLED lady. She told
11 you about the GSR test. She told you that Sebastian
12 allegedly didn't have any GSR on his hands.

13 But she also told you that part of the GSR test, part
14 of the stuff that they needed to test for GSR on that red
15 or burgundy Impala that belongs to Ra-Ra, wasn't sent to
16 SLED for testing.

17 Keep in mind in my friend and my partner's opening he
18 said this is the state's courtroom. That's Trey Gowdy.
19 He's the state. That's Barry Barnette. He's the state.

20 They're prosecuting Rashaun Sobers for murder, and
21 there was some evidence there that could have been
22 obtained, that could have been tested. And Ila Simmons
23 could have come in and said there's no gunshot residue
24 there. But, ladies and gentlemen, the state, the owner of
25 this courtroom, didn't produce the evidence for Ila Simmons

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1 to test. She told you that. I didn't. It wasn't there.
2 She couldn't do it.

3 And then they called Dr. Wren. Now, Dr. Wren is a
4 pathologist, and I'm just going to tell you. You heard us.
5 We stipulated to his admissibility as an expert witness,
6 because he's the smartest man in the world. He's got more
7 degrees and experience than anybody that I've ever met.
8 And what he told you was that Sebastian died of a bullet to
9 the brain. That's what he told you.

10 And then I asked the question. And I'm sure you
11 probably thought it was a bit smart aleck, but, "Dr. Wren,
12 do you know who did it?" And he said, "Well, I can tell
13 you who didn't." Dr. Wren is brilliant, but all he could
14 tell you is how he died, what caused his death, not who
15 caused his death.

16 Ladies and gentlemen, in this case the state has the
17 burden to prove beyond a reasonable doubt that my client is
18 guilty of murder. Murder is the killing of another, the
19 taking of another life, with malice aforethought.

20 Now, ladies and gentlemen, I've got to ask you a
21 question because I've been wondering it since Tuesday
22 morning. Why does the state think my client killed him?
23 Why? Why did he shoot him?

24 Mr. Gowdy is so eloquent, and he does a wonderful job
25 questioning. But he asked every one of his witnesses did

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1 Ra-Ra have anything to do with that fight, did Rashaun
2 Sobers know Sebastian, did Rashaun Sobers get out of his
3 car, did Rashaun Sobers have anything to do with the
4 incident that you saw on the video. The answer was no.
5 Why did he shoot?

6 Then we called Mr. Kesler back. And I'm not going to
7 go further into that. He got in the second time to bring
8 that statement in.

9 Then Ms. Sullivan testified. Very short witness. We
10 brought her here to tell you that it wasn't uncommon for
11 Rashaun Sobers to come and visit her, for him to be in that
12 neighborhood. That's it.

13 We called Ra-Ra's grandmother. And she testified that
14 the house that she lived in before -- she lived some place
15 on April of '09, but before that she lived in an apartment
16 complex. And her apartment had been broken into three
17 times.

18 The only reason that's important is because my client
19 told you he bought a gun illegally. And the reason he did
20 it is because the house kept getting broke into. So we
21 called grandma to confirm their house had, in fact, been
22 broken into.

23 Mr. Gowdy wants you to believe that my client went to
24 Charlotte to run from the police. Well, we also asked
25 grandma. Isn't it true that Ra-Ra's mom at your home told

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1 the police where he was? Yeah. And he had called them.
2 He called mom. We know he called mom, because if he was
3 hiding she wouldn't have known where he was at. He called
4 his mom. She told the police. They knew where to go and
5 get him.

6 Now, we have a video and we have a picture. I'm going
7 to show you first the picture. That is a picture that was
8 drawn by a Spartanburg County sheriff's deputy in
9 Charlotte, North Carolina, while they're talking to Rashaun
10 Sobers.

11 Now, we know that during this same conversation
12 Rashaun Sobers told the story about Trey -- not Trey Gowdy
13 but the other Trey -- having a gun. And we know that he
14 didn't tell him about a mob. But you know what we do know?
15 Is he told them that his car was there, that Ricky's car
16 was there.

17 That's the video. That's video. That's video of that
18 picture. Ra-Ra may have lied to the police about Trey
19 Vaughn having a gun. He may not have told them about the
20 mob. But he told them where the cars are. And we know
21 that he wasn't lying about that because you see it on
22 video. The cars were parked at least in some semblance of
23 that nature right there on Basil Court. We know that to be
24 true.

25 Now, what we also have in evidence are these

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1 photographs, these two photographs. Those are pretty much
2 two photographs of the same thing right there.

3 Remember that is the dent caused by an alleged bullet.
4 And that dowel rod shows the direction and trajectory of
5 that bullet.

6 Okay. Now, if -- well, what we also know is that that
7 back door was open. We know that back door was open. We
8 know that back door was open because we've got another
9 picture right here, right there, that was introduced
10 through Deputy Hogsed. And I asked him did the door have
11 to be open for that mark to be made, and he said yes.
12 Again, using your God-given common sense you know that that
13 door had to be open for that dent to be made.

14 What we also know is Dr. Wren said that that bullet
15 that was removed from Sebastian had a mark on it. He said
16 that it looked like it ricocheted off of something. So
17 that back door was open, because you've got Sebastian in
18 the car. You've got a window that isn't broken. So the
19 door had to be open.

20 Okay. Please look at the trajectory of that bullet
21 hole and that doweling. And keep in mind at the same time
22 that that door was open.

23 Now, imagine in your mind for just a minute that the
24 red Impala is parked like Quita and Trey want you to
25 believe that it is, that they're parked in kind of a "T"

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1 shape.

2 Okay. For that to be true we know a couple of things.
3 That bullet is coming from the rear of that car at an
4 upward angle.

5 Now, if I'm in the red car -- I'm not going to point
6 it at you. If I'm in the red car and the jury box is
7 that -- and the witness stand is the blue car, and we're
8 parked in a "T" and I'm -- if I'm in the driver's side and
9 I go out and shoot like this, if I have the gun and I've
10 shot the bullet that strikes that driver's-side door it's
11 not going to be in an up angle and it's not going to be
12 from the rear. It's going to be direct on and probably at
13 a downward angle.

14 Okay. Now, now, wait a minute, because I know -- I
15 know what Trey's going to say because Barry got into it
16 too. Maybe, maybe that front door was open. Maybe it was.

17 So now you've got both doors open. Okay. Maybe,
18 maybe that gives you the angle. Maybe it does. It still
19 doesn't give you the upward angle. It doesn't give you the
20 upward trajectory. But it may give you the angle.

21 But then the state's got a bigger problem, because if
22 I'm in the red car and my headlights are facing the side of
23 that blue car and I'm shooting out the window, in order to
24 hit Sebastian with a shot my bullet's now gotta go past two
25 doors and take a left-hand turn before it can hit that door

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1 frame and then strike Sebastian.

2 So now it's got to be a magic bullet. It's got to be
3 a bullet that can avoid two car doors, strike the interior
4 frame and then kill Sebastian.

5 So if I'm parked like this and that's the blue car and
6 this is the back door and it's open and this is the front
7 door and it's open, my bullet's got to go zoop like that.
8 Or I guess they could say he went like that. I guess they
9 could say that. But you still got a door and a window to
10 get through. And, by golly, the window ain't broke.

11 Ladies and gentlemen, Rashaun's car was never parked
12 facing that blue car. The state gave me that picture.
13 That's a South Carolina law enforcement officer with a
14 glove on holding a doweling. I didn't make this up. They
15 gave me that picture.

16 And what it proves, ladies and gentlemen, is that
17 Ra-Ra's car was never pointed at that blue car. Never.
18 And he didn't shoot out his driver's-side window and kill
19 somebody. That's not what happened.

20 Well, you've either got that story or you've got the
21 story where his car was parked just like it was in this
22 drawing, just like that drawing right there.

23 Okay. Now, wait a minute. There might be one more
24 shot. Maybe, maybe Ra-Ra turned his car around and he was
25 driving down the road and as he was going by he shot out

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1 the driver's-side window. Maybe, maybe that's what it was.
2 Okay. Maybe they're going to try and say that.

3 Well, here's what we know. We know for a fact the
4 back door on this blue car is open. Right? It's open. So
5 if Ra-Ra's driving around the car speeding away and he's
6 shooting as he goes, he shoots back, maybe a bullet did
7 strike Sebastian. Maybe.

8 But you know what didn't happen? The dent in the
9 front door didn't happen because the back door's open. You
10 can't dent the front door with the back door open if you're
11 driving down the road. It can't work; it doesn't work; it
12 won't work. The only way this could happen is those cars
13 were parked like that. The only way. Now, the cars are
14 parked like that.

15 Will you please play that video? I'm sorry. I need
16 for you to play the first one.

17 (Whereupon, the video was played for the jury.)

18 MR. BRANNON: I'm going to ask you. When you go back
19 to the jury room you're going to have this disc, and you'll
20 have a computer that you can play it on. But look at the
21 time right there. That video started at 1919. That's
22 7:19 p.m. on April the 21st of 2009.

23 Did you hear them? Did you hear them talk? Hold him,
24 get him, hold him. They were working together -- they were
25 working together.

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1 (Whereupon, the video was played for the jury.)

2 MR. BRANNON: This video started at 1923, 7:23 p.m.,
3 just a couple of minutes after the first segment of video.

4 Remember there was a stipulation into evidence. The
5 first 9-1-1 call reporting Sebastian's death came in at
6 7:29, six minutes from when that video starts to when 9-1-1
7 gets called about Sebastian's having been shot.

8 Did you hear what they said? Rock his ass. Rock him.
9 Take him down. You'll have it back there, and I ask you to
10 hear what they said.

11 Remember the state has the burden to prove beyond a
12 reasonable doubt everything that is required to convict
13 Rashaun Sobers.

14 You know, I'm sure that you think that sometimes
15 lawyers are jerks. I'm sure that I gave you multiple
16 reasons to feel that I am. But I objected when the state
17 put their version of this video in, because if you'll
18 remember the first time you saw the video it didn't have
19 sound.

20 Okay. Now, I get my evidence from them. My disc, my
21 video, has sound. They put one in that didn't, because if
22 you remember in the opening statement Mr. Gowdy wanted you
23 to believe that this was a group of young people having fun
24 after school playing in the park.

25 He didn't want you to hear rock him, beat him down.

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1 He didn't want you to hear. Hold him. He didn't want you
2 to hear that this was a group of people, a mob of people,
3 working together. That's what it was.

4 There was get him, knock him out, hold him. And then
5 we know not on the tape but by the testimony that Treyquan,
6 a member of this mob, talked Devon into coming back to
7 man-up.

8 They worked together. This group, this mob, worked
9 together to accomplish the beat-down of Devon. They split
10 up. They chased him. They had a car drive around. They
11 worked together.

12 Ladies and gentlemen, they worked together to get
13 their friend. That group of people worked together to get
14 their friend. Their witnesses said that they were friends.

15 What do you reckon that mob of people would do to
16 someone who wasn't their friend who called their sister a
17 bitch? They worked together to beat down Devon. They
18 chased him. They split up. They talked him into coming
19 back. They worked together to beat down their friend.

20 What do you reckon they would do to someone who wasn't
21 their friend who insulted their sister? If they'll work
22 together to beat down their friend do you reckon they'll
23 work together to get someone who isn't their friend who
24 called their sister a bitch?

25 Ladies and gentlemen, what we know is that at 1723

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1 that fight hadn't even taken place. But at
2 7:29 somebody -- I believe it was Quita -- had called
3 9-1-1. In six minutes the fight takes place and Sebastian
4 is shot.

5 Why did Ra-Ra shoot his gun? Why did he shoot his
6 gun? He didn't even know Sebastian. They weren't friends;
7 they weren't enemies. He had nothing to do with that
8 fight. He had nothing to do with anything. He never got
9 out of his car. Why did he shoot his gun?

10 The state hasn't shown you that. They don't know why
11 he shot the gun. In fact, they don't know he shot the gun.
12 They don't know how he died. They don't.

13 What happened was seconds after that fight, seconds
14 after that video ended, that same mob circled that red car.
15 They circled that red car. They grabbed him by the shirt
16 and was pulling him out of the front door, out of the front
17 window. Others opened the driver -- the passenger-side
18 front and back door.

19 That same mob that worked together to beat down Devon
20 worked together to get Ra-Ra. They came after him. They
21 went to his driver's side. They were pulling. They went
22 to the passenger side and were jerking. Get his keys, get
23 his phone. They chased down Devon, and they were after
24 him, and it all happened in six minutes.

25 We know that the red car was never pointed at the blue

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1 car. We know that because of the state's own evidence. It
2 doesn't work. They haven't introduced the magic bullet.
3 It doesn't work. The two cars were parked somewhat side by
4 side apart from each other on opposite sides of that
5 cul-de-sac.

6 Yeah. Ra-Ra had a gun. Yes, he did. But he never
7 got out of his car. He sat in his car the whole time. He
8 didn't know Sebastian. And he didn't ask for a fight.
9 They came to him. And when they came to him they opened
10 the passenger doors.

11 As they were jerking him and trying to get him out of
12 his car he did get his gun, and he did fire off two shots.
13 He did. One of them may have struck Sebastian, one of
14 them.

15 Do you ever wonder why a young man like Trey knows so
16 much about a gun? Do you ever wonder why the first shot
17 didn't startle Mr. Smith, Ricky? Didn't startle him.
18 First shot didn't.

19 We heard Deputy Kesler say there'd been other shooting
20 incidents in the area. Ladies and gentlemen, I'm telling
21 you right now we don't know how many guns were there. We
22 don't know. And I'm telling you that that bullet strike on
23 that front-car door makes no sense in this case, none
24 whatsoever.

25 There is no way, no way, that a bullet that came from

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1 his gun made that mark. Think about it. Again, to quote
2 my friend, use your God-given common sense. That bullet
3 strike in that front door is a puzzle.

4 Mr. Hice told you that he did four times in a Honda
5 Accord park approximately where Rashaun Sobers parked and
6 then was able to turn and not damage or touch or manipulate
7 or alter those file folders that he had set up where we
8 know the blue car was setting.

9 Now, Investigator Williams, wonderful gentleman. I've
10 known him for years, and I'm probably sure that in his
11 Crown Vic he couldn't make that big turn. But nobody was
12 driving the Crown Vic on April 21st.

13 Rashaun Sobers pulled his gun in self-defense. He was
14 being drug out of that car. When he fired the gun he
15 didn't know where it was pointed. He didn't know who was
16 on the other end, and he had no intent to kill anyone.

17 What he intended to do was get free from the mob, from
18 the group that was working together. And as soon as he
19 fired that gun that mob scattered. As soon as they
20 scattered he was out of there. He swung around, he turned
21 around and he got out of there.

22 Now, ladies and gentlemen, you know, I don't know why
23 he did what he did after that. I don't know why he went to
24 Charlotte. But I can tell you that Rashaun Sobers wasn't
25 born and raised at the Spartanburg Country Club. Rashaun

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1 Sobers was born in New York State. Rashaun Sobers hadn't
2 been in South Carolina very long, and Rashaun Sobers was
3 scared.

4 You know, the state wants to make a big deal about the
5 car was found in Inman. My client told me that he took the
6 car to Papa's Breakfast Nook. But you know something? It
7 doesn't prove anything about Sebastian's death, whether he
8 took it to Papa's Breakfast Nook and somebody joy rode it
9 out to Inman or he went to Inman. It doesn't matter. It
10 doesn't. But I believe Ra-Ra.

11 Now, he makes his way to Charlotte. He made his way
12 to Charlotte because he was afraid. He wasn't from here.
13 And when he talked to the investigators he told them a
14 story.

15 Now, let's think about that story for a minute. He
16 didn't have to say anything. He was advised of his right
17 to remain silent. He didn't have to say anything.

18 He could have told them that day the same story that
19 he told you yesterday and that I have reiterated over and
20 over again. But he chose, in fact, to say something that
21 wasn't true.

22 But one thing is for sure, and it doesn't matter. He
23 was going to jail. It doesn't matter if he drove his car
24 to Inman or not, and it doesn't matter what he told those
25 sheriff's deputies. He was going to jail.

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1 What we know is the cars could not have been parked in
2 the "T" shape. It had to have been parked side by side.
3 What we know is the mob or the group acted together. They
4 worked together. And they accomplished their goal with
5 Devon. It just didn't work the second time.

6 Now, ladies and gentlemen, the judge is going to tell
7 you the law in this case. And so what you hear from me is
8 just my interpretation or rendition.

9 But, again, the state has the burden to prove beyond a
10 reasonable doubt. The judge will tell you, I believe, that
11 a reasonable doubt is that kind of doubt that would make a
12 reasonable person hesitate to act.

13 Each and every one of you because you're sitting on
14 this jury is a reasonable person. So if anything in this
15 case makes you hesitate to act, makes you go hum, that's a
16 reasonable doubt.

17 The state has to prove beyond a reasonable doubt that
18 Rashaun Sobers took Sebastian's life with malice
19 aforethought. Malice means with an evil or mean spirit.
20 And aforethought means that quick before he did it. The
21 state hasn't even told you why he did it, let alone tell
22 you that he intended to do it.

23 Malice is mean. Aforethought is before. That's it.
24 They have to prove beyond a reasonable doubt that he took
25 his life with malice aforethought.

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1 Now, ladies and gentlemen, our defense in this case,
2 what we are positioning to you, is self-defense, that our
3 client acted in self-defense. The judge, again, will tell
4 you the law of self-defense. But it goes something like
5 this. Rashaun Sobers was without fault in bringing on this
6 act.

7 Now, y'all are sitting there thinking, well, he had a
8 gun and he told you that it was -- it was bought illegally.
9 The fact that Ra-Ra had a gun isn't what brought this act
10 on. It was the mob coming to his car that brought this act
11 on.

12 You see, Rashaun Sobers isn't charged today with
13 unlawful possession of a weapon. He's charged with murder.
14 It's not the unlawful carrying of a gun that brought this
15 on. It's the mob coming to his car.

16 You have to believe that the defendant has to have
17 believed that his life was in imminent danger of serious
18 bodily injury or death. He has to believe that, and a
19 reasonable person of ordinary firmness in the same position
20 would have believed the same thing, and that he had no
21 other means to escape the peril, to escape the imminent
22 bodily injury or death, than to act as he did.

23 You know, Trey asked him why didn't you leave when --
24 excuse me. Mr. Gowdy asked him why didn't you leave when
25 Trey and Sebastian walked away. My client told you and

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1 told him that he thought that it was over because Little
2 Greg stepped in and said cool down, it's over. They walked
3 away.

4 My client had seconds to react. After that fight was
5 over that mob converged on his car. Once that mob
6 converged on his car he had no other means to escape the
7 peril of imminent bodily injury. Once he was encircled,
8 once he was crowded, he had nowhere to go.

9 Ladies and gentlemen, self-defense is a complete
10 defense. So if you believe that Rashaun Sobers acted in
11 self-defense he is not guilty.

12 But there's another law that the judge is going to
13 charge you on, and that's called the law of voluntary
14 manslaughter.

15 Again, the judge will tell you the actual law, but
16 voluntary manslaughter is the unlawful killing of another
17 without malice in the sudden heat of passion upon
18 sufficient legal provocation.

19 He's going to go a lot deeper into it, but, you see,
20 murder has malice. Voluntary doesn't. I told you that
21 self-defense is a complete defense to murder. It's a
22 complete defense to voluntary manslaughter as well.

23 If you believe that Rashaun Sobers was without fault
24 in bringing on the mob attacking him, if you believe that
25 he thought he was in imminent peril, imminent risk of

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1 danger, and that if you put yourself in that same position
2 that you would have believed the same thing, and you
3 believe that he had no other way to get away from it, he's
4 not guilty of voluntary either.

5 In Brac Turnipseed's opening he said imagine yourself
6 in a car at the end of a road and a group or a mob
7 encircles your car and starts -- and starts to assault you.
8 What would you do? Rashaun Sobers in his own self-defense
9 drew a gun to defend himself.

10 The burden is on the state. Their story has something
11 in front of it. The something in front of it is the back
12 door to that car. It was open. That bullet strike in the
13 front door proves that the cars were never like this and it
14 proves that he wasn't shooting as he was driving away. The
15 door is in the way.

16 They haven't proven why, and they can't prove beyond a
17 reasonable doubt the elements of murder or voluntary.

18 Ladies and gentlemen, thank you so much for your time
19 and patience.

20 THE COURT: Does any juror need a short break before
21 we go further? Anybody?

22 (No response.)

23 THE COURT: Okay. Mr. Gowdy.

24 MR. GOWDY: Thank you, Your Honor.

25 Let's start by saying good afternoon, ladies and

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1 gentlemen.

2 This will be the last time anyone from the State of
3 South Carolina stands before you in this trial. So I would
4 be remiss if I didn't begin by thanking you for your
5 service and your careful attention. And we apologize, all
6 of us on both sides apologize, for any time that you have
7 spent out of the courtroom. Jury service is
8 extraordinarily significant. And on behalf of everyone
9 involved on both sides of this I want to simply start by
10 saying thank you.

11 You are judges in this case. Judge Cole is the judge
12 of the law. But make no mistake you are judges too. You
13 don't have on a black robe. This may be the only time
14 you're ever at the Spartanburg County Courthouse sitting in
15 a jury box.

16 But you are judges in this case. You, and you alone,
17 will decide what happened from a factual standpoint on
18 April the 21st of 2009. You, and you alone, will separate
19 truth from fiction. You will separate what is true from
20 what is not true. You, and you alone, will decide which
21 witnesses to believe and how much of what they said to
22 believe.

23 And at first blush that may seem like a daunting task.
24 How do I separate truth from fiction? How do I separate
25 what is true from what is not true? How do I discern who

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1 to believe and not to believe.

2 And what I will tell you, ladies and gentlemen, is the
3 same thing I told you Tuesday. The same common sense that
4 you use as a parent or as a coworker, as a brother or a
5 sister, as a spouse, as a friend, the same common sense
6 that you use as you make decisions throughout your life is
7 more than sufficient to serve as a juror in this case.

8 Stop and think of the major decisions that you have
9 made in life. There wasn't a judge there. Heaven knows
10 there wasn't a prosecutor there. There wasn't a defense
11 attorney there. It was just you with your background and
12 your education and your common sense. And you made it.
13 You made the decision. That is sufficient for your service
14 in this case.

15 Ladies and gentlemen, our criminal justice system is a
16 wonderful thing. And one of the rules the judge told you
17 about on Tuesday, and I'm sure he'll tell you about it
18 again in just a minute, is that under our system a
19 defendant has no obligation whatsoever to testify.

20 And no inference or suggestion of guilt can be drawn
21 by any of you from the fact that he or she does not. You
22 have an absolute right to remain silent. No inference or
23 suggestion of guilt can be drawn from the fact that you do
24 remain silent. That is one of the cornerstones, the
25 bedrocks, the foundations of our criminal justice system.

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1 However, when you do testify as Rashaun Sobers did
2 yesterday, then you are free to judge his testimony by
3 exactly the same standard that you would anyone else's,
4 which is -- which means you are free to say was there
5 enough detail, how many times did I hear I don't know or I
6 don't remember? Is there bias? Is there interest in the
7 outcome? And we'll get to that in a minute.

8 But I want you to think back with me if you would when
9 I asked him why did you mislead the police in Charlotte
10 when they asked you what happened. Do you remember what he
11 said? We'll get to it in a minute. But do you remember
12 what he said? Because I didn't want to incriminate myself,
13 so I made up a story about Trey Gentry coming over to my
14 car.

15 Ladies and gentlemen, I ask you the same thing I asked
16 him. What's different today? How was his motivation any
17 different today than it was in Charlotte?

18 You are free to consider someone's interest or bias in
19 the outcome of this case. You are free to consider whether
20 Dr. John David Wren has an interest in the outcome of this
21 case. You are free to consider whether Ila Simmons has an
22 interest in the outcome of this case. You are free to
23 consider whether Lorin Williams has an interest in the
24 outcome of this case. But you are most assuredly free to
25 ask yourselves individually and collectively does Rashaun

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1 Sobers have an interest in the outcome of this case.

2 And as you judge the testimony -- and we're going to
3 go through it because there are some parts in it that we
4 need to discuss -- but before we can do that I want to talk
5 about all of the witnesses globally for a minute. I'm not
6 going to go through what every one of them said.

7 You paid careful attention. Every one of your eyes
8 were trained on the witness box during this trial. You
9 didn't need me to go back and rehash everything. But I
10 want to say this globally, corporately, about the
11 witnesses. And I'm going to do it in the form of a
12 rhetorical question to you all.

13 I want you to think back Tuesday when madam clerk of
14 court stood right here and you first saw her for the first
15 time. Okay. What color of dress did she have on? What
16 color were her earrings? What hair length is it? Is it
17 there or was it there?

18 Now I want you to think back Tuesday to the first time
19 you saw His Honor. What color was his tie? What color was
20 his shirt? Was his computer up or down when you saw him
21 for the first time? What color of suit did Barry Barnette
22 have on Tuesday when you saw him for the first time? Did
23 Doug Brannon cross-examine Phoenix Fielder or was it Brac
24 Turnipseed?

25 And I know what you're sitting there thinking, is come

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1 on, Gowdy, I mean, that's a minor detail, what difference
2 does it make what color tie Derham Cole, Judge Cole, had on
3 Tuesday. What difference does it matter, whether Hope
4 Blakely had on hoop earrings or some other kind of earrings.

5 My point is you're right. You're right. So why are
6 we going to judge these 17, 18 and 19-year-old witnesses by
7 a different standard than you would judge yourselves by?

8 When Doug Brannon or Brac Turnipseed are standing up
9 there saying was it 30 seconds or a minute, now, were you
10 standing here or were you standing there, we wouldn't do it
11 to each other.

12 When we go to a sporting event we don't know which
13 team had more penalties or who won the opening toss. We
14 know who won and loss. That's the way we do it in life.
15 We know the major things that happen. We don't focus on
16 the earrings or we don't focus on the color of a tie unless
17 I warn you ahead of time to do it.

18 Then you've got 17 and 18 and 19-year-old kids. And I
19 don't care how tough of a veneer they may want to put on.
20 They are still teenage kids. And for us to expect them to
21 remember the intricate details of what happened on
22 April the 21st of 2009, he doesn't even remember who he
23 bought his gun from. He doesn't even remember how he got
24 to Charlotte.

25 But we want to expect Phoenix Fielder and Ricky and

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1 Quita and Trey and Jayquan and Devon to remember the
2 intimate details of an otherwise nondescript April
3 afternoon.

4 Now, if we'd told them when they got out of school,
5 look, your friend Sebastian is going to get shot in a
6 couple of hours, y'all might want to pay attention, maybe
7 we would have had a different result.

8 But you've seen the video. It is young people running
9 through a back yard. Would we as 45-year-olds or however
10 old you are approve of what they were doing? Probably not.
11 That's why we don't let them vote. That's why we don't let
12 them drink. That's why we don't let them possess firearms
13 until a certain age. Their judgment isn't what our
14 judgment is.

15 But I'll tell you this. Instead of criticizing
16 Phoenix Fielder because his camera angle wasn't good, why
17 don't we stop for a second and say, Phoenix, thank you for
18 caring enough to tell the police that you captured it on
19 your cell phone. Thank you for being a responsible enough
20 citizen to volunteer to the police, hey, I have part of
21 this on my cell phone, officer, you may want it.

22 That's a whole lot more than can be said for this
23 defendant who goes and abandons his car in Inman and then
24 takes off for Charlotte. And if you believe he was about
25 to turn himself in I have some land I would like to sell

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1 you. He was arrested in the middle of the street by a
2 fugitive marshals' task force.

3 Phoenix Fielder was the first witness we called, the
4 videographer. He shot it. Polite young man -- yes, sir,
5 no, sir. Almost all of them said yes, sir, and no, sir.

6 Then we go to Quita Gentry. She was the young woman
7 who had tears in her eyes. And I couldn't help but stop
8 and think that's early in life to watch a friend die.

9 I don't care how tough you act, how tough your veneer
10 is, that's early in life to have the person sitting next to
11 you in a car get shot in the head.

12 And then we move to Jayquan. This is -- this is the
13 mob that Mr. Brannon's talking about -- Jayquan who is
14 going to be a respiratory therapist, a mob of respiratory
15 therapist -- Jayquan Hardy.

16 He came and testified to you that right before we were
17 leaving I said, Rashaun, what's up with you and Trey. And
18 do you remember what his testimony was? Do you remember
19 what this defendant said? There wouldn't be any fighting
20 today as he pointed towards his gun. There won't be any
21 fighting today.

22 Jayquan Hardy, Ricky Smith. Mr. Brannon didn't read
23 that part of it. You can read it when you get back there.
24 But that document we put in today from the police officer
25 that had the typing on it, you go read it.

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1 Every one of those kids was emotional. They were
2 distraught; they were upset; and they stuck around to talk
3 to the police. And they were interviewed there, and then
4 they were interviewed by someone else. And then they came
5 and they talked to you. And they subjected themselves to
6 cross-examination. And every one of them told you the same
7 thing.

8 He had a gun and the bullets came from his car. And
9 they were cross-examined. Boy, were they cross-examined by
10 Doug Brannon and Brac Turnipseed. They were cross-examined
11 exactly like you would expect them to.

12 But you know what? Then the defendant testified. He
13 said they're right, I had a gun, I did the shooting, which
14 makes you wonder what all of that cross-examination was
15 about.

16 We could have saved ourselves a lot of time and
17 trouble. He admits he had the gun. He admits he was in
18 the car. He admits he did the shooting. But you know what
19 you didn't hear a single, solitary witness say, not one?
20 That there was a mob. Not one.

21 We've got to be really careful -- we've got to be
22 really careful. Just because you got a group of teenage
23 boys together in a neighborhood, we've got to be real
24 careful calling that a mob. That's a group of people.

25 Did they all attack Devon Davis? Did all of them

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1 attack him? You know, Devon Davis came right here. I felt
2 sorry for him while he was testifying. He had to admit
3 about a dozen times that he lost a fistfight. It's hard to
4 admit that once.

5 Mr. Brannon kept asking him time and time again you're
6 the one that got your butt whipped, you're the one that got
7 your butt whipped. And he had that smile on his face, that
8 unfailingly polite, and said, yes, sir, it was me.

9 And do you remember what else he told you? He was man
10 enough to admit he started it. Yeah, I slapped Sebastian.
11 Yeah, I started it. Then I ran away. Why did you run
12 away? Well, I didn't want to fight him. Just as honest as
13 he could be about it.

14 So if you believe him when he says that, then wouldn't
15 you believe him when he says it was over? We shook hands.
16 It was over. Nobody's mad at anybody any more.

17 I mean, it's hard sometimes to explain to people how
18 you can fight with friends and then be okay afterwards, but
19 you can do it. And they did it. You can see on the video
20 Devon was never knocked to the ground. He was covering up.
21 One of those teenagers came in and broke it up. They
22 separated them, and it was over. It was done.

23 Even Devon Davis told you the shots came from his car.
24 I started the fight. We were fine afterwards. I don't
25 really know all of those people that well. Sebastian was

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1 my friend. And, oh, by the way, the bullets came from his
2 car.

3 Friedrich Nietzsche was a German philosopher who said
4 a lot of things, most of which I couldn't begin to tell you
5 what they meant. But he's got one quote that I think I do
6 know what he means by it.

7 This is what he said. He said I'm not mad that you
8 lie to me, I'm mad that I can't believe another single word
9 you ever tell me. I forgive you for lying to me. It's
10 just the loss of trust.

11 My grandmother said it differently. You got one
12 chance to tell me the truth. Nietzsche said I'm not mad at
13 you for lying, I'm mad because I can't believe another word
14 you tell me.

15 And I mentioned Nietzsche's quote to you because we're
16 about to go into Rashaun Sobers' version. And I just want
17 you to keep in mind the very first opportunity he had to
18 tell his story was not what you heard yesterday and was not
19 what Doug Brannon just got through repeating.

20 It was that Trey Gentry came over to the car with a
21 gun and it must have gone off. Nothing about a mob. Not a
22 single, solitary word about a mob. I'm not angry that you
23 lied to me. I'm angry that I can't believe another single,
24 solitary word that you say.

25 April 21st of 2009 shots ring out. Rashaun Sobers

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1 leaves in his car. He wants you to believe that he went to
2 someone's house to make a telephone call. And I remember
3 while he was testifying I kept hoping he was going to say
4 he called 9-1-1. But that's not what he called. He called
5 some North Carolina number. And he can't tell you whose
6 phone he used. He doesn't remember.

7 And then he went to Papa Jones -- Papa Sam's -- Papa
8 John's. I should know the name of it. I don't. I think
9 it's Papa Sam's Breakfast Nook. Y'all know where it is,
10 right down across Barnett Park on the back side of the
11 fence, and he just abandoned his car. Left the keys in it.
12 And this is his version.

13 All right. Keep that quote in mind. I'm not mad that
14 you lied to me. I just can't believe anything else you
15 tell me.

16 I'm going to abandon my car. I'm going to pass the
17 Spartanburg police department. I've got to pass the
18 sheriff's department. I'm not going to go tell anybody
19 what happened. I'm just going to go dump my car off at a
20 breakfast place and leave the keys in it.

21 Now, ladies and gentlemen, that car was found with a
22 spare tire in the back, all of the tires still on it, all
23 of the rims still on it, the radio still working.

24 Do you really think somebody's going to steal a car
25 and not strip it and then just go politely park it

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1 somewhere under a power line in Inman? Is that what a car
2 thief would do or is that what the owner would do? Would
3 the owner do that who also, by the way, took the license
4 tag off? And you go and park the car because you don't
5 want anybody to find it, right? That's not -- that's not
6 high math. That's not complicated. I'm going to park it
7 because I don't want anybody to find it. And I'm going to
8 take the tag off of it because I want it to be more
9 difficult to trace whose car it is.

10 The notion that he left that car at Papa Sam's
11 Breakfast Nook and then some stranger drove it to Inman and
12 didn't strip it is total utter nonsense.

13 And I wrote something down Mr. Brannon said. I
14 couldn't believe that he said it. I hope I got it right.
15 I'm pretty sure I did. Doesn't matter whether he told the
16 truth or not.

17 I would submit to you, ladies and gentlemen, any time
18 you are engaged in an activity that ends with the word
19 verdict, which is Latin for speaking the truth, that, yeah,
20 the truth matters.

21 Mr. Brannon said the truth doesn't matter, doesn't
22 matter whether he told the truth about that or not. Of
23 course it does, because it goes to every other detail he
24 tells you.

25 So the car is abandoned and he goes to Charlotte. But

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1 he doesn't remember who gave him a ride up there. He
2 doesn't remember their names and doesn't remember any part
3 of that. He was hanging out in Charlotte. And, boy, he
4 sure was thinking about turning himself into law
5 enforcement. He just never got around to doing it. So the
6 marshals arrested him in the middle of the street in
7 Charlotte.

8 And Lorin and Jason and David are up there, and they
9 interview him. And they sit down and say tell me what
10 happened. What's the first version of what happened? The
11 first version no mob, no nothing. You saw the drawing.
12 I'm going to show that video to you in just a second
13 because I'm not sure that drawing is exactly correct.
14 We're going to look at it together.

15 He told a lie. And I asked him why he lied, and he
16 said I didn't want to incriminate myself. I said what do
17 you mean by that. I don't want to go to jail. That's the
18 most powerful motivator in the world, is self preservation.
19 We want to do and say anything to preserve ourselves
20 including making a story about the mob.

21 When you go back in the jury room I would like for you
22 to do this for me. You can do it right now while I'm
23 talking if you want to.

24 I want you to imagine a blank slate in your minds.
25 Nothing's on it. Now I want you write every piece of

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1 evidence that supports his mob theory that didn't come from
2 his mouth. Any independent evidence you have to support a
3 theory of a mob, write it down in your mind, that didn't
4 come from his mouth, because the truth is that's the only
5 version you've got, is from a guy who started off by saying
6 Trey Gentry had the gun, the guy who took off, the guy who
7 can't remember where the gun is.

8 And, ladies and gentlemen, perhaps I asked him too
9 many times, and if I did forgive me. But, you know, as a
10 prosecutor it is my burden to prove it to you, and it's
11 that guy's burden to bring to you the best case he can --
12 Lorin Williams and Jason Bryant and David Taylor and all of
13 the other guys.

14 And so often we get asked where's the evidence,
15 where's the rest of it. If we had the gun I could tell you
16 how many times it'd been fired. I could tell you the
17 pounds of pressure required to pull the trigger so you
18 could be the judge of whether or not it could ever happen
19 the way that he described it.

20 But when you throw the gun away somewhere in Charlotte
21 and you make no effort to tell them or anyone else where it
22 is, how can I answer that question for you? And when you
23 go and dump your car in Inman and expose it to the
24 elements, how can I test it for GSR?

25 Whatever evidence is missing in this case, ladies and

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1 gentlemen, you can look right squarely there, from Little
2 Greg who we never heard from.

3 MR. BRANNON: Objection, Your Honor. I believe he's
4 shifting the burden.

5 THE COURT: Overruled.

6 Go ahead.

7 MR. GOWDY: No gun, no car for four days, no Little
8 Greg.

9 Ladies and gentlemen, I'm going to ask Ms. House if
10 she will -- and I promise I'm not going to go through.
11 Y'all have seen this video many times. I know you are
12 tired of seeing it. I just want to point out. I want to
13 point.

14 Stop it right there if you would, please, Missy.

15 I want you to see Sebastian and Trey Gentry. This is
16 early on. Y'all remember. Y'all have seen this video
17 several times.

18 First of all, actually before we get there, do you see
19 this drawing he made? Do you see where the car is in the
20 drawing? It is up as close to the curb as you can possibly
21 get it, right? Do you see the drawing? Do you see where
22 he draws his car? Right there.

23 Now, look there. It obviously is not up against the
24 curb because you've got another car between it and the
25 curb. You've got enough space for those three gentlemen to

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1 walk. So that we know is not correct.

2 Now, I'm not making a big deal out of it. I mean,
3 this is the same piece of paper where he said Trey Gentry
4 came. But, look, I'm not an artist. He's probably not an
5 artist either. Lorin Williams isn't an artist.

6 My point is this, the notion that that shooting had to
7 take place this way. You can see, look at the video, and
8 tell it didn't take place that way.

9 It's not up against the curb. You've got another car
10 right there. At a minimum that car is 6 to 8 to 10 feet on
11 this side. You've got enough room for people to walk
12 around in here.

13 But here's my main point aside from the fact that that
14 drawing is inaccurate. You've got Trey Gentry. Not only
15 did he testify. You don't have to take his word for it.
16 You don't have to take his word for it. Just watch the
17 video.

18 He walked up to the car, he had a conversation. And
19 he did what? What did he do? He left. He walked away --
20 he walked away.

21 Keep playing it, Missy.

22 (Whereupon, the video was played for the jury.)

23 MR. GOWDY: Stop it right there.

24 The main significance, I would submit to you, of
25 Phoenix Fielder, the videotaping that afternoon, is you

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1 don't have to take anybody's word for whether or not there
2 were shots fired.

3 You can see from this video that door panel or the
4 front driver's side of Catina Smith's car. It has no
5 bullet holes in it whatsoever. It's just as clean as it
6 can be. Unmarked.

7 You watch the video. We showed it to you the other
8 day.

9 Missy keep playing it.

10 That video -- let's back it up right here. Back it up
11 just a little bit. Look, look right there.

12 This is before the shooting and there are no marks
13 whatsoever on that door. We're going to talk about the
14 charge.

15 Before we do that I want to ask you one more time. I
16 want to implore you one more time to engage me in the
17 exercise that frankly Mr. Brannon and I agree on of common
18 sense. I want to ask you -- thank you, sir. I appreciate
19 that.

20 I want to ask you right now what each one of you are
21 doing with your eyes. I'm not even doing anything that
22 interesting to be honest with you. I'm just walking
23 around.

24 But what are you doing with your eyes? You ever
25 watched a tennis match? It's boom, boom, boom, boom. You

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1 ever watch a football game, somebody returning the opening
2 kickoff? All the eyes. What do eyes do? They follow
3 action, don't they?

4 David Wren said something I found extraordinarily
5 interesting. A very short witness, short witness. It was
6 almost a throw-away line.

7 He told Mr. Brannon, he said the one thing I can tell
8 you is that Sebastian wasn't facing the shooter. Do you
9 remember that? Wasn't facing the shooter.

10 I want to ask you. Use your common sense. There's a
11 mob over here. Okay. This is Rashaun's mob. We'll call
12 it Rashaun Sobers' mob over here trying to tear him limb
13 from limb.

14 Where's Sebastian looking? That way. Does that make
15 any sense to you whatsoever how Sebastian can get shot in
16 the left side of his head, which means he's facing that
17 way? Human nature tells you that if there's something
18 really interesting going on I'm going to turn and watch it.

19 And let me tell you what else human nature tells you.
20 Sebastian already proved his willingness to scuffle if need
21 be. He's already -- you just watched him scuffle. You'd
22 already seen his willingness to walk over to Rashaun
23 Sobers' car. You watched it on the videotape.

24 If there's a mob going to his car guess who's not part
25 of it. The kid sitting in the back seat with a bullet

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1 through the back of his head -- through the side of his
2 head.

3 Common sense, ladies and gentlemen. If there was a
4 fight going on why is he facing that direction? And if
5 there's a mob going after Rashaun Sobers why is his behind
6 parked in the back seat of a car where it can get shot?

7 There was no mob. The mob came up yesterday, because
8 the greatest motivator, the greatest motivator in the
9 world, is self preservation. That's where the mob came
10 from.

11 He's charged with murder. And I asked you in my
12 opening to please lay aside whatever. We've all seen
13 movies and T. V. shows and read books about what we think
14 murder is. And I ask you to pay attention to what the
15 judge told you.

16 It is the killing of any person with malice
17 aforethought. That does not mean premeditation. Malice is
18 the amount -- that that malice is a heart fatally bent on
19 mischief. It's the conscious doing of a wrong act. It's a
20 total and utter disregard for the well being or the safety
21 of others. That's malice.

22 Aforethought does not mean premeditated. It can arise
23 in an instant. And I want to ask you this. I've got a
24 gun. I shoot down in the ground. It ricochets up. It
25 hits someone.

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1 What's the charge? Just say I'm sorry, and, look, I
2 didn't mean to kill you. I'm sorry. I was actually aiming
3 at the ground and it just ricocheted up.

4 But if I just -- if I go to a high school football
5 game and I stare up at the stands and I don't pick anybody
6 out in particular and I just decide to fire and I just fire
7 indiscriminately and I hit somebody, is it enough for me
8 just to write a letter and say I'm sorry, I wish I hadn't
9 done it and really wasn't shooting at anybody? Of course
10 it's not.

11 The intention deals with whether or not you intended
12 to pull the trigger. And the bullet carries with it the
13 consequences of your decision making. He consciously
14 decided to pull the trigger by his admission twice, and
15 perhaps as many as five times.

16 You don't just absolve yourself of responsibility by
17 saying I wasn't aiming at anybody. I cannot shoot in the
18 ground or shoot up in the air or just shoot in my
19 neighborhood and indiscriminately just say, well, I wasn't
20 aiming at anybody. You can't do it.

21 That's not voluntary manslaughter. Voluntary
22 manslaughter is when you rush into your home and you find
23 your spouse in the arms of someone else and you're so
24 overcome with anger, you're so overcome with emotion and
25 anger, that you lose the ability to reason. It is a rage.

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1 Listen to what Judge Cole tells you. Voluntary
2 manslaughter is an uncontrollable urge or rage. That's not
3 what this case is.

4 He says it's self-defense, which means you have to
5 believe that there was a mob. And the State of South
6 Carolina tells you that it is murder because it is the
7 taking of another life with malice; with malice being a
8 reckless disregard for the safety of others, aforethought
9 with the aforethought being this.

10 Who took the only weapon to Basil Court? Who took the
11 only one? He can say what he wants in closing argument.
12 There's not one stitch of evidence to support that anyone
13 else was armed.

14 Who had the only gun? Who's the only person who fired
15 the gun at Basil Court? Who's the person who left and
16 disregarded the gun, spoliated the evidence, threw the
17 evidence away, ditched the car and fled to Charlotte?

18 It is Rashaun Sobers' day in court. I conceded that
19 to you on Tuesday. It is also Sebastian Jaramillo's. And
20 the criminal justice system in South Carolina, which is a
21 wonderful thing, but it does not afford you an opportunity
22 to know much, if anything, about a 17-year-old kid that
23 brought us here. That's just the way it is.

24 You know he's got parents. You know that they have
25 been here for every second of the trial. You know that he

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1 was a Dorman High School student. You know that he was a
2 pretty good boxer.

3 I suspect what you can imagine because of your life
4 experience is that he had the same dreams and hopes that we
5 have and that we have for our kids. And he's 17 years old
6 and he's sitting in the back of someone's car.

7 It's a school afternoon. He's supposed to go to
8 school the next day, and he's dead. And what I am asking
9 you is that you find the person who pulled the trigger
10 responsible for what he did.

11 You know there was no mob. There's not one stitch of
12 evidence to support that. You know you have a dead
13 17-year-old who had nothing on his hands. There's no
14 weapon being handled by him. There is only one person who
15 had a weapon.

16 I don't know whether he shot from that direction or
17 whether he was facing them or whether he was hightailing it
18 down Basil Court. I can't tell you that. I wasn't there.

19 As I started by telling you, we got to be careful
20 asking teenagers details when they had no idea at the time
21 that they were going to be witnessing a murder, just like I
22 can't ask you what Hope Blakely's dress was.

23 It's tough for us to go back and ask them to remember
24 every detail, but they were unanimous on this. Nobody
25 provoked it; nobody went to his car. He fired; he sped

1 off. It's murder.

2 And I'm going to ask you not out of sympathy for the
3 victim or his parents. I'm asking you because you took an
4 oath to find the facts and apply the law. I'm asking you
5 when you come back into this courtroom with your verdict
6 let it be one that does reflect the truth and it holds
7 people accountable and responsible for the decisions that
8 they make.

9 I cannot tell you, I will not tell you that Rashaun
10 Sobers went to that cul-de-sac that afternoon intending to
11 kill Sebastian Jaramillo. It would a lie for me to tell
12 you that. I am not going to.

13 What I can tell you is he took a gun and he used it in
14 the most incredibly reckless way you can imagine and that a
15 17-year-old kid is laying slumped over in the back seat of
16 a car because he wanted to make a grand exit from Basil
17 Court. And he did it with his gun. And I'm looking to you
18 for justice in this case.

19 THE COURT: Does any juror need to take a break before
20 I provide you the instruction on the law? Nobody?

21 (No response.)

22 THE COURT: Okay. Ladies and gentlemen, as you know,
23 you've heard and seen all the evidence in the case. You've
24 now heard the final summations of the lawyers; and
25 therefore it becomes my duty and obligation to instruct you

Jury charge

1 on the law that's applicable in the case as soon as we can
2 get everybody settled down.

3 (Pause.)

4 THE COURT: I'm going to instruct you on the law
5 that's applicable in the case, and then you'll be asked to
6 go back and begin with your deliberation. And through that
7 process you'll examine the evidence, decide the facts,
8 apply the law and arrive at a fair and just decision in the
9 case, whatever that decision might be.

10 It is your exclusive duty to determine what the facts
11 are. You do that through your own common sense examination
12 and evaluation of all of the testimony and other evidence
13 received during the trial of this case.

14 You 12 jurors alone will decide what weight, value and
15 effect to give to any particular witness' testimony or
16 other evidence in the case. Your sole objective is to
17 simply reach the truth in the matter. And by doing that
18 you will have fulfilled your obligations as jurors, and
19 that is to give both the state and the defendant a fair and
20 impartial trial.

21 Now, in this case, as you know, the defendant has been
22 accused by the state with having committed the crime of
23 murder. The allegations setting forth that charge are
24 contained in that document which I referred to prior to and
25 after your selection, and that's referred to as the

Jury charge

1 indictment.

2 The indictment alleges that the defendant, Rashaun
3 Jamine Sobers, did here in Spartanburg County on or about
4 April the 21st of 2009 wilfully and with malice
5 aforethought kill one Sebastian Jaramillo by shooting him
6 with a firearm and that the victim died as a proximate
7 result of that gunshot wound.

8 As to those allegations and as to that charge the
9 defendant has entered a plea of not guilty. And as I've
10 told you, that plea of not guilty places upon the state
11 because they brought the charge to establish the
12 allegations set forth in the indictment, to prove each of
13 the essential elements of the crime alleged against the
14 defendant; and therefore the burden is upon the state to
15 establish the defendant's guilt to the satisfaction of you
16 12 jurors beyond a reasonable doubt.

17 The indictment is not evidence in the case. It
18 doesn't prove anything. It does not establish anything.
19 It will be in the jury room because it is on the back of
20 the indictment, Mr. Foreman, that you're going to be asked
21 to indicate the jury's unanimous decision in the space
22 provided. But other than serving as the verdict form the
23 indictment serves no purpose so far as you jurors are
24 concerned. As I say, it is not evidence, although it will
25 be in the jury room.

Jury charge

1 You are further instructed that it is a vital,
2 important and cardinal rule of law that every defendant in
3 a criminal trial, no matter how serious the offense might
4 be for which that person stands charged, that person is
5 always presumed innocent of the charge.

6 That presumption of innocence remains with any
7 defendant, as it does with this defendant, from the time
8 that he is placed under arrest and throughout the course of
9 the criminal process and even throughout the course of the
10 actual trial in the case.

11 As I believe I told you, that presumption of innocence
12 will be with the defendant even as you go back to begin
13 with your deliberations in this case.

14 That presumption of innocence will be with him in the
15 jury room, and it'll be with him forever unless you 12
16 jurors unanimously determine that he's no longer entitled
17 to the presumption of innocence.

18 In other words, after you've carefully considered all
19 of the evidence in the case, and after considering that
20 evidence you have determined what you believe to be the
21 true facts that relate to this event, and upon deciding
22 those facts you apply the law that I will have provided
23 you, if you 12 jurors unanimously determine that his guilt
24 has been proven beyond a reasonable doubt, then he's no
25 longer entitled to the presumption of innocence. But it's

Jury charge

1 only if, unless and until you are satisfied of his guilt
2 beyond a reasonable doubt that the presumption of innocence
3 would no longer be applicable.

4 Now, while the state has the burden of proving the
5 defendant's guilt to your satisfaction beyond a reasonable
6 doubt, that doesn't mean that the state has to prove his
7 guilt beyond all doubt or beyond any possible doubt. But
8 it does require the state to prove his guilt to your
9 satisfaction beyond a reasonable doubt.

10 The term reasonable doubt should be given its plain
11 and ordinary meaning. A reasonable doubt is the kind of
12 doubt that would cause a reasonable person to hesitate to
13 act upon the information provided.

14 A defendant is entitled to any reasonable doubt that
15 arises from the evidence or lack of evidence in a case.
16 And if upon any factual issue essential to a finding of a
17 verdict of guilty you have some reasonable doubt as how
18 that issue should be resolved, it would be your duty to
19 resolve that reasonable doubt in favor of the defendant.

20 And therefore if upon your consideration of the whole
21 case you have a reasonable doubt as to the defendant's
22 guilt it is your duty to resolve that reasonable doubt in
23 favor of the defendant and to return a verdict of not
24 guilty.

25 And, at the same time, after you've carefully

Jury charge

1 considered all of the evidence in the case and decided the
2 facts and applied the law, if you have no reasonable doubt
3 as to his guilt as it relates to a particular crime, then
4 it would be your corresponding duty to find him guilty of a
5 crime which the state has proven to your satisfaction
6 beyond a reasonable doubt.

7 The same law that provides that you are the judges of
8 the facts also provides that I am judge of the law. And
9 that simply means that nobody is going to tell you how to
10 arrive at your determination of fact in this case. You do
11 that, as I've already stated, through the exercise of good
12 judgment and common sense conscientiously applied to the
13 testimony and evidence received during the trial of the
14 case.

15 Under your oath as a juror however you must accept the
16 law as I provide it to you as being the law that you are to
17 apply in this case. In other words, you're never to
18 concern yourself with what you thought the law was before
19 you came to serve as a juror this week or what you think
20 the law ought to be.

21 Under your oath you must simply accept the law as I
22 provide it to you as being the law that you are to apply in
23 this case. Then you simply take that law and you apply it
24 to the facts as you 12 jurors determine those facts to be
25 based upon your common sense examination of all of the

Jury charge

1 evidence in the case.

2 Now, because you are the judges of the facts in this
3 case you are therefore necessarily the sole judges of the
4 credibility and the believability of each witness that has
5 testified during the course of the trial.

6 And there are a number of factors which you should
7 consider in arriving at your assessment as to a particular
8 witness' credibility, and I'm going to list those factors
9 for you.

10 But you should consider the demeanor of the witness,
11 that is how the witness appeared to you when the witness
12 testified from the witness stand. Was the witness
13 straightforward or in responding to questions, or was the
14 witness hesitant or evasive in responding to questions that
15 were asked of that witness.

16 Simply put, did the witness appear to you to be
17 telling the truth and to have knowledge of the facts to
18 which that witness has testified.

19 You should consider whether or not the testimony of a
20 witness is consistent, or is it inconsistent with that
21 witness' own testimony or with other statements made by
22 that witness outside of court, as well as whether a
23 witness' testimony is consistent or inconsistent with other
24 testimony or other evidence received during the trial of
25 the case.

