

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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S.C. SUPREME COURT

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
Post Conviction Relief

Michael G. Nettles, Circuit Court Judge

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Case No.: 2017-002269

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Deonte Brown #361477,..... Petitioner,

vs.

State of South Carolina, .....Respondent.

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BRIEF IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI  
PURSUANT TO WHITE V. STATE

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**STATEMENT OF THE CASE**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. Applicant was indicted at the February 2013 term of the Charleston County Grand Jury for murder, attempted murder, and possession of a firearm during the commission of a violent crime (2013-GS-10-00535, 00536, 00537). James W. Smiley, Esquire, represented him. Applicant proceeded to a jury trial and was found guilty as indicted. The Honorable Roger M. Young, Sr., sentenced Applicant to incarceration for fifty years for Murder, thirty years for Attempted Murder, and

five years for Possession of a Firearm During the Commission of a Violent Crime, each sentence to be served concurrently. Applicant did not appeal his conviction or sentence.

### **STATEMENT OF FACTS**

This matter came before the Lower Court by way of a post-conviction relief (PCR) application filed on July 15, 2015. Respondent submitted a Return on February 18, 2016. An evidentiary hearing was convened on August 3, 2017, at the Charleston County Courthouse. Applicant was present at the hearing and was represented by Tommy Thomas, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's mother, Doris Gregory, and Applicant's trial counsel, James W. Smiley, Esquire ("Trial Counsel") also testified. Accordingly, the Lower Court granted Applicant a belated review.

The Petitioner testified that on July 15, 2012 he went out to a night club called Frasier's in Charleston County and after that went to the Waffle House for breakfast. This was around 4:00 a.m. There were a number of people present at the Waffle House and he was there with a group of people. In the Waffle House, there was an altercation between the Petitioner and another individual. There was a shot fired from outside in the parking lot. At this time he was coming out of the door. Everyone started running and that is when a second shot took place. (App. p. 593, lines 5-24)

Petitioner was notified that he was wanted for Attempted Murder and he turned himself into the County Jail. He was transferred to Police headquarters where Detective Lawrence and Detective Smith read him his Maranda Rights. He gave a written statement. (App. p. 594,

lines 13-19) In his statement indicated that he was innocent of this crime. (App. p. 595, lines 2-4)

The Petitioner testified that two individuals were shot. Mr. Dontaye Reed, a friend of his, was killed at the scene. Quinten Allen was also shot and survived. Petitioner hired Mr. Jim Smiley to represent him. He met with Mr. Smiley a number of times and they talked about his innocence. It was his understanding that the theory of defense was going to be that he would testify and that Mr. Smiley was going to show how a second possible suspect was involved in this case. This individual, Derrick Brown, was the actual shooter. Mr. Brown's Mother was in a sexual relationship with Detective Lawrence who was investigating the case. (App. p. 597, lines 6-24) Petitioner testified that he gave this information to trial counsel, but he did not believe that he investigated this matter.

Petitioner was initially charged with Attempted Murder. (App. p. 599, lines 24-25) This was later upgraded to a charge of Murder. The Petitioner testified that he believed that Counsel was ineffective for his failure to have a Pre-Trial suppression hearing. It was the Petitioner's understanding that the State's case revolved around the State being able to identify him in a photo that showed a muzzle flash. The State was saying that they could identify him behind the muzzle flash and that he was wearing a red shirt. (App. p. 604, lines 9-17)

Petitioner testified that he was concerned about the testimony of a number of witnesses. That one of the witnesses, Chavis Heyward, was questioned in 2012. Trial Counsel told Petitioner that Mr. Heyward did not indicate anything about who had a weapon or what clothing they had on. (App. p. 605, lines 14-19) In addition, Petitioner was concerned about Chavis Heyward and his interaction with Investigator Barfield. Investigator Barfield was

allowed to testify regarding his conversation with Chavis Heyward. Chavis Heyward testified at the trial that he had never told Investigator Barfield anything about who the shooter was or what he was wearing. (App. p. 605, lines 2-4) Investigator Barfield testified that they spoke with Mr. Heyward inside the office with two other officers. Barfield never indicated anything about anyone having a weapon or seeing the shooter. However, on the way to the elevator, it was just Detective Barfield and Chavis Heyward. Barfield stated that he had a heart to heart conversation with Heyward and that is when Mr. Heyward came forward and said that the guy with the red shirt was the shooter. That this individual was the one with the weapon. (App. p. 607, lines 2-12) Petitioner testified that he felt this was extremely prejudicial because he was wearing a red shirt. This testimony identified the individual with the gun as an individual who had on a red shirt. The State was therefore able to link the shooting to the Petitioner.