Jury charge

1 You should also consider how the witness came to know
2 the facts to which a witness has testified. In other
3 words, what was that particular witness' opportunity and
4 ability to perceive the existence of those facts to which
5 that witness has testified by having previously used his or
6 her senses, and then what is that witness' ability to be
7 able to come into court and to accurately recollect to you
8 as to what they have previously perceived.

9 You should also consider any bias, prejudice or
10 interest that a witness might have with respect to the
11 case. In other words, do you find some reason that a
12 particular witness would come into court and would testify
13 one way or another to help or to hurt one side or the
14 other.

15 And you should consider any interest that a witness
16 might have in the outcome of a case if you determine that a
17 witness does have such an interest and you find that that
18 interest would bear upon that particular witness'
19 credibility.

20 And you should also consider whether or not the
21 testimony of a witness is strengthened, or is it weakened
22 by other testimony or other evidence received during the
23 trial of the case.

24 Now, you as the finders of the facts and you as the
25 judges of the credibility of each witness are permitted to

Jury charge

1 believe as much or as little of what a witness has
2 testified to as you deem is appropriate.

3 And therefore you may believe everything that a
4 witness testified to; you may choose to believe none of it.
5 You may believe one portion of a witness' testimony and
6 reject some other portion of that same witness' testimony.
7 You may believe one witness as opposed to several, or
8 several as opposed to one.

9 But whatever your good judgment and common sense tells
10 you is the most believable and credible testimony is the
11 testimony you should accept, and you should reject any
12 testimony or other evidence that you find not to be
13 credible or believable.

14 Again, your sole objective is to simply reach the
15 truth in the matter. And by doing that you will have
16 fulfilled your obligations as jurors, and that is to give
17 both the state and the defendant a fair and impartial
18 trial.

19 Now, while there are various forms of evidence such as
20 testimony, photographs, documents, charts and other types
21 of physical exhibits, there are really only two types of
22 evidence, and either or both of those types of evidence may
23 be used to prove any fact in issue. But the two types of
24 evidence are direct evidence and circumstantial evidence.

25 Direct evidence is the testimony of a person who

Jury charge

1 testifies from actual knowledge of the fact. It is
2 testimony by a person who has perceived the existence of a
3 fact by means of his or her senses, and then they come into
4 court and they testify as to what they have previously seen
5 or heard, or felt for matter.

6 Circumstantial evidence, on the other hand, is the
7 proof of some other fact or set of facts taken either
8 singly or collectively which may prove the existence of a
9 fact in question as a necessary consequence. That is
10 through an inference.

11 And an inference is simply a deduction of fact that
12 may logically and reasonably be drawn from the proof of
13 some other fact or set of facts. It is a fact not proven
14 by the direct testimony of a witness based upon personal
15 perception, but it is a conclusion which might reasonably
16 be drawn from the proof of other facts.

17 In other words, you may infer that a particular event
18 occurred or that a particular fact exists based upon the
19 proof of sufficient factual circumstances which would
20 reasonably warrant your arriving at that conclusion.

21 The law makes absolutely no distinction between the
22 weight or value to be given to direct evidence or to
23 circumstantial evidence, nor is a greater degree of
24 certainty required of circumstantial evidence as opposed to
25 direct evidence.

Jury charge

1 Whatever the type of evidence used to prove any fact
2 in issue, you should consider all of the evidence presented
3 in the case. And after carefully considering all of that
4 evidence and weighing it in your minds if you are not
5 convinced of the guilt of the defendant beyond a reasonable
6 doubt, then you must resolve that doubt in his favor and
7 return a verdict of not guilty.

8 Now, in this case I'm going to instruct you on the law
9 as it relates to the charge which is contained in the
10 indictment. I will also be charging you on the law as it
11 relates to a lesser included offense, although it's not set
12 forth in the indictment.

13 And so you'll be considering each of those charges.
14 You may find the defendant guilty of the charge contained
15 in the indictment; you may find him guilty of the lesser
16 included offense if you determine it's appropriate; or if
17 the state has failed to prove either offense you would find
18 the defendant not guilty.

19 Now, the charge contained in the indictment is that of
20 the crime of murder. Murder is defined in a South Carolina
21 code section, 16-3-10. Some criminal offenses are
22 common-law offenses. Some criminal offenses are statutory
23 offenses. And statutory offenses are simply those that are
24 defined in a legislative act and set forth in the Code of
25 Laws.

Jury charge

1 16-3-10 of the Code of Laws provides that murder is
2 the killing of any person with malice aforethought either
3 expressed or implied.

4 In order for you to find the defendant guilty of the
5 crime of murder it would be necessary that the evidence in
6 this case has established to your satisfaction beyond a
7 reasonable doubt that the defendant did commit some act or
8 acts which proximately caused the death of the decedent.
9 In this case the decedent of course is Sebastian Jaramillo.
10 And that the killing was done with malice aforethought.
11 Malice aforethought is an essential element of the crime of
12 murder.

13 Malice as an essential element of the crime of murder
14 is a term connoting an ill will and having an intent to do
15 harm.

16 Intent means the state of a person's mind which
17 directs his actions towards a specific object or goal. And
18 intent would include those consequences which represent the
19 very purpose for which an act is done, as well as those
20 consequences which are known to be substantially certain to
21 result whether actually intended or not.

22 The term malice is a technical term importing
23 wickedness and excluding just cause or legal excuse. It is
24 something which springs from depravity, from a heart devoid
25 of social duty and fatally bent on mischief. It is a state

Jury charge

1 of mind indicating an extreme disregard for or an extreme
2 indifference to human life.

3 Malice may be likewise defined as a state of mind
4 which indicates a formed purpose and design to do a
5 wrongful act under circumstances that exclude any legal
6 right to do it.

7 The words expressed or implied malice do not mean
8 different kinds of malice but merely the manner in which
9 malice may be shown to have existed, that is to say either
10 by direct evidence or by circumstantial evidence implying
11 or inferring the existence of malice.

12 Malice may be expressed as where there is an expressed
13 threat to kill or a lying in wait or where the
14 circumstances show directly that an intent to kill was
15 entertained by the killer.

16 Malice may be inferred, though no expressed intent to
17 kill is proven by direct evidence, where the facts and
18 circumstances which have been proven by the evidence in the
19 case satisfy you beyond a reasonable doubt that malice was
20 present in the mind of the killer at the time any killing
21 took place.

22 The existence of malice may be inferred from the
23 circumstances shown to have existed at the time of the
24 event, as often the state of a person's mind can only be
25 proven by circumstantial evidence.

Jury charge

1 Malice as an essential element of the crime of murder
2 does not necessarily require proof of an ill will or a
3 hatred towards the particular individual who is killed, nor
4 does it necessarily require proof of an actual or a
5 specific intent to take human life. But rather it means a
6 state of mind accompanying conduct signifying a general
7 malignant recklessness and an extreme disregard for or an
8 extreme indifference to human life.

9 The state is required to prove malice just as it must
10 prove any other essential element of the crime charged.
11 And it is for you 12 jurors to determine whether or not the
12 evidence in this case establishes malice beyond a
13 reasonable doubt.

14 It's also essential in the crime of murder that there
15 exist not only malice but that it be malice aforethought.
16 The law does not require that malice must exist for any
17 appreciable length of time before the commission of an act
18 proximately causing the fatal result. Indeed, it may be
19 conceived at the very moment that the fatal act is
20 committed.

21 It is sufficient in the law so long as the state does
22 prove beyond a reasonable doubt both the existence of
23 malice and the commission of an act or acts by the
24 defendant which proximately caused the fatal result.

25 You must determine whether or not malice aforethought

Jury charge

1 existed based upon your consideration of all of the
2 evidence introduced during the course of the trial and any
3 reasonable inferences that might be drawn from that
4 evidence.

5 Now, while the state must prove beyond a reasonable
6 doubt that a killing did occur accompanied by the element
7 of malice aforethought in order for the defendant to be
8 found guilty of the crime of murder, it is not necessary
9 that the state prove any motive for the killing. Motive is
10 not an essential element of the crime which must be proven,
11 although there may be evidence relating to such a fact
12 introduced during the course of the trial.

13 Now, an indictment for murder may also include the
14 lesser included offense of voluntary manslaughter, even
15 though that lesser offense is not actually set out in the
16 indictment itself.

17 In other words, a defendant who has been charged with
18 the crime of murder may be convicted or may be found guilty
19 of the lesser included offense of voluntary manslaughter if
20 you determine that the evidence warrants such a finding.

21 Manslaughter is defined in the law as the unlawful
22 killing of a human being without the element of malice
23 either expressed or implied being present but a killing in
24 sudden heat of passion based upon a sufficient legal
25 provocation.

Jury charge

1 While the element of malice must be proven in order
2 for the defendant to be found guilty of the crime of
3 murder, the element of malice need not be proven in order
4 for the defendant to be found guilty of the lesser offense
5 of manslaughter.

6 Voluntary manslaughter is defined in the law as the
7 unlawful taking of the life of another human being that is
8 committed in a sudden heat of passion which is provoked by
9 a sufficient legal provocation.

10 The law recognizes that sudden heat of passion arising
11 out of exasperation, rage, anger, sudden resentment, fear
12 or terror may for the time being affect the self control of
13 an individual temporarily disturbing the ability to
14 properly reason and therefore reduces the crime from that
15 of murder to that of voluntary manslaughter provided there
16 was a sufficient legal provocation.

17 The law does not reduce from murder to manslaughter
18 every homicide that is committed in the heat of passion.
19 It must be the heat of passion justly excited by a
20 sufficient legal provocation. If a sufficient legal
21 provocation does not exist, then the killing even committed
22 in heat of passion is murder and not manslaughter.

23 The sudden heat of passion aroused by a sufficient
24 legal provocation which may reduce a homicide from that of
25 murder to that of manslaughter need not dethrone reason

Jury charge

1 entirely or shut out knowledge and volition, but it must be
2 such extreme emotion provoked by such facts or
3 circumstances as would naturally disturb the sway of reason
4 of an ordinary reasonable and prudent person rendering the
5 mind incapable of cool reflection and producing what
6 according to human experience may be described as an
7 uncontrollable impulse to do violence.

8 No mere words alone, however insulting or offensive,
9 would ever constitute sufficient legal provocation or
10 justify the use of deadly force in retaliation. If such
11 words are accompanied by overt threatening or hostile acts
12 or by a physical encounter, then such conduct may give rise
13 to a sufficient legal provocation depending upon the
14 circumstances of the case and the event and therefore may
15 reduce the offense from that of murder to that of voluntary
16 manslaughter where you find it to be appropriate.

17 In determining whether an act resulting in the death
18 of another was impelled by a heat of passion or by malice
19 you should take into consideration all of the surrounding
20 circumstances and conditions accompanying the event in
21 making your determination.

22 Again, voluntary manslaughter is an unlawful homicide
23 committed in the absence of malice but in sudden heat of
24 passion arising from a sufficient legal provocation.

25 Criminal intent is also a necessary element of any

Jury charge

1 crime that has to be proven to your satisfaction beyond a
2 reasonable doubt. Criminal intent is the state of a
3 person's mind that operates jointly with the commission of
4 an act in the commission of a criminal offense.

5 Criminal intent is a mental state of conscious
6 wrongdoing in contrast to an act that is done
7 inadvertently, mistakenly, accidentally or in accordance
8 with the law and therefore without criminal intent.

9 Where a person is engaged in the commission of a
10 criminal act accompanied by criminal intent he is legally
11 responsible for all of the consequences that necessarily
12 flow from the commission of that act that are natural and
13 probable consequences of it even though the actual result
14 was not actually intended as a part of the original design
15 so long as it is proven that the result was reasonably
16 known to be substantially certain to occur.

17 And it is not necessary in order to establish the
18 element of criminal intent that intent be proven by direct
19 evidence. Intent may be proven and established by
20 circumstantial evidence the same way any other fact or
21 element of a crime may be proven.

22 In your determination as to whether or not criminal
23 intent has been proven, as well as any other element of the
24 crime, you are permitted to infer the existence of such a
25 fact from the declarations and the conduct of the

1 defendant, as well as from any other circumstances proven
2 by the evidence in the case from which you may reasonably
3 and logically infer such intent so long as you are
4 satisfied of its existence beyond a reasonable doubt.

5 Now, in this case the defendant has raised what is
6 known in the law as the defense of self-defense. The law,
7 recognizes the right of every person to defend himself from
8 death or from sustaining serious bodily harm. And to do
9 this a person may use such force as is reasonably necessary
10 even to the point of taking human life.

11 The right of self-defense is founded upon necessity,
12 either actual necessity or reasonably apparent necessity,
13 and it is a complete defense to a charge of an unlawful
14 homicide should you find it to exist based upon your
15 evaluation of the evidence produced during the trial of the
16 case. The existence of self-defense entitles a person
17 charged with the commission of an unlawful homicide to a
18 verdict of not guilty.

19 Although the defendant has raised the defense of
20 self-defense, the burden of proof is not on the defendant
21 to prove the existence of self-defense. As I've stated,
22 the burden is never upon a defendant to prove that he is
23 not guilty to prove that he is innocent because in some
24 cases that might not be possible.

25 So a defendant may raise a defense, but the burden is

Jury charge

1 never upon a defendant to prove that defense by any
2 evidentiary standard. As I have previously told you, the
3 burden is always upon the state to prove the defendant's
4 commission of the crime alleged against him beyond a
5 reasonable doubt. And this would therefore necessarily
6 require that the state prove beyond a reasonable doubt the
7 absence of self-defense.

8 In your consideration of the defense of self-defense
9 you are instructed that there are four basic elements
10 required to be present before self-defense can exist where
11 deadly force is employed in order to repel an assault.

12 First, it must be shown that the defendant was without
13 fault in bringing on the immediate difficulty which gave
14 rise to the necessity for the use of deadly force which
15 resulted in the taking of human life.

16 In other words, one cannot provoke, initiate or
17 otherwise through his own fault bring about a difficulty
18 and then claim the right of self-defense in the use of
19 deadly force against an attack caused by that provocation.

20 Secondly, it must be shown that at the time the fatal
21 act was committed that the defendant actually believed that
22 he was in imminent danger of losing his own life or
23 sustaining serious bodily injury or that he actually was in
24 such imminent danger. The term imminent danger means an
25 immediate or present danger, not a past or future danger.

1 Thirdly, if the defense is based upon a belief of
2 imminent danger, then it must be shown that the belief was
3 reasonable, that is that a reasonably prudent person of
4 ordinary firmness and courage would have entertained the
5 same belief if they had been acting under the same or
6 similar circumstances.

7 If the defendant actually was in an imminent danger,
8 then it must be shown that the circumstances were such as
9 would warrant a person of ordinary prudence and courage to
10 inflict the fatal injury in order to save himself or
11 herself from serious bodily injury or loss of life.

12 It must be shown that a reasonably prudent person of
13 ordinary firmness and courage if acting under the same or
14 similar circumstances as established by the evidence in the
15 case would have reached the same conclusion and entertained
16 the same belief.

17 Deadly force is only appropriate when necessary and
18 may only be exercised where the defendant entertains a
19 reasonable belief that he is about to sustain a loss of
20 life or suffer serious bodily harm.

21 The law of self-defense encompasses preventative
22 action taken to protect one's own life if such action is
23 taken in anticipation of imminent danger of losing his life
24 or sustaining serious bodily injury and such action is in
25 response to an immediate threat.

Jury charge

1 The defendant has a right to act upon appearances even
2 though he may be mistaken. The law does not hold someone
3 to a refined assessment of the danger as might be
4 accomplished having adequate time to reflect, provided
5 however that he has acted as a person of ordinary reason,
6 firmness and courage would have acted or should have acted
7 in meeting the appearance of the danger.

8 In other words, he does not have to wait until his
9 adversary or assailant gets an advantage, for one always
10 has the right to act under the law of self-preservation and
11 to prevent another from getting the advantage over him.

12 There is however a requirement of objectivity. The
13 belief must be reasonable, that is that a reasonable and
14 prudent person if acting under the same or similar
15 circumstances would have believed or would have been
16 warranted in so acting as the defendant did.

17 And in determining whether the defendant's belief in
18 an apparent danger and in the necessity of using deadly
19 force to meet that danger is in conformity with an
20 objective standard you should consider a reasonable person
21 of ordinary firmness and courage but one who also shares
22 some of the same physical characteristics of the defendant
23 such as age, size, sex and physical condition in contrast
24 to those characteristics of the person who is alleged to
25 have been the assailant or the aggressor.

1 And as to the forth element it must be shown that the
2 defendant had no other means of avoiding the danger of
3 losing his life or of sustaining the infliction of serious
4 bodily injury other than to act as he did in the particular
5 circumstances, because, as I have stated, self-defense is
6 founded upon necessity.

7 And it is therefore a person's duty to avoid the use
8 of deadly force and the taking of human life where it is
9 possible to avoid such action even to the extent of
10 retreating from one's adversary if such can be done without
11 increasing the danger to one's self.

12 In other words, to avoid the necessity of using deadly
13 force against another the person claiming self-defense must
14 retreat from the confrontation unless it is shown that by
15 retreating the defendant would increase the danger of
16 sustaining serious bodily injury or loss of life to
17 himself.

18 If you have a reasonable doubt as to the defendant's
19 guilt after considering all of the evidence received during
20 the trial of this case, including any evidence relating to
21 the issue of self-defense, then it would be your duty to
22 resolve that reasonable doubt in favor of the defendant and
23 to find him not guilty.

24 If, on the other hand, you have no reasonable doubt as
25 to the defendant's guilt after considering all of the

Jury charge

1 evidence, including any evidence relating to the issue of
2 self-defense, then it would your duty to find the defendant
3 guilty of any unlawful homicide that has been proven to
4 your satisfaction beyond a reasonable doubt based upon the
5 instruction that I've already provided you as it relates to
6 the crimes of murder and of voluntary manslaughter.

7 Now, ladies and gentlemen of the jury, I am not in any
8 way concerned with what your verdict is, but I do tell you
9 that the decision of the jury must be unanimous. All 12 of
10 you must be in agreement before any decision may be
11 returned to the Court.

12 Mr. Foreman, as you know, you're going to be called
13 upon to preside over jury deliberations in the jury room
14 simply to ensure that those deliberations are carried out
15 in some orderly fashion.

16 But of course, as I've stated, the verdict of the jury
17 has to be unanimous. So all jurors are expected to
18 participate in the deliberations, because the verdict is
19 the consensus and unanimous opinion of all 12 of you.

20 Now, Mr. Foreman, in this case you're going to have
21 three potential verdict forms. And so once you and your
22 fellow jurors arrive at that unanimous decision I'm going
23 to ask that you indicate that decision on the back of the
24 indictment.

25 And you'll see on the back of the indictment in the

1 lower left-hand corner there is the word verdict. There's
2 also the entry for -- says foreperson of the petit jury,
3 which is you. That's for your signature.

4 Whatever the verdict is, insert it in the space
5 provided. Sign your name as the foreperson. You're the
6 only person that has to sign the verdict form. And place
7 the appropriate date on it.

8 Now, in this case if you find in considering all of
9 the evidence that the state has proven the defendant to be
10 guilty beyond a reasonable doubt of the crime of murder,
11 then the verdict form would be guilty, that one word, which
12 means guilty of the crime charged in the indictment, that
13 means guilty of murder. But you only need to insert the
14 one word guilty.

15 If you determine the state has failed to prove any one
16 or more of the essential elements of the crime of murder
17 but you find that the state has proven the lesser included
18 offense of voluntary manslaughter beyond a reasonable
19 doubt, then in that event the verdict form would be guilty
20 of voluntary manslaughter. You'd have to write that out
21 because that is not in the indictment. So if you find him
22 guilty of the lesser offense you'd need to write that out,
23 guilty of voluntary manslaughter.

24 And if the state has failed to prove the defendant to
25 be guilty of either of the crimes beyond a reasonable

Jury charge

1 doubt, then your verdict in that event would be not guilty.
2 Whatever the decision is, insert it, sign your name and
3 date it and knock on the door. Let the bailiff know you've
4 reached a decision. We'll bring you back to receive that
5 verdict.

6 During your deliberations you may have a question
7 about the facts that relate to the case or that relate to
8 testimony, or you may even wonder if there's something else
9 out there that you can have that you think would benefit
10 you.

11 No additional evidence can be received now that you
12 are going back to begin with your deliberations. So even
13 if there was something existing out there that you wanted
14 and it's there, you can't have it because all of -- the
15 evidence is closed now. And the case is going to be
16 submitted to you. So no additional evidence can be
17 received.

18 Also, I don't have transcripts of witnesses'
19 testimony. However if you need to have the testimony of a
20 witness replayed in whole or in part to assist you in
21 answering a question that you have I can always bring you
22 back to the courtroom to have a witness' testimony replayed
23 in whole or in part if it will assist you in resolving a
24 question.

25 If you ever have a question about the law that's

Jury charge

1 applicable, I am permitted to answer those questions. So
2 if you need for me to reread the instruction in whole or in
3 part, if you need me to give you a different explanation or
4 a clarification of some point of law, if you'll let me know
5 I can always respond to those questions.

6 If we have any smokers on the jury you can smoke. You
7 can't smoke in the jury room. You have to go outside. So
8 if you want to smoke let the bailiff know. He'll take you
9 outside to accomplish that purpose.

10 You are instructed however that deliberations must
11 stop if any juror is absent for any authorized purpose.
12 And they may only resume when all 12 jurors are present so
13 that all can participate.

14 I think that covers everything, but if it doesn't I'll
15 bring you back.

16 So right now I'm going to ask the 12 primary jurors --
17 Mr. Lyles, you stay here with me. The 12 primary jurors
18 please go with the bailiff to the jury room.

19 Do not begin deliberations until I send you word to do
20 so. When I send you word to do so the bailiff will bring
21 to the jury room all of the exhibits which have been
22 introduced.

23 He'll also bring the indictment which serves as the
24 verdict form for you, Mr. Foreman.

25 He'll also bring the evidence which is on a CD. It

Jury charge

1 will be put on a computer for you to operate. If for some
2 reason you can't figure it out, it won't work or whatever,
3 you let us know. We can help you with that. But I think
4 you can deal with it. But if you can't, let me know.

5 So right now go to your jury room, but await my
6 instruction as to when to begin deliberations.

7 (Whereupon, the jury retired to deliberate at
8 4:10 p.m.)

9 (Whereupon, the alternate juror was excused.)

10 THE COURT: Are there are any exceptions taken to the
11 instruction or requests for additions to the instruction by
12 the state?

13 MR. GOWDY: No objections, no exceptions.

14 THE COURT: By the defendant?

15 MR. BRANNON: None from the defense.

16 THE COURT: All right. Let me ask y'all to verify all
17 of the exhibits before they go back, please. And let's get
18 the video and audio cued up for the benefit of the jury.

19 (Pause.)

20 THE COURT: All right. All of the exhibits are
21 accounted for?

22 MR. BARNETTE: Yes, sir. There's just one change. I
23 think there's a -- there was two, three exhibits, but the
24 one is the incident report from Investigator Wilde, going
25 to be switched from 3 to 3-A for the defense.

1 MR. TURNIPSEED: That's correct.

2 THE COURT: Okay. All right. Send the exhibits back
3 and tell the jury to begin their deliberations and notify
4 us when they have concluded.

5 Also tell the foreman if he needs to address anything
6 to me write it on a piece of paper and give it to you and
7 you'll give it to me.

8 We will be at ease while the jury is deliberating.

9 (Whereupon, the exhibits were submitted to the jury at
10 4:23 p.m.)

11 (Whereupon, a recess was taken.)

12 THE COURT: The jury wants to be reinstructed on the
13 difference between murder and manslaughter. So I'm simply
14 going to instruct them as I did previously.

15 MR. BARNETTE: Your Honor, may we have one second to
16 get the family in?

17 THE COURT: Okay.

18 (Pause.)

19 THE COURT: All right. Bring the jury in.

20 THE BAILIFF: Do you want the alternate also?

21 THE COURT: Yes.

22 (Whereupon, the jury returned to the courtroom at
23 6:12 p.m.)

24 THE COURT: Mr. Foreman, I have your request for me to
25 reexplain the difference between the charge of murder and

Jury charge

1 the charge of voluntary manslaughter, and I'm guessing by
2 your note you really would prefer that I do it in a much
3 simpler fashion. But I'm obligated and required to provide
4 the legal definitions of these terms.

5 So what I'm going to do is simply reinstruct you as I
6 did previously on the charge of murder and on the charge of
7 voluntary manslaughter. And then you'll be asked to go
8 back.

9 And if you still need further clarification or
10 explanation, you let me know, and maybe I can provide a
11 better clarification or explanation.

12 THE FOREMAN: Yes, sir.

13 THE COURT: But, quite frankly, I'm simply obligated
14 to provide it in legal terms. I know you'd rather have
15 common-usage language, but that's not what we do here.
16 These are legal terms that have to be explained. But I'll
17 be happy to explain them as often as I need to or clarify
18 it as much as I can.

19 All right. Murder is defined in the code as the
20 killing of any person with malice aforethought either
21 expressed or implied.

22 Malice as an essential element of the crime of murder
23 is a term connoting an ill will and having the intent to do
24 harm. And intent means the state of a person's mind which
25 directs his actions towards a specific object or goal. And

Jury charge

1 intent would include those consequences which represent the
2 very purpose for which an act is done, as well as those
3 consequences which are known to be substantially certain to
4 result whether actually intended or not.

5 Malice is a technical importing wickedness and
6 excluding just cause or legal excuse. It is something
7 which springs from depravity, from a heart devoid of social
8 duty and fatally bent on mischief.

9 It is a state of mind indicating an extreme disregard
10 for or an extreme indifference to human life. Malice may
11 be likewise defined as a state of mind which indicates a
12 formed purpose and design to do a wrongful act under
13 circumstances that exclude any legal right to do it.

14 And the words expressed or implied malice do not mean
15 different kinds of malice but merely the manner in which
16 malice may be shown to have existed, that is to say proof
17 of malice by direct evidence or by circumstantial evidence
18 from which malice may be implied.

19 Malice may be expressed as where there is an expressed
20 threat to kill or a lying in wait or where the
21 circumstances show directly that an intent to kill was
22 entertained by the killer.

23 Malice may be inferred, though no expressed intent to
24 kill is proven by direct evidence, where the facts and
25 circumstances which have been proven by the evidence in the

Jury charge

1 case satisfy you beyond a reasonable doubt that malice was
2 present in the mind of the killer at the time any killing
3 took place.

4 And the existence of malice may be inferred from the
5 circumstances shown to have existed at the time of the
6 event, as often the state of a person's mind can only be
7 proven by circumstantial evidence.

8 Malice as an essential element of the crime of murder
9 does not necessarily require proof of an ill will or a
10 hatred towards the particular individual who was killed,
11 nor does it necessarily require proof of an actual or a
12 specific intent to take human life. But rather it means a
13 state of mind accompanying conduct which signifies a
14 general malignant recklessness and an extreme disregard for
15 or an extreme indifference to human life.

16 It's also essential that there exist not only malice
17 but that it be malice aforethought. The law does not
18 require that malice must exist for any appreciable length
19 of time before the commission of an act proximately causing
20 a fatal result. Indeed, it may be conceived at the very
21 moment that the fatal act is committed.

22 It is sufficient in the law so long as the state
23 proves beyond a reasonable doubt both the existence of
24 malice and the commission of an act or acts by the
25 defendant which proximately caused the fatal result.

1 Now, with respect to voluntary manslaughter,
2 manslaughter is defined as the unlawful killing of a human
3 being without the element of malice either expressed or
4 implied being present. It is a killing done in sudden heat
5 of passion based upon a sufficient legal provocation.

6 While the element of malice must be proven in order
7 for the defendant to be found guilty of murder, the element
8 of malice need not be proven in order for the defendant to
9 be found guilty of the lesser offense of voluntary
10 manslaughter -- voluntary manslaughter being defined in the
11 law as the unlawful taking of the life of another human
12 being that is committed in sudden heat of passion which is
13 provoked by a sufficient legal provocation.

14 The law recognizes that sudden heat of passion arising
15 out of exasperation, rage, anger, sudden resentment, fear
16 or terror may for the time being affect the self control of
17 an individual temporarily disturbing the ability to
18 properly reason and therefore reduces the crime from that
19 of murder to that of voluntary manslaughter provided there
20 was a sufficient legal provocation for the sudden heat of
21 passion.

22 The law does not reduce from murder to manslaughter
23 every homicide that is committed in the heat of passion.
24 It must be the heat of passion which is justly excited by a
25 sufficient legal provocation. If a sufficient legal

1 provocation does not exist, then the killing even committed
2 in the heat of passion is murder and not voluntary
3 manslaughter.

4 The sudden heat of passion aroused by a sufficient
5 legal provocation which may reduce a homicide from that of
6 murder to that of manslaughter need not dethrone reason
7 entirely or shut out knowledge or volition, but it must be
8 such extreme emotion provoked by such facts or
9 circumstances as would naturally disturb the sway of reason
10 of any ordinary reasonable and prudent person rendering the
11 mind incapable of cool reflection and producing what
12 according to human experience may be described as an
13 uncontrollable impulse to do violence.

14 No mere words alone, however insulting or offensive,
15 would ever constitute sufficient legal provocation or
16 justify the use of deadly force in retaliation if such
17 words are accompanied by overt threatening or hostile acts
18 or by a physical encounter.

19 Then such conduct may give rise to a sufficient legal
20 provocation depending upon the circumstances of the case
21 and therefore reduce the offense from that of murder to
22 that of voluntary manslaughter.

23 In determining whether an act resulting in the death
24 of another was impelled by heat of passion or by malice you
25 should take into consideration all of the surrounding

Jury charge

1 circumstances and conditions accompanying the event.

2 (Pause.)

3 THE COURT: Here it is.

4 Voluntary manslaughter is an unlawful homicide
5 committed in the absence of malice but in sudden heat of
6 passion arising from a sufficient legal provocation.

7 So, again, with respect to murder. Murder is the
8 killing of any person with malice aforethought either
9 expressed or implied. And voluntary manslaughter is an
10 unlawful homicide committed in the absence of malice but in
11 sudden heat of passion which arises from a sufficient legal
12 provocation.

13 All right. That's the best I can do right now. But
14 if you have need for additional explanation or
15 clarification, please feel free to let me know. I'll be
16 happy to try to do the best that I can.

17 Okay. So please retire to your jury room and continue
18 with your deliberations.

19 (Whereupon, the jury retired to deliberate at
20 6:25 p.m.)

21 THE COURT: Mr. Lyles, you will be escorted to a
22 different jury room.

23 (Whereupon, the alternate was excused from the
24 courtroom.)

25 THE COURT: Are there any exceptions taken to the

Jury charge

1 instruction by the state?

2 MR. GOWDY: No exceptions, no objections.

3 MR. BRANNON: None, Your Honor.

4 MR. TURNIPSEED: None.

5 THE COURT: We'll continue to be at ease.

6 (Whereupon, a recess was taken.)

7 THE COURT: I understand the jury has reached a
8 decision. Are we ready to receive it?

9 MR. BRANNON: Yes, sir, Your Honor.

10 MR. GOWDY: Yes, sir, Your Honor.

11 THE COURT: Bring the jury in.

12 (Whereupon, the jury returned to the courtroom at
13 7:50 p.m. to report its verdict.)

14 THE COURT: Mr. Foreman, have you and your fellow
15 jurors reached a unanimous decision?

16 THE FOREMAN: We have, Your Honor.

17 THE COURT: And have you indicated that decision on
18 the back of the indictment as requested?

19 THE FOREMAN: We have, Your Honor.

20 THE COURT: Have you signed your name as the
21 foreperson and dated it?

22 THE FOREMAN: I have, Your Honor.

23 THE COURT: If you will, please hand that verdict form
24 up by way of the bailiff.

25 You may publish the verdict.

Verdict

1 THE CLERK: State of South Carolina, County of
2 Spartanburg, the State vs. Rashaun Sobers, Indictment No.
3 2009-GS-42-6427. We, the jury, find the defendant guilty.
4 Signed today's date. Foreperson, Richard Hall.

5 Ladies and gentlemen, if this is your verdict and
6 still your verdict, please raise your right hand.

7 (Whereupon, all jurors responded in the affirmative.)

8 THE CLERK: So say you all.

9 THE COURT: Does the defendant wish to have the jury
10 polled?

11 MR. BRANNON: Yes, Your Honor.

12 THE COURT: All right. Poll the jury, please, ma'am.

13 THE CLERK: Ladies and gentlemen, I will pose to you a
14 question, that question being is this your verdict and
15 still your verdict. When I call your name, please answer
16 yes or no.

17 Danny Culbreth.

18 THE JUROR: Yes.

19 THE CLERK: Stanley Tuffill.

20 THE JUROR: Yes.

21 THE CLERK: Debra Cole.

22 THE JUROR: Yes.

23 THE CLERK: Douglas Gilbert.

24 THE JUROR: Yes.

25 THE CLERK: Archie Means.

Verdict

1 THE JUROR: Yes.

2 THE CLERK: Allison Jones.

3 THE JUROR: Yes.

4 THE CLERK: William Barnette.

5 THE JUROR: Yes.

6 THE CLERK: Erica Jacobs.

7 THE JUROR: Yes.

8 THE CLERK: Michole Smith.

9 THE JUROR: Yes.

10 THE CLERK: Charles Koproski.

11 THE JUROR: Yes.

12 THE CLERK: Jeremy Martin.

13 THE JUROR: Yes.

14 THE CLERK: Richard Hall.

15 THE JUROR: Yes.

16 THE CLERK: The jury has been polled, Your Honor.

17 THE COURT: All right. Any other matters to address

18 with the jury present?

19 MR. GOWDY: None from the state, Your Honor.

20 MR. BRANNON: No, Your Honor.

21 (Whereupon, the trial jury was excused.)

22 THE COURT: All right. Anything further on behalf of

23 the state?

24 MR. GOWDY: Your Honor, may it please the Court.

25 I have consulted with Mr. Turnipseed and Mr. Brannon.

Motions

1 And, as the Court knows, Mr. and Ms. Jaramillo have been
2 present for the duration.

3 They wanted me to pass to the Court two photographs
4 and two letters just to ask the Court in the quietness of
5 the Court's own counsel to read them.

6 They don't want to speak to the Court. They don't
7 feel like they could. They just wanted you to read.
8 They're both fairly quick and short letters.

9 THE COURT: Okay.

10 (Pause.)

11 THE COURT: All right.

12 MR. GOWDY: Thank you, Your Honor.

13 THE COURT: Anything else from the state?

14 MR. GOWDY: No, sir, Your Honor.

15 THE COURT: Does the defendant have a criminal
16 history?

17 MR. GOWDY: No, sir, Your Honor. No convictions.

18 THE COURT: All right. Mr. Brannon.

19 MR. BRANNON: Your Honor, at this point I would make a
20 motion for a judgment notwithstanding the verdict.

21 Your Honor, I believe the jury's verdict is rendered
22 in opposition of the greater weight of the evidence in this
23 matter.

24 THE COURT: All right. To the extent that that motion
25 is applicable, it's denied.

Motions

1 MR. BRANNON: Then move for a new trial, Your Honor.

2 THE COURT: That motion is also denied.

3 MR. BRANNON: At this point then, Your Honor, I would
4 move to renew all objections made just to preserve the
5 record, Your Honor.

6 THE COURT: All right.

7 MR. BRANNON: Nothing further, Your Honor.

8 THE COURT: All right. Anything else to be said on
9 behalf of the defendant?

10 MR. BRANNON: Your Honor, I would ask you to consider
11 my client's young age. You heard all of the facts in this
12 case, Your Honor. You're familiar with his family and
13 those individuals that he is close to.

14 Your Honor, he does have a child, and I would just
15 simply ask you to be as lenient as possible.

16 THE COURT: All right. Mr. Sobers, do you have
17 anything you'd like to add to what your lawyer has told me?

18 THE DEFENDANT: No, sir.

19 THE COURT: All right. On Indictment 2009-42-6427,
20 State vs. Rashaun Jamine Sobers, an indictment for murder,
21 wherein you have been found guilty by the jury, the
22 Sentence of the Court is you, Rashaun Jamine Sobers, be
23 confined to the South Carolina Department of Corrections
24 for the period of your natural life.

25 Now, Mr. Sobers, you have a right to appeal the

Sentence

1 verdict of the jury and the Sentence of the Court. You
2 must file any notice of your intention to appeal those
3 decisions within ten days of today's date. Okay.

4 END OF REQUESTED TRANSCRIPT OF RECORD

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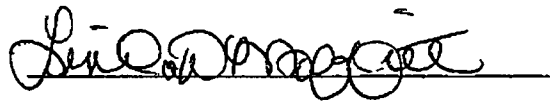
Certificate

CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 7th, 8th and 9th days of September 2010.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

January 20, 2010

A handwritten signature in cursive script, appearing to read 'Linda D. Moffitt', is written over a horizontal line.

Linda D. Moffitt
Circuit Court Reporter

Spartanburg County Courthouse

RANDOM STRIKE SHEET

JUDGE NAME : Cole, J. Derham

Sorted by: Random Nbr

CRIMINAL TYPE : Criminal

CASE ID : 2009GS4206427

DESCRIPTION : STATE VS RASHAUN SOBERS

Trial

COURTROOM JAR

NAME	AGE	RACE	SEX	STRIKE	DEFECT	REMARKS
1 Black, Thomas C	14	W	M	☒	()	()
2 Culbreth, Danny B	36	W	M	☒	☒	()
3 Drake, Sandra B	42	W	F	☒	☒	()
4 Tuffill, Stanley T	173	W	M	☒	☒	()
5 Cole, Debra S	29	W	F	☒	☒	()
6 Colegrove, Alfred J	30	W	M	☒	☒	()
7 Gilbert, Douglas L	64	W	M	☒	☒	()
8 Means, Archie L JR	116	B	M	☒	☒	()
9 Jones, Allison P	91	W	F	☒	☒	()
10 Koberg, Paul W	96	W	M	☒	☒	()
11 Bridwell, Allen E	21	W	M	☒	()	()
12 Barnette, William T	7	W	M	☒	☒	()
13 Jacobs, Erica Y	87	B	F	☒	☒	()
14 Smith, Michole L	160	W	F	☒	☒	()
15 Fink, Todd A	54	W	M	☒	☒	()
16 Horton, Charles H	81	W	M	☒	()	()
17 Koproski, Charles M	97	W	M	☒	☒	()
18 Simmons, Geraldine S	155	W	F	☒	☒	()
19 Eaker, Regina J	44	W	F	☒	☒	()
20 Martin, Jeremy Q	111	W	M	☒	☒	()
21 Hammond, Jerry W	74	W	M	☒	☒	()
22 Hall, Richard G JR	73	W	M	☒	☒	()
23 Lyles, Brandon K	109	B	M	☒	☒	()
24 Clark, Richard A	25	W	M	()	()	()

WITNESSES

Spartanburg County Sheriff's Office

1. SENTENCE MADE

2. REPORT ENDED

3. CARD PULLED

4. INDEXED

5. CHECKED WARRANTS

6. CHECKED SIGNATURE

7. ASSESSMENT AND
FINE CARD MADE

ARREST WARRANT NUMBER

M-087209

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date: 12/2/09

VERDICT

Guilty

Foreperson of Petit Jury

Date: September 9, 2010

DOCKET NO
09-GS-42-6427

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

NOV 30 2009

TERM

THE STATE

vs.

RASHAUN JAMINE SOBERS

Indictment for

MURDER

SC Code 16-03-0010, 0020

CDR Code 116

Class FEL-EXM

FILED
CLERK OF COURT
SPARTANBURG COUNTY

2009 DEC 10 PM 12:16

MARC KITCHENS

A CERTIFIED COPY

m. Hope Backley
CLERK OF COURT
SPARTANBURG COUNTY
BY: [Signature]
DATED: 11/10/10

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

NOV 24 2009

At a Court of General Sessions, convened on _____, the

Grand Jurors of Spartanburg County present upon their oath:

MURDER

The Defendant, Rashaun Jamine Sobers, did in Spartanburg County on or about April 21, 2009, feloniously, willfully, and with malice aforethought, kill one Sebastian Jaramillo, by shooting him with a firearm, and the victim died as a proximate result thereof, all in violation of Section 16-3-0010, 0020, Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


DEPUTY SOLICITOR

COUNTY OF SPARTANBURG
STATE VS.

Rashaun Jamine Sobers

AKA:

Race: B Sex: M Age: 20

DOB: SS#:

Address: 1036 Wildwood Ln

City, State, Zip: Spartanburg, SC 29301-3828

DL#: SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
TO: Murder / Murder

INDICTMENT/CASE#: 2009GS4206427

A/W#: M087209

Date of Offense: 4/21/2009

S.C. Code §: 16-03-0010,

CDR Code #: 0116

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-03-0010, of the S.C. Code of Laws, bearing CDR Code # 0116

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury (defendant's initials)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST

GOWDY, TREV 13150 Rashaun Sobers Defendant
SC Bar# 13039
Attorney for Defendant SC Bar# 68798

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of life days/months/years or ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 20.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCA Surcharge)	\$5	\$ 3.00
§ 44-53-450(C) (Conditional Discharge)	\$350	\$
3% to County (if paid in installments)	\$	\$ 3.00
TOTAL	\$	\$ 133.00

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (06/2010)

PTUP

 days/hours Public Defender Fund

Obtain GED ☐

Attend Voc. Rehab. or Job COUNSELING ☐

May serve W/E beginning

Substance Abuse Counseling ☐

Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ beginning

\$ paid to Public Defender Fund

Other:

☐ Condition Discharge, § 44-53-450(C) requires
\$350 be paid to the Clerk prior to case disposition

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Presiding Judge

Judge Code:

Sentence Date: September 9, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RASHAUN SOBERS,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

Whether 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?

II.

Whether 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?

STATEMENT OF THE CASE

Appellant was indicted by the Spartanburg County Grand Jury for the offense of murder. R. 509. His case was called to trial on September 7, 2010 before the Honorable J. Derham Cole, and a jury. R. 1.

N. Douglas Brannon, Brac Turnipseed, and Timothy Langley represented appellant. Harold Trey Gowdy, III and Barry Joe Barnette were the solicitors. R. 1

On September 9, 2010, the jury was charged the law of murder, voluntary manslaughter, and self-defense. R. 466, l. 22 – 493, l. 6. The jury found appellant guilty of murder. R. 501, ll. 1-4. Judge Cole sentenced appellant to life imprisonment. R. 502, ll. 19-24.

This appeal follows.

ARGUMENT

I.

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.

Relevant Facts

Phoenix Fielder testified that on April 21, 2009, when he was eighteen or nineteen-years-old, that he had known the decedent, Sebastian Jaramillo, for about a year. R. 36, l. 11 – 39, l. 7. Fielder remembered that the young people were getting ready to “load up and get it the car. It was me, Ricky Smith, Quitha Gentry, Travoiris Gentry and Sebastian” before the incident began in a playful way. “Devon went over there to Sebastian and they started playing. He was chasing him down the hill to the little cul-de-sac.” R. 39, ll. 2-23.

All of the young people were around the age of eighteen. Many of the witnesses gave their version of what happened that day, and part of it was recorded on a cell phone camera.¹ Fielder testified that “Devon had smacked Sebastian in a playful way, and we chased after him down the hill once he took off running.” R. 40, ll. 4-20.

There was testimony that Devon and Sebastian were in a “tap-boxing match.” “[D]evon got the upper hand and it turned serious.” R. 43, l. 14 – 46, l. 17. Devon and Sebastian then started seriously fighting - - it was a fist fight. Fielder said during the fight

appellant was sitting in his car. "He [appellant] got nothing at all to do with it." R. 46, l. 14 – 47, l. 14.

Fielder said that there was laughing after the fight and "we cranks [sic] up the car. Then after the cars cranked up I'm adjusting the music. And then not too long after that I hear a gunshot." Fielder said he heard three or four gunshots and he said he said he claimed he was "a hundred percent" sure that appellant fired his gun "towards the car" he was inside. R. 48, l. 22 – 49, l. 25.

Fielder said he saw "Sebastian slumped over behind the passenger - - behind the driver's seat." However, Fielder acknowledged he left without talking to the police or waiting for EMS to arrive. R. 50, l. 11 – 51, l. 19. Fielder also testified that appellant and Sebastian did not know each other. The decedent later died after he was shot. R. 54, ll. 9-12.

On cross-examination, Fielder identified Sebastian and Trey on a video and Fielder repeated that appellant never got out of his car during the fight. Fielder agreed that somebody was sitting on appellant's car at the time. However, that person was not appellant. R. 64, l. 11 – 65, l. 7.

Fielder also testified that he recalled that there was some discussion between Trey and appellant about whether appellant called Trey's sister "a bitch" on an earlier occasion. Fielder remembered that Trey asked appellant about calling his sister a bitch but he said neither man was really angry about. R. 66, l. 8 – 67, l. 14. Fielder said the incident was videotaped because: "[I] wanted to have something to come back and laugh at." Fielder

¹ The defense complained prior to trial that the entire recording or video had not been preserved. R. 2-7. All of the relevant videos and photographs are before this Court for

stated that he was already videotaping the "tap boxing" before the fight got serious, and before it got out of hand. R. 67, l. 7 – 69, l. 7. The jury would never hear the expert testimony, as will be seen infra, that Fielder's attempted rationalization was not an accurate assessment about why this gang taped activities. Fielder also estimated there were about fifteen people around at the time of the fight, and that they all of individuals knew each other. R. 69, l. 15 – 70, l. 4. On recross-examination, Fielder repeated that appellant not had anything to do with the fight. He was not involved in the violence at all. R. 73, ll. 11-13.

The following day, Defense Counsel Brannon reminded the judge that the judge had said the defense could potentially "be able to go into the victim's gang activity in our case in chief." However, defense counsel argued this was not sufficient for the defense, and that he needed to cross-examine the state's witnesses on this subject as the solicitor called them as witnesses. The judge ruled, "You haven't established the relevance of this gang-related information that's why I'm not permitting it. And that's as simple as that." R. 77, l. 9 – 78, l. 7.

Defense counsel argued this gang evidence went directly to appellant's fear and apprehension at the time he shot his gun. The judge repeated that he was not going to allow this evidence about the gangs until the defense established its relevance to his satisfaction. R. 77, l. 9 – 78, l. 7.

Appellant later testified that he shot his gun out of fear after a "mob" descended on his vehicle. Defense counsel later proffered the testimony of Travoiris Gentry, Ricky Smith,

review.

Quita Gentry, Joshua Fuller, and Phoenix Fielder about gang signs and activity pertaining to this case.

As seen, appellant was prohibited from cross-examining Fielder about the subject of gangs. During the subsequent proffer, Phoenix identified his cousin Ricky Smith and said he was making gang signs that showed what part of town he was from. R. 397, l. 24 – 399, l. 19. Fielder identified the letters S. S. G. which stood for “South Side Gangsters.” Fielder also said the N. S. G. gang signs stood for “North Side Gangsters.” The following occurred on direct-examination of Phoenix Fielder during the proffer:

Q. Please tell me again who those people are.

A. Quay, Quita, Trey and Ricky.

Q. Okay. Ricky [earlier] testified in this trial, didn't he?

A. Yes, sir.

Q. Trey testified in this trial, didn't he?

A. Yes, sir.

Q. Quita testified in this trial, didn't she?

A. Yes, sir.

Q. *They're all throwing down gang signs, aren't they?*

A. *Yes, sir.*

Q. *And they're all in a gang, aren't they?*

A. *No, sir. I wouldn't feel like that.*

Q. Now, you just said they were.

A. No. It's gang symbols.

R. 400, l. 22 – 401, l. 10. (emphasis added).

Fielder acknowledged he earlier had said the other young people were gangsters or in a gang, but Fielder attempted to explain "they're not gangsters, but they are - - well, they're not in a gang. That's just the side of town they grew up on." Fielder also acknowledged he was in the photograph "throwing out a gang sign," but denied that he was in a gang or "a gangster." He said he was only representing "my side of town." R. 401, l. 21 - 403, l. 17. The following also occurred in direct examination of Fielder during the proffer:

Q. And Sebastian beat down Devon, didn't he?

A. Yes, sir.

Q. So that's a group of kind of gangsters beating down Seba - - beating down Devon, right?

A. Well, kind of, but, yes, sir.

Q. Yeah. Okay. *So when y'all are hanging out has kind of gangsters people get beat up, don't they?*

A. No, sir, they don't.

Q. Now, that day they did, right?

A. Yes, sir.

Q. Okay. *So sometimes when y'all are hanging out being kind of gangsters people get beat up, right?*

A. No, sir, not normally. *That was just the first time that ever happened. That's the reason why he was videotaping.*

Q. *That's the reason why you videotaped it.*

A. Yeah, come back and laugh at it.

R. 404, ll. 5-21. (emphasis added).

After Fielder's testimony as the final proffered witness, defense counsel argued that gang signs were symbols being made and "he identified those people that testified in this courtroom as gangsters, kinda." Defense counsel argued the tie had now been made to gang activity and "it goes directly to our client's state of mind, his belief and his fear." Defense counsel said he wanted to recall the state's witnesses "to tie this group of people, this mob as you have allowed us to identify them, as a gang." R. 406, ll. 3-17. The judge denied appellant's motion and said he would not alter his ruling that there would be no mention of gang activity. R. 406, ll. 3-20.

Prior to the proffer of Phoenix Fielder, Travoiris Gentry's testimony was also proffered. Gentry identified himself in a photograph with his friend Josh. Gentry said in the photograph they were "just throwing stuff up." Gentry identified a photograph from his Facebook page which showed the letters "S. S. G." Gentry denied he was a member of the north side gang or the south side gang and he said the photograph of himself on "My Space" that says "S. S. G. N. S. G. 'we da best'" meant "that's where all my people [are] from." R. 369, ll. 14-25.

Gentry admitted that "some of his people" were in a gang and that he "hanged with them" at times. R. 370, ll. 1-12. When defense counsel asked Gentry to tell him specifically his friends that were in a gang, Gentry stated: "I can't name them." The solicitor then accused the defense of "trying to put this witness in personal jeopardy." Defense counsel responded that "we've been arguing for - - for three days now that he was in jeopardy because this was the act of gang. I'm not trying to put this - - " The judge interrupted defense counsel and he ruled: "If he [Gentry] knows somebody who's in a gang that has nothing to do with this case, it's not relevant to this case." R. 371, l. 5 - 372, l. 16. On

continued examination, Gentry said he did not think that a future member of the gang had to “beat anyone down” to be in a gang. Gentry said he thought a person could join a gang simply by asking. R. 373, ll. 6-21.

Ricky Smith, who was also a friend of the decedent and present when the shots were fired, testified during the proffer that north side and south side gang symbols were being thrown up in a photograph he identified. R. 375, l. 20 – 378, l. 14. He also identified Jay Red, another witness, with a gun in his hand. R. 378, l. 9 – 379, l. 15.

During the proffer of Quita Gentry, who was also at the scene of the shooting and a friend of the decedent, she also identified the letters “S. S. G.” and “N. S. G.” However, she claimed she did not know what the letters meant. R. 384, ll. 11-25.

Joshua Fuller identified photos taken from his Facebook page that depicted what appeared to be Fuller and friends of the decedent making gang signs. However, Fuller refused to admit that he knew what “S. S. G.” meant. Fuller claimed he worked all day and was not familiar with gangs or gang activities. Fuller also said the young people: “[W]e all liked being together, like [we are] family,” but he denied that they were in a gang. R. 388, l. 14 – 389, l. 12.

Prior to these proffers appellant had testified in his own defense, and he clearly raised self-defense as a complete defense that the state had the burden of disproving beyond a reasonable doubt. Appellant said that he did not know the decedent and he only knew Trey “by face.” R. 246, ll. 11-25.

Appellant had purchased a gun because of violence in the neighborhood, and he told the jurors that his grandmother and his family had to move out of the Quail Point Apartments because of housebreakings and burglaries there. R. 250, l. 1 – 251, l. 24.

Appellant acknowledged he had called Trey's sister "a bitch" about a week or two before the incident because she "tried to take up for him [Trey's little brother]" after Trey's little brother had been sitting on appellant's vehicle. R. 254, l. 25 – 255, l. 23.

On the day of the fatal incident appellant recalled that Trey asked him: "Why the fuck did you call my sister a bitch?" Appellant acknowledged that the decedent got Trey calmed down. R. 255, l. 24 – 257, l. 15.

When a video was played for the jury, appellant said he did not know who was fighting on the video, and that he was simply sitting in his car at the time. R. 257, l. 22 – 258, l. 23. Appellant testified someone sat on his car apparently watching the fight and:

[T]rey and the crowd of guys that was over by the fight ran towards my car. And Trey stuck his hand in my car window, and he grabbed me by my shirt. He was yelling, "Get the fuck out of the car, motherfucker. Get the fuck out of the car."

And I started reaching for my gun because I got scared. And at that point I heard my passenger and my back doors open. I could see Quan standing in front of my car, sir. And at that point I just fired toward my passenger side because Trey had me. I was just trying to get away, sir.

R. 259, l. 17 – 260, l. 3.

Appellant said after he fired the gun the crowd "scattered from my car so that's when I started my car and turned the car around. And I got out, got out of there." R. 263, ll. 19-22. Appellant testified he believed he may have been killed if Trey pulled him out of the car with the mob there. Appellant had just watched a fight that turned serious and he believed the crowd would have beaten him if they would have been able to get him out of the car. Appellant was only 5'4" and weighed 135 lbs. and he testified that he was scared for his life that day. R. 264, l. 6 – 277, l. 14.

Appellant said he went to Charlotte and he waited to turn himself in because he was afraid. Appellant wanted his mother to get retain an attorney before he returned to Spartanburg. R. 299, l. 6 – 301, l. 24.

Appellant finally stated he did not know why the decedent was among the mob that rushed his car. R. 318, l. 18 – 319, l. 15. As stated, the judge charged the jury on law of murder, voluntary manslaughter, and self-defense.

Discussion

As seen above, appellant testified that he was attacked by a “mob,” and that he was in fear of his life, which is why he shot his gun. Defense counsel Brannon correctly argued that whether the people out there were in a gang went to appellant’s self-defense case because it was relevant of appellant’s state of mind and his fear and his apprehension of being killed or badly injured.

Despite an abundance of evidence during the proffer about the south side gang and the north side gang – and as seen in issue two expert testimony on the subject -- the trial judge refused to allow the jury to hear **any** evidence regarding these gangs. The judge repeatedly said this evidence was not relevant.

However, the definition of relevance is broad. Rule 401, SCRE provides: “Relevant evidence” means “evidence having any tendency to make the existence of any fact that is of consequence to the determination of action more probable or less probable than it would be without the evidence.”

In State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991) and State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986), our Supreme Court held that evidence “was relevant if

it tended to establish or it made more or less probable some matter in issue upon which it directly or indirectly bore.”

Here, appellant had the right to have a jury understand the situation he found himself in on that fatal day. Yet the jury in this case was not allowed to hear the proffered evidence regarding gang signs and gang activity. The trial judge respectfully was adamant that there would not be evidence about the north side gang and the south side gang presented to the jury. Thus, the self-serving statements that a beating was not being taped because that was common, and that the gang members would never laugh at another person being beaten was left unchallenged before the jury. Appellant’s fears and his state of mind were relevant in this self-defense case. Further, our Supreme Court has held sometimes unpleasant facts (drugs or other bad acts) are just part of the *res gestae* and the jury must be allowed to hear the evidence. See State v. Owens, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001).² Here, that subject was the north and south side gangs.

Further, a defendant’s testimony is going to be viewed as self-serving to the jury, and corroboration of appellant’s testimony was critical. Fear for one’s safety is a necessary element of self-defense and appellant had the right to corroborate his testimony of his fear, and his state of mind at the time, by showing the jury the true nature of this gang related situation. See, State v. Hendricks, 270 S.C. 653, 244 S.E.2d 503 (1978).

Our Supreme Court recently held in State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011) that the defendant was entitled to a directed verdict as a matter of law by reason of self-defense. Here, there was evidence appellant was sitting in his vehicle, and was without fault in bringing on the difficulty. If the jury believed appellant, there was certainly

1
evidence he was in imminent danger of sustaining serious bodily harm or losing his life at the time he fired his gun. Further, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief and appellant clearly testified he shot his gun to attempt to get away from this mob because he believed he could be killed. Appellant clearly made out a defense of self-defense if he could have corroborated his testimony.

The evidence about the north and south side gangs was critical for the jury to have a full understanding of the situation and the videos. This entire case -- the videotaping of the scene -- and the Face Book and My Space to preserve the memories had to somewhat appear strange to the jury but the real gang activity relevant in this case was never heard by the jury because the proffered evidence was excluded. Appellant was sentenced to life without parole following this trial and he should now be granted a fair trial.

² Overruled on other grounds.

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.

Relevant Facts

Defense counsel also proffered the testimony of Rocky Watts. Rocky Watts had been employed by the Greenville County Sheriff's Office for sixteen years. He had done undercover work in narcotics and with gangs. He had also worked in the violent crime unit during those sixteen years. He retired after being wounded or injured on the job. R. 346, l. 1 – 348, l. 25.

Watts had to continue taking at least twelve hours of training to keep his license as a private investigator. His training dealt specifically with gangs and he had done independent studies on gangs, their apparel, colors, and signs. He had very specifically investigated the gangs involved in this case. R. 348, l. 1 – 350, l. 25.

On cross-examination, Watts said that although he had never published any books or articles on the subject of gangs, his research consisted of interviewing many people in the Spartanburg area about gangs. As stated, Watts was well acquainted with the North and South Side gangs. R. 350, l. 3 – 353, l. 25.

Watts testified he was retained in this case by the defense and he found out initially that the gangs were at odds with each other and he found this out by use of appellant's mother's Facebook account, and that he was also able to make friends with others involved

in this case through social media. His investigation allowed him to learn much about these gangs and their practices. R. 356, l. 3 – 359, l. 21.

Watts stated that the people involved were flashing gang signs on video and in photographs. His investigation revealed that S. S. G. stood for south side street gang and N. S. G. stood for north side gang. R. 350, l. 1 – 356, l. 25.

Watts testified that many gangs currently videotape their gang activity. Watts said with cell phones and cameras gangs were able to tape or record their activities and he stated he thought the two gangs were now actually the same. R. 363, l. 3 – 365, l. 25.

Defense counsel Brannon argued that under Rule 702, SCRE that Rocky Watts was qualified and that his testimony would assist the trier of fact. The judge refused to allow Watts to testify in this manner. R. 363, l. 3 – 365, l. 25.

Discussion

Under Rule 702, SCRE a witness may be qualified as an expert if the judge finds that his expertise will assist the trier of fact; the expert possesses the requisite knowledge, skill, experience, training, or education, and the expert's testimony is reliable. See, Rule 702, SCRE. In State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) the Supreme Court noted that the trial court has a gatekeeping function in assuring the reliability of expert testimony – whether scientific or non-scientific. The Court in State v. White also found that the particular expert testimony relating to dog tracking evidence in that case was reliable.

While Rocky Watts had not been qualified as an expert in the past regarding gangs, it is elementary that every expert was qualified for the first time at some point. Here, Watts was a long time narcotics agent, and he worked in the violent crimes unit. He had continued to study gangs and specifically this particular gang activity in Spartanburg.

Watts had a clear understanding of this gang activity through his investigation of social media, videos, interviewing various people in the community, and investigating these particular gangs that made him qualified to assist the jury with understanding the evidence that was being presented to them in this case. Watts was qualified as an expert and his testimony was relevant.

In State v. Martin, 391 S.C. 508, 706 S.E.2d 40 (Ct. App. 2011), this Court rejected the argument that a forensic toxicologist had insufficient training or expertise to allow him to give his opinion regarding the effects of drugs and alcohol on the body.

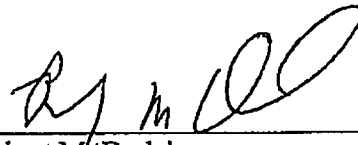
Here, Watts could have assisted the trier of fact in understanding the gang culture specifically involved here, and that expert testimony was necessary to appellant's defense. Again, the jury must have found it strange that unusual signals were being made and that this strange activity was being videotaped. The testimony of Rocky Watts would have assisted the jury in understanding the facts of this case and would have given it a further appreciation of appellant's self-defense case.

The judge at first refused to allow cross-examination of the state's witnesses who were present and the time of the fight and the shooting on this subject. After the proffered testimony of Private Investigator Watts and the witnesses discussed in issue one above, the judge abused his discretion by refusing to allow any of this evidence to be heard and considered by the jury. The judge successfully and unfairly sterilized the gang element out of this case to the detriment of appellant's defense. Appellant should be granted a new trial. See State v. Martin, supra.

CONCLUSION

By reason of the foregoing arguments appellant's conviction should be reversed and his case remanded to the Spartanburg County Court of General Sessions for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', is written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

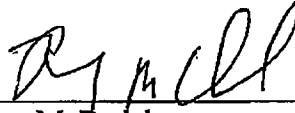
ATTORNEY FOR APPELLANT

This 19th day of July, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

July 19th, 2012

A handwritten signature in black ink, appearing to read "R. M. Dudek", is written over a horizontal line.

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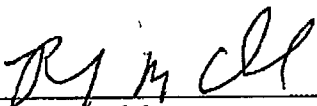
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CERTIFICATE OF SERVICE

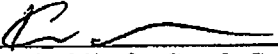
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Melody J. Brown, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 19th day of July, 2012.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of July, 2012.



(L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013.

STATE OF SOUTH CAROLINA
In The Court of Appeals

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J. Derham Cole, Circuit Court Judge

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vs.

Rashaun Sobers,

Appellant.

FINAL BRIEF OF RESPONDENT

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I.

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. 8

II.

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. 19

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I.

Whether the court erred by excluding the testimony of Travoiris G*****, Ricky Smith, Quitha G*****, 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?

II.

Whether 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?

(FBOA, p. 3).

RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial judge abused 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.

II.

Whether appellant's issue two -- that the trial judge abused his discretion in finding Mr. Watts was not qualified as an expert in gang activity -- should even be addressed by this Court where the defense failed to show the substance of the proffered evidence 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.

RESPONDENT'S STATEMENT OF THE CASE

A Spartanburg County Grand Jury indicted appellant, Rashaun Sobers, in November 2009 for the murder of Sebastian Jaramillo. (R. p. 509). A jury trial was held September 7-9, 2010, before the Honorable J. Derham Cole. The jury convicted appellant as charged. (R. p. 501, lines 1-3). Judge Cole sentenced him to life imprisonment. (R. p. 502, lines 19-24). This appeal follows.

RESPONDENT'S STATEMENT OF FACTS

On April 21, 2009, a group of young adults were gathered at Catina Smith's home. Ms. Smith's son, Ricky, and her nephew, Phoenix Fielder, lived in her home.¹ Phoenix testified that friends Travoiris "Trey" G****, Shaquila "Quita" G****, Jayquan Hardy, Devon D****, and Sebastian Jaramillo were at the Smith home along with Phoenix and Ricky. (R. p. 37, line 23- p. 39, line 15). Phoenix testified that Devon hit Sebastian "in a playful way," then a short chase ensued with several people in the Smith car driving to a nearby cul de sac in the same general area. (R. p. 39, line 20 - p. 41, line 9). (See also State's Exhibit 4). Devon and Sebastian, now near the cul de sac, decided to "tap box." Phoenix used his cell phone to video record what he considered a harmless fight. (R. p. 41, line 9 - p. 42, line 22; p. 45, lines 21 - 24; p. 67, lines 18 - 25). A crowd of approximately fifteen (15) people gathered to watch the fight. (R. p. 69; lines 15 - 22). Appellant Rashaun Jamine Sobers, a/k/a "RaRa," was in a burgundy Impala parked in the cul de sac. (R. p. 47, lines 4-11). Appellant was not involved with the fight, and did not participate in the fight. (R. p. 47, lines 12-21; p. 72, lines 17-22). Devon and Sebastian's fight began to turn "a little serious," with Sebastian besting Devon, (R. p. 46, line 10; p. 67, lines 1-3), but no one was "knocked down." (R. p. 72, lines 4-8). The two boys walked away from each other, but some members of the group encouraged both Devon and Sebastian to shake hands to put the fight behind them, and they did. (R. p. 46, line 18 - p. 47, line 3; p. 72, lines 2 -

¹ Because there are individuals such as the Smiths who share a last name, Respondent will liberally use first names hereafter for the young adults to avoid confusion and identify the individuals clearly while also remaining in compliance with court redaction rules.

15). Phoenix testified that after the expression of no-hard feelings and reconciliation, and in the midst of everyone laughing and leaving, he, Ricky, Sebastian, Quita and Trey got in the Smith car. Again according to Phoenix, as he was adjusting the music in the car, he heard a gunshot. Ricky “said to get down,” prompting Phoenix to look up. Phoenix saw appellant pointing a gun at the car. Phoenix testified that he ultimately heard “[t]hree to four” shots. Phoenix also testified that he knew appellant prior to the shooting and was “a hundred percent” sure that it was him in the Impala, and that it was appellant who fired a gun at the Smith car. (R. p. 47, line 25 - p. 49, line 25). Sebastian was hit just above the left ear, and “slumped over behind ... the driver’s seat.” (R. p. 51, lines 4-12; p. 238, line 2 - p. 239, line 17).

Phoenix’s video was shown to the jury. (See State’s Exhibit 4). In addition to the fight, the video shows that someone sat on appellant’s car prior to Sebastian and Devon’s scuffle, but there was no incident from that action. (R. p. 65, lines 3-7). Further, Phoenix testified (and the video demonstrates) that Sebastian and Trey approached appellant, while appellant was in his car, prior to the scuffle between Sebastian and Devon. Testimony established that Trey asked why appellant had called Trey’s sister a name “a week or two weeks before....” (R. p. 44, line 25 - p. 45, line 20; p. 65, line 23 - p. 67, line 10; p. 340, lines 16-25). However, both Trey and Sebastian walked away without incident, the scuffle between Sebastian and Devon occurred, and both Sebastian and Trey were in the Smith car before appellant began shooting. (R. p. 44, line 25 - p. 45, line 20; p. 48, lines 9-25; p. 72, line 23 - p. 73, line 7). (See also State’s Exhibit 4).

"Quita" also testified that there were no threats to defendant. She testified that the group in the car was simply talking among themselves when she heard appellant shout "bust what, ask what," then he began shooting at them. Just prior to the shooting she had heard Jayquan "say now I'm ... going to ask him." R. p. 86, line 2 - p. 89, line 17).

Devon testified that he saw Jayquan walk up to appellant's car after the scuffle between Trey and Sebastian, but before the shooting. Devon testified that Jayquan "was talking to him for a second. And then he walked back... then I seen - - I just seen fire coming out of" the burgundy vehicle. (R. p. 101, lines 2-23).

Trey testified that, prior to the fight between Sebastian and Devon, he and Sebastian walked over to appellant's car and questioned appellant about comments to Trey's sister. Trey testified that he saw appellant had a gun in his car. Trey testified that appellant denied calling Trey's sister a name, so the two shook hands and Trey and Sebastian walked away. Appellant was not involved at all in the subsequent scuffle between Sebastian and Devon. (R. p. 114, line 10 - p. 115, line 16; p. 134, lines 16-25). Trey testified that, after the fight, while the group was in the car, he saw appellant actually back up and shoot toward the car. Appellant fired three or four times. (R p. 115, line 17- p. 117, line 20).

Jayquan testified that he approached appellant after the scuffle between Sebastian and Devon, and just before the shooting. Appellant was in his car. Jayquan asked "what was up with him and Trey getting into it. And he told me there wouldn't be any fighting." (R. p. 150, lines 21-25). Jayquan testified that he saw appellant "reach[] to his right." Appellant stated for a second time that "there wouldn't be fighting ... then he pulled a gun out." Jayquan ran. Appellant fired several times. Jayquan testified he "heard about three

gunshots.” Jayquan did not believe the initial exchange with appellant to be confrontational, and, in fact, thought they were “cool.” However, according to Jayquan, “it just led from that to a bad situation quickly.” (R. p. 151, line 1 - p. 153, line 23).

Ricky also testified that appellant was not involved in the scuffle between Sebastian and Trey, and that Sebastian and Trey were already in the car before the shots were fired. He also confirmed that appellant was the only one with a weapon, and that appellant fired the shot that killed Sebastian. Further, he testified he heard appellant’s “car speed off” after the shooting. (Rr. p. 165, line 3 - p. 170, line 16)

Sebastian’s body was still in the back seat of the Smith car when officers arrived. (R. p. 22, lines 1-6; p. 191, lines 7-20; State Exhibits 12 and 13). He had been shot “just above the external” canal of his left ear, indicating he was likely not even looking at the gun when he was shot. (R. p. 238, line 2 - p. 239, line 17). Officers found no evidence of any weapon in the Smith car. (R. p. 192, lines 9-16). There was no gunshot residue detected on Sebastian’s hands. The lack of particles indicated he was not close to the weapon when appellant fired the shot. (R. p. 228, line 9-p. 229, line 17). Examination of the Smith car and scene revealed indications that multiple shots were fired, including markings on the driver’s side of the vehicle and on the asphalt near the car on the same side. (R. p. 204, line 9 - p. 207, line 13; p. 185, line 16 - p. 187, line 16). (See also State Exhibits 8, 9, 15, 16, 20, 21, 23, 24).

Appellant fled the jurisdiction after the shooting. He was apprehended by federal marshals several days later in Charlotte, North Carolina. (R. p. 224, line 10 - p. 225, line 7).

Appellant testified at trial and admitted the shooting. He testified, however, that after the Sebastian/Devon scuffle, Trey approached his car and attempted to engage him in a fight. Appellant testified that Trey “grabbed his shirt” through the driver’s side window and others swarmed the car, opening the passenger side doors. He testified he shot out the front passenger door “because Trey had me.” He denied shooting at anyone. (R. p. 258, line 6 - p. 263, line 22). Appellant testified that he was not scared of Trey after the initial confrontation about Trey’s sister, and did not leave the cul de sac. He testified: “I didn’t think they were going to do anything. Greg told them to leave me alone the first time ... They walked away. So I thought maybe everything was okay.” (R. p. 264, lines 14-19; p. 275, lines 12-17). Greg was a friend of appellant’s who was also in the cul de sac. (R. p. 253, line 4 - p. 256, line 14).² Appellant admitted speaking with officers after he was apprehended in Charlotte. He did not, however, tell them that he was mobbed or that Trey attempted to pull him from the car. Instead, he, admittedly, falsely stated to the officers that Trey had a gun. He also admitted in his testimony at trial that he made up that story “trying to protect” himself. (R. p. 272, line 9 - p. 274, line 22). (See also R. p. 317, line 12 - p. 318, line 20).

² Appellant incorrectly asserts that “the decedent got Trey calmed down.” (FBOA, p. 12). The transcript reflects that Greg “calmed” the situation, though appellant admitted in his testimony that there were no threats or acts of violence, and further admitted that he did not fear that “they were going to do anything.” (R. p. 256, lines 1-14; p. 264, lines 14-23).

ARGUMENT

I.

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.

Relevant Facts:

In pre-trial, the State advised the trial judge that appellant had indicated the defense would present evidence of “gang activity involving the victim, as well as the witnesses in the case.” (R. p. 8, lines 19-25). The State also indicated that appellant had pictures from a Facebook account that he would present as “evidence” of same. (R. p. 9, lines 1-5). As to the photographs, appellant argued one “photograph ... shows basically every eye witness or lay witness that they intend to call, to include the alleged victim in this matter, all of them flashing gang signals.” (R. p. 10, lines 16-20). The Facebook photographs, which were later marked as Court Exhibits in a subsequent proffer, were from accounts maintained by witness Travoiris “Trey” G*****, (R. p. 367, line 6 - p. 374, line 10), and by Joshua “J Red” Fuller, an individual who was not present at the shooting, (R. p. 386, line 24 - p. 391, line 10). (See also Court Exhibits 3, 4, 5, and 6). One of the photographs from Joshua’s page shows Joshua’s memorial tattoo naming the victim and his date of death. (R. p. 390, line 8 - p. 391, line 10; Court Exhibit 6). Another shows Joshua with two guns. (Court’s Exhibit 3). Nothing in the text or pictures references the shooting or cause for the shooting, save for the post-shooting memorial tattoo reflecting the date of death.

The State argued 1) that the matter was irrelevant, but if relevant, the danger of unfair prejudice greatly exceeded any probative value; 2) the Facebook account information

constituted hearsay without identifiable exception; and 3) the evidence unfairly attacked the victim's character. (R. p. 9, lines 1-18). Appellant argued that the evidence "goes to self-defense." (R. p. 11, lines 2-3). Appellant argued that within the "two minutes" between the end of the video of the unrelated Sebastian/Devon scuffle (which would be shown to the jury), and when the 911 call occurred,³ (R. p. 11, lines 8-11), the group of young people gathered around the unrelated scuffle decided to turn back from dispersing, grouped around appellant's car, and tried to pull appellant out of his car. That action resulted in appellant having to reach for his gun and fire, appellant argued, because "[t]hose people are gang members" who had "just beat down another little boy." (R. p. 11, lines 12-18; p. 14, lines 5-19). The scuffle and shooting occurred in a residential area in day light. (See State's Exhibit 4). Testimony at trial established that some of the young adults present simply lived in that residential area. (See R. p. 112, lines 1-25). The video, State's Exhibit 4, shows much of the events involving the scuffle, and some images of the different people in the area. None of the images reflect a tight circle around the scuffle, rather, at most, reflect a loose grouping. Further, that loose grouping appeared to be dispersing and leaving the area after the few seconds of fighting between Sebastian and Devon. The crowd does not appear organized nor to be wearing a uniform color; rather, the video shows individuals milling about with t-shirts or jackets that reflect a range of colors. Appellant did not assert, either in argument or in testimony, that he perceived anyone wearing gang colors. Appellant did

³ The parties stipulated at trial that the first call to 911 was made at 7:29 p.m. on April 21, 2009. (R. p. 242, lines 13-16).

not assert, either in argument or in testimony, that he perceived any gang signs or symbols on the video or at the scene.

Appellant argued in pre-trial that the defense would assert that appellant believed the few seconds of fighting was a gang initiation. (R. p. 13, lines 3-8). Appellant relied upon Rule 406, SCRE, allowing the admission of “habit” or “routine,” to suggest the evidence – in particular that the “gang” had beaten Devon and would “try and pull [Appellant] from his automobile to do the same thing” – would be admissible. (R. p. 15, line 23 - p. 16, line 7). The trial judge inquired whether any statement reflected any gang-related action, and the solicitor responded that none did. (R. p. 16, lines 11-20).

The trial judge found that appellant failed to show any relevance of possible gang associations to the shooting. The trial judge noted that the fear had to do with the “mob” approaching, not any specific associations within the mob. Yet, the trial judge left open the possibility that appellant could offer evidence in his case, if he could establish the requisite relevancy. (R. p. 14, lines 2-4; p. 17, line 6- p. 20, line 18).

Even with this ruling, appellant asked questions several times during the state’s case about groups at the scene and clothing colors. (See R. p. 69, lines 15-22; p. 106, line 1 - p. 110, line 7; p. 138, line 18 - p. 140, line 6; p. 178, line 18- p. 182, line 25). None of the responses, however, indicated gang-related activity or gang colors. Further, witness testimony repeatedly demonstrated appellant was not involved in the Sebastian/Devon scuffle, and was not approached by a group after that scuffle. (See R. p. 47, lines 7-21; p. 85, line 17 - p. 87, line 25; p. 142, line 14 - p. 143, line 9; p. 154, lines 4-14).

Appellant testified, though, that he was mobbed and that Trey grabbed his shirt through the driver's side window and attempted to pull him from the car. He testified that someone opened the passenger side and back doors. Appellant testified that he "just fired toward my passenger side because Trey had me." (R. p. 259, line 17 - p. 260, line 2).

During the defense case, appellant proffered both expert testimony from a private investigator, Mr. Watts, testimony from several people in the Facebook photographs (specifically Trey, Ricky, Quita, Phoenix and Joshua), and the Facebook photographs. The trial judge found that the offered education and experience for the proffered expert did not support qualification as an expert in gang activity. (R. p. 356, lines 3-13). The lack of qualification is addressed in issue two in this appeal. At any rate, the proffered expert testified that he initially believed there were two gangs in the area -- a north side and a south side gang -- but then testified that upon further investigation, he believed the two to be one gang. (R. p. 357, line 9 - p. 358, line 9). He located the Facebook pages in Court's Exhibits 3, 4, 5 and 6, and testified -- "based on [his] experience as both a police officer and a private investigator" -- that the group photos show individuals "flashing gang signs." (R. p. 358, line 11 - p. 360, line 24; p. 363, lines 3-8). He testified that he believed the victim to have been in a gang, as well as witnesses, Quita, Ricky, and Trey, based on the photographs. (R. p. 363, line 17 - p. 366, line 11). He also testified "[b]ased on ... experience as a law enforcement officer and private investigator," that gangs will "videotape their activities." (R. p. 364, line 24 - p. 365, line 8).

Trey, Ricky, Quita, and Phoenix admitted being in the photographs and making signs, but denied being in a street gang. (R. p. 367, line 9 - p. 386, line 15; p. 397, line 16-p. 405,

line 15). Additionally, Joshua, who was not at the shooting, testified that he had a photograph on Facebook showing him with two guns, and he was also in a group photograph with victim. (R. p. 387, line 1- p. 388, line 8). Joshua testified that the individuals in the group photos were “just posing,” and that they were “all being together, like we family, all of us akin,” but not a gang. (R. p. 388, lines 7-23).

In his testimony, Trey described the “north side” and “south side” designations as defining “where all my people from.” (R. p. 369, lines 23-25). He admitted that he knew people who were in gangs, but maintained he was not in a gang, and neither was Ricky, Quita or Phoenix. (R. p. 369, line 18 - p. 371, line 4).

Phoenix described his inclusion in the group photograph (along with Ricky, Quita and Trey) not as representative of inclusion in a gang, and not “gangster,” but “just rep my side of town.” (R. p. 400, line 22 - p. 403, line 17).

The solicitor argued:

... there’s been not one scintilla of evidence offered this morning that connects – first of all, there’s nothing suggesting anybody that’s testified this morning is in a gang.

Assuming for the sake of argument that there were, there’s no connection to what happened to Sebastian Jaramillo on April 21, 2009. It is irrelevant and the jury shouldn’t hear it.

(R. p. 393, lines 6-13).

Appellant argued that “[a]ny evidence that can reasonably be linked or legitimately tending to support Mr. Sobers’ theory of self-defense is admissible.” (R. p. 394, lines 4-6). Appellant reasoned that “[f]ear of a gang is much different ... than fear of a slap box...” (R. p. 394, lines 8-9).

The trial judge reaffirmed his ruling that the proffered expert lacked the qualifications to testify as an expert. (R. p. 394, lines 20-23). Even so, and after considering the proffered evidence of gang associations, the trial judge found:

... with respect to the testimony regarding membership by certain witnesses that have testified to be members of a gang, apparently they're all members of different gangs. But based upon what's been presented it's all the same gang if it is a gang.

Nevertheless, I fail to see the connection between any membership in a gang if there is one to what occurred on April the 21st 2009. I see no connection whatsoever.

They were, if you believe the testimony of the defendant, acting as a mob. But I still fail to see if they were a member of a gang that that has any connection with what occurred on April the 21st.

So based upon there being no connection established, there being no relevance to it, there does not appear – that the testimony would relate or be relevant to any issue that the jury has to decide in this case; and therefore I stand by my previous ruling that that is to be excluded.

(R. p. 394, line 24 - p. 395, line 15).

Discussion:

“The admission or exclusion of evidence is a matter within the trial court’s sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a ‘manifest abuse of discretion accompanied by probable prejudice.’” *State v. Commander*, 396 S.C. 254, 262-63, 721 S.E.2d 413, 417 (2011), quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). An abuse of discretion is shown where the trial judge’s ruling is based upon “an error of law or a factual conclusion that is without evidentiary support.” *State v. Irick*, 344 S.C. 460, 464, 545 S.E.2d 282, 284

(2001). This record does not show an abuse of discretion. The trial judge reasonably found the proffered evidence was not relevant.

Respondent notes that appellant initially offered the instant evidence under Rule 406, SCRE. (R. p. 15, line 23 - p. 16, line 7). In his brief to this Court, however, appellant offers no argument on admissibility under Rule 406, SCRE, and that position has been abandoned.⁴ Appellant only specifically challenges the trial judge's ruling that the evidence was not relevant. (See FBOA, p. 13). He argues here, as he did below, that the evidence was admissible to show state of mind, specifically, as evidence "probative of [appellant's] thought, his subjective thought, and fear at the time and whether or not his fear was reasonable." (FBOA, p. 13; R. p. 394, lines 11-13). This argument depends solely on whether the evidence is relevant as to the facts or fear. It is not.

The evidence presented created a mere suspicion of gang associations of the witnesses Trey, Quita, Ricky and Phoenix, the victim, and Joshua, who was not even present at the scuffle or the shooting. There was no suggestion of rival gangs violence, or even spill-over violence from gang activity – appellant was in his car, away from the Sebastian/Devon scuffle, and the scuffle (*if* it could be establish that the scuffle was part of gang activity) had

⁴ At any rate, the proffer only references generalized, speculative evidence of membership and does not offer any specific evidence of prior violence. Thus, there is no true "habit" evidence discernible. It appears the "habit" evidence is actually general character evidence. "Character evidence is usually rejected when offered under the guise of being evidence of habit." Danny R. Collins, *South Carolina Evidence* 256 (2d ed. 2000), *citing State v. Williams*, 125 S.C. 385, 118 S.E. 783 (1923). *See also State v. Brown*, 344 S.C. 70, 74, 543 S.E.2d 552, 554 (2001) ("Mrs. Brown's testimony identified no specific conduct but simply indicated appellant's general propensity to become violent. We find this evidence inadmissible as evidence of habit"). Thus, the evidence would not be admissible under Rule 406.

ended amicably before appellant began shooting. Appellant identifies only Trey and Jayquan as members of the crowd around his car. (R. p. 259, line 16 - p. 261, line 9). Jayquan is not even identified as a possible member of a gang. (See R. p. 365, line 15 - p. 366, line 5). Moreover, Appellant claims to have fired randomly *away* from Trey, not directly at anyone, and out the passenger side door. (R. p. 262, line 9 - p. 263, line 3). In short, the proffered evidence does not show anything of value.

““Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’ Rule 401, SCRE.” *State v. Bixby*, 388 S.C. 528, 544, 698 S.E.2d 572, 580 (2010). Appellant’s argument is that his fear of harm was reasonable based on gang associations of some of the individuals in the cul de sac; however, his fear was based on *actual* violence, not perceived violence. He testified, and the jury could have found credible, that he was mobbed and Trey tried to pull him from a car. Whether in a gang (or multiple gangs), that action, according to appellant, was what caused his fear. Therefore, the suggestion⁵ of gang membership does not make any fact of consequence more or less probable. It is not relevant. Moreover, allowing presentation of appellant’s evidence of possible gang membership of the witnesses and victim not only would have injected irrelevant considerations into the trial, but also would have unfairly attacked the character of the witnesses and the victim. See Rule 404 (a), SCRE (character

⁵ Again, the evidence did not even fully establish a criminal or street gang association among any of the referenced individuals. Respondent notes that none of the individuals admitted to membership; no tattoos explicitly expressing gang membership or loyalty were admitted; nor were any criminal activity reports related to known gang activity relied upon. Therefore, the evidence does not prove what it was offered to prove.

evidence generally inadmissible “for the purpose of proving action in conformity therewith on a particular occasion”).

“Black’s Law Dictionary (8th Ed.2004) defines a gang as ‘[a] group of persons who go about together or act in concert, esp. for antisocial or criminal purposes.’” *State v. Ward*, 374 S.C. 606, 612, 649 S.E.2d 145, 148 (Ct. App. 2007). The proffer, as the trial judge alluded to in his ruling, did not establish the witnesses were in a group “for antisocial or criminal purposes,” or participated in any recognized criminal enterprise that promoted violence. (See R. p. 394, line 24 - p. 395, line 3). In short, the proffer did not establish membership in a criminal street gang. However, and without question, the suggestion of gang membership carries a negative connotation toward the individuals accused of such association. *See People v. Goldsberry*, 630 N.E.2d 1113, 1117 (Ill. App. 1 Dist. 1994) (“the courts have acknowledged, ‘there is a deep, bitter and widespread prejudice against street gangs in every large metropolitan area in America.’”) (citations omitted). *See also People v. Williams*, 940 P.2d 710, 738 (Cal. 1997) (evidence of “gang membership ... may have a highly inflammatory impact on the jury”). Courts have found that evidence of gang membership is admissible, however, where that membership and/or gang activity is related to the crime at issue, for example to prove motive or identity, *People v. Williams*, 940 P.2d at 738, or “to establish[] criminal intent or agreement to conspire,” *United States v. Sargent*, 98 F.3d 325, 328 (7th Cir. 1996). But where there is no tie-in to gang activity, evidence of gang membership is not relevant and not admissible. *See State v. Goodson*, 135 P.3d 1116, 1124 (Kan. 2006) (gang evidence not relevant where no evidence “the perpetrators made statements about their gang membership in the presence of the victims”); *People v. Goldsberry*, 630 N.E.2d at 1117-

18 (evidence of possible gang membership not relevant where “there was no evidence presented from which the circuit court could infer that, at the time of the shooting, defendant was a member of the High Class Gangsters” and “no evidence whatsoever that the shootings of Taylor and Miller were in any way gang-related.”). *Goldsberry* is instructive.

In *Goldsberry*, the court found the speculative evidence of defendant’s possible gang membership (*i.e.* drawings in defendant’s notebooks consistent with gang membership) failed to demonstrate either membership or motive in the shooting at issue: “... there was no evidence presented from which the circuit court could infer that, at the time of the shooting, defendant was a member of the High Class Gangsters; was engaged in any gang or gang-related activity; or shared a gang’s enmity toward the victims.” 630 N.E.2d at 1117. However, the defendant’s fear based on his perception of threat was presented: “...the record, to a degree, supports defendant’s version of events and provides the necessary motive: that defendant was placed in fear of his life when Taylor and Thames, his companion, approached and confronted him before the shooting.” *Id.* ⁶

⁶ *Goldsberry* concerns evidence of a defendant’s gang membership. Interestingly, *Goldsberry* also sheds light indirectly on when the victim’s gang membership may be admissible. In *Goldsberry*, the aggressors were referenced as present or former members of the “Vice Lords” street gang. 630 N.E.2d at 1115. Two days before the shooting, defendant had witnessed an assault by “a group of teens” in the same area, and was carrying a gun because of that incident. 630 N.E.2d at 1116. At the time of the shooting, the victims were not where they should have been but on school grounds, some were armed, wore “caps tilted to the left,” and the defendant recognized them as members of a gang. 630 N.E.2d at 1118. Additionally, a witness testified that he overheard a member of the gang “speak ‘of getting someone from the school.’” 630 N.E.2d at 1116. Defendant testified he did not shoot until after he was assaulted. *Id.* There are no similar circumstances here either in proof of gang membership or activity. But even if the proof of membership was more substantial, as it was in *Goldsberry*, there still must be some evidence of gang activity or motive based on gang membership or activity to establish relevance to the shooting at issue. That relevance is absent in the instant case.

Here, like the evidence in *Goldsberry*, “the record, to a degree, supports defendant’s version of events and provides the necessary motive,” in that appellant’s own testimony gave a basis for finding Trey, (who admitted earlier asking appellant about appellant purportedly calling Trey’s sister a derogatory name - a cause for disagreement that was clearly not related to gang activity), grabbed him and attempted to pull him from the car where a mob was standing. Gang associations of the victim and witnesses, if any, simply did not make probable or less probable any fact of consequence. *Cf. People v. Orlewicz*, 809 N.W.2d 194, 201 (Mich. Ct.App. 2011) (noting case essentially presented “two starkly contrasting, and largely incompatible, narrative of what *factually* happened,” the court found the “self-defense claim ... depends purely on which of the two factual scenarios actually happened” thus defendant’s “psychiatric testimony would have cast no light whatsoever on which of the two versions of events was the more likely.”). Again, like *Goldsberry*, the evidence simply is not relevant.

In sum, the record fully and fairly supports the trial judge’s ruling – the evidence was not relevant. Appellant’s argument to the contrary should be rejected.

II.

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.

Relevant Facts:

During the defense proffer on gang evidence, appellant offered Rocky Roderick Watts, a private investigator and former Greenville County Sheriff's deputy, as an expert in gang activity. (R. p. 350, lines 4-6). Mr. Watts testified that he had "exposure to drugs and gang members that peddled drugs," while working in the narcotics division. (R. p. 347, lines 2-5). He also noted that he was subsequently in "the violent crime scenes unit" which he simply described as a unit assigned "homicides, robberies, sexual assaults and anything related to gang activities or violent crimes." (R. p. 347, lines 6-11). He did not indicate any particular experience with identification of gang members. Mr. Watts also indicated that proceeding his work experience, while at the police academy, (which was estimated to be 26 or 27 years prior to the trial), he was "introduced" to mainly "motorcycle gangs" but also "Blood[s] and Crips," and mostly in reference to the drug trade. (R. p. 347, line 21- p. 348, line 7). Further, Mr. Watts testified, as a private investigator, he is required to have continuing education in investigation. He testified that in the training on "various aspects of how the law effects and .. current changes in the law," gang activity is discussed. (R. p. 349, lines 3-17). Mr. Watts also testified that he had done "independent study on gangs," and could "identify gang colors or gang apparel," and gang signs. (R. p. 349, line 18 - p. 350, line 2).

On *voir dire* by the solicitor, Mr. Watts admitted he had never been qualified as an expert in gang activity in any previous proceedings; had not published any articles, books or treatises on gang activity; had researched gang activity merely by speaking with the “gang officer” for the Spartanburg Police Department, a resource officer for a local high school, and “just general people,” and by reviewing news accounts; and, had no special certification or FBI training. (R. p. 350, line 11 - p. 355, line 5).

The trial judge found:

... 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 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.

(R. p. 356, lines 3-13).

At the conclusion of the subsequent proffer of evidence, the trial judge reaffirmed his ruling that the proffered expert lacked the qualifications to testify as an expert. (R. p. 394, lines 20-23). Even so, and after considering the proffered evidence of gang associations, the trial judge found the evidence irrelevant and inadmissible. (R. p. 394, line 24 - p. 395, line 15).

Discussion:

As an initial matter, Respondent asserts the issue need not be addressed as the proffered evidence of gang association or activity was not relevant and was excluded. Unless and until that ruling is reversed, whether the expert may be qualified is simply of no consequence – his testimony cannot be received for its substance. Thus, this Court need not

address the issue after affirming appellant's first issue. *See Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 617, 703 S.E.2d 221, 225 (2010) ("Because an appellate court need not address remaining issues when disposition of a prior issue is dispositive, an analysis of the remaining issues is unnecessary."). Even so, the trial judge did not abuse his discretion in finding a lack of qualification.

"The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's discretion." *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997). "To be competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.'" *Id.*, quoting *O'Tuel v. Villani*, 318 S.C. 24, 28, 455 S.E.2d 698, 701 (Ct.App.1995). "The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject." *Watson v. Ford Motor Co.*, 389 S.C. 434, 447, 699 S.E.2d 169, 176 (2010).

Appellant argues that the fact that the witness had not been qualified before should be no bar to his being qualified as an expert. (FBOA, p. 17). However, this was not the bar to this witness being found qualified; rather, it was his lack of "sufficient education, training, experience or otherwise certification" in the field of gang activity. (R. p. 356, lines 4-8). The record supports the trial judge's ruling that Mr. Watts lacked "sufficient education, training, experience or otherwise certification" to testify as an expert in the field of gang activity.

Rule 702, SCRE controls. The rule provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Again, Mr. Watts admitted a lack of formal training specifically in gang activity. (R. p. 353, line 24 - p. 354, line 18). Further, his formal instruction from the academy (which was arguably stale given that was nearly three decades before trial), and from continuing education, referenced gangs in regard to broader training on investigation. (R. p. 346, line 17 - p. 349, line 17). Further still, Mr. Watts' testimony regarding his work experience lacked any detailed reference to actually identifying gangs, individual gang members, and gang activity in general for any particular gang (apart from, arguably, activity in furtherance of the drug trade which is not implicated here). His specific knowledge – on colors, clothing and hand signs – was admittedly obtained from “independent study,” which included speaking to qualified officers, “general people,” and reviewing news accounts. (R. p. 349, line 18 - p. 350, line 2; p. 351, line 9-p. 352, line 10). Most revealing is the following question and answer:

Q What makes you an expert in Spartanburg County gang activity?

A I did my research and found out through talking with people and doing an investigation.

(R. p. 354, lines 19-22).

The Supreme Court of South Carolina reversed a trial judge's ruling finding an expert qualified based on similar assertions in *Watson v. Ford Motor Company*. In *Watson*, the trial judge qualified Bill Williams as an expert on “the training and operation of the cruise control and brakes” and in particular, allowed his testimony on “cruise control diagnosis.” 389 S.C.

at 447-448, 699 S.E.2d at 175. However, “Williams admitted that he had no professional experience working on cruise control systems” and, like Mr. Watts here, “had never taught or published papers on cruise control systems.” *Id.* The Supreme Court found:

In our view, there is no evidence to support the trial court’s qualification of Williams as an expert in cruise control systems. Williams had no knowledge, skill, experience, training or education specifically related to cruise control systems. Rather, it appears he merely studied the Explorer’s system just before trial, which he indicated in his testimony to the jury: “This is how I taught myself the [Explorer’s] cruise control, or speed control system.” While Williams may have been qualified as an expert in other aspects of automobile components, such as the brake system, the trial court failed to properly evaluate Williams’ qualifications specific to cruise control systems.

389 S.C. at 448, 699 S.E.2d at 176.

Following the same logic here, Mr. Watts’ independent study did not support a finding that he was an expert in gang activity. Like the expert in *Watson*, Mr. Watts’ education could quite well support an expert designation in some areas, but not in gang activity. The trial judge here did not abuse his discretion in declining to find Mr. Watts qualified to testify as an expert in gang activity. Appellant’s argument to the contrary should be rejected.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, conviction, and sentence of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

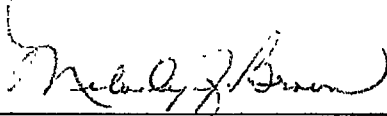
JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

MELODY J. BROWN
Senior Assistant Attorney General

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Solicitor, Seventh Judicial Circuit

BY:


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ATTORNEYS FOR RESPONDENT

July 19, 2012.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
J. Derham Cole, Circuit Court Judge

The State,

Respondent,

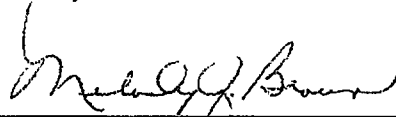
vs.

Rashaun Sobers,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR. The undersigned also certifies that the Final Brief is in compliance with the South Carolina Supreme Court's Order of August 13, 2007.



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ATTORNEY FOR RESPONDENT

July 19, 2012.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
J. Derham Cole, Circuit Court Judge

The State,

Respondent,

vs.

Rashaun Sobers,

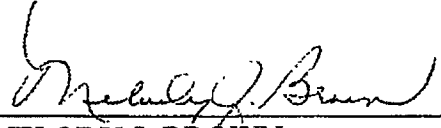
Appellant.

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the Final Brief of Respondent on Appellant by depositing a copy of same in the United States mail, postage prepaid, addressed to his attorney of record as follows:

Robert M. Dudek, Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

This 19th day of July, 2012.


MELODY J. BROWN
SC Bar No. 14244

Office of the Attorney General
Post Office Box 11549
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ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Rashaun Sobers, Appellant.

Appellate Case No. 2010-172246

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 5146
Heard June 4, 2013 – Filed June 26, 2013

AFFIRMED

Chief Appellate Defender Robert M. Dudek, of
Columbia, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Donald J. Zelenka, and Senior
Assistant Attorney General Melody J. Brown, all of
Columbia; and Solicitor Barry Barnette, of Spartanburg,
for Respondent.

LOCKEMY, J.: Rashaun Sobers appeals his conviction for murder, arguing the trial court erred in (1) excluding testimony regarding gang activity, and (2) finding Rocky Watts was not qualified as an expert in gang activity. We affirm the trial court.

FACTS/PROCEDURAL BACKGROUND

On April 21, 2009, Sobers shot and killed Sebastian Jaramillo (the victim) in Spartanburg County. Sobers was indicted for murder, and a jury trial was held in September 2010.

At trial, Phoenix Fielder testified he, Travoiris "Trey" Gentry, Shaquila "Quita" Gentry, Jayquan Hardy, Devon Davis, Ricky Smith, and the victim were at his aunt's house the day of the shooting. According to Phoenix, Devon hit the victim "in a playful way" and a short chase ensued to a nearby cul-de-sac. Phoenix, Trey, Quita, Jayquan, and Ricky jumped in Phoenix's aunt's car and drove to the cul-de-sac. Phoenix testified Devon and the victim decided to "tap box,"¹ and he used his cell phone to video record the fight. Approximately fifteen people gathered to watch the fight. Phoenix stated he saw Sobers sitting in his parked car in the cul-de-sac, but Sobers was not involved in the fight. According to Phoenix, after the fight was over Devon and the victim shook hands, and he, Ricky, Quita, Trey, and the victim got back in his aunt's car. Phoenix testified he subsequently heard gunshots and saw Sobers pointing a gun at their car. The victim was sitting in the back of the car and was shot in the head.

Phoenix's video was shown to the jury. In addition to the fight, the video showed Trey and the victim approach Sobers's car before the fight. Trey testified he asked Sobers about disrespectful comments Sobers had allegedly made about his sister. According to Trey, Sobers denied making the comments about his sister and the two shook hands and Trey walked away. Trey testified that after the fight, while the group was in the car, he saw Sobers back up his car to face their car and start shooting.

Jayquan testified he approached Sobers after the fight between Devon and the victim but before the shooting. Jayquan asked Sobers "what was up with him and Trey getting into it," and Sobers told him "there wouldn't be any fighting." Jayquan testified he then saw Sobers reach to his right and pull out a gun. Jayquan started running and testified he heard several gunshots.

Devon testified he saw Jayquan approach Sobers's car before the shooting. He stated that after Jayquan walked away from the car, he saw shots fired from Sobers's car. Quita testified she did not see or hear anyone threaten Sobers before the shooting. According to Quita, she, Trey, Ricky, Phoenix, and the victim were

¹ Phoenix described "tap boxing" as "play fighting but not with fists, hands open."

all in the car when she saw shots fired from Sobers's car. Ricky also testified he was in the car with Quita, Trey, Phoenix, and the victim when Sobers fired at their car.

Sobers testified Trey approached his car before the fight between Devon and the victim and asked about comments Sobers made about Trey's sister. According to Sobers, after Trey walked away, he assumed "it was over with" and "everything was ok." Sobers testified he fired shots after Trey approached his car a second time and attempted to engage him in a fight. According to Sobers, Trey grabbed his shirt through the driver's side window. Sobers stated the others who were watching the fight swarmed his car and opened the passenger side doors. Sobers testified he shot out of the front passenger door "because Trey had me," but he denied shooting directly at anyone. Sobers stated he was "scared they were going to kill me." Sobers admitted he lied when he told police following the shooting that Trey had a gun at the time of the shooting.

The jury found Sobers guilty of murder, and he was sentenced to life in prison. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (citing *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001)). "This [c]ourt is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* (citing *State v. Quattlebaum*, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000)).

LAW/ANALYSIS

I. Gang Activity Evidence

Sobers argues the trial court erred in excluding evidence of gangs and gang activity at the scene of the shooting. We affirm the trial court's decision.

Pre-trial, defense counsel informed the trial court it would present evidence of gang activity involving the victim and witnesses. Defense counsel indicated it had pictures from Facebook accounts belonging to Trey and Joshua Fuller² that showed the victim and witnesses flashing gang signs. The State argued the evidence of

² Joshua was not present at the shooting.

gang activity was irrelevant and unfairly prejudicial. Defense counsel argued the evidence went "to self-defense." According to defense counsel, Sobers pulled his gun and fired after the "mob of people" who had been watching the fight between Devon and the victim surrounded his car and tried to pull him out. Defense counsel maintained Sobers acted in self-defense because "those people are gang members" who had "just beat down another little boy." Defense counsel argued Sobers believed the fight between Devon and the victim was a gang initiation. The trial court asked whether any witness statements indicated any gang-related activity at the scene of the shooting, and the State responded that none of them did.

The trial court found Sobers failed to show the relevance of any possible gang associations to the shooting. The trial court noted Sobers's fear was related to the approaching "mob," not any specific gang associations within the mob. However, the trial court left open the possibility that Sobers could offer gang evidence, if he could establish the requisite relevancy.

Sobers offered Rocky Watts, a private investigator and former Greenville County Sheriff's deputy, as an expert in gang activity.³ Watts testified that based on the Facebook photographs, he believed the victim, as well as Quita, Ricky, and Trey, were members of a gang. He also testified that based on his experiences in law enforcement, gangs will "videotape their activities."

Trey, Ricky, Quita, and Phoenix admitted being in the photographs and making gang signs, but they all denied being in a gang. Joshua testified the individuals in the group photo were not in a gang but were "just posing" and "all being together, like we family, all of us akin." Thereafter, the State argued (1) no witnesses testified they were in a gang, and (2) assuming they were, there was no evidence of a connection between gang activity and the shooting.

After considering the evidence of gang activity presented, the trial court found:

[W]ith respect to the testimony regarding membership by certain witnesses that have testified to be members of a gang, apparently they're all members of different gangs. But based upon what's been presented it's all the same gang if it is a gang. Nevertheless, I fail to see the connection between any membership in a gang if there is one to what occurred on April the 21st 2009. I see no

³ The trial court found Watts was not qualified as an expert in gang activity.

connection whatsoever. They were, if you believe the testimony of the defendant, acting as a mob. But I still fail to see if they were a member of a gang that that has any connection with what occurred on April the 21st. So based upon there being no connection established, there being no relevance to it, there does not appear - that the testimony would relate or be relevant to any issue that the jury has to decide in this case; and therefore I stand by my previous ruling that that is to be excluded.

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011) (citation omitted).

Pursuant to Rule 401, SCRE, "relevant evidence' means evidence having the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

On appeal, Sobers argues the gang evidence proffered was relevant to show his state of mind and his fear of being killed. The State contends the evidence presented created only a mere suspicion of gang associations of the victim and witnesses. Further, the State maintains the suggestion of gang membership does not make any fact of consequence more or less probable.

We find the trial court did not abuse its 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 he was more fearful because the mob was part of a gang. Thus, Sobers never introduced evidence that would make gang activity relevant.

II. Expert Witness

Sobers argues the trial court erred in finding Watts was not qualified as an expert in gang activity. Based upon our decision to affirm the trial court's exclusion of testimony regarding gang activity, we need not address this argument. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues on appeal when disposition of a prior issue is dispositive).

AFFIRMED.

FEW, C.J., and GEATHERS, J., concur.

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF Spartanburg

Rashawn Terence Sobers # 342645
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2014-CP-42-640

APPLICATION FOR
POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact thereon may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, take care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached to the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention LCI 920 Highway Hwy Bishopville S.C. 29010
2. Name and location of Court which imposed sentence General Sessions
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2009-GS-42-6427 Life sentence
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) September 7-9, 2010 Life sentence
 - (b) _____

Revised 3/2003

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty ✓
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. June 26, 2013
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Opinion No. 5146
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

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SPARTANBURG COUNTY
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M. HOPE BLACKLEY

- (a) Investigative Assistance of Counsel 6th Amendment Constitutional Violation
- (b) Prosecutorial Misconduct Due process constitutional Violation SEE enclosed Attachments
- (c) Burden shifting Due process constitutional Violation

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Counsel failed to object to the prosecution Burden shifting
- (b) Prosecutorial Misconduct for shifting the burden and misrepresenting the facts to the courts
- (c) Allowed the State to lessen the burden, or shift the burden to prove elements of crime.

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? _____
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. _____
- ii. _____
- iii. N/A
- iv. _____

(b) the name and location of the Court in which each was filed:

- i. _____
- ii. _____
- iii. N/A
- iv. _____

(c) the disposition thereof:

- i. _____
- ii. N/A
- iii. _____

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- iv. _____
- (d) the date of each such disposition:
- i. _____
- ii. _____
- iii. N/A
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. _____
- ii. _____
- iii. N/A
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. _____
- ii. N/A
- iii. _____

(b) the proceedings in which each ground was raised:

- i. _____
- ii. N/A
- iii. _____

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16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) Lead counsel and appellate counsel was ineffective for failing to present these issues
- (b) Said ineffectiveness is the cause and prejudice and is not a procedural waiver
- (c) All of these issues are plain upon the face of the record, and substantially affected the outcome of this case.

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
- (b) your trial, if any? Bea Hylton Turnipseed
- (c) your sentencing? Bea Hylton Turnipseed
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Robert M. Dudek
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Bea Hylton Turnipseed trial and sentencing

ii. Robert M. Dudek direct appeal

iii. _____

(b) the proceedings at which each such attorney represented you:

i. _____

ii. _____

iii. _____

19. State clearly the relief you seek in filing this application:

Any and all relief required under state and Federal law.

20. Are you now under sentence from any other court that you have not challenged?

N/A

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SPARTANBURG COUNTY
2014 FEB 21 PM 1:40
M. HOPE BLACKBERRY

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, _____, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Bathany Sabers
Applicant

SWORN or affirmed to and subscribed before me this
19 day of July, 2011.

[Signature]
Notary Public

My Commission Expires: 11-11-2013

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SPARTANBURG COUNTY
2011 FEB 21 PM 1:43
M. HOPE BLACKLEY

Requested Actions to PCR Council

Petitioner, is Respectfully Requesting his court appointed PCR Attorney to take the following actions:

- 1) Adequately and sufficiently present all issue listed under ineffective assistance of counsel, and as stand alone issues as well.
- 2) Proposed a Order Granting PCR Relief and include it at the close of the evidentiary hearing with findings of facts and conclusions of law.
- 3) File a SCRP Rule 59(e) or and 59(f) to assure that all issues are properly addressed and preserved for appeal.
- 4) Challenge any order, or determination from the State with misrepresented facts or law entered.
- 5) Request for full discovery and use of Subpoena
- 6) To make sure that the below mentioned issue are addressed at said hearing and in said order.