### **ARGUMENT I**

#### **The Court erred in allowing the testimony of Detective Barfield regarding the Statements allegedly made by Chris Heyward Under Rule 613 (b).**

Defense Counsel James Smiley made a Motion for a Directed Verdict. The Court points out the circumstantial nature of the evidence. The Court, in its ruling on the Motion discusses four pieces of circumstantial evidence presented by the State:

“Well, I suppose one of the most remarkable things about this case is I’ve never had a case with this many different video cameras and angles of the incident that took place and there being no conclusive proof as to who the shooter was, along with this many people in close proximity of an actual shooting with no one being willing to identify who the shooter was.

So there is no direct evidence that the defendant was the shooter. It’s all circumstantial evidence, and the circumstantial evidence standard is substantial circumstantial evidence, and here is what I have written down as the circumstantial evidence that the defendant was the shooter: First, that the defendant was wearing a red jersey and that he was being pushed out the door at the time that shots were fired.

Second: Chris Hewyard told Investigator Barfield that the guy wearing the red shirt was the shooter. He denied that on direct and cross, but his statement came in under 613 (b). Not the strongest evidence in the world, but it is evidence.

That is a chain of circumstantial evidence. It's not the strongest circumstantial evidence case I've ever seen, but, in my opinion, it is enough to get you past the directed verdict at this time, so your Motions are denied."

Objection is made to the Testimony of Investigator Kenneth Barfield under the fact that it is hearsay. (App. p. 201, lines 1-2) The court however, states that this testimony is offered under 613 (b) (App. p. 201, line 4) Rule 613 of the Rules of Evidence covers prior statement of witnesses. Rule 613 (b) extrinsic evidence of prior inconsistent statements of witnesses

This case was extremely circumstantial as can be seen from the excerpt from the Court's ruling regarding Counsel's Motion for Directed Verdict. The court notes that Chris Heyward told Investigator Barfield that the guy wearing the red shirt was the shooter. He denied that on direct and cross, but his statement is allowed under Rule 613 (b). The Petitioner would assert that the Court was in error in allowing this information in under 613 (b) and that this was extremely prejudicial to the Petitioner. It is convenient that Heyward decides to tell Investigator Barfield this information before exiting the door to the parking garage (App. p. 201, lines 15-20) That Chavis tells him that the color of the shooter's shirt was red. (App. p. 203, lines 3-7)

## ARGUMENT II

**The Court erred in allowing the State to present frames from a video to the Jury in closing that were not introduced into evidence.**

In the Solicitor's closing argument she referred to the exhibits that had been introduced into Court. She reminds the Jury that they are the Judges of the facts and that it is up to them

to decide who to believe and what to believe (App. p. 449, lines 19-22) She goes further to state that similar to defense counsel, that she is going to show certain moments of the video and it would ultimately be up to the Jury to decide what it shows. However, her argument is that based on the testimony and other items of video, that this supports her theory that the Petitioner is the one who committed this crime. (App. p. 450, lines 1-19) Defense Counsel objects and states that these are frames from the video that haven't been put into evidence. The Court rules that they are for demonstrative purposes only. That they will not go back to the Jury. That they weren't in evidence, but they were demonstrative purposes and she can show them now. (App. p. 450, lines 10-14) The State then goes frame by frame and calls attention to the these pictures on a detailed basis. (App. p. 450, lines 15-25, p. 451, lines 1-25, p. 452, lines 1-25, p. 453, lines 1-25, p. 454, lines 1-25, p. 455, lines 1-17) She concludes by saying that the video shows that "he turned back around toward the Waffle House, toward all the people and fired again, firing outside of the Waffle House. That in the beginning hit Quentin Allen. Firing back at the Waffle House from the parking lot and killed Dontaye Reed. (App. p. 456, lines 4-11)