Issues

- (1), Ineffective Assistance of Trial Counsel and Appellate Counsel
- (2), Cumulative Error doctrine, See *State V. Beckman*, 405 S.C. 223, 746 S.E. 2d 483 (SC App 2013); *State V. Anderson*, 349 S.C. 125, 731 S.E. 2d 604 (SC App 2012)
- (3) Burden shifting - *State V. Lewis*, 753 S.E. 2d 747 (SC App 2012); *State V. Daniels*, 408 S.C. 724, 737 S.E. 2d 473 (SC 2012); and *State V. Meggett*, 396 S.C. 516, 728 S.E. 2d 492 (SC App 2012). Petitioner objected and argued the state's statement amounted to burden shifting. Solicitor's argument made defendant's failure to present evidence was burden shifting; and *State V. Gordon*, 389 S.C. 588, 683 S.E. 2d 742 (SC App 2012). Conviction weak in closing rises to the level of burden shifting.
- (4) Inferred Malice - See *State V. Shanks*, 402 S.C. 252, 741 S.E. 2d 706 (SC 2013); *State V. Lewis*, 400 S.C. 100, 732 S.E. 2d 732 (SC App 2012); and *State V. Miller*, 397 S.C. 725 S.E. 2d 742 (SC App 2012)

Petitioner asserts that these issue should be protected by his PCR counsel, petitioner has given counsel a starting point, however it is counsel's job to make sure that these issues are adequately and sufficiently addressed and ruled on by the PCR courts. Let this Panel reflect petitioner's due diligence in requesting PCR counsel's help in processing, raising and addressing these (4) issues. Petitioner has supported his allegations with case law, exhibits, and a argument, at the least counsel must assure that they are presented to the courts in proper form by way of proposed order granting relief to give his or her client a fair chance, at having his meritorious claim addressed.

See Exhibit to support petitioner allegations. Embold.

Table of Authorities Cases

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Stok v. Hughes, 336 S.C. ~~584~~ 585, 683 S.E.2d 521 S.E.2d 502, 503 (1999)
Stok v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999)
Stok v. Lemire, 753 S.E.2d 274 (SC App 2012)
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Ineffective Assistance of Counsel

Sixth Amendment Violation

Petitioner argues that all defendants must have the effective assistance of Counsel when raising an ineffective assistance claim in collateral attack. Mackel v. MURRAY, 109 F.3d 952, 967-63; Martinez v. Ryan, Supra and Moyle v. Thomas, Supra, hold an attorney's errors during an appeal can direct reversal may provide cause for cause a procedural default. For if the attorney is ineffective, the prisoner has been denied due process and the opportunity to comply with the State's procedures, and obtain an adjudication on the merits of his claim.

Petitioner, is alleging that his trial Counsel and appellate Counsel's representation fell below an objective standard of Reasonableness, and that there is a reasonable probability that, but for Counsel's errors, the result of the proceedings would have been different.

For a petitioner to be granted Post Conviction Relief as a result of ineffective assistance of Counsel, he must show first, that his Counsel failed to render Reasonably effective assistance under prevailing professional norms; Secondly, that his Counsel's actions caused him prejudice. See, Waller v. Georgia, 132 S.Ct. 1376 (2012); Citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); Butler v. State, 286 S.C. 441, 334 S.E. 2d 31, 3 (1985); cert denied, 504 U.S. 1094 (1992).

Where allegations of ineffective assistance of Counsel are made, the question arises, whether Counsel's conduct so undermined the proper functioning of the adversarial process that the trial can be relied on as being procedurally just result. See Butler, supra (quoting Strickland supra). As such, Courts evaluate allegations using a two-pronged test. Reasonable probability is sufficient to undermine confidence in the outcome, Hill v. Lockhart, supra.

Petitioner, is requesting this Court, in assessing prejudice, to consider "all" of the instances of ineffective assistance of Counsel, and to Review these errors under the cumulative error doctrine, which states that the cumulative effects of Counsel's ineffectiveness is so persuasive as to render a particularized prejudice inquiry unnecessary. See, Suber v. State, 371 S.C. 554, 558, 640 S.E. 2d 584 (2007); Freeth v. State, 298 S.C. 54, 378 S.E. 2d (1988); State v. Johnson, 334 S.C. 74, 512 S.E. 2d 285 (1999); and in this Court in State v. Freeman, 319 S.C. 110, 459 S.E. 2d 867 (1994). In Carole v. Mullins, 317 F.3d 1196 (10th Cir. 2013), the court found prejudice both because of numerous instances of ineffective assistance of trial Counsel. See also, Harris ex Rel. Remseyer v.

Ward, 64 F. 3d 1432, 1434 (9th Cir 1995); Defence counsels may deficiencies cumulative prejudicial the defence. Mack V. Blodgett, 470 F. 3d 614, 632-25 (9th Cir 1993); Cumulative errors requiring reversal.

Furthermore, petitioner request this court in reversing the plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the courts. U.S. V. Olano, 507, U.S. 725, States, under the plain error review the court may notice an error that was not preserved by timely objection if petitioner can demonstrate: (1) that the error occurred, (2) that it was plain error, and (3) that the error was material as affected petitioner's substantial rights and seriously affected the fairness, integrity or public reputation of the judicial proceedings. Fed. R. Crim. P. Rule 52(b); U.S. V. Fring, 470 U.S. 1, quoting U.S. V. Atkinson, 297 U.S. 152, Chapman V. California, 386 U.S. 18. Acknowledged that certain constitutional rights are so basic to a fair trial that their infringement can never be treated as harmless.

Argument

Petitioner, is alleging, and the Record reflects, that trial counsel failed to contemporaneously object to the prosecution's prejudicial, and continued attempts to mislead the jury of the use of implied malice from a gun standing alone. Further, petitioner is alleging that he was prejudiced, because of counsel's failure to properly raise these issues preserved for appellate review.

SEE, Recommendation to defense counsel - How to preserve errors for appeal:

- 1) Any objection should include all possible legal basis "I If I" is better to be overinclusive than underinclusive. If uncertain whether a constitutional provision applies, counsel should include it anyway. Counsel should assert all supporting grounds in his argument.
- 2) Counsel should reference specific cases in raising objection and making motions. By citing a case counsel invokes all of the principles discussed in that case.
- 3) Counsel must obtain a Ruling from the trial court
- 4) Counsel should continue to object and state the relevant grounds, and
- 5) Competent counsel should be familiar not only with United States Supreme Court and State procedural rules

Counsel's failure to properly comply with South Carolina's "Contemporaneous objection Rule" is below the standards of professional norms, especially in a case like this, because the evidence counsel failed to object to, negated counsel's strategy of self defense.

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Furthermore, this failure to object created the following prejudice:

1), allowed the prosecution to mislead the jury, and lessen the burden from the State to prove the element of malice. The United States Supreme Court's pronouncement that Due process clause of the 14th Amendment is violated when a jury charge creates a mandatory presumption and impermissibly shifts the burden of proof to the defendant. See *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979), (holding that "burden shifting presumptions" or "conclusive presumptions" deprive a defendant of due process of law and therefore unconstitutional); *Mullaney v. Wilbur*, 421 U.S. 684, 703 (1975) (holding that "Due process clause" forbids a state from placing the burden on the accused to prove his actions reduced the crime from "murder to manslaughter"). In examining the legal proposition in a homicide prosecution that an inference of malice arises from the use of a deadly weapon, we are unable to harmonize the earlier holdings of this court with our modern jurisprudence.

2), Mislead the jury with a half truth. Our appellate court has described this jury charge as a "half truth". *Adams v. State*, 511 A.2d 1110, 1126 (Md. Ct. Spec. App. 1986). Stated that malice includes the absence of justification, excuse and mitigation. When viewed in light of these component parts it becomes clear that inferring malice from the use of a deadly weapon is indeed only "half truth". The absence of justification, excuse or mitigation cannot be inferred from the use of a deadly weapon standing alone. Other facts and evidence (or the absence of other facts and evidence) are required for the fulfillment of these component parts. Pursuant to, *Beckwith v. State*, Opinion No. 2872 (Tenn. 1979), Under our policy - Making Rule in Criminal Law, we hold no place in a mixed case where evidence is presented that would reduce, mitigate, excuse or justify the killing.

Furthermore, because it was error for trial counsel to not object to the prosecutive inferences from the use of a deadly weapon, the prosecution was allowed to misrepresent the facts of the case, and was the cause of a denial of due process and equal protection of the law, and was caused a fair trial. In the above mentioned cases, the issue was jury instructions, in this case it was the prosecution, whether it is the panel itself or, the prosecution, whom is an officer of the State, said error was impelled by the State.

3) ~~The Neglected Petitioner defense of Self defense.~~ Petitioner asserts that because of counsel's failure to object, the state was allowed to circumvent petitioner's allegations of defense of self defense. See, *Beckwith v. State*, supra. In many murder prosecutions, there will be overwhelming evidence of malice apart from the use of a deadly weapon. Here, however, the error was not objecting to the prosecutive attempts to mislead the jury that malice may be inferred by use of a deadly weapon cannot be considered harmless. Evidence of self defense was presented, thereby highlighting the prejudice resulting from this failure to object.

There can be no dispute that any competent attorney would have made sure that his most important witness, his chosen expert, would have or should have concluded that he in fact was qualified to testify as an expert. Clearly the prejudicial effect of not having his self-defense evidence presented to the jury for consideration of mitigation, and thereby defeating any defense of self-defense.

To make matter worse, counsel failed to "Contemporaneous object" to the trial court's refusal to let any favorable evidence, which supported petitioner's claim of self-defense. At least a competent attorney would have made sure that said issue was preserved properly for appellate review. Counsel's abandonment of preserving this issue by way of objection can not be attributed to negligence, because it is counsel's ineffectiveness which caused the any allegations of a waiver of an independent and adequate state procedural ground, ("cause and prejudice") Counsel's failure to understand the "Contemporaneous objection" rules could have led to the exclusion in state court of evidence objected to, thereby making a major contribution to finality in criminal litigation: without the evidence claimed to be voluminous and federal constitutional grounds, a jury may acquit a defendant, and that would end the case, or a jury may nonetheless convict the defendant, and he will then have one less federal constitutional claim to assert in his federal petition.

Furthermore, an objection by trial counsel, would have on the spot forced the prosecution to take a look hard at its hole card, and even if the prosecution thinks that the state trial judge will admit the evidence he must contemplate the possibility of reversal by the state appellate court or the ultimate reversal by the federal court based on the unavailability of the state court's rejection of the federal constitutional claim. *Stone v. Powell*, 429 U.S. 465 (1976); *Henderson v. Kibbe*, 431 U.S. 145, 152 (1977). The last opportunity for examination as required by the prosecution was improper and prejudicial.

Once counsel is appointed, the day to day conduct of the defense rests with the attorney. He, not the client, has the immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defense to develop. In this case at bar trial counsel, did not do object, his witness was not qualified as an expert witness, and then he could not get any evidence on record of self-defense, therefore, resulting in no self-defense, defense. This is the kind of case that "plain error" applies on the record and one that is sufficiently egregious to demonstrate that the service of counsel was not "within the range of competence demanded of attorneys in criminal cases." *McMinn v. Richardson*, 397 U.S. 759, 771 (1970). Other reasons not amounting to deliberate bypass, such as ignorance of the applicable rules, would be sufficient to cover the failure to object to evidence offered or not offered during trial.

MR. Justice Brennan and MR. Justice Marshall, stated "I cannot accept a system that ascribes the absolute finality of an individual's constitutional claim to a function where his lawyer manifestly exercises his professional judgment at all - where considerations, subtle, or ignorance is the explanation for a procedural default." There is nothing unreasonable, however, in adhering to the proposition that it is the responsibility of a trial lawyer who takes on the defense of another to be aware of his client's basic legal rights and of the legitimate rules of the forum in which he practices his profession. If he should unconsciously permit such rules to bar the assertion of the valuable constitutional claim of his client, then his conduct may fall below the level of competence that can fairly be expected of him. For almost 40 years it has been established that inadequacy of trial counsel cannot undermine the very competence and jurisdiction of the trial court and is always open to collateral review. *Johnson v. Zerbst*, 304 U.S. 458 (1938). Obviously, as a practical matter, a trial counsel cannot procedurally waive his own inadequacy.

Petitioner asserts that counsel's failure to comply with Sixth Amendment's "Contemporaneous Objection" Rule, was a failure which affected substantial rights, and therefore, may be raised although they were not brought to the attention of the courts. *U.S. v. Olney, supra*; *U.S. v. Young, supra*; *U.S. v. Atkinson, supra*, and *Chapman v. California, supra*. Petitioner asserts that as a result of counsel's inefficiencies, these critical issues were not presented or addressed in appeal, and may be the cause and proper in any future procedural defaults, which is clearly prejudicial. See, *Madlock v. Ore* 1985 *Step Cherokee* VEN 17CWB7828FT129001, 322 S.C. 127, 134, 470 S.E.2d 375, 378 (1996) ("To preserve an issue for appeal, a contemporaneous objection is necessary and specific grounds must be clearly stated."); *State v. White*, 311 S.C. 289, 429 S.E.2d 1740 (1993); *State v. Lyman*, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1991) (Concluding defense counsel's failure to contemporaneously object did not preserve the issue for appellate review); *I'On L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); *State v. Williams*, 303 S.C. 410, 414, 407 S.E.2d 168, 169 (1991) (concluding appellate courts will not generally address an issue unless the issue was raised to and ruled upon by the trial court).

The Supreme Court in *I'On* explained the preservation requirement placed on an appellant, stating the "preservation requirement" as the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law and arguments." 338 S.C. at 422, 526 S.E.2d at 724, also it serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve - intentionally or by chance - in the hope that an appellate court will accept the ace card and, via a reversal, give him another opportunity to prove his case. See, *State v. Williamson*, 346 S.C. 495, 499, 552 S.E.2d 285, 286 (2001); *State v. Hughes*, 336 S.C. 585, 591, 521 S.E.2d 500, 503 (1999);

State v. Gagnon, 328 S.C. 500, 564-65, 492 S.E.2d 822, 2824 (11th Cir. 1992) (concluding an in limine motion is not final; the losing party must renew his objection at trial when the evidence is presented in order to preserve the issue for reversal). Moreover, the petitioner submits this issue is not subject to the ABA's exception detailed in State v. White, 363 S.C. 151, 156, 629 S.E.2d 172, 175 (2009). It must be noted that the prosecution attempted to shift the burden multiple times, thus allowing defense counsel multiple opportunities to re-argue, the relevancy and admissibility of the prosecution and make contemporaneous objections.

Moreover, defense counsel was unaware of the proper procedure for making contemporaneous objections taught in basic beginning law school classes. Thus, this failure to do basic legal research, failure to familiarize himself with readily available documents necessary to understanding of his client's case, lack of preparation and research is below professional norms. This failure cannot be considered as a result of a deliberate intended trial strategy, and could only be the kind of incompetence, and ignorance, in which the 6th Amendment was denied to protect against.

Furthermore, petitioner asserts that trial counsel's failure to contemporaneously object was prejudicial under the test established by the Supreme Court in Strickland, upon. However, the Supreme Court created an exception to the Strickland standard for ineffective assistance of counsel, and acknowledged that certain circumstances are so egregiously prejudicial that it will be presumed. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2051 (1984). ("...presumes prejudice where there has been an actual breakdown in the adversarial process at trial.")

The Supreme Court recognized in Strickland that there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." United States v. Tamm, 724 F.2d 831 (9th Cir. 1984); in this case at bar it was counsel's failure to object, to ~~make~~ ^{make} ~~and~~ ^{and} ~~continued~~ ^{continued} attempt to induce justice from the deadly weapon called the other mitigating fact, and defense was involved. Such failure of trial counsel was a complete break down in the adversarial process sufficient to undermine the confidence in the outcome of this case.

Furthermore, petitioner is alleging that his appellate counsel was just as ineffective for failing to raise ineffective assistance of trial counsel's failure to properly object and preserve said issue for appeal. Petitioner asserts that appellate counsel completely abandoned the issue of trial counsel's ineffectiveness. Thus, this action on its own was already below a professional norm of a competent attorney. In this case at bar, the direct appeal was the first designated proceeding for a prisoner to raise his ineffective assistance claim. Failure to do so could result in procedural default, however, courts have recently ruled that an attorney cannot or should not delay appeal until, provide care to ensure a procedural default, for if the attorney appointed by the State is ineffective, the prisoner has been denied due process and the opportunity to comply with States procedural procedures and obtain an adjudication on the merits of his claim. Without adequate representation in direct appeal a prisoner will have similar difficulties vindicating a substantial ineffective assistance at trial claim. The Courts have stated "A prisoner's inability to present an ineffective assistance claim is of

particular concern because the right to effective trial counsel is a bedrock principle in this Nation's justice system.

It thus follows that, when a state requires a prisoner to raise a claim of ineffective assistance of trial counsel in a collateral proceedings, a prisoner may establish cause for a procedural default of such claim in two circumstances: (1), Where the State courts did not appoint counsel in the initial review collateral proceedings, and (2), Where appointed counsel in the initial review proceedings was ineffective under *Strickland*, supra.

Petitioner asserts that his appointed counsel in his direct appeal was ineffective under *Strickland*, supra, for the following reasons: It was plain Error on the face of the Record, that trial counsel was not competent enough, and did not know how to properly perform the basic function of preserving petitioner's trial errors for appellate review. Nevertheless, either appellate counsel was just as incompetent or just clearly abandoned petitioner's ineffective assistance of trial counsel claim in direct review. Either way, Appellate counsel failed to perform its task as adversary at that critical stage. The Record is clear, that the only reason no 6th Amendment constitutional violations or deprivations claims was raised in direct appeal that would entitle petitioner to Relief, is because: (1), trial counsel never properly preserved any constitutional violations, and (2), Appellate counsel never raised any against trial counsel. Obviously, as a practical matter, a trial counsel and or appellate counsel cannot practically have his own investigation, and that was clearly Appellate counsel attempt in not raising these issues to the appellate court.

Appellate counsel, and trial counsel, cannot consider this abandonment of said issue as a kind of trial strategy for failing to comply with an independent and adequate state procedural ground which could and did prevent direct review of constitutional violations. See *Strick v. Powell* 428 U.S. 465 (1976); and *Henderson v. Kibbe*, 431 U.S. 145, 157 (1977) or that a particular line of examination or argument by the prosecution was improper or prejudicial. Clearly the prosecution's continued attempts to shift the burden and to mislead the jury that neither can and should be inferred from the use of a deadly weapon, these allegations of self defense is present is improper and prejudicial, and for trial counsel to fail to object and preserve said issue for appeal was ineffective, just as much so as Appellate counsel's failure to raise it.

Petitioner is a layman and cannot be held responsible for his counsel incompetently presenting claims or abandonment of those, where counsel is the guarantee in presenting these claims. Nevertheless, in this case at bar, the Record is completely void of any attempt by appellate counsel to sufficiently and adequately develop, investigate, and ascertain or alert any of petitioner's meritorious claim of trial counsel's failure to properly comply with the contemporaneous objection Rule, thus not preserving said issue for appeal. Such a blatant failure by appellate counsel at this critical stage is outside the range of competence expected of an attorney in criminal cases, and hence, operated to deny petitioner effective assistance of appellate counsel. Counsel for an indigent defendant should be appointed promptly and, aside from being afforded a reasonable opportunity to prepare to defend an accused, should confer with his client without undue delay to advise him of his

*Rights and to elicit matters of defense or to ascertain that potential defenses are not, or are available, or should conduct appropriate investigations both, factual and legal, to determine if matters of defense can be developed and allow himself enough time for reflection and preparation. Clearly this was not done in this case at bar, direct appeal counsel abandonment of petitioner ineffective assistance of trial counsel claim fly in the face of U.S.C.A. Const Amend, 6th and 14th.

Therefore, petitioner has stated his constitutional violation, along with all issue to be addressed before the PER Court. It is now the duty of appointed PER Counsel to make sure that any evidence, documentation, and witness, that could support these allegations be brought forward at the PER hearing. Any failure on PER Counsel's part to comply with the PER Mandates SC Code Ann § 17-27-20 through § 1602 and adequately and sufficiently cause the above and below mentioned meritorious claims to withstand. Strickland would be just as ineffective as it was for trial counsel and appellate counsel. Further, it would clearly show how petitioner was impeded by counsel and never had effective assistance of counsel to comply with the state's procedures and obtain an adjudication on the merits of his claims. See, *Townsend v. Sain*, 372 U.S. 293 83 S.Ct. 745, stated that Federal Courts must hold an evidentiary hearing if applicant did not receive a full and fair evidentiary hearing in state court either at trial or in collateral proceedings, 28 U.S.C.A. § 2243.

In a Post Conviction Relief action, Petitioner has the burden of proving his allegations in the application to demonstrate a violation, see, Rule 21.1(e), and petitioner is entitled to effective assistance of counsel. If counsel fails to sufficiently and adequately develop, investigate, ascertain or elicit any of petitioner's meritorious claim then PER Counsel would be ineffective. This kind of abandonment will be the "disse" and "prejudice" to over come any procedurally defaults caused by ineffective PER counsel. See, *Maples v. Thomas*, 132 S.Ct. at 912 (2012); and *Martinez v. Ryan*, when a lawyer breaches his duty it amounts to abandonment because it leaves the client without representation. The lawyer conduct is external to the client and the duty that of one agent who represents the client.

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STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Rashaun Jamine Sobers, #342645,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) SEVENTH JUDICIAL CIRCUIT

) 2014-CP-42-0640

) **RETURN**

Respondent, making its Return to the application for post-conviction relief (PCR) filed February 21, 2014, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the November 2009 term of the Spartanburg County Grand Jury for murder (2009-GS-42-6427). The Applicant was represented by Brac H. Turnipseed, Esquire. The Applicant proceeded to trial and on September 9, 2010, he was found guilty of the charge by a jury. The Honorable J. Derham Cole sentenced the Applicant to a term of life.

A timely notice of appeal was filed. The South Carolina Court of Appeals affirmed the conviction and sentence. State v. Sobers, Op. No. 5146 (filed June 26, 2013). The Remittitur was returned on July 15, 2013.

Attached herewith and incorporated herein are the records of the Spartanburg County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and Applicant's appellate records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel, in that;
 - a. Counsel failed to properly object to the prosecution's prejudicial and continued attempts to mislead the jury with references to implied malice,
 - b. Counsel failed to object to the burden shifting jury instructions regarding inferring malice from use of a deadly weapon,
 - c. Counsel failed to fully investigate and present evidence for self-defense,
 - d. Counsel failed to properly object and preserve for appellate review the court's refusal to allow defense's expert to testify,
 - e. Counsel failed to properly object to State's evidence,
2. Ineffective assistance of appellate counsel, in that;
 - a. Appellate counsel failed to present issues of trial counsel's ineffectiveness in the appeal,
 - b. Appellate counsel failed to act as the State's adversary at a critical state of the proceedings,
3. Denial of due process, in that;
 - a. "Prosecutorial Misconduct for shifting the burden and misrepresenting the facts to the court,"
 - b. "Allowed the state to lessen burden or shift the burden to prove elements of crime."

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application 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 upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 334 S.E.2d 813.

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. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea 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 professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. 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, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose

among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, Id. at 537. When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

The Respondent contends that the Applicant's appellate attorney rendered effective assistance of counsel. However, this ground for relief may raise factual issues that are not conclusively refuted by the record. The Respondent requests an evidentiary hearing on this allegation. Sharper, Id.

V.

The Applicant alleges that he was denied due process of law because of infringement of his rights under certain amendments to the United States Constitution. Specifically, the Applicant alleges that the prosecution impermissibly shifted the burden of proof upon the Applicant during the trial. The allegations potentially raise questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

VI.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

VII.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held solely on the claims of ineffective assistance of trial and appellate counsel and due process violations.

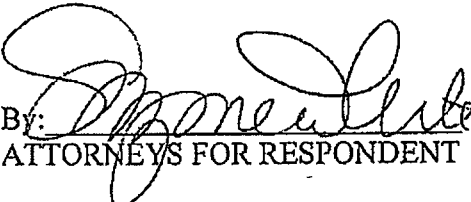
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Deputy Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

September 8, 2014.

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
RASHAUN JAMINE SOBERS, #342645
Applicant,
vs
STATE OF SOUTH CAROLINA,
Respondent.

IN THE COURT OF COMMON PLEAS

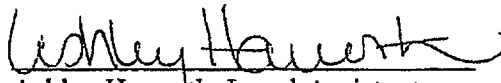
2014-CP-42-0640

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Ms. Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
PO Box 1015
Rock Hill, SC 29730

DATED this 8TH day of September, 2014.


Ashley Haworth, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
Rashaun Sobers, #342645,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2014-CP-42-0640

**Amendment to Application for
Post Conviction Relief**

2016 AUG 16 AM 9:08
CLERK OF COURT

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on February 24, 2014. A Return was filed on September 10, 2014. Applicant would move to amend his claims of ineffective assistance of counsel and specifically allege 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, Ins. 16-20, 568, Ins. 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.
 11. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

August __, 2016
Columbia, SC

so move.


Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
Attorney for Applicant

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Rashaun Sobers, #342645,)
Applicant,)

2014-CP-42-0640

v.)

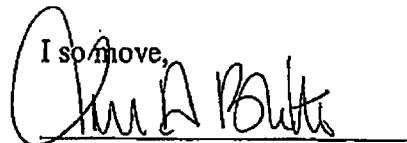
State of South Carolina,)
Respondent.)

**Amendment to Application for
Post Conviction Relief**

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on February 24, 2014. A Return was filed on September 10, 2014. An Amendment to Application for Post Conviction Relief was filed August 16, 2016. Applicant would move to amend his claims of ineffective assistance of counsel and specifically allege ineffective assistance of trial counsel as follows:

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

September 8, 2016
Columbia, SC

I so move,


Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
Attorney for Applicant

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Rashaun Sobers, #342645,)
Applicant,)

2014-CP-42-0640

v.)

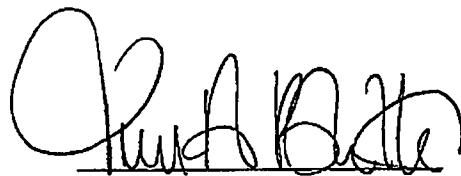
CERTIFICATE OF SERVICE

State of South Carolina,)
Respondent.)

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that I placed in the United States Mail on this 8th day of September 2016, a copy of an Amendment to Application for Post Conviction Relief with postage prepaid and the return address clearly shown on said envelope to Alicia Olive with the Office of the Attorney General at:

Office of the Attorney General
ATT: Alicia Olive, Ast. AG
P.O. Box 11549
Columbia, SC 29211

September 8, 2016
Columbia, SC



Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
Attorney for Applicant

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

RASHAUN JARMINE SOBERS

APPLICANT)

vs.

THE STATE OF SOUTH CAROLINA

RESPONDENT)

) COURT OF COMMON PLEAS
) 2014-CP-42-0640
)
)
)
)

ORIGINAL

) TRANSCRIPT OF RECORD
)
)

June 27, 2017

Spartanburg, South Carolina

B E F O R E:

THE HONORABLE ROBIN B. STILWELL, Judge.

A P P E A R A N C E S:

TRICIA A. BLANCHETTE, ESQ.
Attorney for the Applicant

VALERIE G. GIOVANOLI, ESQ.
Attorney for the Respondent

APRIL HERRON
Official Court Reporter

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STATE EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
1	Affidavit	7	7
1	Facebook Photograph	5	6
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3	11	CD	5	6
4	12	CD	5	6
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1 (WHEREUPON, Applicant's Exhibits Nos. 1-12 were
2 marked for identification only.)

3 THE COURT: Yes, ma'am, you may proceed.

4 MS. GIOVANOLI: Thank you. This is the case of
5 Rashaun Sobers vs. The State of South Carolina, case
6 number 2014-CP-42-0640.

7 THE COURT: All right, you may call the case.

8 MS. GIOVANOLI: Thank you. We're before the
9 court on an application for post-conviction relief.
10 It was filed February 21st, 2014. The Applicant's
11 presently incarcerated with The South Carolina
12 Department of Corrections. He was indicted
13 November 2009 for murder. That was 2009-GS-42-6427.
14 He was represented by Brac H. Turnipseed, Doug
15 Brannon and Ryan Langley.

16 The Applicant proceeded to trial and on
17 September 9th, 2010 he was found guilty of the charge
18 by a jury. The Honorable J. Derham Cole sentenced
19 The Applicant to a term of life. Timely notice of
20 appeal was filed and the South Carolina Court of
21 Appeals confirmed the conviction and sentence.

22 The State is present and ready to proceed. The
23 Applicant is also present, represented by Ms. Tricia
24 Blanchette. And I will hand it over to
25 Ms. Blanchette.

1 THE COURT: All right, Ms. Blanchette.

2 MS. BLANCHETTE: Thank you, Your Honor, may it
3 please the Court. Tricia Blanchette on behalf of The
4 Applicant, Rashaun Sobers. And at this time it's my
5 understanding that The State has agreed to the
6 admissibility of Applicant's Exhibits marked 1
7 through 12. And I would like to move to admit those
8 at this time.

9 THE COURT: Any objection, ma'am?

10 MS. GIOVANOLI: No objection, Your Honor. The
11 State also has an exhibit that counsel had not
12 objected to either, State's Exhibit 1. If we can
13 admit those all at the same time.

14 THE COURT: So, all the exhibits, that is
15 Applicant's 1 through 12 and State's Exhibit 1 are
16 all admitted without objection?

17 MS. GIOVANOLI: Yes, sir, Your Honor.

18 MS. BLANCHETTE: Yes, Your Honor.

19 THE COURT: Okay. And they've all been
20 appropriately marked and inventory? All right, good
21 enough. Thank you.

22 (WHEREUPON, Applicant's Exhibits Nos. 1-12 were
23 admitted into evidence.)

24 (WHEREUPON, State's Exhibit No. 1 was marked for
25 identification and received into evidence.)

1 MS. BLANCHETTE: And, Your Honor, if you would
2 like a copy, I do have a paperclipped copy of the
3 exhibits in order.

4 THE COURT: Sure, if you want to bring that
5 around.

6 MS. BLANCHETTE: I do not have a copy of the
7 CD's, Your Honor.

8 THE COURT: Okay, thank you.

9 MS. BLANCHETTE: Your Honor, by way of
10 introduction, I had provided Your Honor earlier this
11 morning an outline that just provides each allegation
12 and pertinent cites to the transcript. I'll briefly
13 go over that before we call our first witness. Which
14 is going to an expert that's going to come to us via
15 phone from Alabama.

16 THE COURT: Okay.

17 MS. BLANCHETTE: Your Honor, the first
18 allegation before you today is ineffective assistance
19 of counsel for failure to conduct a reasonable
20 investigation prior to the trial. There will be
21 going into some basic questions about the attorneys
22 and how they were retained and what interaction he
23 had with them. As well as looking at the transcript
24 regarding an investigator they utilized, Investigator
25 Heist. Who ended up going to the scene and offered

1 testimony about whether or not the vehicle would have
2 been able to exit the scene as Mr. Sobers had
3 testified to.

4 The second allegation, Your Honor, will go into
5 ineffective assistance of counsel for the handling of
6 the motion to dismiss related to the admissibility of
7 the phone video evidence obtained from The State's
8 witness' cell phone. There, I will direct The
9 Court's attention to a motion hearing that was held.
10 The defense made argument beginning on Page 46 of the
11 transcript, that they were only given two segments of
12 a video from -- or videos from Phoenix Fielder's
13 phone. They had two major difficulties. The quality
14 was poor so they did not have an expert look at it.
15 And they believe there could have been more. Because
16 the last video cut off right before the incident that
17 we're here about today, the shooting incident.

18 The other issue that they brought up is they
19 returned Mr. Fielder's phone to him and merely copied
20 these videos. The State, in response, on Page 50
21 said that there had been a prior motion hearing in
22 front of Judge Couch. And that the entire SIM card
23 had been turned over and that it was proper to turn
24 back the phone to Mr. Fielder. Ultimately, the Judge
25 denied the motion and he made comments in the record

1 that the phone itself was not evidence. So, that
2 would be an issue we will be exploring today.

3 The third issue is ineffective assistance of
4 trial counsel for failure to present a reasonable
5 defense at trial. I'll be honest, Your Honor, that's
6 a catchall. We do not have any specific allegation
7 that fall under that.

8 THE COURT: Okay.

9 MS. BLANCHETTE: Number four is ineffective
10 assistance of trial counsel for failure to properly
11 prepare Applicant to testify both in-camera and in
12 front of the jury. There, we will be going through
13 the Jackson vs. Denno hearing and what transpired at
14 the Jackson vs. Denno hearing. The State called
15 Investigator Bryant who testified about his interview
16 of The Applicant and whether or not he requested
17 counsel. They also called Investigator Williams who
18 spoke about a diagram that The Applicant made and
19 whether or not Applicant had requested counsel.
20 During the Jackson vs. Denno, the defense questioned
21 if there was a statement or just a diagram. But what
22 ended up happening is The State did not introduce the
23 statement or diagram during trial but that did come
24 in after The Defendant testified.

25 I will be going through some of the testimony

1 that resulted from the admission to that statement.
2 Specifically, them pointing out that Mr. Sobers lied
3 in a statement about one of the other individuals
4 having a gun. He was repeatedly asked about lying.
5 And that, essentially, became one of the mantras of
6 The State's closing argument. As he's lied before,
7 he's lying to you today.

8 The subpart, also included in that is
9 ineffective assistance of counsel for failure to
10 properly prepare and utilize Mr. Sobers while he was
11 on the stand. He will be testifying about some
12 specific portions of his testimony regarding the
13 scene and the incident we're here about today. About
14 prior difficulties. About an issue that comes up
15 regarding an illegal gun. And then an issue that
16 comes up about whether or not he had ever been in
17 trouble before in a prior 2007 case.

18 Your Honor, issue number five is ineffective
19 assistance of trial counsel for failing to utilize
20 witnesses. A request and a continuance to locate all
21 necessary witnesses. That boils down to an
22 individual named Little Greg. We were not able to
23 get him successfully under subpoena to be here today,
24 so we will not be going forward on that allegation.

25 Allegation number six, this is our largest

1 allegation. Your Honor can read it for himself in
2 the event that I will put it on the record, I will
3 just summarize. It comes down to the issue that the
4 defense, essentially, seemed to be that this was a
5 gang and activity and this was a gang approaching
6 Mr. Sobers and his shooting and his reactions that
7 night was because he was in fear of his life as a
8 result of this gang and their activities.

9 There was a motion hearing that is on Pages 69
10 through 79 of the transcript, where it comes up that
11 just a couple minutes prior the defense had received
12 a motion to exclude any testimony or evidence
13 regarding gangs. And then that matter is flushed out
14 with argument from both sides. Essentially, the
15 recurring theme of the Judge was, how is this
16 relevant? That was the question that he continuously
17 asked counsel. In the outline that I provided I gave
18 all the cites for the discussion back and forth and I
19 will go through those for you now.

20 The Judge initially ruled that it would not be
21 admissible but then agreed to take a proffer. They
22 proffered the testimony of Rocky Watts. Who the
23 defense was attempting to qualify as an expert. The
24 Court found that he was not qualified. They also
25 proffered the testimony of The State's witnesses,

1 Trey Gentry. And I have outlined his testimony in
2 the outline. Ricky Smith, Quita [ph] Gentry, Joshua
3 Fuller. Then there's further argument from the
4 defense. And specifically, on Page 480, they argue
5 any evidence that can reasonably be linked or
6 legitimately linked to support Ms. Sobers theory of
7 self-defense is admissible. And this goes to show
8 his fear at the time. And I think that best
9 summarizes the argument that they were continuously
10 making. The Court then makes ruling that Mr. Watts
11 was not sufficiently qualified. And that the gang
12 testimony would not be admissible. Thereafter, they
13 took testimony from Phoenix Fielder. And he provided
14 testimony as well which we will be going through with
15 expert.

16 Your Honor, that is just a summary of the gang
17 issue, it's much more detailed but you'll be hearing
18 that throughout the day.

19 THE COURT: Okay.

20 MS. BLANCHETTE: Issue number seven--

21 THE COURT: I've --

22 MS. BLANCHETTE: Yes, Your Honor.

23 THE COURT: I'm read those. So, I'm pretty
24 comfortable with it.

25 MS. BLANCHETTE: Okay and obviously the

1 remaining issues are all legal objection issues or
2 ineffective appellate counsel issue that I think just
3 read off the page.

4 THE COURT: Okay.

5 MS. BLANCHETTE: So, unless Your Honor has any
6 further questions, I will go about getting the expert
7 on the phone at this time.

8 THE COURT: Sure.

9 MS. BLANCHETTE: Thank you, Your Honor.

10 THE COURT: Yes, ma'am.

11 MS. BLANCHETTE: And, Your Honor, is that a
12 microphone that you'd like me to put the phone up to
13 once I get her on the phone?

14 THE COURT: There's one right there --

15 (WHEREUPON, a phone conference was held.)

16 MS. BLANCHETTE: Dr. Britz.

17 DR. BRITZ: Yes.

18 MS. BLANCHETTE: Hi, this is Tricia and we're in
19 the courtroom here in Spartanburg. I was just asking
20 the Judge where it would be best to place the phone.

21 DR. BRITZ: Okay.

22 MS. BLANCHETTE: Okay, just give us one moment.

23 Can everyone hear it if I set it here?

24 THE COURT: Yes, ma'am. I can hear it just
25 fine.

1 Doctor, this is Judge Stilwell, can you hear me,
2 ma'am?

3 DR. BRITZ: I can hear you but not clearly.

4 THE COURT: Okay.

5 MS. BLANCHETTE: Would it be better if I put it
6 on the witness stand?

7 THE COURT: Well, if you bring it up here for
8 just a second, I'll give it back to you so that you
9 can hear. But maybe the witness stand will be best.
10 Just put it right there.

11 Doctor, can you here me better now?

12 DR. BRITZ: Sure. That's much better. Thank
13 you.

14 THE COURT: All right, doctor, I'm going to
15 swear you in. Please, would you raise your right
16 hand.

17 DR. BRITZ: Okay.

18 MARJIE BRITZ, after being duly sworn,
19 testified as follows:

20 THE COURT: And, ma'am, you realize that it's
21 unusual for the Court to take testimony via telephone
22 but under certain circumstances, when circumstances
23 require, we'll do so. But it's a sensitive matter
24 and you understand that if you misrepresent your
25 identity in any way, then you would potentially be

MARJIE BRITZ-DIRECT BY MS. BLANCHETTE

1 subject to contempt of court which could result in a
2 period of incarceration or you could subject yourself
3 to charges of perjury which could be prosecuted by
4 the State of South Carolina. Do you understand that
5 ma'am?

6 DR. BRITZ: I do.

7 THE COURT: Okay. Will you state your full name
8 for the record, please.

9 THE WITNESS: Margaret Tina Britz, B-R-I-T-Z, as
10 in zebra.

11 THE COURT: All right, thank you very much,
12 doctor.

13 You may proceed with questioning.

14 DIRECT EXAMINATION

15 BY MS. BLANCHETTE:

16 Q Doctor, my name is Tricia Blanchette, can you
17 hear me okay?

18 A I can, thank you.

19 Q Okay. Dr. Britz, can you tell us your current
20 profession.

21 A I'm a professor at Clemson University.

22 Q And what area are you a professor, what
23 department there?

24 A I'm in the Department of Sociology, anthropology
25 and criminal justice.

MARJIE BRITZ-DIRECT BY MS. BLANCHETTE

1 your education, please.

2 A I receive a Bachelor's of science degree from
3 Jacksonville State University in forensic science. I
4 received a Master's Degree in police administration from
5 Michigan State University. And I subsequently received a
6 Ph.D from Michigan State University in the areas of
7 criminal justice with two cognate areas in sociology and
8 psychology.

9 Q And beyond your position at Clemson, where else
10 have you held academic positions?

11 A I am currently on staff at Anderson University
12 for their demand college, which is a masters level program
13 for police executives across the state. And I have
14 previously been a professor at The Citadel in Charleston,
15 South Carolina.

16 Q And Dr. Britz, are you a member of any
17 professional organizations?

18 A I'm member of several different professional
19 organizations. I'm a member of the International
20 Association for Chiefs of Police. I'm a member of the
21 Association of Criminology. I'm moving my computer up
22 here so I can see what else I have on there. I'm sorry, I
23 guess I'll have to check it out. I'm a member of The
24 Academy of Criminal Justice Sciences, I have numerous
25 regional criminal justice associations. The Atlanta

MARJIE BRITZ-DIRECT BY MS. BLANCHETTE

1 Q Okay. And what classes do you regularly teach
2 at Clemson University?

3 A I teach in criminal justice, computer crimes,
4 organized crimes, criminal evidence. Occasionally, I
5 teach policing, criminology, special topic courses. I
6 think that sums it up.

7 Q And Dr. Britz, have you provided me a copy of
8 your curriculum vitae?

9 A I have.

10 Q Okay.

11 Your Honor, at this time I do have a copy.
12 I don't know if you'd like to mark it as a Court's
13 Exhibit, I did not mark it as a Applicant's exhibit yet,
14 if you'd like that for a reference.

15 THE COURT: Are you going to go over it with
16 her?

17 MS. BLANCHETTE: I was going to go over, not in
18 the detail of multiple pages here, Your Honor.

19 THE COURT: Okay.

20 Ms. Giovanoli, have you received a copy of this,
21 ma'am?

22 MS. GIOVANOLI: Yes, Your Honor, I have a copy.

23 THE COURT: All right, thank you.

24 BY MS. BLANCHETTE:

25 Q Ms. Britz, if you would just take us through

MARJIE BRITZ-DIRECT BY MS. BLANCHETTE

1 Electronic Crimes Task Force, National Coalition for
2 Juvenile Justice. I am a trained assessor or CALEA, which
3 is The Commission for the Accreditation of Law Enforcement
4 Agencies. The High Technology Crime Investigation
5 Association. And I'm a previous member of the South
6 Carolina Gang Investigator Association.

7 Q And do you hold any professional training or
8 licenses?

9 A I do. I am a trained professor for CALEA. I
10 have completed forensics evaluation courses and have been
11 certified by TASC/Litton. And also by the National Center
12 for the White Collar Crime. I've also been certified only
13 Marsware Software and New Technologies.

14 Q And Dr. Britz, your publications and books on
15 your CV are rather extensive, could you just highlight
16 some of those that deal directly with the areas of
17 organized crimes or criminal street gangs, please?

18 A Sure. The books that are most associated with
19 this would be the first book that I published in 2000 with
20 Sean Grennan, Jeff Rush and Todd Barker. It was a book
21 published by Prentice-Hall, it was called Gangs: An
22 International Approach, where we looked at gangs. Both in
23 the United States and Internationally. I published a book
24 on organized crime with Sean Grennan. Which was a global
25 perspective of organized crime. In which we discussed the

MARJIE BRITZ-DIRECT BY MS. BLANCHETTE

1 evolution of street gangs. Across the world, not just the
2 United States, but across the world. I published a
3 chapter on African Americans and the Criminal Justice
4 System in 2008. I am currently working on a book for
5 Kendall Hunt on globalization on gangs and organized
6 crime.

7 Q And have you given any lectures or taught any
8 classes to professional associations regarding gangs or
9 organized crime?

10 A I have. The one specifically to organized crime
11 would be in 2013, I did a organize crime [indiscernible]
12 for the International Association of Crime Investigators
13 in 2010. Street gangs and organized crime: An
14 evolutionary perspective at the South Carolina Gang
15 Association. In 2008 I did one on Contemporary Gangs:
16 Historical Foundations and Future Projections for the
17 annual meetings of The South Carolina Recreation Parks
18 Association. And I've done numerous others that you can
19 tell by my CV.

20 MS. BLANCHETTE: And, Your Honor, at this point,
21 her CV is rather lengthy, but I would offer her as an
22 expert in the area of organized crime and criminal
23 street gangs.

24 THE COURT: Any exception to her qualifications
25 or voir dire?

MARJIE BRITZ-VOIR DIRE BY MS. GIOVANOLI

1 MS. GIOVANOLI: Yes, Your Honor, if I may ask
2 some questions with regards to her qualifications?

3 THE COURT: Sure.

4 VOIR DIRE EXAMINATION

5 BY MS. GIOVANOLI:

6 Q Good morning, Dr. Britz, can you hear me?

7 A Yes, ma'am.

8 Q I'm Valerie Giovanoli, I represent The State. I
9 just have a few questions for you. First and foremost,
10 your CV is very impressive. But I'd like to just get a
11 little more detail on your qualifications with regards to
12 the issues in this case.

13 A Okay.

14 Q How many times have you been qualified as an
15 expert in gang activity to testify in court?

16 A Zero.

17 Q Okay. I understand that you've studied gangs on
18 a very broad level, National, International through
19 academic and social studies. But what experience and
20 training do you have regarding Spartanburg, local
21 neighborhood gangs?

22 A Very little.

23 Q Okay. Do you have any?

24 A Only in what I have researched through
25 interviewing police officers, gang investigators, my

MARJIE BRITZ-VOIR DIRE BY MS. GIOVANOLI

1 association with the gang investigator association, those
2 kinds of things.

3 Q Okay. Do you have any actual experience, I
4 guess I'd say, real life on the ground experience; maybe
5 with police departments in Spartanburg County dealing with
6 gangs?

7 A No.

8 Q Okay. Have you worked with law enforcement at
9 any point in Spartanburg County?

10 A No.

11 Q Okay. Have you talked to members of the
12 Northside or Southside gangs, which are relevant to this
13 case?

14 A I didn't hear you.

15 Q Have you ever talked to any members of the
16 Northside or Southside gangs that were relevant to this
17 case?

18 A I have not.

19 Q So, you don't know any members.

20 A No.

21 Q Okay. Have you talked -- excuse me. What kind
22 of research have you done on this Spartanburg gangs? I
23 guess you mentioned talking to law enforcement officers,
24 is there any other investigations?

25 A No.

MARJIE BRITZ-VOIR DIRE BY MS. GIOVANOLI

1 Q Were any Spartanburg County gangs part of the
2 research that was involved in your books or articles,
3 lectures and seminars?

4 A No. My expertise is more in National gangs,
5 National gang structures. Sociological factors associated
6 with gang development, what gang and how gangs develop,
7 what gangs mimic and how they present themselves and how
8 gangs communicate.

9 Q Okay. I understand that. I guess gangs is a
10 broad term, is a broad umbrella. Would you agree that the
11 gang issue that we're dealing with here is a local
12 neighborhood gang, strictly to Spartanburg. Not even a
13 state wide -- not even a state level gang?

14 MS. BLANCHETTE: Your Honor, I would object at
15 this point. I think she's asking opinion testimony.

16 THE COURT: Okay, I'll give her some latitude.

17 MS. BLANCHETTE: Okay.

18 BY MS. GIOVANOLI:

19 Q You may answer.

20 A I would.

21 Q So, the subject matter of all your books and
22 lectures and seminars that never involved Spartanburg,
23 local neighborhood gang's.

24 A that's correct.

25 Q Okay. And today you're being proffered as an

MARJIE BRITZ-VOIR DIRE BY MS. GIOVANOLI

1 expert witness in the gang issue relating to Northside and
2 Southside gang, which are local, Spartanburg gangs; is
3 that correct?

4 A May I answer?

5 Q Yes.

6 A Okay, I think I might have proffered as an
7 expert overall in gangs overall and organized crime.

8 Q There's a major difference in organized crime
9 and National and International Gangs, in comparison to the
10 gangs at issue in this case. Local, street gangs, local
11 to Spartanburg, right?

12 A There can be. Gangs are always a organized
13 crime. Organized crime is not sealed in a vacuum, it
14 develops with what are often neighborhood gangs, which
15 develop into National [indiscernible], which then evolves
16 into organized crime. When the people of Folk Nations
17 developed in Chicago, those gangs historically had been
18 small, local neighborhood gangs. And they developed on
19 the National level and they're International in nature.
20 And so, although those things may appear to be distinct
21 categories, they're all related to one another.

22 Q Okay. Do you have any knowledge that NSG, I'm
23 going to call it NSG and SSG for Northside gang and
24 Southside gang. Do you have any knowledge or have you
25 conducted any research that has shown you that those gangs

MARJIE BRITZ-VOIR DIRE BY MS. GIOVANOLI

1 have evolved into the bigger state level and National
2 level gangs?

3 A I have not done any research in that regard.

4 MS. GIOVANOLI: Court indulgence, Your Honor?

5 THE COURT: Sure.

6 BY MS. GIOVANOLI:

7 Q You said that your research with regards to this
8 case was very little and only through an investigation in
9 speaking with Spartanburg Police Departments?

10 A Right.

11 Q Okay. When did you start that research? Was
12 that recently? Did you do that just in preparation of
13 this testimony?

14 A I did.

15 MS. GIOVANOLI: I have nothing further. But if
16 you would allow me to argue as to the expert
17 obligation?

18 THE COURT: Sure, you may do so now.

19 MS. GIOVANOLI: Your Honor, at this point we
20 would object to her qualification as a expert to
21 testify on matters of the Northside and Southside
22 gangs that are relevant to this PCR hearing. First
23 and foremost at trial, trial counsel proffered the
24 testimony of a 16 year veteran law enforcement
25 officer who also owned his own private investigation

MARJIE BRITZ-VOIR DIRE BY MS. GIOVANOLI

1 company for 11 years. He did the same exact thing,
2 investigation, but actually on the streets. He
3 talked to other officers, he talked to resource
4 officers at the high school that all these children
5 attended. And he was not qualified as a witness. He
6 had a lot of real life experience with those street
7 gangs, local to Spartanburg. He was in the
8 undercover narcotics unit for a number of years and
9 he was also in the crime -- violent crimes unit. So,
10 he was -- he actually had the experience, real life
11 on the street, along side these gangs.

12 I can appreciate Dr. Britz's extensive resume.
13 It's quite impressive but I feel that she lacks the
14 knowledge, training, education and skills to testify
15 on the matters in this in this case. Furthermore, in
16 Watson vs. Ford Motor Company, that was a Supreme
17 Court case in South Carolina where they reversed the
18 trial Judge's finding that an expert's qualified. In
19 Watson, the Judge qualified Bill Williams as an
20 expert on training and the operation on cruise
21 control and brakes. And in particular, allowed his
22 testimony on cruise control diagnosis.

23 There, the Supreme Court found that there was no
24 evidence to support to trial Court's qualification of
25 Williams as an expert in cruise control systems.

MARJIE BRITZ-VOIR DIRE BY MS. GIOVANOLI

1 Williams had no knowledge, skill, experience,
2 training or education specifically related to cruise
3 control systems, rather it appeared he merely studied
4 the Explorer system just before trial, which he
5 indicated to his testimony to the jury. And that was
6 that quote, This is how I taught myself the
7 Explorer's cruise control or speed control system.
8 While Williams in that case may have qualified as an
9 expert in other aspects in other automobile
10 components, such as the break system, trial Court
11 failed to properly evaluate Williams' qualifications
12 specific to cruise control.

13 Similar in this case, she's testified that in
14 preparation for this hearing she did some research
15 and talked to Spartanburg County police officers and
16 various people local to Spartanburg. And we would
17 submit that that does not rise to a sufficient level
18 of training, expertise, knowledge and education to
19 testify as a witness in this case. To the issues,
20 specifically, the local gangs in Spartanburg.

21 THE COURT: Okay. All right. Thank you.

22 I don't take the qualification offered by The
23 Applicant to apply to specific expertise as to the
24 Northside and Southside gangs in Spartanburg. I
25 believe the proffer of this witness as an expert was

MARJIE BRITZ-VOIR DIRE BY MS. GIOVANOLI

1 a expert in sociology and a expert generally in
2 gangs. And the social pneumonium of gangs. I think
3 she is qualified to testify with regard to the social
4 pneumonium of gangs. And therefore, I'll find her
5 qualified her qualified and admit her an as an
6 expert. Of course, all the questions that you asked
7 are relevant and will go to her credibility and to
8 the weight of any testimony that she provides.

9 With regards to Watson, I think this is
10 distinguishable. My reading of that case is,
11 essentially, that the Court found that that expert
12 was [indiscernible] and basically it offered just
13 [indiscernible] silence. I don't see that in this
14 case. So, I'm allow her as --

15 THE COURT REPORTER: Judge, I'm sorry, can we
16 ask her to stop flipping through whatever she's
17 doing? I'm having a hard time hearing you.

18 THE COURT: Doctor, are you flipping pages or
19 otherwise making noises?

20 DR. BRITZ: I'm not but the phone is going in
21 and out.

22 THE COURT: Oh, okay --

23 DR. BRITZ: -- [indiscernible] -- the phone, I
24 apologize.

25 THE COURT: It's okay, it's okay.

MARJIE BRITZ-DIRECT CONTINUED BY MS. BLANCHETTE

1 DR. BRITZ: Okay.

2 MS. BLANCHETTE: Would it be better if I moved
3 further away from the mic?

4 THE WITNESS:

5 THE COURT REPORTER: I guess. I'm just trying
6 to hear him and I keep hearing this' noise and I can't
7 hear what he's saying.

8 MS. BLANCHETTE: If you forgive me, Your Honor,
9 I apologize.

10 THE COURT: I'm good. I'm done. Okay.

11 DIRECT EXAMINATION CONTINUED

12 BY MS. BLANCHETTE:

13 Q All right, Dr. Britz, we're going to proceed
14 with your testimony at this time, can you hear me okay?

15 A I can.

16 Q Now, I know that you're expertise and what you
17 review and look at on a National basis. But can you tell
18 me, specifically, what was provided to you what did you
19 review in regards to Rashaun Sobers case?

20 A In this particular case, I reviewed the entire
21 case file, I reviewed the autopsy photograph, the enter
22 trial transcript, all that you had provided me. Including
23 the investigation of the Facebook photographs that were
24 introduced in court.

25 Q Okay. And you also reviewed the trial

MARJIE BRITZ-DIRECT CONTINUED BY MS. BLANCHETTE

1 transcript; is that correct?

2 A I have.

3 Q Okay. And first I want to speak with you about
4 the Facebook photographs that you referenced that were
5 introduced in court. Can you still hear me?

6 A I can, I'm sorry, it's going in and out. It's
7 probably on my end.

8 Q No, I walked away from the phone, I apologize.
9 I'm going to first take you through what has been marked
10 today as Applicant's No. 1. It is a packet of one, two,
11 three, four photographs that were introduced at the
12 original trial. Since you're not here with us today, I
13 will be rather descriptive. The first photograph is of a
14 individual, a black -- I mean, a African-American male
15 holding two guns, posing towards the camera. The second
16 picture is of various individuals. The one in front has a
17 red shirt, they're holding their hands up. The second one
18 is a darker image of just about five or six individuals,
19 there's wood paneling it appears in the background, and
20 they are also posing for the camera. And then the final
21 picture is a picture of a tattoo. Are you familiar with
22 those pictures?

23 A I am.

24 Q Okay. Would you take us through your review of
25 those pictures and any pertinent findings that you had?

MARJIE BRITZ-DIRECT CONTINUED BY MS. BLANCHETTE

1 A Okay. In the first paragraph, the one that
2 displays the young man holding two weapons, that is very
3 characteristic of gang members both in the
4 African-American gang community and the Latino gang
5 community. This is a way for them to posture and show
6 power. So, this is very common in gang members. In the
7 second photograph, you can clearly identify that these
8 individuals are throwing gang signs. As I indicated
9 before, I'm not an expert in the area of Spartanburg,
10 however, these have been identified by testimony in the
11 previous trial, that these are Northside and Southside
12 gang signs. These are consistent with the types of gang
13 signs that are represented across, including in your major
14 gangs in both Chicago and LA, that would be the United
15 Blood Nation out there on the East coast.

16 And then in the third photograph, you can
17 tell also that these individuals are throwing gang signs,
18 communicating with their hands. Which is quite common in
19 street gangs. The final photograph of the tattoo,
20 although, I find that this tattoo is common on gang
21 members, it also a common tattoo to mark individuals in
22 memorial. And so, I don't find that to be as compelling
23 as the previous three.

24 Q Now, were you able to do any additional research
25 on the web or on Facebook in relation to this case?

MARJIE BRITZ-DIRECT CONTINUED BY MS. BLANCHETTE

1 A I did.

2 Q And what were your findings regarding that
3 research?

4 A I was able to find Facebook, current Facebook
5 pages of a couple of the witnesses in the case. In
6 particular, Jay Red Fuller. And throughout his page, you
7 continue to see images where he is displaying gang signs,
8 tagging on the right to keep up with his hat, similar to
9 characteristics of street gangs. I also found images
10 of -- find my notes here. Felix Fielder and these were
11 similar to the things that I found on Jay Red Fuller's
12 page where individual are throwing gang signs in many of
13 the photographs. There are photographs on both of these
14 pages of individuals just displaying copious amounts of
15 money. That also is consistent with gang members.

16 And on Quita Gentry's page, I did find her
17 page several months ago I was able to access it in the
18 week prior to my testimony here. She also had images on
19 her Facebook page which indicated that individuals were
20 throwing or displaying gang signs.

21 Q Now, you mentioned that you had reviewed the
22 autopsy report; is that correct?

23 A That's right.

24 Q And I'm sorry, let me ask you this, was there
25 anything additional regarding the pictures or the research

MARJIE BRITZ-DIRECT CONTINUED BY MS. BLANCHETTE

1 that you did that you would like to explain to the Court?

2 A No, I think, that's all.

3 Q Okay. Now, you also reviewed the autopsy
4 report, did you find any indicators of gang activity or
5 any red flags, for lack of a better word, in reviewing the
6 material in the autopsy report or the coroner's file?

7 A I did. I'm not sure why it's not listed in the
8 coroner's report, in the autopsy photographs, you see that
9 one of the individuals -- I'm sorry, the victim in this
10 particular case had several items taken from his person.
11 They included a red bandanna, a red wallet, a red lighter
12 and a red phone. All of these are suggestive of
13 representing a particular gang. In addition to that, the
14 victim was found with rosary beads. Which is quite
15 common, especially in contemporary gangs and Latino gangs.

16 Q And these items, these red items that were
17 found, did it indicate what side of his body those items
18 were found on?

19 A All of the items with the exception of the
20 lighter, which was found in his cigarette pocket -- or his
21 cigarette pack in his left pocket, all of the items were
22 found on the right side.

23 Q And in your opinion, what is the significance of
24 those items being located on the victim's right side?

25 A Gangs typically have represented on a particular

MARJIE BRITZ-DIRECT CONTINUED BY MS. BLANCHETTE

1 side. So, for example, on the National level, in the
2 People Nation, which the blood sets are a part of, they
3 represent to the left. Whereas, the Crip and the Folk
4 Nation, represent to the right. It's very common that
5 they will have everything on one side of their body.

6 Q And have you reviewed the video evidence that
7 was offered in this case?

8 A I have.

9 Q And are there any indicators of gang activity or
10 gang affiliation in the videos that you have that I must
11 note for the record were without sound, is that correct?

12 A That is correct.

13 Q Okay. Were there any indicators or noticeable
14 activities that related to gangs in the videos for you?

15 A It would be cites that was originally
16 characterized, as I believe, a slapped, a slap, I can't
17 remember the terminology that was used in the original
18 trial but that was found in the transcript. Is not
19 consistent with what I see on that video. What I see on
20 that video is very typical of inter gangs fighting.
21 Meaning individuals [indiscernible] fighting, excuse me.
22 Where individuals will oftentimes get in an argument or
23 show their masculinity but having a fight. It's usually
24 broken up by other members of the gang before it goes too
25 far. It's not characteristic, however, of a beating in.

MARJIE BRITZ-DIRECT CONTINUED BY MS. BLANCHETTE

1 Which I think was suggested at some point. A beating in
2 usually involves more than one member of the gang. The
3 fact that this individual was separate -- or these
4 individual were separated, when it was becoming more
5 serious and that they all left together, is
6 characteristics of gangs behavior.

7 Q I'm sorry, there was a little bit of noise. You
8 said it's characteristic of what?

9 A Of the way that gangs behave.

10 Q Okay. Thank you. Was there anything EMS
11 regarding the videos that you would like to offer?

12 A No, that's all.

13 Q Okay. Let's turn then to the proffered
14 testimony of the testimony of the trial that you reviewed.
15 Would you take us through that and explain anything of
16 significance that you saw in the proffered in trial
17 testimony.

18 A Yeah, we can start with the testimony of Trey
19 Gentry. Trey Gentry using terminology like just throwing
20 stuff up. I'm sorry, he was referring to Court's Exhibit
21 4 in this particular testimony. And it's found on Page
22 453 through 457. He says, Just throwing stuff up and
23 we're just going like that. He then testified that he
24 identifies what the acronym SSG and NSG mean. He also
25 said, That where's all my people are from.

MARJIE BRITZ-DIRECT CONTINUED BY MS. BLANCHETTE

1 Which is a very, very common vernacular for
2 gang members.

3 He states that some of his people are in a
4 gang. And that he sometimes hangs with people in a gang.
5 Of course, he subsequently denied it that he is in a gang
6 or that any of the gang's witnesses are in a gang. Which
7 is quite common as well for any witnesses or gang member
8 to actually identify themselves or others. That is part
9 of the gang. That led up to the testimony of Ricky Smith.
10 Ricky Smith admits on Pages 461 through 468 the he and Jay
11 Red and the victim are throwing a Northside gang sign in
12 Court's Exhibit 4. And that others including Quita
13 Gentry, threw up Southside signs. Tasmia [ph] Gentry,
14 which is on Page 469, she testified, initially, that she
15 is communicating with her hands. Which is suggestive of
16 the way that gangs communicate with hand signs.

17 I think the most compelling, though, is the
18 testimony of Phoenix Fielder. And what I specifically
19 reference is on 483 through 486. He also testified that
20 he throwing up Northside and that the sign is gang
21 related. He also in Court's Exhibit 5, acknowledges that
22 SSG and NSG stands for Northside Gangsters and Southside
23 Gangsters. Now on Page 486, he says that the individuals
24 in the photograph and it includes the one he identifies as
25 Quay [ph], Quita, Trey, Ricky, then another Trey, are, and

MARJIE BRITZ-DIRECT CONTINUED BY MS. BLANCHETTE

1 these are his words, kind of gangsters. Then he
2 backtracks and says they're not in a gang. But then on
3 Page 49, he reiterates that. Basically saying that if
4 they're over there, and he answered affirmative to that
5 and says, They're kind of gangsters.

6 Q Okay. Dr. Britz--

7 A Okay--

8 Q Go ahead.

9 A Oh, that's okay.

10 Q I'm sorry, what was that?

11 A That's all.

12 Q Okay. Dr. Britz, in this case, Mr. Sobers was
13 represented by attorney Doug Brannon, who's in the
14 courtroom with us today. If he had contacted you prior to
15 trial, would you have been willing to consult with him on
16 this case?

17 A I would have, yes.

18 Q Would you have been willing to review the
19 materials that you reviewed leading up to today?

20 A Absolutely.

21 Q And but for the proffer testimony that,
22 obviously, came during the trial, would you have been
23 willing to offer the opinions that you offered today?

24 A I would.

25 Q Okay. And if you had heard the proffer

MARJIE BRITZ-CROSS BY MS. GIOVANOLI

1 testimony, would you have been willing to offer the
2 opinions you have today regarding the proffer testimony?

3 A I would.

4 Q And, Dr. Britz, what is your ultimate opinion as
5 to whether there's indicators of gang activity and gang
6 affiliation in this case?

7 A I would say that, without reservation, that
8 there are clear indicators of a gang relationship. Both
9 through the trial court -- or, I'm sorry, through the
10 trial transcript and through the video and through the
11 Facebook images. I would say unequivocally that these
12 individuals are associated and are active in gang life.

13 Q Dr. Britz, I know we've had a long time leading
14 up today, is there any further testimony or opinion you'd
15 like to offer in this case?

16 A No, that's all.

17 MS. BLANCHETTE: Your Honor, I have no further
18 questions of this witness.

19 THE COURT: Okay.

20 MS. GIOVANOLI: May I approach, Your Honor?

21 THE COURT: Yes, ma'am, you may.

22 CROSS-EXAMINATION

23 BY MS. GIOVANOLI:

24 Q Dr. Britz, okay, so let me tie this down.
25 You're of the opinion that these certain witnesses and the

MARJIE BRITZ-CROSS BY MS. GIOVANOLI

1 victim were members of a gang, correct?

2 A Correct.

3 Q And can you further elaborate the basis of that
4 opinion? It was based on the photographs, correct?

5 A That's right.

6 Q The Facebook photograph showing -- showing Jay
7 Red Fuller, who was actually -- are you aware that he was
8 not present during the shooting?

9 A I am.

10 Q Okay. But you got -- you looked at photos from
11 his Facebook page, correct?

12 A Correct.

13 Q Okay. And those photos show the guys holding up
14 NSG and SSG symbols, correct?

15 A Yes.

16 Q And your testimony is that that's an indication
17 that they are members of a gang?

18 A It is one of many, yes.

19 Q Okay. The other indicators being the showing of
20 a weapon in one of the photos?

21 A That's right.

22 Q Okay. And the showing of the weapon was
23 actually by a person who wasn't even a witness to this
24 crime, correct?

25 A Correct.

MARJIE BRITZ-CROSS BY MS. GIOVANOLI

1 Q Okay. And the other photos that you said that
2 you researched through Facebook, do you recall the
3 postings of those, the dates of those paragraphs?

4 A I can go back and look. As I had explained to
5 Tricia, I am not able to access the internet down here.

6 Q Okay.

7 A So let me see where I saved these. Hold on just
8 a moment.

9 Q Okay.

10 A So, I have one and there are a couple. I have
11 one here from Phoenix Fielder's page, which is an image of
12 him that he posted -- let me enlarge that. That was
13 posted on May 15th. And it says, and I quote, it says,
14 Small size which --

15 Q Well, what year was that?

16 A That was this year.

17 Q Okay. 2017?

18 A Uh-huh.

19 Q And you're aware that this case took place in
20 2010?

21 A Oh, excuse me, I'm sorry, that is -- actually
22 this photograph is from July 15, 2010.

23 Q Okay. And the other photographs that you were
24 researching, were they from -- let me just ask it more
25 simply. Were they from prior to the date of this trial or

MARJIE BRITZ-CROSS BY MS. GIOVANOLI

1 post-trial?

2 A There was a collection of those, many of those
3 were around the date of the trial.

4 Q Okay. And your opinion is based off of all of
5 these indicators that you have seen in these photographs
6 on Facebook?

7 A Correct.

8 Q Okay. And you don't know -- when you don't know
9 when these photographs were actually taken do you?

10 A Not when they taken, I can just see when they
11 were posted?

12 Q When they were posted. And you don't know who
13 posted them, do you?

14 A Well, certainly in many of those, it's clear
15 that the owner of the page actually posted them.

16 Q Okay. So, do you know who the owner of the page
17 is? Or who had access to the page?

18 A I'm not sure who had access outside of the
19 person whose personal page that it is.

20 Q Well, but would you contest the fact that
21 someone could put up a Facebook name and not actually be
22 that real person?

23 A Yes.

24 Q You would contest that?

25 A I'm sorry, that's what I -- I would agree that

MARJIE BRITZ-CROSS BY MS. GIOVANOLI

1 somebody else could set up a Facebook page.

2 Q Okay. Do you know if these -- who took the
3 photos?

4 A I'm sorry, who?

5 Q Who took the photos?

6 A I don't know that.

7 Q Do you know if they were altered?

8 A There's no way to tell that. However, you can
9 see the comments underneath some of these photographs in
10 which the person who [indiscernible] is the person whose
11 name is associated with the particular page, is making a
12 comment on that consistent with the way that friends or
13 friends group or a gang member would talk to others that
14 they are familiar with.

15 Q Okay. Again, you don't know who posted that
16 comment?

17 A Correct.

18 Q Okay. There's also -- you were mentioning --
19 one second, I'm reviewing my notes. You were mentioning
20 some terminology that was used in the proffered testimony,
21 especially from Trey, just throwing stuff up, where my
22 people from, some people in gang, some others aren't.
23 Would you agree that someone than wasn't in a gang would
24 also make those same statements or use that terminology?

25 A Some of the comments, sure, Just throwing stuff

MARJIE BRITZ-CROSS BY MS. GIOVANOLI

1 up. Taken holistically, when you take that comment with
2 the photographs and with other communications, is when it
3 becomes a complete picture.

4 Q Okay. Have you done any research to learn
5 whether or not The Applicant, Mr. Sobers, in this case was
6 a member of a gang?

7 A I did not.

8 Q Are you being compensated for your testimony
9 here today?

10 A I am. Wait, let me -- I'm sorry, let me say,
11 I'm not being compensated for my testimony today, but I
12 have been compensated for the research and preparation
13 leading up to this. I agreed to testify without
14 additional compensation.

15 Q Okay. So, for the time that you are testifying
16 right here on the phone, you're not billing these hours?

17 A Correct.

18 Q Okay. And just one last time, clarify, your
19 investigation on -- during your testimony, was strictly
20 the autopsy photos in this case, the actual entire autopsy
21 file, the trial transcript and the Facebook photos,
22 correct?

23 A I also looked at the solicitor's file but I
24 didn't really see anything in there that would be helpful
25 in regards to my testimony.

MARJIE BRITZ-REDIRECT BY MS. BLANCHETTE

1 MS. GIOVANOLI: Okay. Nothing further, Your
2 Honor.

3 Thank you.

4 THE COURT: Redirect, ma'am?

5 MS. BLANCHETTE: Very briefly, Your Honor.

6 THE COURT: Okay.

7 REDIRECT EXAMINATION

8 BY MS. BLANCHETTE:

9 Q Dr. Britz, I just had two quick questions for
10 you. The Facebook pages that you've been referencing that
11 you subsequently researched?

12 A Right.

13 Q I know The State asked you a number of questions
14 about that but who are the names listed as those being
15 associated with on Facebook?

16 A Jay Red Fuller, Trey Gentry, Phoenix Fielder and
17 Quita Gentry.

18 MS. BLANCHETTE: Your Honor, I have no further
19 questions.

20 THE COURT: Okay.

21 Any recross based on that, Ms. Giovanoli?

22 MS. GIOVANOLI: No, Your Honor, nothing further.

23 THE COURT: All right, doctor, thank you, I
24 appreciate you being here and being available for
25 testimony this morning.

DOUG BRANNON-DIRECT BY MS. BLANCHETTE

1 DR. BRITZ: Okay, thank you very much.

2 THE COURT: Yes, ma'am.

3 MS. BLANCHETTE: Thank you, Your Honor.

4 THE COURT: You may call your next witness.

5 MS. BLANCHETTE: Your Honor, I call attorney
6 Doug Brannon to the stand.

7 THE COURT: Okay.

8 Mr. Brannon, if you would place your left hand
9 on the Bible and raise your right, please sir.

10 DOUG BRANNON, after being duly sworn,
11 testified as follows:

12 THE COURT: You can have seat and please state
13 your name for the record.

14 THE WITNESS: My name is Doug Brannon.

15 DIRECT EXAMINATION

16 BY MS. BLANCHETTE:

17 Q Mr. Brannon, what is your current profession?

18 A I'm an attorney.

19 Q And how long have you been a practicing
20 attorney?

21 A Twenty years.

22 Q And do you--

23 A Approximately.

24 Q And do you know the percentage of the cases that
25 you handled that would be criminal cases?

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1 A Forty to 50.

2 Q Okay.

3 A Okay.

4 Q And any idea the number of criminal cases you've
5 handled in your career?

6 A A thousand.

7 Q And Mr. Brannon, with those thousand cases that
8 you handled, do you recall representing Rashaun Sobers?

9 A I do.

10 Q And how was it that you came to represent
11 Mr. Sobers?

12 A I believe that Rashaun's mother hired a
13 gentleman named David Turnipseed to represent him. In
14 March of 2009, I became a partner of David Turnipseed and
15 his son Brac Turnipseed. And I guess almost by default
16 but with Rashaun and his mother's consent, I took over the
17 case. Mr. David Turnipseed -- unfortunately both David
18 and Brac are now deceased. But David's hearing was
19 failing mightily. And it got to the point prior to
20 Rashaun's trial, he couldn't be in the courtroom and
21 handle the trial because if more than one person was
22 talking, he couldn't tell who it was that was speaking.
23 So, I took over the case. I believe with their blessing.

24 Q Okay. Do you remember your interaction with
25 Mr. Sobers? Approximately how many times you met with

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1 him?

2 A It was many times. I mean, he was incarcerated
3 the whole time that I was involved in the case. But
4 shortly after David and I became partners, we went to the
5 jail and I believe that first meeting was of me, David and
6 Brac and Rashaun. But, I mean, obviously, as the trial
7 grew nearer, I was spending more time with Rashaun. But I
8 don't know how many times I went to the jail and met with
9 him. But it was -- it was dozens of times.

10 Q Now, I'll just point your attention to Page 76,
11 Line 11 through 12. And you don't have to turn there, I'm
12 happy to summarize it for you.

13 A Go ahead.

14 Q You're going through a motion at that time and
15 the Judge questions, Who's handling this case?

16 A Uh-huh.

17 Q What was kind of the lay out in the courtroom as
18 far as the attorneys and who was handling the case?

19 A Well, I mean, at the table I was sitting -- if
20 the Judge was looked at the table, I would have been
21 sitting on the aisle, okay. I mean, it was my trial to
22 try but Brac Turnipseed and I are both Type A personalities
23 and different things would set us off. And I'm summing
24 that at that point we probably both jumped up and objected
25 to something, so.

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1 Q Okay. And so, you were both actively handling
2 the case.

3 A Absolutely. Absolutely.

4 Q Okay. Just wanted to be clear because the
5 record could be a little confusing on that. Did you use a
6 private investigator in this case?

7 A We did. We did.

8 Q And that was Mr. Heist; is that correct?

9 A It was.

10 Q Okay. Now, you had asked for -- do you recall
11 asking for the jury to be able to go out to the scene and
12 on page, let's see, Page 431, the Court says he's not
13 going to allow the jury to go to the scene; do you recall
14 that?

15 A I do.

16 Q And as a result, did y'all make the decision
17 then to send Mr. Heist to the scene?

18 A I can't specifically remember that. I can tell
19 you that Mr. Heist had been to the scene on multiple
20 occasions prior to trial. I was at the scene twice before
21 the trial. So, I mean, I don't remember saying, well geez
22 peeps, since the Judge isn't going to let them go back out
23 there but that may have happened.

24 Q Okay. Now, during -- you al called Investigator
25 Lauren Williams, if I'm saying his name correctly. And on

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1 cross-examination he was asked about whether or not
2 Mr. Sobers testimony about he could have existed the cul
3 de sac without backing up was legitimate, essentially.
4 And he testified in the negative to that. Is that the
5 reason why then you all had Mr. Heist go out to the scene
6 and testify?

7 A Probably, probably, yeah.

8 Q Okay. Was that an issue that you had explored
9 before or did that kind of come up as a surprise during
10 Investigator's Heist testimony?

11 A Yeah, we -- we new approximately where Rashaun
12 was parked. And I would submit that I don't guess that we
13 expected Lauren to testify that he couldn't have done what
14 he said he did. But I don't have a specific recollection
15 of that.

16 Q And, Mr. Brannon, if it will assist you at all
17 during your testimony, I'm going to hand you what has been
18 already admitted as Applicant's 4, 5 and 6. Four is a
19 exhibit that was introduced at trial, which is a close up
20 of the cul de sac in question. Five is more of an aerial
21 photograph. And then six is a close-up photograph of the
22 crime scene tape still. So, if that is any help to you
23 during your testimony, I wanted to provide those to you
24 for reference.

25 Now, I want to ask you about the issue of

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1 Phoenix Fielder's phone and the videos that were admitted
2 at trial. Right away there's a motion made, it's Page 46
3 of the transcript where you're all arguing that you've
4 only been given two segments of video clips. And you had
5 concerns that, one, there could be more. And I'm just
6 paraphrasing your argument that's on Page 47. And two,
7 the quality was poor. So an expert could not enhance
8 those. Just take us back to that. What was going on with
9 that phone video evidence?

10 A Well, I remember a law school class on the best
11 evidence rule. And I didn't think we had been given the
12 best evidence. We never saw the phone. We were told that
13 we had been given the entire -- the entire content of the
14 SIM card, but I only had two videos. I mean, I thought
15 that I made a valid and strong argument that we weren't
16 giving the proper and best evidence. Apparently, I was
17 wrong.

18 Q And the week before trial, do you recall that
19 you all did file a motion to dismiss on that basis?

20 A Uh-huh.

21 Q I'm going to hand you what's already been
22 admitted as Applicant's Exhibit 2; do you recognize that?

23 A Yes.

24 Q Is that the motion you all filed in support of
25 your argument?

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1 A Uh-huh.

2 Q Okay. Now I'm going to show you what's been
3 admitted as Applicant's Exhibit No. 3. If you could, just
4 look over that. It appears to be a picture of an evidence
5 envelope. And what's on that evident envelope as far as
6 what should be contained in it?

7 A A CD with the two videos transferred from
8 Phoenix Fielder's phone.

9 Q Does that indicate in any way that there's a
10 video of an entire SIM card of Phoenix Fielder's phone or
11 two videos?

12 A Well that says there's two videos. And I
13 certainly argued that all I had was two videos.

14 Q So, you never saw the transfer, the entire SIM
15 card that they say was provided to you and that they took
16 from Phoenix Fielder's phone?

17 A I saw the two videos, that's all I had.

18 Q I won't ask that question again. Now, the
19 ruling of the Court was that there was no bad faith and
20 that the phone itself, the Judge specifically says on Page
21 55, Line 3, is not evidence.

22 Do you agree that that phone in this case
23 was not evidence?

24 A We made the motion that we made, and I'm not
25 trying to give you a hard time. I tried -- I went back

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1 and counted, I've tried 19 trials in front of Derham Cole,
2 okay. If Derham believes the phone is not evidence, by
3 God the phone's not evidence. I mean, that's all there is
4 to it. I made my motion, I did what I could. But he
5 ruled that the phone wasn't evidence. So, it's no
6 evidence.

7 Q And would you agree that there could be more on
8 that phone that wasn't even saved on the SIM card? If, in
9 fact, they had the entire SIM card recorded.

10 A I'm not an expert on cell phone memory, so I
11 wouldn't know. But I would have loved to have seen -- it
12 would have been nice to know that we had the original of
13 the video. I mean, clearly, the video had been doctored
14 to some extent because it had been cut in half and put on
15 two separate videos. So, if it had been manipulated that
16 much, how do we know it hadn't been manipulated more? I
17 think I made a pretty strong showing of that. But again,
18 what I think and what the guy in the rob thinks are two
19 different things.

20 Q I understand. In making the pre-trial motion
21 that was filed and then making the argument at the trial
22 itself, were you preserving that issue for a potential
23 district appeal?

24 A I thought I was.

25 Q And was that an issue that you would have

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1 expected to see raised on direct appeal in this case?

2 A If I had been an appellate attorney, I probably
3 would have raised that issue.

4 Q And what's your reasoning for that?

5 A The best evidence rule. I don't think we had
6 the best evidence.

7 Q All right, I'll move on. I'm going to ask you,
8 and this may be more kind of extensive questioning, about
9 how to Applicant was utilized at trial. First, at the
10 Jackson vs. Denno hearing, The State called Investigator
11 Bryant. And his testimony is on Page 61 and 62. He says
12 that Mr. Sobers only asked for an attorney at the end of
13 the interview. Then Investigator Williams is called,
14 Pages 64 through 67. He says that The Applicant did a
15 diagram, told his side of the story, he began questioning
16 him and then he asked for an attorney.

17 On cross-examination he says he doesn't
18 recall when he asked if -- when asked for an attorney. My
19 question is this, why did you all not call Mr. Sobers to
20 testify during the Jackson vs. Denno and about whether or
21 not he asked for an attorney?

22 A I didn't -- I didn't ask for the Jackson v.
23 Denno hearing. Again, I've got pretty extensive
24 experience in front of Judge Cole. And with Trey Gowdy.
25 And I saw the documents, the pre-interrogation waiver

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1 forms. He checked the boxes, he initialed where he was
2 supposed to initial, he signed them. You know, I was -- I
3 was pretty confident that the statement was coming in.
4 So, I mean, the truth is I kind of wanted his statement
5 in. So, I mean, you know, I wasn't fighting Jackson v --
6 the voluntary nature of the statement was not an issue in
7 my opinion.

8 Q Okay. Was it something that you discussed with
9 Mr. Sobers leading up to trial?

10 A I'm sure that we did.

11 Q Okay. And you just referenced the waiver form,
12 I'll show you what's been admitted as Applicant's Exhibit
13 No. 8, is that in what you were referencing?

14 A Yes, ma'am.

15 Q And I'll show you what's been admitted as
16 Applicant's No. 7, do you recognize that as the diagram
17 that they were disgusting as well?

18 A Yes, ma'am.

19 Q Okay. I can take those back for you. Now, you
20 said you wanted the statement. And did you also want the
21 diagram in as well?

22 A Yes.

23 Q Okay. What was your reasoning behind that?

24 A The defense in this case was self-defense with a
25 very strong element of gang activity. I thought that his

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1 statement, in particularly the diagram, actually supported
2 his testimony as to how he got out of there. And what
3 happened while he was in there.

4 Q And as you kind of alluded to, the statement and
5 the sketch were admitted only after the defendant
6 testified --

7 A Correct?

8 Q -- or Mr. Sobers testified?

9 A Correct.

10 Q Now, kind of the theme of his cross-examination
11 a about lying to police, do you recall that?

12 A I do.

13 Q On direct you asked him about lying about Trey
14 having a gun on Page 359. But then, subsequently on
15 cross-examination, the solicitor gets him to say on Page
16 363, line 24, I lied to police. He makes him repeat it
17 verbatim. Do you know that point in the trial?

18 A I do.

19 Q And then he continues to question him Pages 354
20 essentially, through 391, just keeps peppering him with
21 the question of, You lied to police? Is there any reason
22 that you didn't object to that contentious line of
23 questioning?

24 A I don't have an answer to that question. I
25 mean, I brought it up on his direct because I believe in

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1 putting your bullet holes in front. And so, no, I don't
2 have an answer to your question, I don't have an answer.

3 Q And you said you brought it up on direct because
4 you put your bullet holes up front, so did you prepare
5 Mr. Sobers to take on the cross-examination that he would
6 potentially be facing from Solicitor Gowdy?

7 A We prepared him to testify. I remember
8 specifically that it was myself, Brac Turnipseed and Ryan
9 Langley that were there when we were doing the testimony
10 prep. But you ask an interesting question. I don't know
11 that one can accurately prepare somebody for
12 cross-examination by Trey Gowdy. I mean, we prepped him
13 for testimony. I mean, changing the subject briefly, I
14 remember specifically telling Rashaun, Don't lie on the
15 witness stand. He will tear you up. Well, so, I felt
16 like I prepared him for testimony. But again, Trey Gowdy
17 is really good at what he does.

18 Q Now, you said you told him not to lie on the
19 stand, which is always excellent advice. When he
20 testified about being in that location, about this
21 individual, Little Greg.

22 A Uh-huh.

23 Q And then The State, would you agree, tried to
24 spin it that he was lying about this Little Greg, where is
25 is this Little Greg? Did you all ever look into trying to

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1 locate Little Greg or anyone to corroborate his version of
2 why he was in that location?

3 A We looked for Little Greg and looked for Little
4 Greg. In fact, we found Little Greg and then he
5 disappeared again. I would be you that if you could have
6 found Little Greg, he would have testified before me
7 today.

8 Q So, you did try to locate Little Greg?

9 A You bet we did.

10 Q Is there any reason why you didn't ask for a
11 continuance for more time to try to locate Little Greg?

12 A I never found anybody to be successful in
13 requesting a continuance in perpetuity. I mean, I could
14 not tell The Court that I could find him in a week or a
15 month. I mean, we had been looking for him for months.

16 Q And so, am I correct in summarizing that you
17 thought it would be futile to make such a motion?

18 A Yeah.

19 Q I will move on then. I'll direct your attention
20 to Page 396. And the reason I'm referencing that is there
21 Mr. Sobers is talking an incident with a little boy being
22 on his vehicle that was prior to this incident. Involving
23 the sister of Trey Gentry.

24 A I'm sorry, I'm having trouble flipping here.

25 Q That's Page 369, I believe.

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1 A 369, I thought you said--

2 Q No, 396, I transpose numbers so please question
3 me on that.

4 A Okay. All right, I'm on 396.

5 Q And he talks there about -- he's being
6 questioned there about a little boy being on his car and
7 how that would be different. Were you familiar with the
8 incident leading up to this day where he had an encounter
9 with Trey Gentry's sister and had been accused of calling
10 her a curse word to her face?

11 A I'm not sure that I understand your question,
12 was I familiar with it?

13 Q Throughout the testimony, there's different
14 times -- I'm sorry, I just directed you to where you're
15 redirecting him on that issue, not to the direct. But
16 were you familiar with an incident that had occurred with
17 Trey's sister and younger brother being on Mr. Sobers
18 vehicle, and that being what Trey Gentry had approached
19 Mr. Sobers about on the day of the incident?

20 A I'm sure that Rashaun had told me about that. I
21 don't have a specific recollection of that today.

22 Q Okay. My other question was going to be, and if
23 you don't recall, that's fine, how you all had prepared to
24 address that prior incident or prior difficulty in his
25 testimony?

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1 A I'm sorry, I can't help you with that.

2 Q Okay. Did you all discuss leading up to trial
3 or prepare his testimony in a certain way to try to obtain
4 a involuntary manslaughter or a voluntary manslaughter
5 charge in this case?

6 A I don't -- I don't think that we ever thought
7 specifically about voluntary or involuntary. We were --
8 we were -- my client's story, my client's story to me, and
9 it stayed consistent the entire time, was that there was a
10 gang of individuals trying to pull him out of his car.
11 Pretty much through the window. The driver's side window
12 of his car. That somebody opened the passenger side door.
13 And that in an effort to get away from the people on the
14 driver's side, he laid down, the gun was either under the
15 seat or between the seats. And that he fired without
16 aiming at anybody specifically, out the passenger side of
17 his car.

18 We were -- I mean, it was a self-defense
19 case, it was a accidental shooting case. Certainly, it
20 could have been involuntary but this was self-defense,
21 accidental shooting.

22 Q Let me ask you a little bit about the
23 voluntarily because I think you hit sufficiently on the
24 involuntarily. Specifically on Page 507, after you asked
25 for the voluntary, The Court found that Mr. Sobers

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1 testimony didn't establish sudden heat and passion. And
2 that you can -- because there's no criminal intent, you
3 can't have voluntary man and self-defense. Did you agree
4 with that ruling?

5 A I don't understand -- what does it matter if I
6 agreed with it or not? I mean, I was doing everything I
7 could to protect my client, you know.

8 Q I guess what I -- I'll rephrase that. Instead
9 of asking you to comment on the Judge's ruling, did you
10 agree that Mr. Sobers testimony hadn't sufficiently
11 established sudden heat and passion in this case?

12 A I believe my client was responding out of fear.
13 And if I think back to the case law and training, I mean,
14 sudden heat and passion is typically described as you walk
15 in, you catch your wife with another guy, that's not
16 typically somebody is jerking me out of a car. So, maybe
17 if you look at it from that perspective, it wasn't, I
18 don't know.

19 Q And do you recall if you requested an accident
20 charge in this case and if that was instructed?

21 A I know that -- I know that there was a request
22 to charge printed out on accident, but I don't know if it
23 got presented or not. But I know that -- I wrote a
24 chapter in a book on Request to Charge. And it was on
25 murder. And I printed every single charge out of that

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1 book and accident was in there. So, I know that I printed
2 it out. And on the record, I haven't checked it
3 specifically, just looking back on notes, my notes reflect
4 there's a request for self-defense, involuntary and
5 voluntary.

6 Q If you did request accident, was there any
7 reason for that?

8 A Not that I can recall at this point.

9 Q Okay. Did you think this was a strong case for
10 involuntary manslaughter or just self-defense? Was
11 defense more the primary?

12 A Defense was absolutely the primary.

13 Q Okay. Now, I'm going to jump back into his
14 testimony a little bit. On direct, on Page 335 through
15 336, you ask him about the gun.

16 A Uh-huh.

17 Q And he testifies that he bought the gun because
18 his apartment had been broken in several times, he knew it
19 was illegal. He also called his grandmother, Corice to
20 testify about the apartment being broken into. On Page
21 367, again, he gets extensive questions about this. What
22 did you do in preparation for him to testify and take on
23 this issue of the illegal gun?

24 A We told him not to lie. And the fact was, it
25 was an illegal gun. I mean, that was it. I mean, he

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1 explained why he had a gun. He explained how he got the
2 gun. While he knew it was illegal, he believed it was a
3 necessary -- he needed the gun for protection.

4 Q Now, turning to Page 382 through 384 in his
5 testimony, an issue comes up about whether or not he had
6 ever been in trouble before?

7 A Uh-huh.

8 Q He explains on Page 382 that he drove by the
9 police station to ditch the car because he wasn't thinking
10 about going to the police station since it was his first
11 time getting in trouble.

12 A Uh-huh?

13 Q And responds and the solicitor warns him to be
14 careful. I think you take the indicator there and you ask
15 for a bench conference; do you recall that?

16 A Uh-huh.

17 Q Okay. Again, then he says he's never been in
18 trouble before, and then The State proceeds to ask him
19 about a 2007 incident on Page 383?

20 A Uh-huh.

21 Q His response on Page 383, Line 17 through 384,
22 was, That was a total lie just like this.

23 A Uh-huh.

24 Q A very long explanation to ask what preparation
25 did you do of Mr. Sobers going into trial to address this

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1 2007 incident or to try to avoid addressing this 2007
2 incident?

3 A We knew about it. We told him not to lie. And
4 I mean, we had extensive conversation. Myself, Langley
5 and Turnipseed talked about the 2007 arrest and we told
6 him, Don't lie.

7 Q So, he had been warned--

8 A Absolutely.

9 Q -- to try to avoid that topic?

10 A Absolutely.

11 Q Okay. Now, one of the other allegations deals
12 with the failure to impeach and cross-examine witnesses.
13 What did you do to prepare in this case to impeach and
14 cross-examine The State's witnesses?

15 A I mean, we spent days pouring over the
16 discovery, reading the statements, looking at the
17 forensics, looking at the photographs. I mean, the only
18 real fun in a criminal trial in cross-examination. So, I
19 thought I was pretty well prepared.

20 Q Was there anything that you recall coming out as
21 a surprise or any testimony from The State's witnesses
22 that you all were not prepared for?

23 A I can't say that the surprise -- not -- no, not
24 from The State's witnesses. I mean, I was thrown back by
25 some of the Court's rulings. I mean, we had the problem

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1 with I've never been in trouble before. But, you know, I
2 mean, these police officers that testified, it wasn't the
3 first time I ever heard them testify. I mean, you know,
4 they're involved in all of the cases primarily. So, I
5 mean, I can't say that I was shocked by cross-examination
6 testimony.

7 Q Okay. Was one surprise The State's motion to
8 exclude gang evidence?

9 A Absolutely.

10 Q Okay. Let me show you what has been admitted as
11 Applicant's NO. 9 and 10. Number 9 would be The State's
12 motion that appears to be filed or dated, September 7th?

13 A Uh-huh.

14 Q And then the second is the memo in opposition to
15 The State's motion, and that is dated, I believe,
16 September the 8th.

17 A Right.

18 Q And I'll just give you those as a point of
19 reference. Take us through from your perspective what
20 happened and how this came as a surprise to the defense
21 team.

22 A Well, I mean, there was -- the fact that gang
23 activity was going to be an issue or we were going to
24 make gang activity an issue in this case, was -- was
25 every -- everybody knew it. I mean, I had had multiple

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1 conversations with Trey and I'm assuming that Barry
2 Barnett was involved in those conversations. I'm pretty
3 sure Derek Bulsa was involved in those conversations.
4 They knew that we had a gang expert on our witness list.
5 I mean, that was -- it was key. Now, does that mean that
6 I should not have -- I shouldn't have been surprised by
7 their motion? Maybe. But, I mean, you know, we filed our
8 motions pre-trial, we had hearings before the trial. It
9 caught me by surprise.

10 Q And, essentially, what did, because it did
11 happen, the exclusion of any testimony or evidence
12 regarding gang activity, due to the defense in this case?

13 A Well, it obviously weakened the self-defense
14 defense. I mean, that was it. I mean, look, I was told,
15 If the word gang comes out of your mouth, I will declare a
16 mistrial and sanction you. I changed the word gang for
17 mob. I got screamed at one time because I said, What does
18 it mean that everybody's got the same color t-shirt on?
19 The same color t-shirt on. I mean, it -- the exclusion of
20 gang activity, dramatically weakened the self-defense
21 case.

22 Q And was Mr. Sobers' testimony prepared, you know
23 you said you had a sense of preparations with him, was it
24 prepared in such a way that he's going to have to be
25 testifying without the exclusion of the word gang and

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1 referring to any gang activity in this case?

2 A I mean, we did talk to him after -- I mean, look
3 there were multiple rulings, okay. I mean, and we talked
4 after each and every ruling. So, as much as we could
5 prepare, we did prepare.

6 Q And you came up, though, in the course of trial
7 with we're going to use the word mob.

8 A Uh-huh.

9 Q As a substitute --

10 A Uh-huh --

11 Q -- for gang; is that correct?

12 A Uh-huh.

13 Q And he got questioned extensively on
14 cross-examination on why he didn't tell the officers about
15 the mob when he was originally given his statement and
16 drawing that diagram. Is that something you were able to
17 prepare with him before trial on?

18 A Well, I remember specifically talking about it
19 because I believe that Rashaun was afraid of these people.
20 I believe that he was afraid of these people. And we had
21 a conversation about, potentially, one of the reasons you
22 wouldn't say it is because you were afraid of
23 repercussions if you did. I don't know if that answered
24 your question but, I mean, I remember that conversation.

25 Q Okay. Now, you said, and the record reflects

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1 there's a motion on Page 69, intermittently throughout the
2 trial this issue keeps coming up. Then, ultimately, you
3 do proffers towards the end of the trial. But beginning
4 on Page 71, The Court really makes his question clear that
5 he's questioning the relevance.

6 A Uh-huh.

7 Q Is there any reason you didn't ever proffer
8 Mr. Sobers testimony, outside of the presence of the jury
9 where he could have used the word gang, to try to tie up
10 the relevancy?

11 A I don't have a specification recollection of the
12 decision making process there. But I got four or five
13 people in proffer to admit that they were gang members or
14 they were affiliated with gang members in that they were
15 throwing up gangs signs and that they knew gang people.
16 And if -- those people were there on that day. If Judge
17 Cole didn't believe that that made it relevant, then what
18 would my client's self-serving testimony to say, Oh, they
19 were gang members. How was that going to benefit me? And
20 I believe that the more I had Mr. Sobers testify, the
21 weaker he was going to get.

22 Q And let me just -- I want to make sure we get
23 this issue very clear for the record. I'm going to read
24 you a portion of The Court of Appeals opinion. That
25 essentially sets up what I'm asking you about.

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1 It states here, on this issue of the
2 admission of the gang testimony evidence, We find that
3 trial Court did not abuse its discretion in finding the
4 evidence suggesting gang associations of the victim and
5 witnesses was not relevant. We know that although the
6 trial Court left open the possibility Sobers could offer
7 gang evidence, that he could establish the requisite
8 relevancy, Sobers never testified that the mob that
9 surrounded his car was part of a gang. According to
10 Sobers, the mob action caused him to fear her his life and
11 fire his gun. But he never testified he was more fearful
12 because the mob was part of a gang. Thus, Sobers never
13 introduced evidence that would make the gang activity
14 relevant.

15 So, that goes to my question as to why did
16 you not have him outside the presence of the jury
17 testifying that he was more fearful because the mob was
18 part of a gang? And make that connection for not only
19 Judge Cole but also for the Appellate Court?

20 A All right, let's be clear. The connection for
21 Judge Cole was as crystal clear as it was ever going to
22 get without Rashaun testifying to that. Okay. I mean,
23 Judge Cole knew exactly where we were going. Or trying to
24 go. But, Tricia, I'm not -- I think I have to stand on my
25 last answer. I mean, you know, I got through proffer, I

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1 got the person that I tried to admit as an expert to
2 testify that these were gang activities. I got the
3 four -- I think it was four people to talk about their
4 gang symbols and their colors and the pictures of their
5 guns. I just have to respond -- that's my answer.

6 Q Okay. And I just wanted to give you a fair
7 opportunity to respond --

8 A I understand.

9 Q -- to that specific language there. If you ave
10 nothing further to offer, I'll be happy to move on. Well
11 I said that but then I have one more question, I
12 apologize. I'm having a little trouble making sense of
13 this when The Court rules that Sobers never testified that
14 the mob was a gang. But clearly, Judge Cole had ruled
15 that he could not testify to that; is that correct?

16 A That's correct.

17 Q Okay. So, would you agree the only way to have
18 done that would have been through some type of proffer
19 outside the presence of the jury?

20 A I would agree with that but I would submit to
21 you that I think I got there with the other witnesses
22 proffered testimony.

23 Q And do you recall what happened with the
24 witnesses? Because I'm reading through and I'm the Monday
25 morning quarterback that just gets to read the transcript,

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1 you were there.

2 A Uh-huh.

3 Q Did some of the witnesses leave and you had to
4 get them back --

5 A Uh-huh.

6 Q -- the State's witnesses. Will you take us
7 through that, that's not jumping off of the page of the
8 transcript, for us?

9 A Well, the witnesses were sequestered. Excuse
10 me. And; I mean, I don't know -- I don't know why but
11 some of them left. I mean, they just went home, I guess.
12 And it took a while to get them back. But I think we got
13 most of them back. I think we got all of them back.

14 Q Did you have any concerns that, as you were
15 doing this proffer, it appears kind of coming back in
16 slowly, then the last one would be Phoenix Fielder, that
17 they may have been discussing their testimony?

18 A I didn't have any fear, I knew they were.

19 Q And is that an issue that you raised to The
20 Court at all, do you recall?

21 A We talked -- to The Court, probably not. But I
22 talked to Mr. Gowdy about it. And he said, What do you
23 want me to do? I can't even keep them here, how can I
24 control what that say? I mean, that was the conversation.

25 Q But they were sequestered?

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1 A There was a motion to sequester made,
2 absolutely.

3 Q Okay. Let's talk a little bit about the expert,
4 Rocky Watts.

5 A Uh-huh.

6 Q You said The State had full notice that you
7 intended to use him as an expert?

8 A Yes.

9 Q Did you have any indication that they had
10 problems with his qualifications prior to trial?

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

22 Q So, you may have already answered my next
23 question. Would you have done anything differently if you
24 would have known The State was going to object in the
25 manner that they did?

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1 A I'm not the one to ask that question. And
2 unfortunately, the person that you would need to ask is
3 deceased. But David Turnipseed hired Rocky. Now, I think
4 Rocky's a great guy and I think he was a good witness.
5 But I'm not the one to ask if we would have done something
6 differently, okay.

7 Q Okay. That's a fair answer for that question.
8 If I can beg the Court's indulgence just
9 one moment.

10 THE COURT: Yes, ma'am.

11 BY MS. BLANCHETTE:

12 Q You made the argument that you, and I apologize
13 it may have been one of your co-counsel's, but the
14 arguments made by the defense that you all can't properly
15 cross-examine The State's witnesses and it's violating
16 Mr. Sobers Sixth Amendment right. And this is probably an
17 obvious answer, but did the limiting and the exclusion of
18 that gang testimony and evidence hinder your ability to
19 cross-examine The State's witnesses in this case?

20 A Well, I mean, if you can't ask the police if
21 they've investigated any of these people for gang
22 activity, you're limited. I mean, we did have our hands
23 tide behind our back. And we knew the answer to that
24 questions, too, by the way. We knew that those law
25 enforcement officers had investigated some of these people

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1 for gang activity, we knew that. Rocky -- Rocky
2 interviewed some of these -- maybe not Lauren Williams,
3 one of these police officers so we knew the answer to the
4 question but we couldn't ask the question.

5 Q Did you speak with Mr. Sobers about his
6 knowledge of these individuals gang activity and the
7 working knowledge that he had of their affiliations?

8 A Well, I mean, every time we talked to Rashaun,
9 the conversation was, you know, gang related. How he knew
10 they were in a gang. How he was being recruited to join a
11 gang. And how if you didn't agree to become a member of
12 the gang, then you became their enemy. I mean, we talked
13 about that consistently. That's what led to his fear.

14 Q So, you're aware of his working knowledge of
15 their gang --

16 A Yes --

17 Q -- activity and affiliation?

18 A Yes.

19 Q Okay. And it's probably the same answer you
20 offered before but is there any reason why you didn't
21 proffer testimony on his working knowledge of their gang
22 association and affiliation?

23 A Well, it's the same answer but I think he did
24 testify as much as he could about their enrollment or
25 their involvement in a mob and how he knew that. I mean,

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1 he was dating one of the sister's or something like that.
2 I mean, you know, I danced around that as best as I could.

3 Q Now, in The State's closing they argued that
4 Mr. Sobers was the long love who mentioned the mob, nobody
5 else did. Was the limits that was placed on you the
6 reason why you didn't go more into that with The State's
7 witnesses outside the proffer?

8 A Yes.

9 Q Okay. I'm going to move on unless you have
10 anything else you'd like to offer regarding this gang
11 issue and the allegations of the amendment?

12 A No, ma'am.

13 Q Okay. In The State vs. Daniels --

14 And I have a copy of that for the Court to
15 review.

16 The Court put some very strong language in
17 there telling circuit courts to no longer use the fair and
18 just for all, those types of comments that could be burden
19 shifting. So, I'm going to direct your attention to Page
20 90, Lines 16 through 21. There, specifically, on Line 20,
21 The Judge says, You'll arrive at a fair and just decision.

22 Is there any reason why you all did not
23 object to that statement by The Court?

24 A I don't have a reason for -- I didn't object.

25 Q And then there's two references, Page 561, Line

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1 16 through 20, in the jury charge and 568, Lines 14
2 through 18. And I can go through each of those
3 separately. I'm sorry. Page 561, Lines 16 through 20.
4 Where it says, Your objective is simply to reach the truth
5 in the matter. And that is to give both The State and The
6 Defendant a fair and impartial trial.

7 Is there any reason why the defense team
8 didn't object to those statements?

9 A No. I mean, Trish, you said it. You said
10 you're the Monday morning quarterback. I mean, you had
11 five or six years of Mondays to look this over, I had 30
12 seconds, okay.

13 Q That is fair enough. But I got to give you one
14 more, I'm sorry. Page 568, Lines 14 through 18. There,
15 The Judge says again, Your sole objective is to simply
16 reach the truth in the matter. And then he goes on to
17 say, To give The State and The Defendant a fair and
18 impartial trial.

19 I assume you have the same answer?

20 A Have you ever tried a case in front of Derham?

21 MS. BLANCHETTE: Your Honor, I don't believe I
22 can answer questions.

23 THE COURT: I understand the witness' point.

24 THE WITNESS: Have you ever seen him look down
25 his glass like this?

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1 MS. BLANCHETTE: If I could answer I can say I
2 had to do PCRs. Which is even more fun.

3 THE WITNESS: Yeah, yeah. Same answer, Tricia.

4 BY MS. BLANCHETTE:

5 Q Thank you. And then, if I can direct your
6 attention to Page 558, looking at Line 18 through 559,
7 Line 15. And I'll give you a minute to read over that.

8 A I'm sorry, the lines? 18 through what?

9 Q 558, beginning on Line 18 through the next page,
10 Line 15.

11 A Okay.

12 Q Do you see objectionable comments in that
13 argument?

14 A Probably, but, yeah.

15 Q Okay. And you concern with him the solicitor
16 asking him to imagine -- or the jurors, the dreams and the
17 hopes it could have been, he likens it to their kids
18 sitting in the back of the vehicle?

19 A Uh-huh.

20 Q Is there any reason why all didn't object to
21 those comments?

22 A That line is in every single one of Trey Gowdy's
23 closing statements. Maybe I should object every time he
24 says it but it's the same answer. I mean, he's typically
25 standing on a rock, a rock called justice. The good

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1 people sit in the jury. And I mean, yeah.

2 Q I will move on. We've talked about some of the
3 charges that you all requested in this case, I did not see
4 in the record where you requested or a prior difficulties
5 charge was given. And testimony was elicited regarding
6 this prior incident with Trey Gentry's sister and then
7 Trey approaching Rashaun; which was kind of the
8 instigation of the incident that you were there about. Is
9 there any reason that you didn't ask for a prior
10 difficulties charge?

11 A If it's not in the transcript then I would
12 suggest I didn't do it. But I can tell you, I had that
13 charge pulled, okay.

14 Q That's fair enough.

15 MS. BLANCHETTE: Your Honor, if I could beg the
16 Court's indulgence one moment.

17 THE COURT: Sure.

18 BY MS. BLANCHETTE:

19 Q Just one more line of question to clarify. It
20 appears from the record that there was a video that had
21 sound that you all introduced; is that what you recall?

22 A Yeah. And I will tell you that I didn't recall
23 this, Madam AG reminded me. That the disk that The State
24 introduced or attempted to introduce, didn't have sound
25 with it, it was just the video. And mine had sound. And

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1 so, we exchanged my disk for their disk. I can't tell you
2 what happened -- I mean, you told me earlier today that
3 you requested the disks from the clerk. I mean, mine was
4 introduced into evidence. So, I don't know what happened
5 to it.

6 Q Okay. So, both videos, we have marked two
7 exhibits that were originally State's No. -- they were No.
8 4 and NO. 42 at trial. And if neither of those had sound,
9 it was your understanding there should have been a disk
10 with the two videos that did have sound?

11 A I can tell you the disk that I had, that I
12 swapped for the one that Trey was introducing, had sound
13 on it.

14 Q Okay.

15 A Because we took -- we took a computer and played
16 it in the jail. I mean, we watched it.

17 Q Okay. And your expert was able to review the
18 video that did have sound?

19 A Absolutely, yeah.

20 Q Okay.

21 A And we tried to have it -- there was that one --
22 there was one segment that was basically inaudible and we
23 tried to have it cleared up or whatever they do. And it
24 couldn't happen. It wouldn't happen.

25 Q Do you ever recall Mr. Sobers indicating to you

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1 that he didn't want to have to testify in this case?

2 A No.

3 Q Okay. So, the plan, from your perspective, was
4 always that he would testify?

5 A Well, I'm not going to say that my plan was for
6 him to testify. I mean, we -- we talked regularly, we
7 being the lawyers and Rashaun. I don't specifically ever
8 recall him saying I don't want to testify. And I do
9 recall saying, The person that had to tell your story is
10 you. I mean, I remember that.

11 Q And going back to the phone issue, one of the
12 first things we discussed, was there any reason that it
13 was never raised as a Brady violation? Because you're
14 asked directly, You know, are you saying the solicitor did
15 something funny here?