In fact the Solicitor goes step by step through these frames in her argument to the Jury. She breaks this down to times she argues that at 4:11.10 ("that you see the Defendant with the fancy stuff on his shoulder on this red shirt holding a cup". That 3 seconds later, at 4:11.12, you see a red t-shirt that is right after that and these were showing people exiting the Waffle House. (App. p. 451, lines 2-5) "I would argue that you see the Defendant in the red shirt with the fancy shoulders." She then refers back to the video frame again from 4:12.16 "The Defendant, fancy red shirt, stuff on his shoulder, throwing a cup at Quinton Chavis." (App. p.

451, lines 19-21) This goes on for quite some time and she ends this by asking that the Jury come back with verdict of guilty for the murder of Deonte Reed and the Attempted Murder of Quinten Allen. (App. p. 456, lines 15-19)

According to Merriam Webster Dictionary evidence is defined as something such as testimony, writing or objects presented at a judicial or administrative proceeding for the purpose of establishing the truth or falsity of an alleged matter.

Demonstrative Evidence is defined as evidence in the form of objects, as maps, diagrams or models that has in itself no probative value, but is used to illustrate or clarify the factual matter of the issue. The Petitioner would argue that the video frames used at the hearing and allowed as demonstrative evidence by the Court did not meet the definition of demonstrative evidence. In addition, it is arguable that the video frames presented in this case did have probative value and were used expressly for the purpose of proving that the Petitioner was guilty of the crimes.

Our Court of Appeals in the case of Davis v. Taylor, 340 S.C. 150, 530 SE 2d 385 (2000) reviews this issue of demonstrative evidence. The Court of Appeals state that they were unable to find any South Carolina case in which the trial court refuses to admit an object into evidence or allow the use of the object for demonstrative purposes during trial. They go further to state that they believe the standard for merely showing or exhibiting demonstrative evidence would be not be higher than the standard for actually admitting demonstrative evidence, and that the Trial Court has broad discretion regarding this matter. The court references Clark v. Cantrell 399 S.C. 369, 529 SE 2d 528 (2000) and Holmes v. Black River

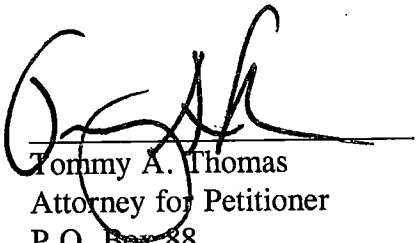
Electric, Coop, 274 S.C. 252, 262 SE 2d 875 (1980) The Court states that the omission or rejection of evidence will not be overturned unless it abuses its discretion.

The Petitioner in this case would argue that the Court did abuse it's discretion in allowing the Solicitor to use the frame stills in front of the Jury. That these frame stills were highly prejudicial. That the solicitor methodically goes through these frames, frame by frame to indicate and prove that the Petitioner was actually the individual wearing the red shirt and therefore guilty of this crime. This evidence was not used to illustrate or clarify the factual matters at issue. And was completely different than the demonstrative evidence that had been cited by the Court in the past.

#### CONCLUSION

For the above reasons, the Petitioner request that his conviction be set aside and a new trial granted.

Respectfully submitted,



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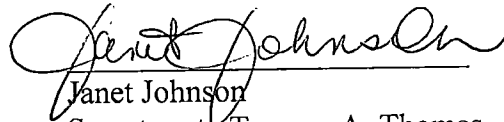
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CERTIFICATE OF SERVICE

I, Janet Johnson, assistant to Tommy A. Thomas, Attorney for the Petitioner, hereby certify that I hand delivered a copy of the Appendix, Petition for Writ of Certiorari, Petition for Writ of Certiorari pursuant to White v. State and a Brief in Support of Petition for Writ of Certiorari pursuant to White v. State to:

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