16 And the response is, No, I'm just concerned
17 that, you know, one of the witnesses may have deleted it
18 or we didn't get the whole thing.

19 But I was just wondering why that Brady
20 line of cases weren't argued or any type of prosecutorial
21 misconduct as far as the phone goes?

22 A I thought that I covered the motion to suppress
23 or dismiss with enough specificity, that I didn't have to
24 say Trey Gowdy did something tricky.

25 Q Okay, that's fair enough.

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1 All right, Your Honor, I have no further
2 questions.

3 THE COURT: Okay.

4 All right, before we begin cross, let's take
5 about a five minute break and then we'll come back
6 in.

7 Mr. Brannon, you can break too, you just can't
8 talk about your testimony.

9 THE WITNESS: Been there, done that.

10 THE COURT: Yes, sir.

11 (WHEREUPON, a short break was taken.)

12 THE COURT: Okay. All right, Ms. Giovanoli,
13 your witness, ma'am.

14 MS. GIOVANOLI: Thank you, Your Honor.

15 CROSS-EXAMINATION

16 BY MS. GIOVANOLI:

17 Q Good morning, Mr. Brannon.

18 A Good morning.

19 Q Okay. So, let's just start from the very
20 beginning. I understand you've been practicing law for 20
21 years. A thousand criminal cases. But give us a little
22 bit of background on how -- I don't need the full
23 background. Let me ask this specific question. Whenever
24 you came on to this case, you testified that you did so
25 with the Defendant's blessing and his mother's blessing.

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1 Can you give me a little bit background on that?

2 A Yeah. Well, I mean, when we formed the
3 Partnership, I went with Brac and David and met Rashaun.
4 And I was -- I think about a month after I first met
5 Rashaun and then a few days later met his mother, David
6 Turnipseed told her that, Well, if you want to see him in
7 action, he's trying a murder next week or next month or
8 something like that. And she came to every day of that
9 trial. And it was in this courtroom with Judge Couch
10 presiding and the jury found him not guilty.

11 And so, she said, Okay, he can do it.

12 Q What that a self-defense?

13 A Yeah. Well, in fact, it was a self-defense
14 case, yes.

15 Q All right. And so, you have previously tried
16 murder cases?

17 A A lot of them.

18 Q How many?

19 A Twenty-eight.

20 Q Okay. How many of those ended up in convictions
21 on the murder charge?

22 A On the murder charge, I think five.

23 Q You testified that you met with Mr. Sobers over
24 a dozen times?

25 A I think I said, Dozens of times.

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1 Q Okay. Was he cooperative with you?

2 A Absolutely, yes.

3 Q And you filed the Rule 5 Brady Motion for all
4 the discovery?

5 A Well, technically, no, I didn't. It had been
6 filed when I took the case over. I think Brac filed it.

7 Q Okay. And Brac and David are both diseased?

8 A Correct.

9 Q Okay. You reviewed all the discovery material,
10 correct?

11 A Yes.

12 Q And you reviewed them with Mr. Sobers?

13 A With Mr. Sobers and his mother saw some of it.

14 Q Could you briefly describe the evidence in this
15 case?

16 A Pictures of people, pictures of the scene,
17 statements from different people, the two videos. I mean,
18 you know.

19 Q Well instead of doing that, how about just
20 describe The State's theory of the case. Chronologically,
21 just so The Court can get a better understanding. I know
22 we have the transcript in front of us and we've talked
23 about here and there. But what was the general theory of
24 the case and how everything -- how the shooting occurred.

25 A I think The State's theory of the case was that

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1 my client was [indiscernible] do well, that was in
2 possession of an illegal gun and he shot somebody. I
3 mean. . .

4 Q And how did this start? There were five kids
5 getting into a car at a house. Then there was a sixth
6 person, Devin, who came up and kind of slapped one of the
7 guys. And then there was a chase down to the cul-de-sac,
8 do you recall that?

9 A Yeah.

10 Q Can you explain a little bit about that
11 situation?

12 A I don't know that I can -- I'll give you a
13 different explanation, maybe. My client is in this
14 cul-de-sac because of a girl. And there's something else
15 going on some place else that ends up in a driveway in
16 that cul-de-sac. And our theory of the case was that that
17 was a gang beat in, if you will. And I know the expert
18 said that wouldn't have been it, but that was what our
19 expert thought that it was. And then because -- and I may
20 not be completely accurate about this, but then they see
21 Rashaun sitting in his car, talking to be somebody over
22 there, and there's some bad blood because of one female or
23 another female, and they approach his vehicle and start to
24 pull him out of the car.

25 Q All right. Did you discuss with Mr. Sobers the

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1 version of the events?

2 A Repeatedly.

3 Q Okay. Were they always consistent--

4 A His story was always consistent.

5 Q But it was inconsistent with the statement he
6 gave to law enforcement?

7 A Correct.

8 Q Okay. And what did you see as the weaknesses in
9 this case?

10 A Well, any time you have one -- any time there is
11 a blatant lie in a statement, it weakens your credibility.

12 Q Did you also think that the fact that he left
13 the scene and fled to Charlotte, North Carolina, was a
14 weakness?

15 A Yeah. I mean, you know, like in ever case -- I
16 mean, we don't make the facts, we got to work around them,
17 you know.

18 Q That's totally understandable. Did you think
19 that he couldn't remember the name of the stranger's phone
20 he used after the shooting was a weakness in the case?

21 A I don't remember that, so I don't. . .

22 Q Okay. He didn't remember the two gentlemen that
23 chauffeured him to North Carolina, he didn't remember
24 their names or the vehicle and he road with them to North
25 Carolina. Is that a weakness?

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1 A Could have been, sure.

2 Q He also testified that he turned himself in. Do
3 you recall that testimony?

4 A Uh-huh.

5 Q Was that truthful?

6 A No.

7 Q He was actually picked up by the US Marshall
8 Service and the Spartanburg County Police on the road in
9 North Carolina?

10 A That's right, yes.

11 Q He actually -- his phone was turned off, too; is
12 that correct?

13 A I think so.

14 Q And he testified that he lost it at the scene of
15 the shooting?

16 A Uh-huh.

17 Q Was that phone ever found or recovered?

18 A I don't recall if it was or not.

19 Q Would you agree with me that the record
20 indicates that is not recovered?

21 A Yeah.

22 Q And he never assisted law enforcement in helping
23 them recover his cell phone?

24 A No.

25 Q Okay. And he also testified that he threw the

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1 gun out somewhere in Charlotte. He never assisted law
2 enforcement in trying to locate that gun?

3 A Hu-huh.

4 Q In fact, he never even told them where he threw
5 it in Charlotte?

6 A That's right.

7 Q And he -- he also testified that he left the
8 keys in his vehicle in a parking lot of a restaurant; is
9 that correct?

10 A I think so.

11 Q Okay. And where was that car found, do you
12 recall?

13 A I don't know.

14 Q It was found -- does it refresh your
15 recollection if I tell you that it was found on a power
16 line field, abandoned with no license tag?

17 A I mean, that -- that wasn't a big deal in the
18 grand scheme of things.

19 Q His car being abandoned with no license plate
20 was not a big deal?

21 A No, I didn't think so.

22 Q It didn't make him less credible to the jury?

23 A No.

24 Q So, Sobers testified that he assumed someone
25 stole his car and went for a joyride and put it there,

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1 right?

2 A That's correct, yeah.

3 Q But he had an aftermarket stereo and 22 inch
4 chrome wheels that were still intact on the vehicle?

5 A Still on the car.

6 Q But his tag wasn't on the vehicle, right?

7 A Uh-huh.

8 Q So, do you recall the different version of
9 events that he gave to law enforcement when he was
10 initially arrested?

11 A Today, no I don't recall the different story. I
12 do know that -- that there were blatantly different
13 versions of the story, I do know that. And we talked
14 about that repeatedly in our visits with him.

15 Q Okay. Would you disagree with me if the record
16 indicated that he told law enforcement that Trey attacked
17 him, not a mob, that Trey attacked him and Trey had a gun
18 and Trey fired the gun?

19 A I agree with that 100 percent.

20 Q And you also drew a diagram for law enforcement?

21 A Correct.

22 Q And when further questioned about the
23 inconsistencies in his story and the evidence, he then
24 requested an attorney, correct?

25 A Correct.

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1 Q Did you ever -- I think that you answered this
2 on direct but just to clarify, did you ever question the
3 voluntariness of that Statement.

4 A No.

5 Q Did Mr. Sobers ever indicate to you that
6 involuntary gave a statement?

7 A No.

8 Q Okay. So, the Jackson v. Denno hearing was just
9 sort of typical, standard hearing, you have pretrial then
10 there's a statement?

11 A It was Trey and Barry doing what they do, yeah.

12 Q Okay. And you testified that you actually
13 wanted the statement in?

14 A Yeah.

15 Q I just want to clarify, why did you want a
16 inconsistent statement?

17 A Because the statement's a picture. And I needed
18 the picture in. I wanted his drawn picture.

19 Q Okay. But it wasn't -- he did give an oral
20 statement, not written statement; is that correct?

21 A Yes.

22 Q Okay. Did you want that oral statement in
23 evidence?

24 A Well, I think it was -- I think it was kind of
25 the negative side to the positive. I mean. . .

DOUG BRANNON-CROSS BY MS. GIOVANOLI

1 Q Okay. On the stand, do you recall Mr. Sobers
2 testified that when he grabbed his gun while he was being
3 attacked by a mob, he shot out the passenger side door?

4 A Correct.

5 Q Okay. But he also testified that that passenger
6 door had been opened by a member of the mob?

7 A Somebody else, that's right.

8 Q But the bullet somehow managed to miss
9 [indiscernible] go across the cul-de-sac and strike the
10 vehicle with the victim inside the vehicle?

11 A He was laying down in the seat, grabbed the gun
12 and fired out the opened door, correct.

13 Q There was a brief mention about Little Greg. In
14 your investigation, was Little Greg the only person that
15 could have corroborated the Applicant's story. Not
16 whether these guys were in a gang but what happened at the
17 incident?

18 A Well, I don't like your question. I think
19 Little Greg was the only one that my client thought could
20 corroborate his story. But any number of the other mob
21 around there could have corroborated the story if they
22 would have told the same version of the story. Okay.
23 They weren't -- Little Greg wasn't the only witness but we
24 believe he may have been the only friendly witness. How's
25 that?

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1 Q Yes, that's better. And you testified that you
2 tried plenty of times --

3 A Yeah.

4 Q -- talking to Little Greg. And you actually did
5 locate Little Greg?

6 A Uh-huh.

7 Q Did you guys talk to him?

8 A Pete did.

9 Q And what was the outcome of that discussion?

10 A You know, I'm sorry, I don't specifically
11 recall. I think that we would have liked to have had him
12 as a witness.

13 Q But you didn't ask for a continuance in order to
14 seek out Little Greg?

15 A No.

16 Q Did he not want to be found?

17 A He did not want to be found. I want to be real
18 clear, Pete never talked to him in person. Pete never sat
19 at a table with him, talked with him. They talked by a
20 telephone, I believe.

21 Q And at that time, Little Greg did want -- he was
22 willing to offer favorable testimony, that's your
23 testimony today?

24 A My recollection is that we would have liked to
25 have had him as a witness.

DOUG BRANNON-CROSS BY MS. GIOVANOLI

1 Q You discussed with Mr. Sobers some of the
2 elements that the State was required to prove here, didn't
3 you?

4 A As to murder?

5 Q As to murder.

6 A Oh yeah, we read the indictment and explained
7 the elements and -- yes, absolutely.

8 Q And your defense in this case was self-defense?

9 A Self-defense.

10 Q Okay. Did you explain -- did you explain to him
11 the elements of self-defense?

12 A Absolutely.

13 Q And regarding his testimony, did you explain to
14 him his right to remain silent and not testify?

15 A Yes.

16 Q But it was your advice to him that the only way
17 that the jury could know about self-defense would be for
18 him to take the stand and tell his story?

19 A I recall saying that either the only person or
20 the best person to tell your story is you. Something to
21 that effect.

22 Q So, it was his decision to testify?

23 A It was absolutely his decision to testify.
24 Nobody forced him to testify.

25 Q You use a private investigator in this case,

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1 Pete Heist.

2 A Yes.

3 Q Do you use him regularly?

4 A Still do.

5 Q Okay. There was some testimony -- well you
6 requested that the jury be allowed to go out to the scene.

7 A Uh-huh.

8 Q The reason why you sent Mr. Heist out to the
9 scene during the trial was just to impeach their
10 investigator who said that you couldn't make--

11 A Correct.

12 Q Okay. So, that was your purpose in sending him
13 out there at trial?

14 A During the trial, yes.

15 Q Okay. Do you think that was a big issue in this
16 case whether the vehicle could circle the cul-de-sac in
17 one swoop or have to back up?

18 A I don't know if it was a big issue or not. But
19 it was an issue and I didn't want -- I mean, you know,
20 again, looking back, you can see things that you could
21 have done differently. But I didn't want to leave that
22 stone unturned, okay..

23 Q All right. Moving along to the phone evidence.
24 Judge Cole found that the phone was not evidence, right?
25 And your position was that the phone was evidence?

DOUG BRANNON-CROSS BY MS. GIOVANOLI

1 A Well, information on the phone was certainly
2 evidence.

3 Q Okay. Well, wouldn't that position mean that
4 every phone that was present at the shooting was evidence?
5 Because this guy offered some video --

6 A Right --

7 Q -- that on his phone. That made his phone
8 evidence, whereas, anybody else that could have taken
9 video, their phone wouldn't also be evidence?

10 A And I'll bet you there was another 100, 200
11 videos of that incident. But that was the only one that
12 law enforcement got, yes.

13 Q Okay. And you guys didn't -- you only received
14 two videos?

15 A That's what we got.

16 Q Okay. You testified that, I think, that you
17 assumed it had been altered because it was in two separate
18 chunks, two films, two different videos; correct?

19 A Well, I know what you're talking about. I think
20 what I said was manipulated.

21 Q Okay.

22 A It was clearly manipulated because it was cut in
23 half. I mean -- I mean, those two videos don't go
24 together like this. There was something in between.

25 Q Right. But wasn't there testimony that he

DOUG BRANNON-CROSS BY MS. GIOVANOLI

1 filmed two separate incidents? Start stop, start stop?

2 A That may have been the testimony.

3 Q Okay. So, is it more likely that he actually
4 filmed two difference videos than there was a video
5 manipulated?

6 A I don't know the answer to that question. But
7 my argument was there was likely more video. Because the
8 second video stopped right before this incident occurred.
9 I mean, if you see something's building up -- if you're
10 videoing this and see it's leading up to something bigger,
11 why would stop the video? I mean, that was the point I
12 was trying to make.

13 Q That's assuming that they knew something bigger
14 was about to occur?

15 A Well, if they were -- yes, that's correct, yes.

16 Q Okay. Now, with regard to the video, you
17 weren't actually making a motion to suppress that
18 evidence, were you? Just to dismiss the case based on the
19 phone not being turned over?

20 A I was making a motion to dismiss or to do
21 anything that could benefit my client.

22 Q Well, it wouldn't have benefited your client not
23 to have that video in, correct?

24 A That is a true statement. That's what I said,
25 anything that would have been benefited my client.

DOUG BRANNON-CROSS BY MS. GIOVANOLI

1 Q Okay. Because that video actually showed the
2 victim being violent?

3 A Right.

4 Q Which helped your self-defense case?

5 A Correct.

6 Q Okay. Okay. And during the former Solicitor
7 Gowdy's cross-examination of your client, he did seem to
8 harp on the fact that The Defendant had lied to law
9 enforcement prior to his testimony at trial; do you recall
10 that?

11 A Uh-huh.

12 Q Okay. When opposing counsel asked you why you
13 didn't object to that, I just wanted to follow up to that
14 question. Would an objection have effected your
15 presentation in the jury's eyes whenever -- whenever the
16 solicitor is trying to impeach your client, bring to the
17 jury's attention that he's lying. And you stand up and
18 object. Would that have effected your presentation in
19 your case?

20 A Well, it could have. I mean, it certainly would
21 have weakened my, put your bullet holes in front argument,
22 you know.

23 Q Saying that you were trying to cover the--

24 A Yeah.

25 Q As far as preparing for The Defendant to testify

DOUG BRANNON-CROSS BY MS. GIOVANOLI

1 and would stand a thorough cross-examination by Mr. Gowdy,
2 there's a thin line between preparing a defendant and
3 coaching a defendant, would you agree?

4 A I don't know if I would agree that it's a thin
5 line. There's a line and I'm not willing to cross it.

6 Q A blurred line?

7 A Yeah, yeah, yeah.

8 Q All right. So, you don't tell them what to say?

9 A Other than to say, Tell the truth.

10 Q Right. So, you tell them to tell the truth?

11 A That's correct, yeah.

12 Q And you did that in this case?

13 A Over and over again.

14 Q During your direct examination there was some
15 testimony about Trey's brother crawling on Mr. Sobers
16 vehicle.

17 A Uh-huh.

18 Q And that escalated and he called Trey's sister
19 an exclamation. Then that was Trey. And the victim had
20 confronted Rashaun, right before that fight that was going
21 on in the video.

22 A Right.

23 Q About him calling Trey's sister a name.

24 A Right.

25 Q Is that correct?

DOUG BRANNON-CROSS BY MS. GIOVANOLI

1 A Yes.

2 Q Okay. And then Mr. Gowdy cross-examined him and
3 said, On the video there was a stranger leaning up against
4 Mr. Sobers vehicle and he kind of harped on the fact that
5 when a small child is on your car, you'll call someone an
6 exclamative. But you didn't do anything about this
7 stranger leaning up against your vehicle.

8 And then, whenever you did redirect, you
9 pointed out that there's a difference between a small
10 child crawling in the hood of your car, versus an adult
11 leaning on your car. Did you recall that?

12 A I do.

13 Q Okay. So, you handled that situation well?

14 A I don't know if I did or not.

15 Q At any point did you ever not believe your
16 client? Up until this point?

17 A Well, I believe that Rashaun Sobers was afraid
18 that day. And I believe that was a gang. I don't know
19 much else matters, okay?

20 Q Okay. And in this case, going to the jury
21 charge, you requested voluntary, involuntary,
22 self-defense. When you argued for voluntary, your
23 argument was that the fear was the sudden heat and
24 passion?

25 A Correct.

DOUG BRANNON-CROSS BY MS. GIOVANOLI

1 Q Correct? And The Judge did not except that
2 argument, do you recall?

3 A Obviously, yeah.

4 Q And the voluntary charge came in with a
5 stipulation from the solicitor?

6 A Uh-huh.

7 Q All right. Just to refresh your recollection of
8 that. What was your basis for arguing for involuntary
9 manslaughter? How do you see this case fitting in with
10 involuntary?

11 A I didn't want my client to get life in prison.
12 I mean, I'm literally drawing straws.

13 Q And there was no request to charge accident --
14 well, I don't know what documents you handed up to The
15 Court in your requests.

16 A Yeah.

17 Q But there was actually no accident charge read
18 to the jury. Do you think that would have made a
19 difference if an accident charge would have been read to
20 the jury?

21 A I don't know. Because while I -- while I still
22 believe that the bullet that killed the victim was not
23 intended to kill the victim, pulling the trigger I don't
24 know was an accident, okay?

25 Q Okay. Well, he testified that pulling the

DOUG BRANNON-CROSS BY MS. GIOVANOLI

1 trigger was not an accident.

2 A Right.

3 Q Your client testified to that.

4 A Right, so.

5 Q So, maybe -- is it true that this case hinged on
6 credibility? I mean, basically, The Defendant got up and
7 testified that he acted in self-defense and the jury
8 didn't believe it.

9 A Well, it boiled down to credibility, yes. But
10 my opinion of the case hinged on the gang activity
11 involvement in the case. And when that door got slammed,
12 then the only thing was credibility.

13 Q I'm going to get to the gang stuff.

14 A Okay.

15 Q A whole 'nother can of worms.

16 A Okay.

17 Q Okay. Let's start with the gang. The gang
18 evidence. So, at what point did you apprise the solicitor
19 and The Court that you were seeking to admit evidence of
20 gang activity?

21 A Can't give you a specific date. But I can tell
22 you that our expert was identified very early on because
23 he was -- he was kind of self-identified. Because he was
24 investigating the gang activity. So, he was talking to
25 Laurens Williams and to Brian and the other officers

DOUG BRANNON-CROSS BY MS. GIOVANOLI

1 involved in this case. So, he kind of self-identified
2 himself to law enforcement. But then there were, you
3 know, there were pre-trial motions that discussed the gang
4 activity and those kinds of things. So, Trey knew about a
5 gang expert months before the trial. I mean, maybe a year
6 before the trial. But he was -- Rocky was identified in a
7 witness list, Rocky was identified in motions in court, on
8 the record before the trial started.

9 Q And you testified that Mr. Turnipseed actually
10 retained Rocky Watts?

11 A He did.

12 Q But you were aware of his background and his
13 qualifications?

14 A Certainly, yes.

15 Q And that is acceptable for you --

16 A It was.

17 Q -- for him to testify as an expert witness?

18 A I believe that it was -- I believe that he was
19 an abundantly reasonable expert.

20 Q Are you familiar with the case law at the time
21 in other cases where gang experts testified?

22 A Yeah, I mean. . .

23 Q Does State v. Price ring a bell where law
24 enforcement officers--

25 A I can't say that case names ring a bell but I

DOUG BRANNON-CROSS BY MS. GIOVANOLI

1 remember looking -- but we looked at the case law, we
2 thought we had a handle on what we needed to get that
3 testimony in. Okay.

4 Q One of the allegations here is that you failed
5 to proffer The Defendant's testimony.

6 A Uh-huh.

7 Q During the in-camera hearing.

8 A Uh-huh.

9 Q On the admissibility of gang evidence. Is it your
10 testimony that you didn't proffer him as a witness in that
11 hearing because you thought it would be more detrimental
12 than beneficial?

13 A I mean, I'd like to be able to tell you my
14 thought process, you know, that many years ago. Not
15 asking Rashaun questions about gang activity or proffering
16 that testimony, would have been based on a conversation
17 between me, Brac Turnipseed, Ryan Langley, Shawn himself.
18 But, I mean, at that point I already had four people
19 testify that they were in a gang or that they were
20 associated with gang, that they were flashing gang signs,
21 that they were Northside or they were Southside, I mean.

22 Q Well, actually, the testimony from four State's
23 witnesses, four or five, was that they denied being in a
24 gang but did agree that they were holding up gang signs.
25 Some of them said, we're kind of gangsters.

DOUG BRANNON-CROSS BY MS. GIOVANOLI

1 A Right.

2 Q One witness said that he knew gangster.

3 A Right.

4 Q But they didn't outright admit to being in
5 gangs; is that your recollection?

6 A Yeah, probably, yeah.

7 Q But your Rocky Watts proffered testimony that
8 connected these witnesses and the victim to a gang,
9 correct?

10 A Correct.

11 Q But The Judge still found it irrelevant?

12 A He did.

13 Q Okay. Can you establish relevancy for that
14 evidence to come in? Aside from calling The Defendant to
15 the stand?

16 A Can I?

17 Q Yes.

18 A I thought I could.

19 Q Okay. Did you in your opinion?

20 A I mean, I thought I did. But The Judge said I
21 didn't.

22 MS. GIOVANOLI: Beg the Court's indulgence for
23 one moment.

24 THE COURT: Uh-huh.

25 THE WITNESS: Can I get a glass of water?

DOUG BRANNON-CROSS BY MS. GIOVANOLI

1 THE COURT: Sure.

2 THE WITNESS: Thanks.

3 THE COURT: Stay right there, I'll get you some.

4 THE WITNESS: Thank you.

5 THE COURT: Yes, sir.

6 MS. GIOVANOLI: Okay. Thank you, Your Honor.

7 THE COURT: Yes, ma'am.

8 BY MS. GIOVANOLI:

9 Q You testified that with the gang activity
10 evidence out and admissible, this case came down to the
11 credibility of your client, right?

12 A Yes.

13 Q So, you guys thought all these kids were in a
14 gang and The Defendant said they were all in a gang. We
15 don't even know if they were in the same gang, different
16 gangs, we don't know if The Defendant was in a gang
17 himself. What was your theory of relevance at the time to
18 that crime, the shooting?

19 A The theory of relevance was that this wasn't --
20 these were -- this was either a gang or more than one
21 gang. And that the fight that we saw in the driveway, in
22 the video, was a beat in. Our client had told us
23 repeatedly that he was being recruited by the gang. And
24 that if you didn't accept their invitation, then you
25 became the enemy of the gang. And then you had that

DOUG BRANNON-CROSS BY MS. GIOVANOLI

1 aspect about the cussing at a girl or dating the wrong
2 girl or something like that. And that this gang went from
3 beating in one guy to pull our client out of the car. I
4 mean. . .

5 Q Yeah, but how does the membership in a gang
6 correlate with the shooting or it relevant to the
7 shooting? His testimony was that a mob tried to attack
8 him, he just witnessed another kid being beat up. Why is
9 that not sufficient -- why is gang membership make that
10 anymore to your self-defense claim--

11 A It makes that mob of people significantly more
12 fear causing. I mean, he--

13 Q So, you wanted to make character evidence of the
14 part of the witnesses and the victims that gang, the
15 negative connotation that comes with gang, the word gang,
16 gang members, people are afraid of gang members?

17 A Correct. Gangs are lawless, gangs are
18 dangerous.

19 Q Okay. So, if you had put The Defendant up on
20 the stand, do you believe that Judge Cole would have found
21 that evidence was relevant?

22 A Again, we proffered the testimony we proffered.
23 They were, I would call, disinterested witnesses. Whereas
24 Rashaun -- I mean, if he got on the witness stand and said
25 they're gang members, I don't believe that that

DOUG BRANNON-CROSS BY MS. GIOVANOLI

1 self-serving testimony would have swung the balance in our
2 favor.

3 Q Because you guys had already argued this at
4 three separate periods during this trial. Pre-trial, at
5 lunch and the second day?

6 A Correct.

7 Q Okay. And the proffer testimony. And you
8 understood the Judge's ruling to mean that you could not
9 yourself use the word gang nor could you elicit testimony
10 from your client including the word gang?

11 A That was crystal clear.

12 Q Okay. Because there's a pretty broad allegation
13 of your failing to conduct a reasonable investigation in
14 this trial, aside from reviewing the discovery, discussing
15 the case with the client, looking for this Little Greg
16 character, hiring a private investigator, discussing the
17 case with the solicitors, what else did you do? Just for
18 the record, any other investigation?

19 A We would meet with Rashaun, we would look for
20 something that maybe we missed the last conversation we
21 had with him. Any little fact or additional sliver of
22 evidence, we would then talk to Pete Heist about and have
23 him then go and trace that trial. I mean, I remember
24 reading the statements or the documents in the file one
25 day and putting them down and then going back two days

DOUG BRANNON-REDIRECT BY MS. BLANCHETTE

1 later and reading them again to make sure that I didn't
2 miss, you know, something that didn't jump out at me the
3 first time, might jump out at me the second time. I
4 remember my trial notebook had three different colored
5 highlighters on the written documents.

6 Q Did you hire an investigator to -- a forensic
7 investigator to review the SIM card in this case?

8 A We did, yes. I didn't but Brac dealt with that
9 person.

10 Q Okay. Can you, briefly, just name the defense
11 team? All the people contributing to this defense's case,
12 this investigation?

13 A Myself, Brac Turnipseed, David Turnipseed,
14 initially, Ryan Langley, Pete Heist, Rocky. And I'm
15 sorry, I don't know that forensic guy, I don't know his
16 name.

17 Q Okay. I have it somewhere, but.

18 A I mean, then our paralegals, you know, that kind
19 of stuff.

20 MS. GIOVANOLI: Okay. Nothing further, thank
21 you, Your Honor.

22 THE COURT: Redirect, ma'am?

23 REDIRECT EXAMINATION

24 BY MS. BLANCHETTE:

25 Q Just to be clear for the record, on Page 150,

DOUG BRANNON-REDIRECT BY MS. BLANCHETTE

1 looking at Line 12, Phoenix Fielder says he turned over
2 his entire SIM card to law enforcement. The State was
3 just asking you about having the SIM card looked at, did
4 you have the full SIM card from Phoenix Fielder's phone?

5 A No. And that's no what we had looked at. We
6 had the videos looked at to see if they could be cleaned
7 up.

8 Q Okay. I just wanted to be clear on that.

9 A That was it, yes.

10 Q Okay. Was there a backup plan if the testimony
11 and evidence regarding gangs was excluded?

12 A Self-defense.

13 Q So, still proceed with the self-defense. And
14 would you agree then it would hedge greatly on your
15 client's credibility if you could not focus more on this
16 gang issue?

17 A Yes, ma'am.

18 Q Okay. You testified multiple times that
19 Mr. Sobers shared with you that he had been recruited, had
20 turned down that gang recruitment, he was, essentially, an
21 enemy of the gang. Without his proffered testimony, was
22 that information ever given to Judge Cole or in front of
23 the Appellate Court for their review?

24 A I don't think so.

25 Q And my last question is, how important was the

DOUG BRANNON-REDIRECT BY MS. BLANCHETTE

1 gang testimony and evidence to the self-defense in this
2 case?

3 A I think it was vital. I mean, if you read the
4 transcript, I tried every way I could for four days to get
5 the word gang to come out of my mouth and, I mean, I
6 couldn't get there.

7 MS. BLANCHETTE: Your Honor, I have no further
8 questions.

9 THE COURT: All right.

10 MS. BLANCHETTE: Thank you, Mr. Brannon.

11 MS. GIOVANOLI: Nothing further from The State.

12 THE COURT: All right, thank you, Mr. Brannon,
13 appreciate your being here.

14 THE WITNESS: Thank you. May I be excused?

15 THE COURT: Yes, sir..

16 THE WITNESS: Thank you.

17 MS. BLANCHETTE: Your Honor, I'm going to call
18 Mr. Sobers at this time. As I told you, he will be a
19 lengthy witness so I just wanted to make sure the
20 court wanted me to go forward.

21 THE COURT: I do want you to go forward but I
22 want you to be surgical. I think, honestly, in being
23 an objective observer of the evidence that I've heard
24 today, I've heard about a half an hour worth of
25 evidence and y'all have stretched it out to about two

1 and a half hours, okay. So, I want you to be more
2 surgical, make your points and move on, okay. I
3 don't want to hear rambling because rambling is not
4 going to be constructive for my determination in this
5 matter. Okay.

6 MS. BLANCHETTE: I appreciate that, Your Honor,
7 yes, sir.

8 THE COURT: Okay. Call the next witness but as
9 brief as you possibly can, okay?

10 MS. BLANCHETTE: I will, Your Honor, and I just
11 ask -- I'm not trying to go against your order but I
12 will go through each issue with him just to make sure
13 we've preserved it for the record.

14 THE COURT: I understand.

15 MS. BLANCHETTE: Okay, thank you. I call
16 Rashaun Sobers to the stand.

17 THE COURT: Mr. Sobers, if you'd come up, please.
18 To the extent you're able, place your left hand on
19 the Bible, raise your right hand.

20 RASHAUN SOBERS, after being duly
21 sworn, testified as follows:

22 THE COURT: Take a seat, please. And state your
23 full name for the record, if you will.

24 THE WITNESS: My name is Rashaun Sobers.

25 DIRECT EXAMINATION

RASHAUN SOBERS-DIRECT BY MS. BLANCHETTE

1 BY MS. BLANCHETTE:

2 Q Okay, Mr. Sobers, where are you currently
3 incarcerated?

4 A Perry Correctional Institution.

5 Q Okay. And we're here today on a 2014 PCR
6 Application docketed here in Spartanburg County. Are you
7 the one that filed that PCR Application?

8 A Yes, ma'am.

9 Q Okay. What is the relief that you're asking The
10 Judge to give you today?

11 A For a new trial.

12 Q Okay. And I have met with you and talked with
13 you, obviously, you're serving a life sentence in this
14 case. But do you understand that the only relief he can
15 give you is a new trial? That means your put back in the
16 position you were before you were convicted with no
17 guarantee of less time in getting that relief?

18 A Yes, ma'am.

19 Q Knowing that you still want to go forward today
20 with your application?

21 A Yes, ma'am.

22 Q Okay. Rashaun, I've been handling this case
23 with you for several years at this point, we have met a
24 number of times. You understand the risk, you also
25 understand you're supposed to tell the truth today, is

RASHAUN SOBERS-DIRECT BY MS. BLANCHETTE

1 that correct?

2 A Yes, ma'am.

3 Q Okay. And if there's any time that you're
4 confused, I ask that you tell me so that if I can refer
5 you to the transcript. Do you need a copy of the
6 transcript up there with you?

7 A Yes, ma'am.

8 Q Okay.

9 Your Honor, may I approach him with a copy
10 of the transcript?

11 THE COURT: Yes, ma'am, you may.

12 BY MS. BLANCHETTE:

13 Q Now, Mr. Sobers, we're here today about a
14 shooting that took place on April 21st, 2009. Thereafter,
15 you were apprehended, 'is that correct?

16 A Yes, ma'am.

17 Q Okay. And did you remain in the county jail or
18 did you make bond, Mr. Sobers?

19 A I reminded in the county jail.

20 Q Okay. And tell us how it was that you hired
21 first the Turnipseeds and then Mr. Brannon?

22 A Well, my family retained Mr. David Turnipseed.
23 And Mr. David Turnipseed made me aware that he wasn't
24 going to be able to go forward with the case because of a
25 illness that he had. I think back surgery or something.

RASHAUN SOBERS-DIRECT BY MS. BLANCHETTE

1 And he was going to have another attorney, which was
2 Mr. Doug Brannon, step in and take the case over along
3 with his son, Ryan Langley.

4 Q Okay. And did you meet with your team of
5 attorneys regularly?

6 A Yes, they came -- they came, mostly, towards
7 like the end -- towards the end when I was getting ready
8 to go to trial. That's when they really came to prepare
9 me. But they came a few times before that, too. But most
10 of the time it was towards trial.

11 Q And were you aware that investigator Pete Heist
12 was working on your case?

13 A I don't remember. I never really knew Pete
14 Heist. I remember them during trial asking him to go out
15 to the scene and stuff. But I don't recall sitting down
16 with him and talking with him.

17 Q Okay. And at trial, an issue comes up involving
18 Mr. Heist. You testified on Page 353, you just swung your
19 vehicle out of the cul-de-sac to exit. Then the question
20 becomes whether or not you need to back up to do that.
21 Was that something you had discussed with your attorneys
22 being an issue of contention before you took the stand?

23 A No, it wasn't really a big issue. They was just
24 saying that The State wanted to know, you know, how I got
25 out of there and, you know, if I'm saying the door was

RASHAUN SOBERS-DIRECT BY MS. BLANCHETTE

1 opened to my car and how did it close. They asked me
2 those questions. But as far as the car itself leaving, I
3 didn't see -- they didn't make me aware that that was
4 really a big issue.

5 Q Okay. And we've introduced today three pictures
6 that were introduced at trial. They're now marked as
7 Applicant's 4, 5 and 6. But specifically Applicant's 5,
8 when you were non the stand were you given any photographs
9 to try to help explain how you existed the cul-de-sac?

10 A Yeah, they showed me on a big screen, they had
11 me point a laser at the screen and tell them how I got out
12 of there and where my car was position or possibly.

13 Q Okay. And your attorneys asked for the jury to
14 go to the scene and that request was denied. Is that
15 something you were anticipating was going to be part of
16 your defense that the jury was going to go out and view
17 the scene?

18 A No, that was something that really just came up
19 that he had requested.

20 Q Okay.

21 A That was nothing that was spoken of.

22 Q Let's talk about this. You heard us talking
23 today about the phone and the video. I will try to be
24 concise as possible but, also, if I go to quickly, please
25 let me know. When were you first told about these phone

RASHAUN SOBERS-DIRECT BY MS. BLANCHETTE

1 videos?

2 A It was told to me that the fight that was
3 taken -- taken place with the victim and Devin Davis,
4 that they was going to try to say that I was the guy
5 Devin. Which I made them aware that it wasn't. So, they
6 said they had some video recording that was supposed to be
7 given by someone, which was Phoenix I found out later,
8 Phoenix Fielder. And they said that this would show that
9 it wasn't me fighting. That I had nothing to do with the
10 fight that took place on that day.

11 Q Okay. So, you did review the videos before
12 trial?

13 A Yes. With, I think, his name was Langley.

14 Q Okay. With Mr. Langley?

15 A Yes.

16 Q Did you raise any concerns or were concerns
17 raised to you about there being additional videos or
18 possible additional phone evidence?

19 A The thing that kept coming up was at first there
20 was no sound, of course. Then second, there was like a
21 big, like, when they stopped it, it went from them
22 running, chasing someone to now, you know they was getting
23 prepared for a fight. So, we knew that it was something
24 that was, like, in between. But, you know, that was the
25 whole thing. They was trying to figure out what happened

RASHAUN SOBERS-DIRECT BY MS. BLANCHETTE

1 in between. They was trying to get me to fill in the
2 blanks.

3 Q Okay. Would it have mattered to you if there
4 was additional video that your attorneys could have
5 gotten? Such as, if they had the entire SIM card of
6 Mr. Fielder?

7 A Yes, ma'am.

8 Q And why would that have mattered to you in your
9 defense?

10 A It would have mattered because if there was
11 additional -- I would assume that if it was additional
12 recording that was on there, that it could have possibly
13 shown and would have cooperated my story what I was trying
14 to tell them in the first place.

15 Q Okay. Would you have wanted an expert to be
16 able to look at it and attempt to enhance the original
17 versions of the videos? To see if there was anything
18 additional than could have been helpful to your defense?

19 A Yes, ma'am, I would have.

20 Q Did you agree with the ultimate ruling that the
21 phone was not evidence in this case?

22 A No, I didn't.

23 Q Please explain.

24 A I didn't agree because, you know, I mean, I'm
25 not an expert or nothing but, you know, I have owned

RASHAUN SOBERS-DIRECT: BY MS. BLANCHETTE

1 phones before and I know that you can--

2 MS. GIOVANOLI: Objection, calls for a legal
3 conclusion.

4 THE COURT: Sustained.

5 BY MS. BLANCHETTE:

6 Q Did you ever convey to your attorneys why you
7 would want them to get the entire phone if they could in
8 this case?

9 A Yes. I asked them -- Mr. Brac. And the
10 reason -- my reasoning for asking him was because, like I
11 was saying, I feel like they could have been more on there
12 and we could have found out had he pursued and got an
13 expert to look at it and to review it. And then if it
14 was, that it could have possibly shown other things on
15 there. Maybe what happened, you know, after the fight.
16 Or it could have been some things that, you know, were
17 said on there, I don't know, you know.

18 Q Was it ever discussed with your attorneys that
19 somehow there was only one person's cell phone video and
20 one witness testified there was one to 200 people in the
21 cul-de-sac?

22 A Yes. It was -- it was brought up because they
23 was asking -- they had asked me do I think that someone
24 may have been recorded. And I said it's a possibility.
25 But then, Mr. Phoenix also testified at trial that he was

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1 the one recording because that's what he do. You know,
2 they wanted to have something to look at an laugh at and
3 to record and put on the internet or whatever.

4 Q All right. Let me ask you a little bit about
5 the drawing in your waiver and those have been admitted as
6 Applicant's No. 7 and No. 8. Prior to trial, did you
7 discuss with your attorneys the possibility of testifying
8 at a Jackson vs. Denno hearing regarding the voluntariness
9 of your statement?

10 A Not until the Jackson vs. Denno hearing.
11 Because that never came up. They did prepare me to take
12 the stand and only thing they was telling me was to tell
13 my side. They never really went into any detail of any
14 specific issue, just pretty much told me to tell my side.

15 Q Okay.

16 A That was really it.

17 Q Did your attorneys inform you that you could
18 contest the voluntariness of your statement?

19 A Like go against what The State was trying to
20 say.

21 Q Okay. Did they explain to you that you could
22 argue is wasn't admissible because you didn't give it
23 voluntarily?

24 A No, ma'am.

25 Q Okay. Was the issue of whether or not you asked

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1 for an attorney during that statement ever discussed with
2 you?

3 A Except for one time. And I explained to my
4 attorneys that the moment I got in there, that was the
5 first thing I asked for was an attorney. But I kept being
6 told that it will be in my best interest to tell my side
7 of the story to them. Rather than come to take me down to
8 the jail and I'll be forced to deal with family members,
9 friends or people that was upset about my crime.

10 Q And that issue actually comes up and ultimately
11 on recrossed you were asked if you were in control of what
12 you said that day. And you admit that they put pressure
13 on you but, yes, you concede you were in control of it.
14 Is that something you would have allowed your attorneys to
15 explore pretrial to determine if your statement should
16 have come in?

17 A Yes, ma'am.

18 Q Okay. Now, the statement does come in as part
19 of your testimony and on direct Mr. Brannon, asked you
20 about the lie that you told police about Trey having a
21 gun; do you recall that?

22 A Yes, ma'am.

23 Q Okay. And then on Page 363, Line 24, the
24 solicitor gets you to repeat, I lied to police.

25 A Yes, ma'am.

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1 Q He then questions you about your motivation in
2 lying that day and potentially lying in front of the jury.
3 On Page 366 he gets you to admit you lied again. He then
4 on Page 373 asks you further questions about lying. Kind
5 of take us through that cross-examination of what was
6 going on from your standpoint.

7 A Well, as the record shows, when he asked me
8 about lying to the police, which I made my attorneys aware
9 of prior, I explained to my attorneys before I even got up
10 there that, yes, true indeed, I did lie to the police.
11 But I had -- for one I already asked for an attorney
12 prior. Which they kept talking and kept ranting a raving
13 and slamming hand on the desk and still try to talk to me
14 after I told them I was requesting an attorney. So, I
15 told them whatever I felt they wanted to hear to get them
16 out my face. And I asked my attorney, how do he think I
17 should deal with this situation? Because I already knew
18 that it was going to come up. And I was told to simply
19 tell them that I didn't want to incriminate myself.
20 Because we were not going to win a battle back and forth
21 with my words versus lawsuit. So, that's what I was told.
22 And if you read the transcript you will see where I
23 continued to say I didn't want to incriminate myself.
24 Q As your explanation for why you lied, is that
25 correct?

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1 A Yes.

2 Q Okay. And in The State's closing argument they
3 talk about how you lied to police then to avoid
4 incriminating yourself. Used your own words there. That
5 once you lied you shouldn't be trusted again. Did you
6 find that argument in the line of questioning to be
7 damaging to your case?

8 A Yes, because--

9 MS. GIOVANOLI: Okay, calls for conclusion of
10 law.

11 THE COURT: I'll overrule.

12 You can ask the question.

13 BY MS. BLANCHETTE:

14 Q You can go ahead.

15 A Yes, because, I mean, by that point the jury is
16 seeing me as a liar. And it pretty much killed all my
17 credibility, you know. Anything I had to say after that
18 really -- they felt like I didn't want to incriminate
19 myself no more differently then. Even though, you know, I
20 tried to explain that, you know, I felt like the police
21 were just simply out to their job at the time. They
22 wasn't trying to help me. So, that's why I kept
23 requesting a lawyer and didn't want to even talk to them
24 in the first place. But they wouldn't ease up. They
25 wouldn't stop questioning me even though I was requesting

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1 an attorney. So, I told them a story to try not to put
2 myself in harms way but to protect myself.

3 Q Now we can read the transcript but did you feel
4 that your attorneys had properly prepared you to take on
5 the cross-examination regarding your statement?

6 A No. Because when it came up I was -- I felt
7 left by the wayside. Like I didn't even have anything to
8 say to it like. And I didn't have him to object. He
9 didn't object or didn't try to get me prepared for it.
10 So, it was just like I was up there alone.

11 Q How much preparation did you do just regarding
12 your testimony?

13 A As I said before, they came a couple of times
14 but it wasn't to just get me prepared for my testimony
15 because -- well, let me rephrase that. It wasn't for any
16 specific issue. It was just that -- just in case I had to
17 get on the stand, tell my side of the story, tell the
18 truth, that's it. There wasn't any specific issue that
19 they had me prepared for. So, when I was up there, there
20 was a lot of specific issues that was in detail that I
21 needed to be prepared for. Not only to be prepared but
22 maybe go into, could open up a can of worms for myself but
23 I unprepared, so.

24 Q All right. Let's talk about some of the
25 specific issues so we're not just talking generally. One

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1 is a phrase you came to coin to me a the second approach.

2 A Yes.

3 Q On Pages 341 through 352, you give a very
4 detailed account of what happened that night and I'm not
5 going to go through the whole thing with you, the record
6 speaks for itself. But on Page 342, Lines 6 through 7,
7 you start talking about Trey coming back to the car a
8 second time. What are you alleging today your attorney
9 should have asked you more detail about regrading that
10 second approach?

11 A The second approach, which I thought I was clear
12 on, it was -- it was really a ambush. And they sent
13 Jaquan Hardy back to my car to asks the same question that
14 was asked the first time about the sister. And Trey
15 Gentry sister, Rajek [ph] Gentry, getting into it. Which
16 Trey, you know, in the beginning stated that he was the
17 only one that came to my car and nobody else came to the
18 car. And even the first approach you get to see that,
19 Trey and the victim came to the car the first time.

20 And then the second approach, which Jaquan
21 Hardy's testimony state that he came to the car to asks me
22 what was up with me and him a his friend, Trey, getting
23 into it. And he did that because he thought we was cool.
24 And that's exactly what he said.

25 Q And you're referring to on Page 231, Jaquan

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1 Hardy admits that he went over to your vehicle after
2 everyone was back in the vehicle. But all the other
3 State's witnesses contended that that did not occur; is
4 that correct?

5 A Yes.

6 Q Okay. And are you alleging today that your
7 attorneys should have more thoroughly examined you on that
8 issue to establish that there was a second time that they
9 came over that led up to the shots being fired?

10 A Yes, ma'am.

11 Q Okay. Now, we talked a little bit today about
12 this prior incident involving Trey's sister. You take it
13 on in direct examination on Page 339. What further are
14 you alleging today your attorney should have prepared you
15 to testify to about that issue?

16 A About me and Trey's sister getting into it?

17 Q Yes. Your testimony on Page 339 very briefly
18 about it but is there more today that you're saying your
19 attorney should have elicited from you on that issue?

20 A Yes, ma'am. I made -- well I thought I made my
21 attorneys very aware that the argument with me and Trey's
22 sister, it was not about the little brother being on my
23 car. That wasn't it a issue. The issue was the response
24 I got when I asked him to get off my car. That was the
25 issue.

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1 Q And how does that play into the subsequent
2 event? Why would that have mattered during the course of
3 the trial of this case?

4 A Because during the course of trial, as you can
5 see, they showed the video on there that somebody was
6 leaning up against my car and they tried to make it like,
7 Oh, I got a issue with people being on my car. And that
8 wasn't the case. The little boy was standing on the top
9 of my car with his feet. And I asked him to get down.
10 And he, you know, pretty much cursed at me and he invited
11 me to his private parts. And I got upset, I was very
12 upset about it. So, you know, I got into a heated
13 argument with the little boy. Which, you know, that's
14 where Trey sister, Dre [ph], that's when she got involved,
15 trying to defend her brother.

16 Q And was that the precursor of the event that led
17 up to the conversation that you had with Trey at the
18 scene?

19 A That's what led up to Trey and the rest of the
20 guys, two weeks later, to see me in the street and one of
21 them approached me about, as Trey stated in his testimony,
22 is that he wanted to fight if I would have mentioned that
23 I disrespected his sister, that he was going to ask to
24 fight me.

25 Q And it appears from your testimony, kind of the

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1 context of how you know these people. Did you live in the
2 same neighborhood as the majority of these people?

3 A Yes, ma'am. I lived on a street called Wildwood
4 Lane. Which was a dead-end street. Ricky Smith lived a
5 few doors down from me. Trey Gentry stayed at the top of
6 the stop sign and all with Quita [ph] Gentry. They all --
7 I had to pass them to leave my house and to come home
8 every day. So, this is why when you hear my testimony and
9 Mr. Trey Gowdy asking me, Why didn't you leave? I clearly
10 state, Because I didn't see -- well, I didn't feel them
11 asking the question was a threat at the time, just merely
12 asking the question. Because these weren't people that I
13 just bumped into. These were guys who lived in my
14 neighborhood. If there was a big issue, I felt like they
15 knew -- they knew my dog, they knew where I stayed. You
16 know, they would have came down to the house and talked to
17 me or whatever they felt -- how they felt to deal with the
18 situation.

19 Q I'll ask you a little bit more about your
20 familiarity with them when we talk about the gang issue
21 here at the end. But I do want to ask you about the
22 illegal gun issue that came up in your testimony.

23 A Yes, ma'am.

24 Q On direct on Page 335 through 336 you talk about
25 this gun and why you obtained it. Are you alleging today

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1 that your attorneys failed to properly prepare you to take
2 on cross-examination regarding the gun?

3 A Yes, ma'am. The only thing that I was banking
4 on to protect me from the illegal gun being mentioned was
5 the fact they put my grandmomma on the stand. And that
6 was it. My grandmother's testimony was going to take care
7 of that. They never prepared me to answer any questions
8 to buying or having a illegal weapon.

9 Q Did you feel like you were losing credibility
10 with the jury during the cross-examination regarding the
11 illegal gun?

12 A Yes, ma'am.

13 Q And one other part of your testimony was this
14 issue of not being in trouble before. It comes up on
15 Pages 382 through 348. The State asked you a question,
16 you respond, about why you drove by the police station.
17 You say it is your first time getting in trouble. And
18 then The State repeatedly asked you the question on Page
19 382 to be careful. Did you understand where that was
20 going at that point?

21 A No, ma'am, I didn't.

22 Q Okay. Had your attorneys prepared you to take
23 that issue on?

24 A Not really because they made it aware to me and
25 they even in the transcript mentioned it to The Court that

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1 they didn't see that as an issue because I was not
2 arrested for illegal purchasing of a firearm or the
3 situation, what happened in 2007. Which -- which they was
4 saying that it was two different situations. So -- and
5 they made me aware that you never been convicted of it.
6 So, they kept telling me that because it's pending, you're
7 innocent until proven guilty. And that's what I kept --
8 that's what I was trying -- the same thing they was saying
9 to me is the same things, when I was on the stand, I was
10 trying to respond to Mr. Trey Gowdy, I was trying to
11 answer his questions with. And let him know that I
12 haven't been in any trouble because I haven't been
13 convicted of anything. I have been accused. He wouldn't
14 let me say it. He kept shutting me down every time I
15 tried to speak so.

16 Q Do you think that further preparation by your
17 attorneys would have aided you during the
18 cross-examination regarding that matter?

19 A Yes. I think because the way I answered it,
20 allowed them to be able to go into something that I was
21 unprepared for. Had they prepared me to answer that, I
22 probably would have answered it differently with -- I
23 would have just -- it wouldn't have even been no more to
24 ask me about it, you know.

25 Q Okay. And one issue that's in your amendment is

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1 the failure to impeach and cross-examine witnesses. Is
2 there any specific examples that you'd like to testify
3 today where you feel that your attorneys failed in that
4 regard?

5 A Well, Ricky Smith is one. Where he testifies
6 that I had a black 9mm pointed at his car.

7 And my attorneys asked, Well, how did you
8 know that it was a black 9mm? Even if you understood that
9 he had a weapon pointed at your car, how would you know
10 from where you say it at that it was 9mm?

11 His response was that someone told him that
12 I purchased a black 9mm a week prior.

13 And my attorneys asked him, Well, in your
14 stayed you said that he had, like you knew what it was.

15 And he admitted that he didn't. And he
16 also agreed with them that his testimony was 100 percent
17 false. And I felt like that was -- they should have went
18 more into that to show -- to impeach him and to show that
19 they was pretty much doing everything they could do to
20 protect their friends or gang member, gang brothers.

21 Q Now, Mr. Sobers, before I move on to the gang
22 issue.

23 A Yes, ma'am.

24 Q Is there anything else regarding your testimony
25 or the testimony of The State's witnesses that you would

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1 like to testify about today to support your allegations?

2 A Okay, let me see. I have spoke on--

3 Q Just say it to yourself and let us know if you
4 have an answer.

5 A Let me see. Shaquila [ph] Gentry's testimony.

6 Q What about Shaquila Gentry would like to testify
7 about?

8 A She -- she brought up that it was a second
9 approach, also. And she also, at first, she tried to say
10 that she didn't even remember seeing me at first. But
11 then later on, as she said well she remembers seeing a
12 burgundy car. Which we knew that was the car that I was
13 in. And if I'm not mistaken, she tried to say that there
14 was a female in the car with me.

15 Q Okay. And you heard on The State's examination
16 Mr. Brannon pointed out issues with your testimony. Are
17 you asking The Court today to review the entire
18 transcript, as he will, and that there are things that
19 your attorney's brought out that are very helpful in
20 showing inconsistencies in The State's witnesses as well?

21 A Yes, ma'am. To show that, you know, there were
22 lies told on both ends or whatever. However, you want to
23 look at it. But don't let -- they lie as well as -- some
24 of The State's witnesses told lies and I told a lie, as
25 the transcript reflect. But you use the best judgment to

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1 see the facts still real. What they are.

2 Q Okay. All right, let's move on. I want to ask
3 you just very briefly about Little Greg. Did you request
4 that I try to locate him for today's hearing?

5 A Yes, ma'am.

6 Q Okay. And what was the reason why you wanted
7 him here today?

8 A I wanted him here today because even though he
9 didn't actually see the shooting, the first approach, he
10 would have been able to show and to tell, if he would have
11 told the truth, that when he approached the first time,
12 they came in a aggressive manner. Trey Gentry was pretty
13 much upset about something that was told to him. Even
14 though he wasn't present when me and his sister had the
15 argument. I wanted him to be able to tell the side of the
16 story that I was talking to him when I was approached
17 aggressively. Not just Trey Gentry by himself but the
18 victim also was with him. And even though the victim
19 never made any verbal speaking to me, he used his body
20 language. You know, he stood by, pretty much, to let it
21 be known that he was backing Trey Gentry, he had his back.

22 Q Now, let's turn the gang issue for lack of
23 better words.

24 A Yes, ma'am.

25 Q You heard Mr. Brannon testify how integral,

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1 vital the issue of the gang testimony in evidence was to
2 your defense. What was discussed with you pretrial
3 regarding the importance of the gang testimony evidence to
4 your defense?

5 A Really, they just told me they had photographs.
6 Which they made me aware that I couldn't really have them.
7 So, I never had really seen those. But I was told about
8 them. They asked me a little bit of how I knew the guys,
9 what was my ties to the guys. Which is -- The State's
10 witnesses, everybody that testified, Trey, Phoenix, Devin
11 and so forth.

12 Q Let me show you these pictures, Applicant's
13 Exhibit 1, is that what you're referring to in your
14 testimony, just to be clear for the record?

15 A Yes, ma'am.

16 Q Okay. And I'll show you each of them. So, they
17 showed you these pictures briefly but you weren't able to
18 keep a copy of discuss --

19 A No, they just showed me -- the ones I seen was
20 in black and white, it wasn't in color.

21 Q Now, you said you briefly discussed with your
22 attorneys how you knew these individuals. Was the
23 question ever presented to you, Rashaun, we're going to
24 need to show that you knew that these were gang members or
25 that they were gang affiliated and the actions that you

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1 saw that day put you in fear of your life because they
2 were gang members. Was that ever told to you?

3 A No. Because they said that, pretty much, the
4 pictures were going to speak for themselves. They were
5 going to question The State witnesses about everybody that
6 was in the photographs. Flashing the gang signs. And,
7 pretty much, that was going -- they was banking on that.
8 They never really established that I had to get up and
9 speak on anything about gang or anything. There wasn't
10 until in the courthouse they was like, you know, we been
11 preparing you to take the stand. Which they had. But it
12 wasn't specific, like. Like this specific issue, any
13 specific issue. It was just like take the stand, tell the
14 truth, don't lie. That was pretty much it. It wasn't --
15 they never really prepared me in detailed specifically on
16 any one issue.

17 Q And we've already discussed today about how
18 there's a motion on Page 69 and the issue keeps coming up
19 throughout the course of the transcript, which the record
20 will reflect. But on Page 151 -- 157, I'm sorry, the
21 argument comes up again, that they need this evidence and
22 testimony in because it goes to your fear and
23 apprehension.

24 And the response The Court says, I haven't
25 heard from your client yet so it's not relevant.

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1 When was the only time The Court actually
2 heard from you?

3 A When it was time for me to take the stand after
4 The State's witnesses had already took the stand.

5 Q Okay. And when you took the stand, were you
6 advised by your attorneys that you could use the word gang
7 or talk about your fear or apprehension of this gang?

8 A They told me that I couldn't, which I already
9 knew because I watched it be denied over and over. But
10 they mentioned -- they told me before I even got up there,
11 don't mention anything about gang.

12 Q So, did Judge Cole ever hear from you about your
13 fear and apprehension of this gang?

14 A No, ma'am.

15 Q Did your attorneys ever discuss with you that
16 you could offer testimony outside the presence of the jury
17 in the form of a proper, much like they did with the other
18 witnesses and the expert?

19 A No, ma'am. Because it took them a while to even
20 get that proved, as far as for The State's witnesses. So,
21 it really wasn't never a speak -- we never even had a talk
22 about me getting in front of The Judge without the jury.

23 Q And you know aware of the Appellate Court
24 decision where they note that you testified about the mob
25 but you never testified that you more fearful because the

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1 mob was a gang--

2 MS. GIOVANOLI: Objection, relevance.

3 THE COURT: I'll overrule.

4 You can ask the question.

5 BY MS. BLANCHETTE:

6 Q I'm sorry, let me start again. The Appellate
7 Court decision says you never testified that you were more
8 fearful because the mob was part of a gang. Was it your
9 understanding on direct that you could not say that the
10 mob was a gang?

11 A Yes, it was understood that I couldn't mention
12 it. And if I did, it probably would cost me.

13 Q When did you first hear the word mob thrown
14 around by your defense team?

15 A My attorneys came up with the word mob to try to
16 substitute gang, the word gang.

17 Q Okay. And A primary premise of your allegations
18 as to this gang issue is that your attorneys should have
19 preferred you. So, I need to just ask you some specific
20 questions as to what you could have testified to. Did you
21 have fear that day because of known gang affiliations of
22 The State witnesses and the people present in the
23 cul-de-sac?

24 A My fear was more of that I knew that these were
25 gang members and I know what they were capable of. And I

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1 know this because I lived around them. So, I seen, you
2 know, the gang meetings in the neighborhood. Ricky Smith
3 mother, which worked at Club Hush in Spartanburg, which
4 got -- she was a bouncer at the club. Actually, she got
5 me in the club a few times for free. I've seen where they
6 had gang, you know, standoffs in the club where, you know,
7 song might be playing. This is how I was familiar with
8 the faces, not only living with them, but being at some of
9 the same parties they been at. That's how I was
10 familiarized with the gang symbols.

11 Q Were you aware of any situations, did you have
12 any working knowledge of any situations that occurred at
13 the mall? You just referred to a club but were you aware
14 of anything that had occurred at a public mall?

15 A Yes, ma'am. Where the Northside gang and
16 another street gang had got into shootout in Westgate
17 Mall.

18 Q And did the people who were present in the
19 cul-de-sac that night, were those people that you knew to
20 be present in that shootout?

21 A Yes, ma'am.

22 Q Okay. Now, you did indicate that you had been
23 at the club and seen this. So, why was it different that
24 night? If you knew they were gang members and you had
25 been around where they had done gang activities before,

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1 what was unique to that night in question that caused you
2 to be in fear because these were gang members?

3 A Well, that night, see the difference was, I was
4 already accused of disrespecting Trey's sister. So now, I
5 already got him whatever he was told or because like I
6 said, he wasn't present with the argument with me and his
7 sister. But whatever was told to him, he was already
8 upset with me. And even though I tried to defuse the
9 situation by telling him I didn't know anything about an
10 argument where his sister, obviously, he believed whoever
11 brought him the information. And when I realized that it
12 was going to get out of hand, was the second approach.
13 This is when I started to try -- once I realized I was
14 talking to Jaquan Hardy and I was explaining to him that I
15 had already talked to Trey. And I told y'all already I
16 didn't know I was ambushed from the opposite side. And it
17 was that that made me more fear. The fact that I seen,
18 okay, they're not letting this go, you know. They sent
19 somebody else back to the car to ask me the same question
20 that I was already asked. And if you're not looking for
21 any trouble, why would you be back here asking me a
22 question that I already answered?

23 Q At that point in time did a change from you from
24 an incident between yourself and Trey Gentry, an
25 individual that you knew was gang affiliated, to an

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1 incident between you and his fellow gang members?

2 A Yes, ma'am. And I kind of -- the first time I
3 kind of sensed it but I just thought maybe it wasn't just
4 a question. Maybe he was just asking me a question
5 because we lived in the same neighborhood, I didn't think
6 it would go that far. But the first time they came to the
7 car when Trey said that he came by himself, which you can
8 see in the tape that he came with the victim. Just the
9 presence while he was letting him talk and the body
10 language of the victim, pretty much told me that I got his
11 back, you know, whatever. Right or wrong, I got his back.
12 That was how I read it. And but like I said, I tried to
13 defuse the situation. I told them I didn't know what they
14 was talking about or whatever. And I thought that I
15 didn't have anything to worry about after that. They
16 left. I got back into the car and stayed with Little
17 Greg. It wasn't until the second approach that I realized
18 that, okay, you might be in trouble. And that's when --
19 that's -- it was that second approach that the fear came
20 over me once -- when he sent somebody back at me -- well,
21 Jaquan Hardy, he sent Jaquan Hardy back at me, that's when
22 I knew. Okay, Rashaun, it's time. They're looking for
23 trouble, it's time to go.

24 Q And this can just be a yes or no answer.

25 A Yes, ma'am.

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1 Q Was that fear connected to your knowledge that
2 they were gang members?

3 A Yes, ma'am.

4 Q Was that fear connected to what you had just
5 witnessed between the victim and another individual, the
6 fight that you had seen?

7 A Yes, ma'am.

8 Q And was it your understanding that fight had
9 gang connotation to it?

10 A Yes, ma'am.

11 Q Now, Mr. Brannon pointed out how he proffered
12 testimony from a number of The State's witnesses, do you
13 have more though that you could have offered to
14 established that these were gang members and they were
15 gang affiliated. Did you have more to offer than what The
16 State's witnesses gave in the proffer?

17 A Well, expect for the fact that -- not as far as
18 gang but I could have just offered more that, you know,
19 that was a few of them like I didn't know like the victim.
20 I didn't really know Jaquan. But for the majority of
21 them, they was trying to make it like they only knew me
22 from just seeing me passing by, ridding through. Which
23 was a lie. And, you know, I could have offered that these
24 guys lived in the same duplex I lived in. We lived on the
25 same street, Wildwood Lane. They know me through that.

RASHAUN SOBERS-DIRECT BY MS. BLANCHETTE

1 And I could have you showed that that right there, let it
2 be known that they knew me. It wasn't that I was just out
3 and about and I just bumped into some random people.
4 These were people that knew me.

5 Q The Judge's also ruling on Page 481, Line 4, and
6 I'm summarizing. These are all members of different gangs
7 or the same gang now, because there's some confusion
8 there. But there was no connection to what happened on
9 4/21 of '09. Could you have offered him testimony to
10 refute that finding?

11 A I believe so. I believe that if he would have
12 looked -- well, if my attorneys would have made it clear
13 and showed the intention of Trey from the beginning, that
14 he walked to that car, he said in his statement that had I
15 would have told him that I called his sister, out her
16 name, that he was going to ask to fight me. So, his
17 intent the whole time was to get into an altercation from
18 the beginning. And I feel like my lawyer should have
19 pointed that out. And went into detail about it.

20 Q Let me reask you that. The Judge found there
21 was connection from gangs to what happened that night.
22 Could you have testified that, yes, in your understanding,
23 being there first person, there was a connection between
24 gangs and the gang activity and what happened that night?

25 A Yes, ma'am.

RASHAUN SOBERS-DIRECT BY MS. BLANCHETTE

1 Q Okay. And that's what you've gone into detail
2 for us today, is that correct?

3 A Yes, ma'am.

4 Q Is there anything else that you would have
5 wanted to explain to Judge Cole in a proffer or have in
6 the record regarding your understanding of their gang
7 affiliations, in which you witnessed that night, that
8 concerned you that this was gang activity?

9 A The fact that not only was the fight and the
10 video recording from Phoenix Fielder, clearly stated that,
11 you know, they're like a family, you know, we be together.
12 You know, we had this recording to have something to come
13 back and laugh at. I mean, I don't want -- I don't think
14 it could have had got any clearer. I mean, there's nobody
15 in a normal society that would cause fights and just to
16 have something to -- that thinks it's funny, at that. So,
17 I believe that that right there was a clear indication
18 that this is street gang activity, you know.

19 Q I'm going to turn now to some of the issues
20 regarding objections that you wanted your attorneys to
21 make. I provided you a copy of State vs. Daniels. Would
22 you wanted your attorneys to object to the comments made on
23 Page on 90, 561 and 568.

24 A Yes, ma'am.

25 Q Okay. We've have also gone over Page 515

RASHAUN SOBERS-DIRECT BY MS. BLANCHETTE

1 through 559, and you actually pointed that out to me. Is
2 that also something you would have wanted your attorneys
3 to object to when Solicitor Gowdy's talking about the
4 victim and imagining his hopes and dream and that being
5 your own child?

6 A Yes, ma'am.

7 Q Okay. And why did you want him to object to
8 that?

9 A I feel like he was trying to lean on the jury's
10 emotions and strings and trying to take it from being
11 fair. I feel that when he did that, it made it unfair to
12 my trial. To the whole proceeding. Because he got them
13 thinking of the victim as they child. So now, it's not
14 going to be fair to me because you had women on the stand,
15 you know, people that have children, I don't think it was
16 fair at all.

17 Q Okay. You're also alleging that you wanted your
18 attorneys to make all possible jury charges. You heard
19 some testimony from Mr. Brannon about accident, would you
20 have wanted him to ask for that charge?

21 A Yes, ma'am.

22 Q Okay. And also, you talked today about this
23 precursor event with Trey Gentry's sister that he was
24 accusing you on scene that night. Would you have wanted
25 them to ask for a charge about prior difficulties to

RASHAUN SOBERS-DIRECT BY MS. BLANCHETTE

1 address that prior situation that led up to the night in
2 question?

3 A Yes, ma'am.

4 Q Okay. Now, finally, there's an allegation
5 regarding ineffective assistance of appellate counsel.
6 You're not a lawyer so I'm not going to ask you any legal
7 conclusions as to why these issues should have been
8 raised. Are you specifically alleging, though, that there
9 were further meritorious issues that you would have wanted
10 your attorney to raise?

11 A Yes, ma'am.

12 Q Okay. And do you understand that your appeal
13 attorney isn't here today but he submitted an affidavit in
14 lieu of testifying to respond to those issues?

15 A Yes, ma'am.

16 Q Okay. Mr. Sobers, this has been filed since
17 2014, we have been working years to get to today, this is
18 your one opportunity to testify. I tried to keep it a
19 succinct as possible and make sure we address each issue,
20 but is there anything further that's of importance that
21 you would like to share with The Court to support your
22 allegations?

23 A Not at this time, ma'am.

24 MS. BLANCHETTE: Your Honor, I have no further
25 questions. Thank you.

RASHAUN SOBERS-CROSS BY MS. GIOVANOLI

1 THE COURT: Okay. All right.

2 Cross-examination?

3 MS. GIOVANOLI: I'll be very brief, Your Honor.

4 THE COURT: Yes, ma'am.

5 CROSS-EXAMINATION

6 BY MS. GIOVANOLI:

7 Q Going back earlier in your testimony you stated
8 that the first thing you told the investigators during
9 this investigation is that you wanted an attorney; is that
10 correct?

11 A Yes, ma'am.

12 Q But you signed a Miranda Waiver Form in this
13 case, didn't you?

14 A Yes, that was after I had already asked for an
15 attorney.

16 Q So, you asked for an attorney and then you
17 signed a waiver waiving your right to an attorney?

18 A Yes, ma'am --

19 Q Is that right?

20 A Yes, ma'am. They had already had questioned me.
21 And then kept asking questions even after I asked for an
22 attorney. They didn't push that in my face until at the
23 end.

24 Q Did you understand the Miranda Waiver Form?

25 A At the time, to be honest with you, no, ma'am, I

RASHAUN SOBERS-CROSS BY MS. GIOVANOLI

1 didn't.

2 Q Can you read and write?

3 A Yes, ma'am, I can.

4 Q At the time could you read and write?

5 A Yes, I can.

6 Q Did you read the document that you signed?

7 A Honestly, no.

8 Q And then after you signed the Miranda Waiver
9 Form you proceeded to help them draw a diagram and told
10 them a little bit about what happened. That was after you
11 had requested an attorney?

12 A Yes, ma'am.

13 Q You continued to talk with them?

14 A Yes. I was doing the talking, they was drawing.

15 Q Okay. And then, during cross-examination by
16 Mr. Gowdy you conceded that you were in control of the
17 statements that you were given to law enforcement, do you
18 recall that?

19 A Yes, ma'am.

20 Q And that was the truth, correct?

21 A Somewhat I would because I wasn't -- I didn't
22 fully understand, even though I thought I did, I never
23 fully understand when -- where he was leading to with the
24 question.

25 Q Okay. So, were you in control of what you were

RASHAUN SOBERS-CROSS BY MS. GIOVANOLI

1 telling the police whenever they were investigating you?

2 A Yes, I was in control.

3 Q And you also, when you testified during the
4 trial that you lied to the police, that was the truth?

5 A Yes.

6 Q And you testified that you didn't want to
7 incriminate yourself and that's why you lied, that was the
8 truth; correct?

9 A Yes, that's what I said.

10 Q So, your attorneys, when they were preparing you
11 to testify, they told you to tell the truth; is that
12 correct?

13 A Yes.

14 Q And that's what you did?

15 A Well, they also told me to tell them that I
16 didn't want to incriminate myself, as well.

17 Q They told you to tell you that -- you to say
18 that?

19 A They told me -- they told me that -- because
20 when I explained to them why I said what I said, they told
21 me, pretty much, that I was not going to win. Between
22 myself and law enforcement, the jury was not going to
23 believe me over law enforcement. So, simply explain to
24 them that you didn't want to incriminate yourself and you
25 were afraid. So, I told them what I was told to say.

RASHAUN SOBERS-CROSS BY MS. GIOVANOLI

1 Q So, are you now claiming that that's not the
2 truth?

3 A Yes, ma'am.

4 Q Okay. So, you only said that because you were
5 told to say that.

6 A That's how I was prepared to testify.

7 Q All right. There some prior bad blood between
8 you and Trey because you called his sister a bad word,
9 correct?

10 A Well, he had bad blood with me, I didn't know it
11 was any bad blood.

12 Q Okay. So, he was mad you were calling his
13 sister a cuss word?

14 A Yes.

15 Q Okay. And that bad blood sort of created that
16 confrontation that happened at your car prior to the
17 shooting, correct?

18 A Yes.

19 Q Is that why Trey attacked you?

20 A Yes. He wanted to fight with me. His words
21 were if I would have just said that I called his sister
22 what I called her, he was going to ask to fight me.

23 Q So, when he was going to fight you, that's
24 whenever you were scared and pulled your gun out and shot
25 him?

RASHAUN SOBERS-CROSS BY MS. GIOVANOLI

1 A Yes. Well, and the crowd that ran to assist
2 him, yes.

3 Q Okay. So, you were scared when that crowd came
4 to attack you because Trey wanted to fight you because you
5 called his sister a bad name?

6 A Yes, ma'am.

7 Q Okay. Now, going to the issue about your prior
8 criminal history or lack thereof. The solicitor didn't
9 ask you if had had any prior trouble, you actually offered
10 that testimony, correct?

11 A Yes, because I was unprepared. My lawyer--

12 Q You actually said you'd never been in trouble,
13 you didn't say I have never been convicted?

14 MS. BLANCHETTE: Your Honor, I ask that he be
15 able to finish his answer.

16 THE COURT: Yeah, let him finish.

17 BY MS. GIOVANOLI:

18 Q Go ahead. I'm sorry if I interrupted you.

19 A Yes, my lawyer did not properly prepare me to
20 answer that. So, when I answered it, I answered it to the
21 best of my knowledge. Which I was uneducated in that
22 area.

23 Q But you were telling the truth?

24 A That I had never been in trouble before?

25 Q Well, your attorney told you to tell the truth.

RASHAUN SOBERS-CROSS BY MS. GIOVANOLI

1 A He told me -- on that issue they told me early,
2 prior, that you never been convicted of that charge. So,
3 I was taking it as trouble meaning convictions.

4 Q So, you don't think getting arrested means
5 getting in trouble?

6 A No, because you can accuse somebody of anything,
7 doesn't mean it's a fact.

8 Q Okay.

9 MS. GIOVANOLI: I have no further questions.

10 THE COURT: Redirect, ma'am?

11 MS. BLANCHETTE: Nothing, Your Honor.

12 THE COURT: All right, thank you, Mr. Sobers,
13 appreciate it, you can step down.

14 Anything further from The Applicant?

15 MS. BLANCHETTE: Your Honor, The Applicant has
16 several cases to hand up at the end. I'm always
17 happy to do argument but we have no further witnesses
18 or evidence.

19 THE COURT: Okay. Good enough.

20 All right, does The State wish to offer any
21 evidence?

22 MS. GIOVANOLI: Your Honor, I'm going to briefly
23 call Solicitor Barry Barnette. I promise I will keep
24 it brief.

25 THE COURT: Okay, Mr. Barnette, if you will come

BARRY BARNETTE-DIRECT BY MS. GIOVANOLI

1 up, please. Put your left hand on the Bible, raise
2 your right hand.

3 BARRY BARNETTE, after being duly
4 sworn, testified as follows:

5 THE WITNESS: Barry Barnette.

6 DIRECT EXAMINATION

7 BY MS. GIOVANOLI:

8 Q Good afternoon, Mr. Barnette, what's your
9 current position?

10 A Solicitor of The Seventh Circuit.

11 Q Okay. What was your position at the time of
12 this trial?

13 A Deputy solicitor?

14 Q Okay. You prosecuted this case, correct?

15 A I did with Solicitor Trey Gowdy.

16 Q Okay. Who was the led prosecutor of the case?

17 A Solicitor Gowdy was.

18 Q Okay. At the time to trial you filed a motion
19 in limine to exclude evidence of gang activity, is that
20 correct?

21 A Yes, ma'am, I did.

22 Q Okay. And what was your basis for filing that
23 motion?

24 A What happened was we went downstairs that
25 morning and talked to Judge Cole. It became relevant

BARRY BARNETTE-DIRECT BY MS. GIOVANOLI

1 that, obviously, it was gang activity. My position was it
2 never was gang related. If you see the video, different
3 things like that. So, I filed the motion that morning.

4 Q Okay. And tell me a little bit about why you
5 believe that the gang activity was irrelevant to this
6 case, the shooting.

7 A If you watch the video and everything,
8 everything was involving the kids, that group from there,
9 whatever. The Defendant came up in the cul-de-sac. He
10 had nothing to do with it. The it evolved from there.
11 Like you were saying, the video showed the activity that
12 people thought was relevant, they didn't know about this
13 other stuff. And to me, it was totally irrelevant.
14 That's when I went up and actually typed the motion that
15 morning and then we filed it.

16 Q Okay. Were there ever any in chambers
17 discussion about this gang activity with you, Mr. Gowdy,
18 the defense team and Judge Cole?

19 A Oh, we did several times. At the beginning,
20 that Monday morning and throughout the trial. Mr. Brannon
21 kept trying to bring up -- Mr. Brannon is a very -- he
22 argues very hard for his clients. He fights constantly,
23 he revs up very well. He continued on trying to bring in
24 evidence he thought was relevant to the case.

25 Q So, aside from these three separate incidents

BARRY BARNETTE-CROSS BY MS. BLANCHETTE

1 during the trial when he argued for the gang evidence to
2 come in, he also argued in chambers?

3 A Yes, ma'am.

4 Q And I realize that you didn't make the closing
5 argument in this case, Mr. Gowdy actually did.
6 Unfortunately, he's not hear to testify. Did you hear any
7 burden shifting in Mr. Gowdy's closing?

8 A No, ma'am.

9 Q Okay. There's been allegations that the
10 solicitors misrepresented facts to The Court and the jury.
11 Did you ever misrepresent any facts to The Court and the
12 jury?

13 A No, ma'am.

14 Q Okay. Did you hear Mr. Gowdy misrepresent any
15 of those facts?

16 A No, ma'am.

17 Q Okay.

18 Nothing further. Thank you, answer any
19 questions that counsel may have for you.

20 CROSS-EXAMINATION

21 BY MS. BLANCHETTE:

22 Q Solicitor Barnett, were you present for
23 Mr. Brannon's testimony today?

24 A Yes, ma'am.

25 Q Okay. He testified that the solicitor's office

BARRY BARNETTE-CROSS BY MS. BLANCHETTE

1 was on notice that the defense intended to use a gang
2 expert and go into gang testimony evidence for months or
3 for who knows how long leading up to trial. Were you
4 aware of that prior to the morning of when you filed the
5 motion?

6 A No, ma'am. What happened was I'm sure Trey and
7 I talked a lot about this case. I actually came in to
8 help Trey with it. Derek Bulsa was the other solicitor
9 maybe more involved at one point. But I actually tried it
10 with him. Like I said, that Monday morning it became
11 obvious that they were going to do it so we felt like we
12 needed to file the motion at that point.

13 Q Okay. I just want to ask you briefly, you're
14 familiar with the transcript and the record in this case;
15 is that correct?

16 A I've not reviewed the transcript. Obviously, I
17 was in the trial but have not reviewed the transcript.

18 Q Okay. We admitted today two copies of two
19 videos that were introduced as videos that were taken from
20 Phoenix Fielder's phone. During the argument regarding
21 this phone evidence, the solicitor's office states that
22 you all had that entire SIM card from Phoenix Fielder.
23 We've admitted Applicant's No. 3. There was an evidence
24 envelope that I was provided and it says it's a CD with
25 two videos. My question, actually, is kind of simple. Do

1 you know if you all had two videos or if you had the
2 entire SIM card in this case?

3 A I think we had two videos, ma'am.

4 Q Okay.

5 MS. BLANCHETTE: Your Honor, I have no further
6 questions of this witness.

7 THE COURT: Okay, thank you.

8 Any redirect, ma'am?

9 MS. GIOVANOLI: No, Your Honor.

10 THE COURT: All right, Mr. Barnette, you may
11 step down. I appreciate it.

12 MS. GIOVANOLI: May the witness be excused?

13 THE COURT: Yes, ma'am.

14 MS. GIOVANOLI: Actually, Your Honor, they're
15 subpoenas.

16 THE COURT: Anything further from The State?

17 MS. GIOVANOLI: The State would rest.

18 THE COURT: All right, I'll be happy to hear
19 argument and receive any case law that you want to
20 hand up as well.

21 MS. GIOVANOLI: I'm sorry, Your Honor, I know
22 that I just -- I'm terribly sorry, I did not address
23 the affidavit that has been admitted as State's
24 Exhibit 1. If figure it's part of the record and you
25 will be able to read it.

1 THE COURT: Yes, ma'am. And you can address if
2 you want to give a brief argument, you can address it
3 at that time as well.

4 MS. GIOVANOLI: Okay, thank you.

5 THE COURT: All right, Ms. Blanchette.

6 MS. BLANCHETTE: Your Honor, you may not believe
7 it at this time but I would like to be rather
8 succinct. So, I will stick to the issue that I hope
9 has gotten The Court's attention, if you have any
10 questions in anything that I presented today, I'll be
11 happy to address those as well.

12 THE COURT: Okay.

13 MS. BLANCHETTE: But I rather be in a situation
14 where I can answer questions you actually have then.
15 on a half hour about things you don't care to listen
16 to.

17 THE COURT: Yes, ma'am.

18 MS. BLANCHETTE: Honestly, we presented a number
19 of issues, I hope that The Court will consider those
20 issues. But the primary issue that you hear us
21 talking about today is the gang affiliation evidence
22 testimony. We obviously called an expert to start
23 out. And we have made a number of separate
24 allegations. But the primary thing that I believe it
25 boils down to is actually set forth in The State's

1 brief on appeal. And how they argue so extensively
2 that the defense failed to make this issue relevant.
3 And that's exactly what The court of Appeals found.
4 And I think there's two reasons why the defense
5 failed to make the issue relevant and why it resulted
6 in Judge Cole's ruling clearly on relevancy and The
7 Court of Appeals upholding that ruling.

8 Was one, they failed to proffer the testimony of
9 Mr. Sobers. Obviously, we can't go back and do it
10 exactly as it would have been done that day but I
11 tried to do my best today to give you a picture of
12 what that would have looked like and how we could
13 have tied that relevancy together. Not only for
14 Judge Cole but then maybe, subsequently, for the
15 Court of Appeals. The second thing that we attempted
16 to do today was to call an expert to offer more
17 testimony to make it relevant. Clearly, the Judge
18 did not think that the testimony of Rocky Watts was
19 one, qualified in nature; or two, relevant to answer
20 that questions for him.

21 Mr. Brannon clearly testified that the defense
22 hinged on self-defense but more importantly, this of
23 the gang testimony and evidence. He repeatedly
24 argued that throughout the course of the trial him
25 and Mr. Langley and as Solicitor Barnett said, it was

1 argued in chambers. That was the essential issue to
2 this case and we submit that's the essential issue to
3 this PCR. It was counsels failure to properly
4 address that issue, properly prepare on that issue.
5 And then properly utilize an expert and Mr. Sobers to
6 tie up the issue of relevancy.

7 I do have a number of cases, that deal with
8 different issues that we've presented throughout the
9 course of the day.

10 THE COURT: Yes, ma'am.

11 MS. BLANCHETTE: I'll be happy to state those as
12 slow as I can in the record.

13 THE COURT: Do you have copies of them?

14 MS. BLANCHETTE: I do. And I have a copy of
15 everyone for you.

16 THE COURT: Okay, good enough.

17 MS. BLANCHETTE: Okay. The first case is State
18 vs. Made [ph]. And if I might flip here just very
19 briefly, Your Honor. I outline the cases that deal
20 with Brady violations of prosecutorial misconduct.
21 There is some confusion in the record as to what was
22 going on with that phone and what was turned over.
23 And the primary issue of concern to me there though
24 is that that issue was not raised on appeal. As
25 Mr. Brannon said, he raised the issue, he made the

1 motion, it was not raised on appeal.

2 But I'm handing up State vs. Made, State vs.
3 Cheesboro, State vs. Kennedy and then State vs.
4 Jackson, which was actually cited by counsel in his
5 argument for the court. As well as State vs. Hutton.
6 Then State vs. Reese, I'm handing up regarding the
7 golden rule argument that we addressed just briefly
8 today. I also have a copy of State vs. Daniels that
9 you heard me reference as to the objectionable
10 comments in the courts opening and close. And then
11 State vs. Jones was a case that I found and cited in
12 2013. And that deals with gang testimony and gang
13 evidence in the courts opinion on that here in the
14 South Carolina. So, I'll just be handing those up as
15 resources for The Court.

16 THE COURT: Okay. Thank you. You can bring
17 them up.

18 MS. BLANCHETTE: I promise it's just paper.

19 THE COURT: Thank you.

20 MS. BLANCHETTE: And as I said at the beginning,
21 Your Honor, I am happy to continue to talk and to
22 provide you more argument but unless there's specific
23 questions you have, I believe you've heard the
24 testimony today, I know that you'll consider the
25 record and we've put up all our allegations fort in

1 the amendment.

2 THE COURT: Okay, I'm good. Thank you very
3 much, I appreciate it.

4 Ms. Giovanoli.

5 MS. GIOVANOLI: Thank you, Your Honor. And I
6 will try to be as succinct as possible as well. It's
7 been almost seven years since this trial. And that's
8 a long time to conjure up ideas of how the case could
9 have been tried differently or even better.

10 Ms. Blanchette represent the Applicant since May of
11 2015. So, that's been two years of picking apart
12 performance of four extremely and competent, talented
13 lawyers and come up with theories of how they could
14 have defending the case better. She spent two years
15 doing just like that. I've calculated, in my reading
16 of the case, about 26 allegations. That's a lot of
17 allegations, it's a little bit overwhelming. And I
18 have the upmost respect for Ms. Blanchette, she is a
19 great advocate, she's thorough, she's extremely
20 intelligent, thoroughly prepared.

21 But what I want to make that The Court doesn't
22 lose sight of is the sheer volume of allegations and
23 the evidence presented in this case is the standard
24 by which we measure counsels performance. That
25 standard has its roosts deeply embedded in

1 Strickland. And the standard is reasonableness. The
2 standard is not could counsel have done better, could
3 counsel have done differently? Hindsight can do
4 wonderful things for a PCR applicant. But we have to
5 question counsel's representation at the time of
6 trial. With all of the information known to him at
7 the time of trial. And it's an objective reasonable
8 standard.

9 We can't let the distorted effects of hindsight
10 prevent a fair assessment of counsel's at the time of
11 trial. So, we don't ask should Mr. Brannon have
12 called Dr. Britz to testify as an expert, instead of
13 Rocky Watts, rather than we question, was it
14 reasonable to call Rocky Watts as an expert to
15 testify? That's just one example.

16 PCR is an avenue for one to receive a new trial
17 who was not afforded a fair trial. In this case, I
18 submit to you this Applicant received a fair trial.
19 He was represented by three experienced, capable and
20 intelligent trial attorneys, Doug Brannon, Ryan
21 Langley and the late Brac Turnipseed. He was
22 prosecuted by the former Solicitor of Spartanburg
23 County and the former and the current solicitor for
24 Spartanburg County, Barry Barnette. The Honorable
25 Derham Cole resided over the trial. And on appeal he

1 was appointed the Chief Appellate Defender, Robert
2 Dudek. And Senior Assistant Deputy Attorney General,
3 Melanie Brown represented the state. Current Chief
4 Judge Lockemy wrote the opinion confirming The
5 Applicant's conviction, which joined in concurrence
6 by current Justice Few and Judge Geathers. This
7 trial was fair start to finish.

8 And addressing the specific allegations, I won't
9 go through and respond to each one unless Your Honor
10 has a specific question. But with regards to the
11 gang affiliation, this issue was argued ad nauseam at
12 the trial level. There were three separate incidents
13 during the trial in which trial counsels argued that
14 the gang evidence was relevant and it should have
15 been admitted. The fact of the matter is it wasn't
16 relevant.

17 The Applicant testified at trial and today, that
18 the bad blood between him and Trey, because he had
19 called Trey's sister a bad word, caused the
20 Confrontation. And after the confrontation, Trey was
21 going to attack him and fight him. That's where he
22 derived his fear and that filtered through to the
23 self-defense claim that he grabbed his gun and fired
24 it into the mob that attacked his car. There was no
25 evidence, other than The Applicant's testimony, that

1 he knew these guys were affiliated in a gang, that
2 tide relevance of gang membership, gang activity to
3 the actually shooting.

4 Furthermore, we would argue that The Applicant
5 simply failed to meet the burden of proof of proving
6 any deficiency on the part of Doug Brannon, Ryan
7 Langley or the late Brac Turnipseed. Like I said,
8 they've argued this issue ad nauseam, Judge Cole was
9 going to keep it out. Even if they had proffered the
10 Defendant's testimony in a in-camera hearing, Judge
11 Cole could have still kept it out, it's improper
12 character evidence. As well as -- I apologize, the
13 thought just escaped me. And also, based on Rule 403
14 being overly prejudicial and that outweighing the
15 probative value.

16 If we go to the prejudice prong, if Your Honor
17 does find deficiency on the part of counsel for
18 failing to proffer the testimony of The Defendant in
19 a in-camera hearing, there's no -- there's absolutely
20 no prejudice here. This case, it definitely hinged
21 on credibility. And had The Defendant gotten up and
22 testified that the witnesses and the victim were a
23 member of the gang, it would not have improved his
24 credibility. He was very inconsistent in his
25 statements to law enforcement versus what he

1 testified to at the trial. He could not explain why
2 his car was abandoned, with no tag. He could not
3 explain where his cell phone went to corroborate his
4 testimony about these phone calls. He could not
5 explain who took him to Charlotte. He lied on the
6 stand that he had turned himself. The Applicant
7 simply was not credible. So, no amount of improper
8 character evidence or gang evidence was going to
9 change the juries mind that this Applicant was not
10 credible. So, Your Honor, we would argue that the
11 second prong would not be met as well.

12 THE COURT: Thank you, very much, I appreciate
13 it.

14 MS. BLANCHETTE: Thank you.

15 THE COURT: Okay, counsel, I'll take it under
16 advisement. And I'll issue instructions to one of
17 you to draft an Order within probably by the end of
18 the week. If not by the end of the week, surely by
19 the end of next week. Okay.

20 MS. GIOVANOLI: Thank you, Your Honor.

21 THE COURT: I appreciate it.

22 (WHEREUPON, the proceedings were concluded.)
23
24
25

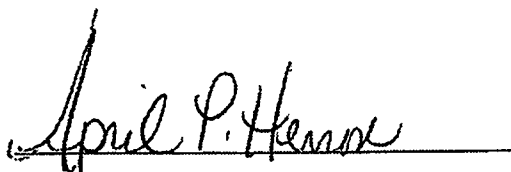
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, APRIL P. HERRON, Official Court Reporter for
the Thirteenth Judicial Circuit of the State of South
Carolina, do hereby certify that the foregoing is a true,
accurate and complete Transcript of Record of the
proceedings had and evidence introduced in the trial of
the captioned case, relative to appeal, in the Court of
Common Pleas for Spartanburg County, South Carolina, on
the 27th day of June, 2017.

I do further certify that I am neither of kin,
counsel nor interest to any party hereto.

March 12, 2018

A handwritten signature in cursive script, reading "April P. Herron", is written over a horizontal line.

APRIL P. HERRON, Court Reporter

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Rashaun Jamine Sobers, #342645,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
IN THE SEVENTH JUDICIAL CIRCUIT

RECEIVED

Case No.: 2014-CP-42-0640 SEP 29 2017

S.C. SUPREME COURT

ORDER OF DISMISSAL
WITH PREJUDICE

2017 AUG -7 AM 11:15
MARCO ET AL. CIVIL

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Rashaun Jamine Sobers (Applicant) on February 21, 2014. The State (Respondent) made its return on September 8, 2014, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on June 27, 2017 at the Spartanburg County Courthouse. Applicant was present and represented by Tricia A. Blanchette, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. Applicant also called Dr. Marjie T. Britz and N. Douglas Brannon (Counsel), Esquire, to testify. Additionally, Respondent called Solicitor Barry J. Barnette, Esquire, to testify. This Court had before it a copy of the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's direct appeal records, the PCR application, Respondent's return, Applicant's PCR exhibits 1-12 and Respondent's PCR exhibit 1.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the

November 2009 term of the Spartanburg County Grand Jury for murder (2009-GS-42-6427). Applicant was represented by N. Douglas Brannon, Timothy Ryan Langley, and the late Brac Hylton Turnipseed, Esquires. The former Solicitor for the Seventh Judicial Circuit, Harold W. Gowdy, III, and current Solicitor for the Seventh Judicial Circuit, Barry J. Barnette prosecuted the case. Applicant proceeded to trial before the Honorable J. Derham Cole and a jury. On September 9, 2010, he was found guilty of murder. Judge Cole sentenced the Applicant to imprisonment for a term of life.

A timely notice of appeal was filed. Chief Appellate Defender for the South Carolina Commission on Indigent Defense, Robert M. Dudek, perfected the appeal. The South Carolina Court of Appeals affirmed the conviction and sentence. State v. Sobers, Op. No. 5146 (filed June 26, 2013). The Remittitur was returned on July 15, 2013.

In his original application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel, in that;
 - a. Counsel failed to properly object to the prosecution's prejudicial and continued attempts to mislead the jury with references to implied malice,
 - b. Counsel failed to object to the burden shifting jury instructions regarding inferring malice from use of a deadly weapon,
 - c. Counsel failed to fully investigate and present evidence for self-defense,
 - d. Counsel failed to properly object and preserve for appellate review the court's refusal to allow defense's expert to testify,
 - e. Counsel failed to properly object to State's evidence,
2. Ineffective assistance of appellate counsel, in that;
 - a. Appellate counsel failed to present issues of trial counsel's ineffectiveness in the appeal,
 - b. Appellate counsel failed to act as the State's adversary at a critical state of the proceedings,
3. Denial of due process, in that;
 - a. "Prosecutorial Misconduct for shifting the burden and misrepresenting the facts to the court,"
 - b. "Allowed the state to lesson burden or shift the burden to prove elements of crime."

On August 12, 2016, Applicant filed an Amendment to his PCR application to include the following allegations:

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:
 1. 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.
 2. 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.
 3. 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, Ins. 16-20, 568, Ins. 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.

RA?

1. Motion for Dismissal regarding the phone video evidence. Transcript pp. 45-55.
2. Objection to burden shifting during the State's closing argument. Transcript pp. 551-2.
11. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

On September 8, 2016, Applicant made another Amendment to his PCR application to include the following allegation:

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

At the evidentiary hearing, Applicant proceeded on all of his claims except he withdrew the allegation of ineffective assistance of trial counsel for failure to utilize witnesses and/or request a continuance to locate all necessary witnesses on the basis that Applicant could not locate or present the testimony of the alleged witness, Greg *****, for the PCR hearing.

FACTS ADDUCED AT TRIAL

On April 21, 2009, a group of young adults were gathered at Catina Smith's home. Ms. Smith's son, Ricky, and her nephew, Phoenix Fielder, lived in her home.¹ Phoenix testified that friends Travoiris "Trey" G*****, Shaquila "Quita" G*****, Jayquan Hardy, Devon D*****, and Sebastian Jaramillo were at the Smith home along with Phoenix and Ricky. (R. p. 37, line 23- p. 39, line 15). Phoenix testified that Devon hit Sebastian "in a playful way," then a short chase ensued with several people in the Smith car driving to a nearby cul-de-sac in the same general area. (R. p. 39, line 20 - p. 41, line 9). (See also State's Exhibit 4). Devon and Sebastian, now near the cul-de-sac, decided to "tap box." Phoenix used his cell phone to video record what he considered a harmless fight. (R. p. 41, line 9 - p. 42, line 22; p. 45, lines 21 - 24; p. 67, lines 18 - 25). A crowd of approximately fifteen (15) people gathered to watch the fight. (R. p. 69, lines

¹ Because there are individuals such as the Smiths who share a last name, Respondent will liberally use first names hereafter for the young adults to avoid confusion and identify the individuals clearly while also remaining in compliance with court redaction rules.

RB

15 - 22). Applicant Rashaun Jamine Sobers, a/k/a "RaRa," was in a burgundy Impala parked in the cul-de-sac. (R. p. 47, lines 4-11). Applicant was not involved with the fight, and did not participate in the fight. (R. p. 47, lines 12-21; p. 72, lines 17-22). Devon and Sebastian's fight began to turn "a little serious," with Sebastian besting Devon, (R. p. 46, line 10; p. 67, lines 1-3), but no one was "knocked down." (R. p. 72, lines 4-8). The two boys walked away from each other, but some members of the group encouraged both Devon and Sebastian to shake hands to put the fight behind them, and they did. (R. p. 46, line 18 - p. 47, line 3; p. 72, lines 2 - 15). Phoenix testified that after the expression of no-hard feelings and reconciliation, and in the midst of everyone laughing and leaving, he, Ricky, Sebastian, Quita and Trey got in the Smith car. Again according to Phoenix, as he was adjusting the music in the car, he heard a gunshot. Ricky "said to get down," prompting Phoenix to look up. Phoenix saw Applicant pointing a gun at the car. Phoenix testified that he ultimately heard "[t]hree to four" shots. Phoenix also testified that he knew Applicant prior to the shooting and was "a hundred percent" sure that it was him in the Impala, and that it was Applicant who fired a gun at the Smith car. (R. p. 47, line 25 - p. 49, line 25). Sebastian was hit just above the left ear, and "slumped over behind ... the driver's seat." (R. p. 51, lines 4-12; p. 238, line 2 - p. 239, line 17).

Phoenix's video was shown to the jury. (See State's Exhibit 4). In addition to the fight, the video shows that someone sat on Applicant's car prior to Sebastian and Devon's scuffle, but there was no incident from that action. (R. p. 65, lines 3-7). Further, Phoenix testified (and the video demonstrates) that Sebastian and Trey approached Applicant, while Applicant was in his car, prior to the scuffle between Sebastian and Devon. Testimony established that Trey asked why Applicant had called Trey's sister a name "a week or two weeks before...." (R. p. 44, line 25 - p. 45, line 20; p. 65, line 23 - p. 67, line 10; p. 340, lines 16-25). However, both Trey and

Sebastian walked away without incident, the scuffle between Sebastian and Devon occurred, and both Sebastian and Trey were in the Smith car before Applicant began shooting. (R. p. 44, line 25 - p. 45, line 20; p. 48, lines 9-25; p. 72, line 23 - p. 73, line 7). (See also State's Exhibit 4).

"Quita" also testified that there were no threats to defendant. She testified that the group in the car was simply talking among themselves when she heard Applicant shout "bust what, ask what," then he began shooting at them. Just prior to the shooting she had heard Jayquan "say now I'm ... going to ask him." R. p. 86, line 2 - p. 89, line 17).

Devon testified that he saw Jayquan walk up to Applicant's car after the scuffle between Trey and Sebastian, but before the shooting. Devon testified that Jayquan "was talking to him for a second. And then he walked back... then I seen - - I just seen fire coming out of" the burgundy vehicle. (R. p. 101, lines 2-23).

Trey testified that, prior to the fight between Sebastian and Devon, he and Sebastian walked over to Applicant's car and questioned Applicant about comments to Trey's sister. Trey testified that he saw Applicant had a gun in his car. Trey testified that Applicant denied calling Trey's sister a name, so the two shook hands and Trey and Sebastian walked away. Applicant was not involved at all in the subsequent scuffle between Sebastian and Devon. (R. p. 114, line 10 - p. 115, line 16; p. 134, lines 16-25). Trey testified that, after the fight, while the group was in the car, he saw Applicant actually back up and shoot toward the car. Applicant fired three or four times. (R. p. 115, line 17- p. 117, line 20).

Jayquan testified that he approached Applicant after the scuffle between Sebastian and Devon, and just before the shooting. Applicant was in his car. Jayquan asked "what was up with him and Trey getting into it. And he told me there wouldn't be any fighting." (R. p. 150, lines 21-25). Jayquan testified that he saw Applicant "reach[] to his right." Applicant stated for a

RA

second time that "there wouldn't be fighting ... then he pulled a gun out." Jayquan ran. Applicant fired several times. Jayquan testified he "heard about three gunshots." Jayquan did not believe the initial exchange with Applicant to be confrontational, and, in fact, thought they were "cool." However, according to Jayquan, "it just led from that to a bad situation quickly." (R. p. 151, line 1 - p. 153, line 23).

Ricky also testified that Applicant was not involved in the scuffle between Sebastian and Trey, and that Sebastian and Trey were already in the car before the shots were fired. He also confirmed that Applicant was the only one with a weapon, and that Applicant fired the shot that killed Sebastian. Further, he testified he heard Applicant's "car speed off" after the shooting. (Rr. p. 165, line 3 - p. 170, line 16)

Sebastian's body was still in the back seat of the Smith car when officers arrived. (R. p. 22, lines 1-6; p. 191, lines 7-20; State Exhibits 12 and 13). He had been shot "just above the external" canal of his left ear, indicating he was likely not even looking at the gun when he was shot. (R. p. 238, line 2 - p. 239, line 17). Officers found no evidence of any weapon in the Smith car. (R. p. 192, lines 9-16). There was no gunshot residue detected on Sebastian's hands. The lack of particles indicated he was not close to the weapon when Applicant fired the shot. (R. p. 228, line 9-p. 229, line 17). Examination of the Smith car and scene revealed indications that multiple shots were fired, including markings on the driver's side of the vehicle and on the asphalt near the car on the same side. (R. p. 204, line 9 - p. 207, line 13; p. 185, line 16 - p. 187, line 16). (See also State Exhibits 8, 9, 15, 16, 20, 21, 23, 24).

Applicant fled the jurisdiction after the shooting. He was apprehended by federal marshals several days later in Charlotte, North Carolina. (R. p. 224, line 10 - p. 225, line 7).

Applicant testified at trial and admitted the shooting. He testified, however, that after the Sebastian/Devon scuffle, Trey approached his car and attempted to engage him in a fight. Applicant testified that Trey "grabbed his shirt" through the driver's side window and others swarmed the car, opening the passenger side doors. He testified he shot out the front passenger door "because Trey had me." He denied shooting at anyone. (R. p. 258, line 6 - p. 263, line 22). Applicant testified that he was not scared of Trey after the initial confrontation about Trey's sister, and did not leave the cul-de-sac. He testified: "I didn't think they were going to do anything. Greg told them to leave me alone the first time ... They walked away. So I thought maybe everything was okay." (R. p. 264, lines 14-19; p. 275, lines 12-17). Greg was a friend of Applicant's who was also in the cul-de-sac. (R. p. 253, line 4 - p. 256, line 14). Applicant admitted speaking with officers after he was apprehended in Charlotte. He did not, however, tell them that he was mobbed or that Trey attempted to pull him from the car. Instead, he, admittedly, falsely stated to the officers that Trey had a gun. He also admitted in his testimony at trial that he made up that story "trying to protect" himself. (R. p. 272, line 9 - p. 274, line 22). (See also R. p. 317, line 12 - p. 318, line 20).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was prejudiced by any deficiency. A Post-Conviction Relief application is not a venue for questioning each and every decision of trial counsel. Rather, the

Applicant must demonstrate by a preponderance of the evidence that trial counsel was deficient. Applicant has failed to do so.

I. Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged 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 upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117 (citing Strickland). 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.

A. Gang Evidence

Applicant has made various allegations revolving around Counsel failing to get evidence of gang activity admitted at trial. The Court will address all the "gang" claims in this section:

- 1. 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.**

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. Counsel called sixteen-year veteran, retired law enforcement officer, Rocky Watts, who had experience in the field as an undercover narcotics officer, working alongside Spartanburg gangs, and as an officer in the violent crimes unit. Watts also ran his own private investigation company since retiring from law enforcement. It was reasonable for Counsel to believe Watts was qualified to testify as an expert on Spartanburg gang activity. See State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006) (Law enforcement investigator qualified as expert in area of gangs and gang activity.); State v. Liverman, 386 S.C. 223, 687 S.E.2d 70 (Ct. App. 2009), *aff'd*, but criticized (on unrelated grounds), 398 S.C. 130, 727 S.E.2d 422 (2012) (Law enforcement investigator and officer qualified as experts in field of gang activity); United States v. Thomas, 490 Fed.Appx. 514 (4th Cir. 2012) (Law enforcement detective qualified as an expert in gang history); United States v. Palacios, 677 F.3d 234 (4th Cir. 2012) (Law enforcement sergeant qualified as expert in field of gang activity). Even if Watts had never before been qualified as an expert in gangs, there is a first time for every expert witness and attempting to have him qualified for the first time does not constitute deficient performance.

Additionally, the trial judge did not allow for the qualification of Watts as an expert in gangs because he did not believe gang activity was relevant to the case. Regardless, Watts was

still allowed to proffer his testimony regarding gangs as a lay witness. This proffered testimony, in conjunction with that of five other witnesses, still did not establish the relevancy of gang activity to Applicant's shooting of the victim. Therefore, even if Counsel had been successful in qualifying Watts as an expert to testify on gang matters at the *in camera* hearing, the gang evidence was still inadmissible as not relevant.

At the PCR hearing, Applicant presented Dr. Marjie T. Britz. Dr. Britz testified as an expert, over Respondent's objection, in the general area of gangs. Based on her review of the entire record, including photos from the autopsy and Facebook photos of the victim and eye witnesses who testified for the State, she concluded, similar to Watts's conclusion, that the victim and eye witnesses were members or affiliated with a gang. 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. Regardless of their qualifications, gang evidence was simply not relevant to Applicant's shooting of the victim and therefore was properly excluded. This Court finds Counsel was not deficient in offering Rocky Watts as an expert witness. Even assuming *arguendo* Counsel was deficient in this regard, Applicant has failed to prove any prejudice.

2. 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.

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. While preparation of a defendant's testimony is important, it is incumbent upon a defendant to testify to the truth. In this case, Counsel testified he spent much time discussing Applicant's testimony with him. However, once a defendant takes the stand, Counsel cannot control his testimony. Counsel was not permitted to

present evidence of gang activity, and therefore, no amount of preparation on that topic would have benefitted Applicant or affected the outcome.

It was also reasonable not to use Applicant's testimony during the *in camera* hearing in light of the six other witnesses from whom Counsel proffered gang testimony. Counsel thoroughly argued the relevancy of the gang activity to Applicant's self-defense claim and on Applicant's behalf, but the trial court disagreed. Furthermore, it is unlikely that Applicant's self-serving testimony on gang membership during the *in camera* hearing, in addition to the six other witnesses, would have established relevancy or circumvented other evidentiary rules against character evidence and overly prejudicial evidence. See Rules 403 and 404, SCRE. Lastly, Applicant testified in support of his self-defense claim, that a "mob" attacked him, which the jury did not find credible. It is a stretch to say that had Applicant vilified the mob and victim as "gang members," the self-defense claim would have been more credible and thus resulted in a different outcome. Therefore, Applicant has also failed to prove prejudice.

3. 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.

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. Counsel testified he had been instructed multiple times by the trial judge that he was not permitted to say or elicit from a witness the word "gang" before the jury and doing so would result in a mistrial. Under this order, it was reasonable for Counsel to advise his client to use the word "mob" in lieu of "gang" during his testimony. Counsel was not deficient in this regard. Furthermore, this Court disagrees with Applicant's assertion that membership in a gang would have strengthened his testimony in

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support of self-defense that he was attacked by a mob of people. The jury was still presented with evidence that:

- After firing his gun, Applicant immediately fled the scene of the shooting, never calling 911.
- Applicant fled South Carolina to Charlotte, North Carolina.
- Applicant claimed he lost his cell phone at the scene of the shooting. Applicant's phone was turned off and never located after a search of the scene. Applicant did not help law enforcement locate the phone either.
- Applicant testified that he used the phone of a friend's neighbor to call his friend after the shooting. Applicant did not know the name of the owner of the phone he used. Therefore, law enforcement did not have the ability to corroborate this story with phone records.
- Applicant did not know the name of the two men who he claimed chauffeured him to Charlotte, North Carolina. Nor did he remember what kind of car he rode in to North Carolina.
- Applicant testified he turned himself in, but was impeached during cross examination based on the fact that the US Marshall Service and Spartanburg County Police went to North Carolina, found and arrested him on the street.
- Applicant testified he threw the murder weapon out the window of his friend's uncle's car somewhere in Charlotte, North Carolina. However, he never helped law enforcement locate it or show them where he threw it out.
- Applicant testified that he left his car, from which he fired the fatal shot, in a restaurant parking lot with the keys in the ignition. The car was found by law enforcement in a desolate power line field, abandoned with no license plate. Applicant testified that he assumed someone stole it and took it to the field, however, the only thing missing from his abandoned car was the license plate and not his aftermarket stereo or 22" chrome rims.
- Applicant gave an inconsistent statement to law enforcement following his arrest. At the time of the statement, Applicant instructed the investigator to draw a diagram of the scene to his specifications. When the investigator began to ask why his story and diagram did not match the evidence, Applicant requested an attorney.
- Applicant's first story to law enforcement was that Trey attacked him with a gun and the gun accidentally went off.
- At trial, Applicant testified that a "mob" attacked him so he reached for his illegally purchased gun and fired through his passenger door, which had been opened by a member of the mob. The bullet did not hit a member of the mob that presumably would have been coming into the passenger side or around his vehicle, but travelled out his passenger side door, across the cul-de-sac, into the car in which the victim sat and into the victim's head.

ps 7

- Applicant claimed his friend, Greg ***** (Little Greg) was there and had witnessed everything. However, Little Greg, could not be located to testify at trial.²
- Applicant admitted, numerous times, that he lied to law enforcement to avoid going to jail.
- Applicant testified the victim accompanied Trey in approaching his vehicle to confront Applicant about calling Trey's sister a bad name. Thereafter, the two walked away and the victim proceeded to have a physical fight with another boy. Applicant testified he was not part of this other fight. Applicant claimed the same mob surrounding the fight then attacked his car as Trey tried to pull him out of his car. However, the victim, who showed a propensity for violence in confronting Applicant the first time and engaging in a physical fight with someone else, then went back to sit in the car while the rest of mob attacked Applicant.
- Six eye-witnesses testified Applicant shot at the car in which the victim sat with no provocation. Applicant was the only person who testified he reacted in self-defense from an attack.

Applicant's self-defense claim was simply not credible. Applicant has failed to prove how presenting evidence that the members of the mob were in a gang would have made his self-defense story more credible. Applicant asserts that the gang membership strengthened the reasonableness of his fear of being attacked, however, this argument is not persuasive. The mob attack was not credible, regardless of gang membership or affiliation. Applicant has failed to prove prejudice resulting from any alleged deficiency.

This Court notes that not only was Counsel not deficient in his attempts to admit gang evidence, he scrupulously attempted to admit gang evidence on three separate occasions during the trial. First, he made a pre-trial argument for admitting evidence of gang activity. (Trial Tr. pp. 71-81). Second, on the following day, Counsel submitted a "Memo in Opposition to the State's Motion in Limine Regarding Gang Activity and Specific Instances of Gang Character Evidence of the Victim"³ with supporting case law and a brief argument to the trial court. (Trial Tr. pp. 157-158). Third, Counsel requested an *in camera* hearing in which he proffered the

² Likewise, Little Greg could not be located to testify at the PCR hearing.

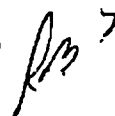
³ This memo was admitted during the PCR hearing as one of Applicant's exhibits.

testimony of six witnesses, including an attempt to qualify a very qualified witness as an expert in gangs, and further argued for the admission of gang evidence. (Trial Tr. pp. 430-492). Counsel fought long and hard on this issue and went above and beyond the representation that is minimally required of a criminal defense attorney.

Applicant complains that Counsel did not establish relevancy for the introduction of the "gang element." The record demonstrates that Counsel clearly articulated the basis for relevancy. The trial judge simply disagreed that it was relevant in the matter. This Court takes note of the Court of Appeals' language in affirming the conviction. That language does not suggest that Counsel was deficient in establishing relevancy. That language simply suggests that one basis for argument was not before the appellate court. However, Applicant has failed to establish that additional proffered testimony would have changed the trial or appellate courts' rulings. In fact, given the amount of evidence proffered, the amount of evidence entered, and the attempts to establish relevancy by Counsel, it is dubious to suggest that the trial judge would have allowed the evidence under any argument.

B. Failure to object

Applicant has made a number of allegations revolving around Counsel failing to object at various times during the trial. Counsel's failure to make any conceivable objection is not deficient *per se*. Objections are calculated to achieve a tactical end in keeping with a party's theory of the case. Counsel, on the whole, reasonably calculated his objections to achieve the stated end. In any trial, decisions of Counsel can be, and will be, questioned. However, tactical trial decisions that do not serve to acquit the defendant do not, by definition, prove deficiency. In this matter, Counsel's performance was more than adequate and clearly within the standards



of professional conduct. The Court will specifically address all the "failure to object" claims in this section:

1. Ineffective assistance of trial counsel for failure to object to burden shifting jury instructions regarding inferring malice from use of a deadly weapon.

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. Applicant has failed to prove, either by presentation of evidence or from support of the record, that Counsel was ineffective for failing to object to a jury instruction regarding inferring malice from the use of a deadly weapon. No such jury instruction was given in this case.

2. Ineffective assistance of trial counsel for failure to properly object to the prosecution's prejudicial and continued attempts to mislead the jury with references to implied malice.

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. Nothing presented at the PCR hearing or in the record supports the assertion that Counsel was deficient, or Applicant was prejudiced by any deficiency, for not objecting to attempts to mislead the jury with references to implied malice by the prosecution, as no such attempts were made by the prosecution.

3. 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, lines 16-20, 568, lines 14-18. See State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012).

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. As an initial matter, State v. Daniels, was decided in 2012 – approximately two years after Applicant's trial. Our Courts have "never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993).

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“While our preservation rules require that objections to the admissibility of evidence be specific, see State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011), they most certainly do not require clairvoyance.” State v. Tapp, , 385-86, 728 S.E.2d 468, 473 (2012), reh'g denied (July 27, 2012). Counsel is not required to be clairvoyant to be effective, and therefore this Court finds Counsel was not deficient in not objecting to the trial court's comments about giving both parties a fair and impartial trial. Similarly, trial counsel in State v. Daniels did not object to the “truth and justice for all parties” comment made by the trial judge. Daniels at 255. The Court found the issue was unpreserved, but instructed the trial judge to remove any suggestion that the jury's duty is to return a “just” or “fair” verdict to all parties in *future* instructions. Id. at 256.

4. Ineffective assistance for failure to object to State's closing argument, Transcript p. 558, ln. 18 – p. 559, ln. 15.

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. Applicant alleges Counsel failed to object when the State violated the Golden Rule in its closing argument. “A Golden Rule argument asking the jurors to place themselves in the victim's shoes tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice.” State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006) overruled on unrelated grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). It is this Court's opinion that the State's closing argument did not rise to the level of a Golden Rule argument. The State did not ask the jurors to put themselves in the shoes of the victim. Rather, the State discussed facts about the victim and commented on how the jurors knew little about the victim, but given their own life experiences, they could imagine what hopes and dreams the victim had at 17 years old. These comments did not “tend to completely destroy all sense of impartiality of the jurors [...] arouse passion and

prejudice. Id. The comments were simply not objectionable. Therefore, Counsel was not deficient by not objecting.

Applicant also failed to prove how any alleged deficiency from not objecting could have prejudiced him. It is unlikely that had Counsel objected to this part of the State's closing, that the result of the trial would have been different, as there was overwhelming evidence of guilt.

5. Ineffective assistance of counsel for failure to properly object and preserve for appellate review the court's refusal to allow defense's expert to testify.

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. As an initial matter, the trial court did not allow the defense's expert to be qualified as an expert or to testify about gang related matters. This ruling occurred during an *in camera* hearing in which Counsel proffered testimony from Watts regarding local gangs. Watts could not testify as an expert witness in gangs because the trial court found gang association or activity was not relevant. Unless and until that ruling was reversed, whether the expert may have been qualified to testify on gang activity is of no consequence. Despite this, Counsel did preserve the issue of inadmissibility of gang evidence and the refusal to allow Watts to testify as an expert. In fact, these two issues were precisely the ones briefed on appeal and addressed by the Court of Appeals. Therefore, Applicant has failed to prove Counsel was deficient in failing to preserve this issue for appellate review.

6. Ineffective assistance of counsel for failure to object to the State's evidence.

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. Additionally, this Court finds this allegation is overly broad and vague. To the extent Applicant includes this allegation as a "catch-all" claim, this Court finds such a claim inappropriate for PCR. The Uniform Post-



Conviction Procedure Act requires applicants to "*specifically* set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50 (1985). (Emphasis added.) Applicant's trial lasted three days; the State presented a copious amount of evidence. Applicant fails to prove Counsel was deficient or that Applicant was prejudiced for not objecting to any specific part of the State's evidence.

C. Trial Preparation

Applicant has made several allegations revolving around Counsel's preparations for trial. The Court will address these "trial preparation" claims in this section:

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

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. Applicant's claim that Counsel failed to investigate the case is contradicted by the record of the trial. Three attorneys represented Applicant at trial, and all were well-prepared. Counsel Turnipseed's opening argument at the start of Applicant's trial coincided with the version of the facts as given to him by Applicant. (Trial Tr. p. 100). Counsel Brannon testified he met with Applicant dozens of times in which they reviewed discovery, discussed Applicant's version of events, discussed trial strategy, and prepared Applicant to testify. Counsel Brannon also went to the scene of the crime with his investigator, Pete Hice. The record is replete with demonstrations of just how well Counsel had investigated and how well-prepared they were.

Applicant claims that Counsel waited until the last minute to send his investigator to the scene of the shooting, during trial, to reenact Applicant's car exiting the cul-de-sac. Counsel also asked the judge to allow the jury to go to the scene. (Trial Tr. p. 431). That request was denied, so Counsel sent Investigator Hice to the scene to perform the cul-de-sac turn. Counsel testified

that his reason for doing this was because Investigator Lorin Williams was asked about how a car could exit out of the cul-de-sac as Applicant had described. Investigator Williams testified that a vehicle would not be able to exit out of the cul-de-sac as Applicant described he did without backing up at least once. (Trial Tr. pp. 426-427). Investigator's mid-trial re-enactment was able to disprove this assertion. Sending his investigator out to the scene during trial was not a sign of lack of preparation, but rather scrupulous advocacy to cover all bases despite a difficult case to try. Therefore, Applicant has failed to show Counsel was deficient in his preparation and investigation of Applicant's case.

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

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. Applicant claims Counsel was ineffective because he failed to utilize Applicant's testimony at the Jackson v. Denno hearing. At the Jackson v. Denno hearing, Investigators Bryant and Williams testified that Applicant was advised of his Miranda rights and signed a waiver form. Applicant proceeded to give a statement to investigators and instructed them to draw a diagram of the scene. The investigators testified that when they started asking for more detail and pointing out inconsistencies in Applicant's story, Applicant requested an attorney and the questioning ceased. Applicant did not testify during the hearing. Counsel testified at the PCR hearing that he did not put Applicant on the stand to testify because Counsel never had any indication that Applicant's statement to law enforcement was not voluntary. Counsel also testified that he wanted the diagram made with Applicant's statement because he believed the diagram supported Applicant's trial testimony about the mob attack and the manner in which he shot toward the victim's car.

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This Court finds Counsel was not deficient in not calling Applicant to testify during the Jackson v. Denno hearing. Counsel had no reason to offer Applicant's testimony nor has Applicant shown how his testimony would have changed the outcome of the case, or even the Jackson v. Denno hearing. Furthermore, Counsel made a strategic decision that he wanted the statement admitted because the diagram supported Applicant's version of events. This Court also finds Applicant was not prejudiced by this strategic decision.

Applicant also contends Counsel was ineffective for failing to properly prepare him for cross examination. At trial, Applicant testified he had never been in trouble before. This allowed the State to impeach Applicant based on a 2007 arrest. At the PCR hearing, Applicant testified he had been arrested, but not convicted. Counsel testified he met with Applicant dozens of times. In those meetings, Counsel prepared Applicant as best as he could. Counsel testified that he cautioned Applicant on multiple occasions not to bring up anything about his criminal history. Unfortunately, Counsel cannot control the witness's testimony once he or she takes the stand. No amount of preparation can avoid any potential, damaging testimony. Applicant's assertion to the contrary is without merit. Applicant also admitted multiple times during cross examination that he lied to law enforcement to avoid jail. Counsel admitted that no amount of preparation can prepare a defendant for a cross examination by Trey Gowdy. Counsel also testified he did not object when Solicitor Gowdy was hammering on the fact that Applicant lied to the police, because objecting to the State's revelation that Applicant lied looks bad to a jury. This is an accurate assessment and a sound strategic decision not to have objected. Counsel was not deficient for withholding his objection.

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D. Trial Performance

Applicant has made various allegations revolving around Counsel's performance at trial.

The Court will address all the "trial performance" claims in this section:

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

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. Applicant claims Counsel was ineffective in his handling of the pre-trial motion to dismiss based on videos recovered from an eye-witness's cell phone where the cell phone was never provided to the defense to analyze. Counsel testified that he was provided with two videos in discovery that were taken from the State's witness's cell phone. Counsel testified, and the record demonstrates, that Counsel argued he was entitled to the entire cell phone so that he could retain an expert to analyze the phone for additional videos that could potentially exonerate Applicant. Counsel cited to State v. Jackson⁴ in support of his argument. The trial judge found the cell phone itself was not evidence and that Applicant could not establish there was any exculpatory or material evidence on the phone and denied Applicant's motion. (Trial Tr. pp. 54-55).

Counsel made the best argument possible and cited the only favorable case available to him. However, this Court agrees with the trial court in that the cell phone used to record the videos was not evidence. The videos recorded were the evidence and were provided to Applicant. Counsel was not deficient in his handling of the motion to dismiss. Furthermore, the videos actually strengthened Applicant's self-defense claim in that they showed the victim beating up another young man minutes prior to the shooting.

⁴ 302 S.C. 313, 396 S.E.2d 101 (1990).

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

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. Once again, this Court finds this allegation is overly broad and vague. At the PCR hearing, Applicant claimed this allegation was a "catch-all" claim; this Court finds such a claim inappropriate for PCR. The Uniform Post-Conviction Procedure Act requires applicants to "*specifically* set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50 (1985). (Emphasis added.) Counsel presented the best defense based on the version of facts as told to him by Applicant – self-defense. Based on Applicant's testimony, there is no other valid defense for the shooting. Counsel would have had to alter Applicant's story to support any other defense. Additionally, Applicant has failed to present evidence of any other reasonable defense Counsel failed to pursue.

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

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. At trial, Applicant testified on direct that he shot the victim with an illegally purchased gun. Counsel asked questions to Applicant on direct examination to reveal that Applicant had purchased the gun because of multiple burglaries to his home and other homes within the neighborhood. Counsel testified the reason for bringing out the fact that Applicant owned an illegal gun during direct examination was his way of getting "out in front of the bullets," instead of that fact coming out on cross-examination. Counsel's proactive approach was indeed sound and not deficient.

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

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. There is no indication from the record or the evidence presented at the PCR hearing that Counsel failed to fully cross-examine and impeach any of the State's witnesses. Additionally, Counsel testified that he spent days going over discovery and statements made by the State's witnesses for the purpose of cross-examining and impeaching them. Counsel testified that cross-examination is the most fun part of a trial. This testimony was credible and was clearly demonstrated at trial. This Court finds Counsel was well prepared to cross-examine and impeach the State's witnesses and executed those tasks with precision and professionalism.

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

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. Applicant claims Counsel was ineffective for not requesting a jury charge on "prior difficulties." On the record, Counsel requested a charge on self-defense and the lesser included offenses of voluntary and involuntary manslaughter. At the PCR hearing, Counsel recalled including a written prior difficulties charge request to the court, but no such request was made on the record. As to prior difficulties, Applicant testified at trial that there were no prior difficulties between him and the victim or the rest of the group present at the shooting. He testified that the victim and Trey approached his car and Trey simply asked Applicant why Applicant called Trey's sister a name. (Trial Tr. p. 340, lines. 24 – 25). Applicant testified that Trey and the victim did not threaten him and he was not



scared because Trey simply asked about his sister and then Little Greg calmed⁵ the situation. (Trial Tr. p. 341, lines. 6 – 20; p. 360, lines. 12 – 17; p. 360, lines 25 – p. 361, lines 3; p. 371, lines 21 – p. 372, lines 3). Applicant did not feel the need to leave after the harmless encounter. (Trial Tr. p. 361, lines 4 – 8; p. 372, lines 4 – 16).

It was Applicant's own testimony at trial that revealed no basis for a jury instruction on prior difficulties. According to Applicant, Trey and the victim non-threateningly asked Applicant why he called Trey's sister a name weeks before. Prior to this encounter, Applicant did not personally know either Trey or the victim. Because the facts did not support a charge on prior difficulties, whether Counsel actually made such a request off the record is irrelevant. This Court finds Counsel was not deficient in this regard. Furthermore, Applicant cannot prove he was prejudiced by a lack of a prior difficulties jury instruction.

E. Appellate Counsel

Applicant has made allegations revolving around Appellate Counsel's performance. The Court will address these "appellate counsel" claims in this section:

- 1. Ineffective assistance of appellate counsel for failure to raise all meritorious issues on appeal; specifically the motion to dismiss regarding the phone video evidence and the burden shifting during the State's closing argument.**

This Court finds that Applicant has failed to meet his burden in proving Appellate Counsel was deficient or that he was prejudiced by any deficiency.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). Appellate counsel has a professional duty to choose among potential issues

⁵ The transcript reflects that Greg "calmed" the situation, though Applicant admitted in his testimony that there were no threats or acts of violence, and further admitted that he did not fear that "they were going to do anything."

according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, 302 S.C. at 537. When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Ibid.

Applicant claims Appellate Counsel was ineffective for failing to brief the issue of the denial of Applicant's pre-trial motion to dismiss. As discussed above, Counsel made a pre-trial motion to dismiss based on the State failing to turn over a cell phone used by an eye witness to film events leading up to the shooting. The trial judge found the cell phone itself was not evidence and that Applicant could not establish there was any exculpatory or material evidence on the phone and denied Applicant's motion. (Trial Tr. pp. 54-55). In his affidavit⁶, Appellate Counsel explains his reasons for not briefing the issue of the motion to dismiss. These reasons include the likelihood of success on that issue, the defense had not shown bad faith as to the returning of the cell phone to its owner, that any assertion the phone contained exculpatory evidence was speculative, the phone owner who filmed the videos was present to testify, the consideration of the ultimate penalty of dismissal and the reasonableness of the judge's denial of

⁶ State's Exhibit 1 admitted at the PCR hearing was an affidavit by Appellate Counsel, Robert Dudek.

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the motion. This Court agrees with Appellate Counsel that the issue was not likely to be successful. Therefore, Appellate Counsel was not deficient for not raising the issue on appeal.

Applicant also claims Appellate Counsel was ineffective for failing to raise the issue of burden shifting during the State's closing argument. Counsel objected when the State commented on Applicant's failure to present Little Greg as a witness to support Applicant's version of events. (Trial Tr. p. 552). Appellate Counsel stated in his affidavit that this would have been improper argument had the defense not put up witnesses in its defense. See State v. Bamberg, 270 S.C. 77, 81, 240 S.E.2d 639, 640 (1977) ("While this Court has indicated "grave doubt" about the propriety of a charge on the drawing of an adverse inference from failure to produce a material witness, we have held it to be proper argument for an attorney") (citations omitted). Appellate Counsel elaborated he did not believe it was improper commentary since it was not commenting on Applicant's right to remain silent or his right to put the state to its burden of proof without putting up a defense. Appellate Counsel further claims the standard for reversal of even a very bad closing is high. This Court finds Appellate Counsel's reasoning for not briefing this issue not only reasonable, but sound. Therefore, Appellate Counsel was not deficient.

CONCLUSION

The remainder of Applicant's allegations are without merit. Applicant essentially questions each and every action or inaction of trial counsel. A Post-conviction relief application is not a venue for second-guessing decisions of trial counsel. Applicant has the burden of proving by a preponderance of the evidence that Counsel was deficient and that the deficiency was prejudicial. Applicant has failed to do so.

This Court finds that Applicant has failed to prove any deficiencies on the part of trial or appellate counsel and further, Applicant has failed to prove any prejudice from any alleged deficiencies in Counsel's representation of him. Therefore, as Applicant has failed to meet his burden of proof in this post-conviction relief action, his application is denied and dismissed with prejudice.

Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice. This Court also finds that Applicant failed to present evidence as to the other allegations, and thus, this Court deems the other allegations abandoned.

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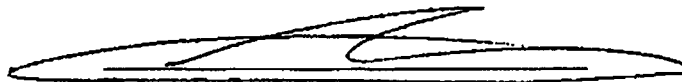
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This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 2 day of Aug, 2017.



ROBIN B. STILWELL
Presiding Judge
Seventh Judicial Circuit

GREENVILLE, South Carolina

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J. ROPE BLANCHET
CLERK

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
DOCKET NO.: 2014-CP-42-0640

Rashaun Jamine Sobers, 342645,)
Applicant,)

v.)

State of South Carolina,)
Respondent,)

MOTION PURSUANT TO
RULE 59(a) & (e), SCRCP

Pursuant to Rule 59(a) and (e) of the South Carolina Rules of Civil Procedure, Applicant would move before this Court for relief as follows.

PROCEDURAL HISTORY

Applicant was indicted during the November 2009 term of the Spartanburg County Grand Jury for murder (2009-GS-42-6427). Applicant was represented by N. Douglas Brannon, Esquire, Brac H. Turnipseed, Esquire, and Timothy Ryan Langley, Esquire.

On September 7, 2010, Applicant was called to trial in front of the Honorable J. Derham Cole and a jury at the Spartanburg County Courthouse. On September 9, 2010, Applicant was found guilty as indicted. Judge Cole sentenced Applicant to term of life, from which a direct appeal was timely filed.

Robert M. Dudek, of the South Carolina Office of Appellate Defense, perfected Applicant's appeal. Thereafter, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Sobers, Op. No. 5146 (S.C. Ct. App. filed June 26, 2013). The Remittitur was issued on July 15, 2013.

On February 21, 2014, an Application for Post Conviction Relief was timely filed. Respondent submitted a Return on September 8, 2014. Applicant, through counsel, submitted an Amendment to his Application on August 16, 2016 and September 8, 2016.

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On June 27, 2017, an evidentiary hearing was convened at the Spartanburg County Courthouse in front of the Honorable Robin B. Stilwell. Applicant was present and represented Tricia A. Blanchette, Esquire. The State was represented by Valerie Garcia Giovanoli, from the Office of the Attorney General.

At the evidentiary hearing, Applicant was called to the stand, along with Dr. Marjie T. Britz¹ and N. Douglas Brannon, Esquire. The State called Barry J. Barnette, Esquire, to the stand. The Court had before him an outline of the issues and transcript citations prepared by Applicant's counsel, Applicant's Exhibits 1-12, Respondent's Exhibit 1, the records of Spartanburg County Clerk of Court and South Carolina Department of Corrections, the trial transcript, the records from the direct appeal and the post conviction relief filings.

On August 2, 2017, an Order of Dismissal was issued, which was filed on August 7, 2017. Applicant, through counsel, received a copy of the filed Order from the Clerk of Court via email dated August 8, 2017 and a paper copy from the Office of the Attorney General on August 15, 2017, from which this Motion follows.

ARGUMENT

In Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), the South Carolina Supreme Court made it clear that a post-conviction relief judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. See also S.C. Code Ann. § 17-27-80. Therefore, Applicant would respectfully request that this Court ensure that specific findings of fact and conclusions of law are entered and that the arguments and testimony of each witness is properly addressed. Applicant concedes that the standing Order provides a reading for each issue raised, but Applicant submits that the testimony and evidence offered that was

¹ Pursuant to prior agreement of the parties and permission of the Court, the testimony of Dr. Britz was taken over the phone.

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favorable to Applicant is not properly addressed under each issue heading. Applicant would urge the Court to thoroughly address each issue raised and would further urge the Court to reconsider the reasoning used to deny each issue raised.

Applicant would respectfully ask that the Court review the evidentiary hearing transcript prior to reaching a final ruling and/or review the testimony and evidence offered and reconsider the standing Order. Applicant asks the Court to find his testimony credible and to further find that the testimony of Dr. Marjie Britz and N. Douglas Brannon, Esquire, clearly support the granting of relief.

Applicant would ask the Court to reconsider each issue raised, but notably Applicant would submit that he met his burden to show that counsel was ineffective in his handling of the "gang evidence." It appears the Court has reasoned around the clear language in the appellate decision that spells out the deficient performance of counsel for failing to utilize Applicant to establish that Applicant was "more fearful because the mob was part of a gang." State v. Sobers, Op. No. 5146 (S.C. Ct. App. filed June 26, 2013). The standing Order makes it clear that the Court has chosen to focus on the testimony elicited at trial and has failed to consider the testimony elicited at the evidentiary hearing. Applicant beseeches the Court to consider the testimony and evidence offered at the evidentiary hearing and find that a new trial must be granted to ensure that Applicant has been afforded his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution

In conclusion, Applicant would request that the Court review the full evidentiary hearing transcript, reconsider the standing Order of Dismissal, and/or rehear Applicant's case pursuant to Rule 59(a) and (e), SCRCP.

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Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
Attorney for Applicant

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Rashaun Jamine Sobers,
Applicant,

vs.

State of South Carolina,
Respondent.

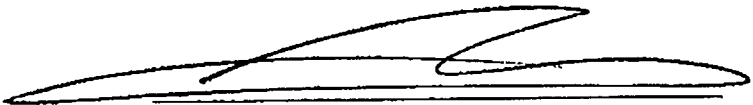
IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

**ORDER DENYING APPLICANT'S
MOTION PURSUANT TO
RULE 59(a) AND 59(e)**

C. A. No.: 2014-CP-42-0640

This matter comes before the Court pursuant to the Applicant's Motion dated on or about August 16, 2017, pursuant to Rule 59(a) and 59(e) of the South Carolina Rules of Civil Procedure. After having had the opportunity to carefully review the Motion, this Court respectfully denies the same.

AND IT IS SO ORDERED.


ROBIN B. STILWELL

August 29, 2017
Greenville, South Carolina



STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

RASHAUN SOBERS,

PETITIONER,

v.

THE STATE,

RESPONDENT.

IN THE COURT of COMMON PLEAS

2014-CP-42-0640

AFFIDAVIT

PERSONALLY appeared before me, Robert M. Dudek, who being duly sworn, deposes and says:

1. He is the Chief Appellate Defender for the Office of Appellate Defense, Commission on Indigent Defense.
2. He has been an Appellate Defender for more than twenty-seven years, handling criminal appeals before the South Carolina Supreme Court and the South Carolina Court of Appeals during that time period.
3. Undersigned counsel represented Petitioner Sobers in his direct appeal to the South Carolina Court of Appeals.
4. Counsel filed an Initial Brief of Appellant and Designation of Matter with the South Carolina Court of Appeals on petitioner's behalf on December 20, 2011.
5. Counsel filed the final brief of appellant on petitioner's behalf on July 19, 2012.
6. Undersigned counsel raised the following two issues for Petitioner Sobers on direct appeal because he thought they gave petitioner the best opportunity to win a new trial:
 - a. 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.

b. 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.

7. Undersigned counsel argued petitioner's case before the South Carolina Court of Appeals on June 4, 2014. The Court of Appeals panel was now-Chief Judge Lockemy, now-Justice Few, and Judge Geathers.

8. The Court of Appeals affirmed petitioner's convictions in a published opinion, State v. Sobers, 404 S.C. 263, 744 S.E.2d 588 (2013). The Court affirmed the trial judge's ruling excluding evidence of gangs and gang activity at the time of the shooting. In affirming, the Court wrote:

"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 he was more fearful because the mob was part of a gang. Thus, Sobers never introduced evidence that would make gang activity relevant." The Court also held that there was not any reason to decide whether former veteran Greenville County Narcotics Officer Rocky Watts should have been allowed to testify as an expert witness in gangs since it reasoned the defense had not established the relevance of gangs or gang activity.

State v. Sobers, 404 S.C 263, 268, 744 S.E.2d 588, 590-591 (2013).

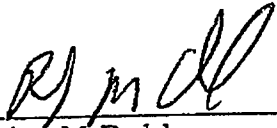
9. Undersigned counsel obviously raised the issues he thought gave petitioner the best chance of obtaining a new trial from the Court of Appeals. Counsel obviously does not intentionally fail to raise any issue he perceives to be a winning issue. Thus, if petitioner identifies a winning issue to this Court that counsel did not raise, undersigned counsel did not have any strategic reason for failing to raise that winning issue on appeal.

10. Specifically, as to an allegation of ineffective assistance of appellate counsel for not raising the denial of the motion to dismiss based on phone camera evidence, Tr. pp. 45-55, counsel did not think the appellate court would reverse the trial judge's ruling that the defense had not shown bad faith (or really even argued it other than returning the phone to the owner while the case was pending). The trial judge reasoned that the prosecution turned over to the defense the relevant portion of the video, and that any assertion of exculpatory evidence that might have been available if the phone was not returned to its owner was speculative. The judge also noted that the video was not going to be of good quality to start with given that a phone did the filming. The judge reasoned the defense had the essence of the video, and everything was speculative. The defense also did not dispute that the person who made the video was present to testify. Given the ultimate penalty of dismissal of a murder case, while the judge's denial of the motion seemed reasonable, for the reasons above, counsel did not believe the appellate court would find an abuse of discretion on this dismissal issue. Again, if this Court disagrees, counsel would assert that petitioner is entitled to relief.

11. As to the "burden shifting" closing argument of then Solicitor Gowdy, at Tr. pp. 550-551, after counsel refreshed his memory, this would have been an improper argument had the defense *not* put up witnesses in its defense. However, petitioner testified in his own defense, and the defense put up a host of defense witnesses. Under the circumstances, counsel does not think it would be improper to point out what was allegedly material and missing since it was not a comment on the defendant's right to remain silent or his right to put the state to its burden of proof without offering witnesses. Further, the arguments of counsel are not evidence, and there was not an instruction to draw an adverse inference from the failure to call witnesses "under the control of a party." Finally, the standard for reversal of even a very bad closing argument is high: Did the solicitor's argument so infect the trial with unfairness as to make the resulting conviction a denial of due process. Counsel does not think this was a good issue given the

closing argument in this case, the circumstances under which it was made, and the standard for reversal. Again, if this Court disagrees with counsel's reasoning on not raising this issue, counsel certainly does not want his former client denied relief.

The above paragraphs are true and correct to the best of my knowledge.


Robert M. Dudek
Chief Appellate Defender

SWORN TO before me
this 21st day of June, 2017.


(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023

12	16	Search

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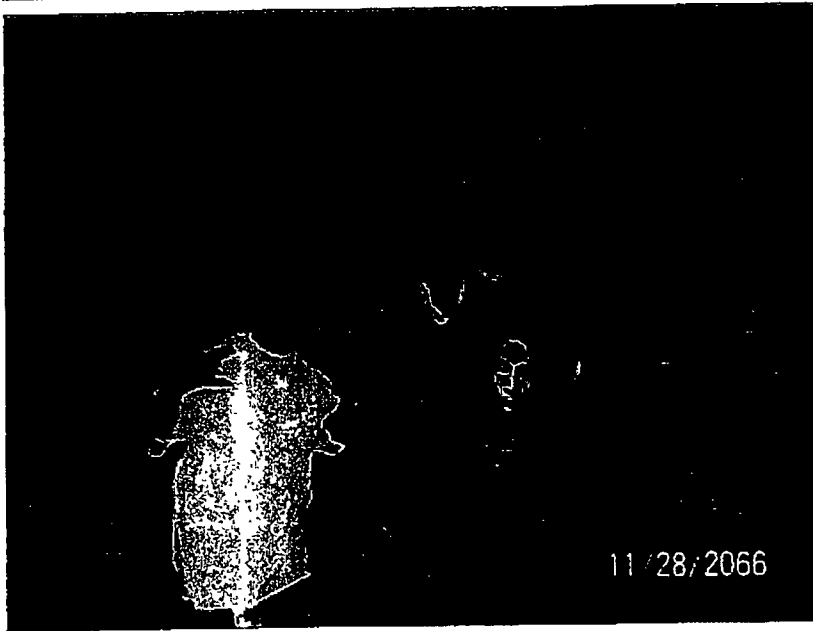
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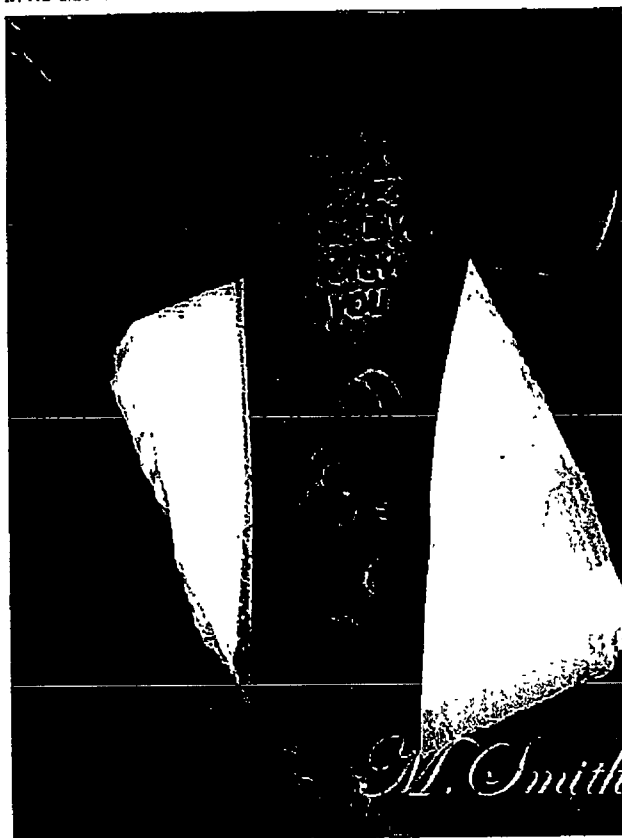
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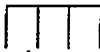
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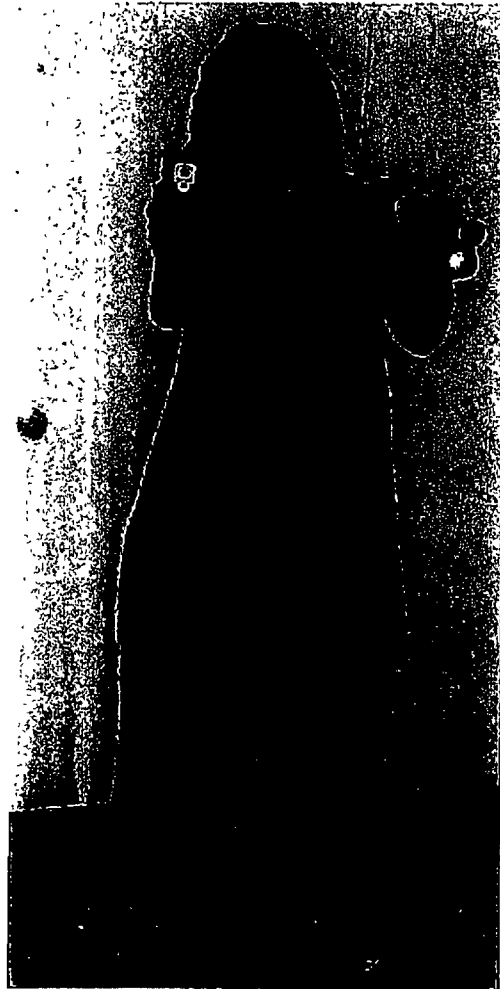
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J Red Fuller lol i alnt did nutn
March 15 at 7:27pm · [Report](#)



Amelia Ray Look at this pic that's Wat u did
March 15 at 7:33pm · [Report](#)



J Red Fuller luks fine 2me
March 15 at 7:36pm · [Report](#)



Amelia Ray Lol wait til i see u
March 15 at 7:37pm · [Report](#)



J Red Fuller oh ok lol
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Amelia Ray Lol
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APPELLANT'S EXHIBIT

16-27-17

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

THE STATE)

vs)

RASHAUN SOBERS)

DEFENDANT.)

Trial Guilty
IN THE GENERAL SESSIONS COURT
SEVENTH JUDICIAL CIRCUIT

APPELLANT'S
EXHIBIT

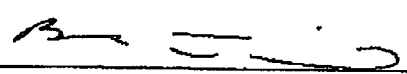
26271'

NOTICE OF MOTION AND MOTION
TO DISMISS

WARRANT NUMBERS: M-087209
09-6427

The Defendant through his undersigned attorney moves the Court to dismiss the above captioned case on the grounds that the State had possession of a cellular telephone that had audio and video of a number of events that occurred at the scene of the alleged murder but allegedly ending just before the shooting took place. The State after retrieving said video returned the telephone to it's owner. The Defense contends that it should have had the opportunity to have access to the telephone itself to determine the full extent of the video and to attempt to improve the quality of both the audio and video content. The Defense was deprived of the opportunity to view the full video from the original source and therefore this matter should be dismissed based on Rule Five of the South Carolina Rules of Evidence.

I SO MOVE


Brac H. Turnipseed
TURNIPSEED, BRANNON & STEVENS
ATTORNEYS FOR THE DEFENDANT
128 Magnolia Street
Post Office Box 1904
Spartanburg, SC 29304
864-573-0048

FILED
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SPARTANBURG COUNTY
2010 SEP -3 PM 1:50
M. HOPE BLACKLEY

September 3, 2010

EVIDENCE

CASE # 2009041126 INVENTORY # _____

CONTENTS

# ITEMS	ITEM DESCRIPTION
1	CD with two video files transferred from Phoenix Fielder's phone

DATE AND TIME OF RECOVERY 04-21-09 2130

LOCATION OF RECOVERY 8045 Howard St.

Spartanburg SC 29307

RECOVERED BY William R. Gary

SUSPECT Rashawn Jamine Sobers

VICTIM Sebastian Saramillo

TYPE OF OFFENSE Murder

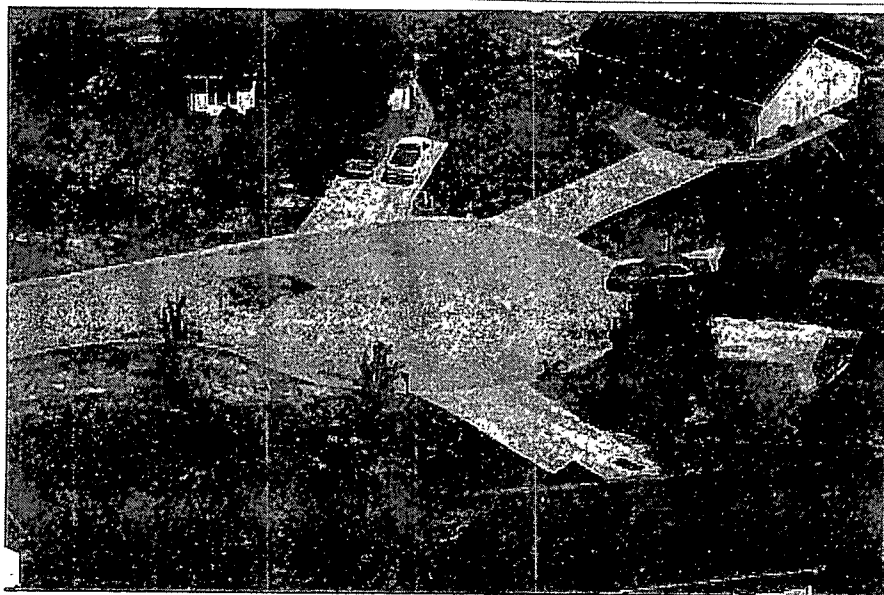
SHERIFF'S OFFICE
Inc# 89041176 Loc: HOM



16618
CD-ROM, from phone

APPELLANT'S
EXHIBIT

3 62717



APPELLANT'S
EXHIBIT

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APPELLANT'S
EXHIBIT

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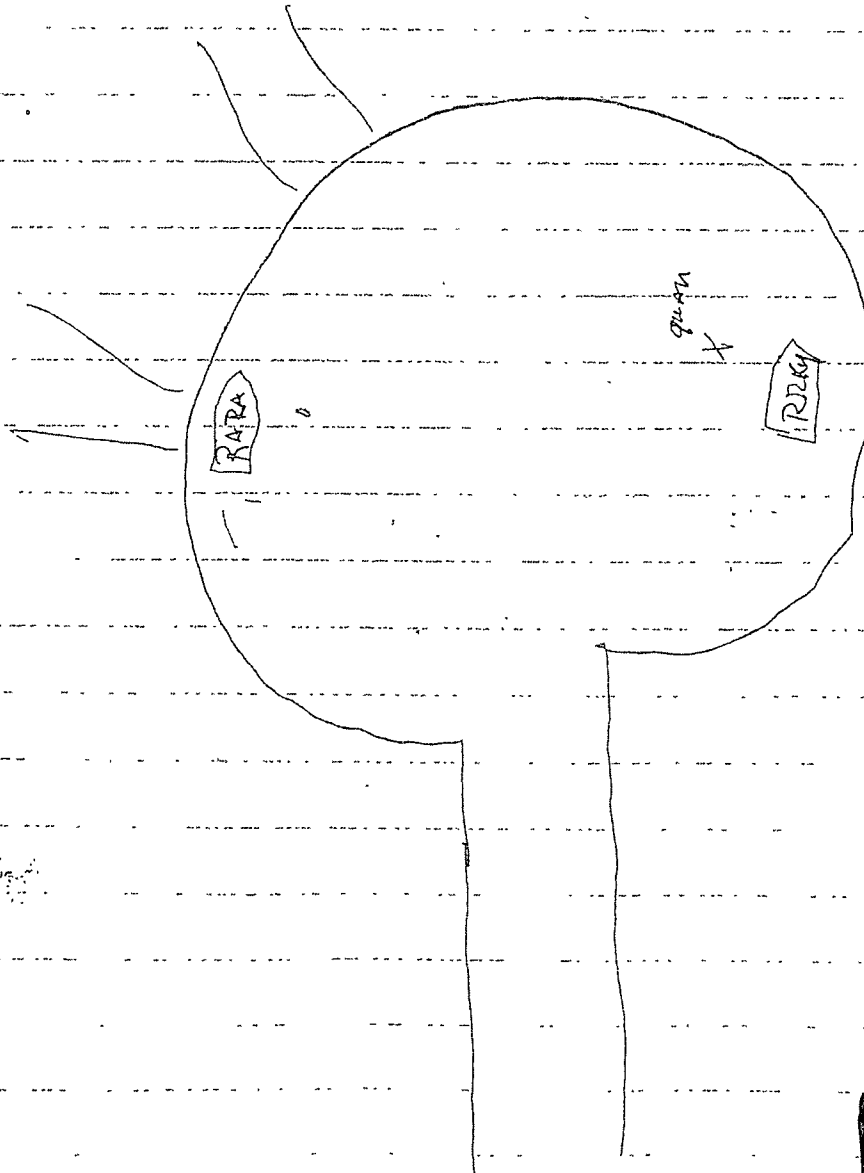
APPELLANT'S
EXHIBIT

60 6-27-17

C-2

Sketch of Basil Ct.
Car position as told by Rashawn Sobers.
Drawn by L. Williams during interview
of Sobers in Charlotte, N.C.
4-24-09 @ 1930 hrs.

J. Williams



CONFIDENTIAL

SPARTANBURG COUNTY SHERIFFS DEPARTMENT
Spartanburg, South Carolina

CASE NUMBER

2009041176

PRE-INTERROGATION WAIVER FORM

Name Rashawn Jamine Sabers Address 1036 Wildwood Ln.

Age 18 Date 4-23-09 Time 6:45 pm

Location 3333 N. Tryon St Charlotte, N.C.

1. I have the right to remain silent.
2. Anything I say can and will be used against me in a court of law.
3. I have the right to talk to a lawyer and to have him present with me while I am being questioned.
4. If I cannot afford to hire a lawyer, one will be appointed to represent me before any questioning, if I so wish.
5. I have the right to stop answering questions at any point in the questioning.

The above rights have been read to me by L. Williams

I have read same and I understand my rights fully.

Witness [Signature] Signed Rashawn Sabers

I waive (give up) my rights as explained above and agree to talk to officer Williams

in reference to Shooting
(CASES OR CHARGES), and my statement that I may
make is of my own free will, without fear, threat or promise or favor or reward of any kind.

I am able to read and write the English Language and finished 9 years in school.

Witnessed [Signature] Signed Rashawn Sabers

Notorized [Signature]

Expiration Date 10.8.17

APPELLANT'S
EXHIBIT

8627-17

9 6-27-17

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF GENERAL SESSIONS
FOR THE SEVENTH JUDICIAL CIRCUIT
INDICTMENT NOS : 09-GS-42-6427

THE STATE ,

VS.

Rashaun Sobers,

DEFENDANT.

) NOTICE OF MOTION AND MOTION
) IN LIMINE TO EXCLUDE EVIDENCE
) OF GANGS OR GANG ACTIVITY,
) OR SPECIFIC INSTANCES OF GANG
) CHARACTER EVIDENCE OF THE VICTIM
) OR HEARSAY EVIDENCE UNDER RULES
) 402, 403, 404, AND 802 OF THE SOUTH
) CAROLINA RULES OF EVIDENCE.
)

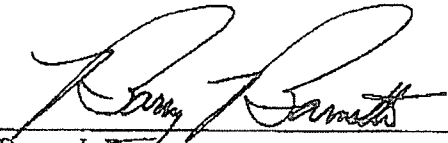
TO: THE DEFENDANT AND HIS ATTORNEYS: Brac Turnipseed, David Turnipseed,
and Doug Brannon

1. Under Rules 402 and 403 of the South Carolina Rules of Evidence, any evidence or testimony on these issues would be irrelevant to the issues of gangs, any gang activity, or gang membership, or any previous drive-by shootings. Even if the Court would find this evidence or testimony relevant, the evidence should be excluded because the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or could mislead the jury. In State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991), the Court held that relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice.

2. Under 802 of the South Carolina Rules of Evidence, the testimony and evidence the Defense purports to rely concerning gangs, gang activity, or previous drive-by shootings would be hearsay and would not be allowed as evidence under the South Carolina Rules of Evidence

3. Under Rule 404 of the South Carolina Rules of Evidence, the testimony and evidence the Defense would produce concerning the victim in this case being involved with a gang or gang activity would not be allowed as character evidence in this case.

The State would request an *in-camera* review by the Court before any such evidence may be deemed relevant or admissible in this case under the grounds stated in this Motion.



Barry J. Barnette
Principal Deputy Solicitor
Seventh Judicial Circuit

Spartanburg, South Carolina
September 7, 2010

10 627.17

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS,
FOR THE SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA)
v.)

INDICTMENT NO.: 09-GS-42-6247

Rashaun Sobers)

Defendant)

Defendant)

**MEMO IN OPPOSITION TO THE STATE'S
MOTION IN LIMINE REGARDING GANG
ACTIVITY AND SPECIFIC INSTANCES OF
GANG CHARACTER EVIDENCE OF THE
VICTIM**

I. Introduction

The State made a motion in limine at the outset of the trial seeking to exclude any evidence of gangs or gang activity or specific instances of character evidence of the victim. The State also sought to exclude any hearsay evidence. This memorandum addresses only the portion of the motion in limine seeking to exclude gang activity and specific instances of gang character evidence of the victim.

II. Facts

The victim in this case was in a gang. There are multiple photographs that show him engaging in gang activity.¹ Specifically, there are photographs that show members of his gang holding weapons.² The State's pre-emptive motion prior to trial seeking to exclude any evidence of gang activity is prima facie evidence that the State is fully aware of the victim's gang activity.

III. Analysis and Citation of Authority

III.a. The evidence of gang activity is relevant to Defendant's self-defense theory

In the murder prosecution of one pleading self defense against an attack by the deceased, evidence of other specific instances of violence on the part of the deceased are admissible under three circumstances: 1) if the specific violent incidents were directed against the defendant; 2) if the specific violent incidents were directed against others in a manner closely connected enough to the

¹ See pictures attached as Exhibit 1.

² Id.

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SEVENTH

homicide in time or occurrence so as to reasonably indicate the state of mind of the deceased at the time of the homicide; or 3) to show reasonable apprehension of bodily harm by the defendant.³

In State v. Day, the South Carolina Supreme Court held the trial judge committed reversible error by prohibiting the defense from supporting its self-defense theory by cross-examining one of the State's witnesses concerning a past act of violence by the victim.⁴ The past act of violence at issue was between the victim and a third party and took place four months prior to the homicide. The Court held that the details of the past act of violence against the third party were admissible under S.C.R.E. 405 to prove that the defendant had a reasonable apprehension of violence from the victim, which was an essential element of the self-defense claim.⁵

In the case at bar, Defendant seeks to introduce the gang activity of the victim to show that Defendant had a reasonable apprehension of victim and the victim's fellow gang-members. Some of this gang activity took place just minutes prior to the shooting. If the details of a violent act that took place four months prior to a homicide are admissible as the Court held in Day, then certainly the details of a violent act that took place just minutes prior to the shooting are admissible in this case.

The State may argue that the video showing the fight, without the further evidence denoting that it is gang activity, is sufficient to meet the requirement of Day. That argument misses the crux of the Court's reasoning for admissibility in Day, however, which was that the actual details of the past violent acts of the defendant are critical to the reasonableness of a defendant's apprehension of violence. The Court in Day specifically noted the significance of the details of the victim's behavior

³ State v. Day, 341 S.C. 410, 419-420, 535 S.E.2d 431, 436 (2000); State v. Thrailkill, 71 S.C. 136, 50 S.E. 551 (1905) (noting that in a murder trial, the reputation of the deceased for violence may be shown).

⁴ Id.

⁵ Id. at 121, 535 S.E.2d 437.

when "crossed by a confidant" and compared that behavior to the defendant's theory of self-defense.⁶

In this case, the details are critically important as well. A small "slap box" among friends in a neighborhood creates a much different apprehension of violence than a fifteen-person gang initiation that "gets out of hand," particularly when multiple gang members have posed in pictures with guns. Accordingly, the evidence of gang membership and activity is relevant to Defendant's self-defense theory and should be admitted.

III.b The evidence of gang activity should not be excluded by Rule 403

The State also argues that this evidence is inadmissible because its probative value is substantially outweighed by the danger of unfair prejudice. The State makes no mention of what it perceives the "unfair prejudice" to be or any weighing of this prejudice against the probative value of the evidence. In fact, the case cited by the state, State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991) is inapposite to the case at bar for a multitude of reasons: 1) Alexander was not a murder case but a rape case, 2) the evidence found to be substantially more prejudicial than probative was the emotional trauma to a rape victim; and 3) the case makes no reference to violence or gang activity.

On the contrary, the Court in State v. Day specifically cited with favor a Texas Court of Appeals decision that allowed the admission of evidence of defendant's gang membership over the argument that it was prejudicial.⁷ The Fourth Circuit Court of Appeals reached a similar conclusion in a drug case in which defendant's gang membership was admitted over the argument that the probative value was substantially outweighed by the danger of unfair prejudice.⁸ Both these cases involved the admission of the defendant's gang membership. Given that it is the defendant's liberty that is at stake, surely the Constitutional protections for defendants' rights against unfair prejudice

⁶ Id. at 421, 535 S.E.2d 437.

⁷ Id. at 422, 535 S.E.2d 437.

⁸ U.S. v. Walters, et al, 350 Fed. Appx. 826, 828 (4th Cir. 2009). S.C.R.E. 403 is identical to F.R.E. 403.

are paramount to the possible prejudice to the State from the admission of a victim's gang membership. Accordingly, the evidence of gang activity should not be excluded by Rule 403.

III.c Excluding the evidence of gang activity violates Defendant's 6th Amendment rights

Defendant has the right of confrontation and presentation of evidence under the Sixth Amendment to the U.S. Constitution.⁹ The Connecticut Supreme Court has held that when a trial court excludes defense evidence that provides defendant with basis for cross-examination of state's witnesses, such exclusion may give rise to claim of denial of right to confrontation and to present defense.¹⁰

IV. Conclusion

In the case at bar, Defendant Sobers entire defense is centered on the reasonableness of his fear of the group of individuals he has evidence to show were members of a gang engaging in gang violence mere minutes prior to the shooting of the victim. Excluding this evidence, even during cross examination, is contrary to S.C.R.E 403, 405, and the applicable case law; as well as Defendant's 6th Amendment Constitutional rights to confrontation and presentation of defense. The reasonableness of Defendant's fear of a group of neighborhood kids joking around is entirely distinct from the fear of a group of gang members engaging in a violent ritual. The State is improperly attempting to construe the victim and his fellow gang-members as the former in an effort to dupe the jury into believing the victim was a good kid who would never cause apprehension of great bodily harm. Defendant has the evidence to prove otherwise and this evidence goes right to the heart of his theory of self-defense. Accordingly, excluding this evidence, even at the cross-examination stage, would be reversible error.

Respectfully submitted by:

⁹ U.S. Const., 6th Amen

¹⁰ State of Connecticut v. Ramos, 261 Conn. 156, *176, 801 A.2d 788, 801.

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