

THE STATE OF SOUTH CAROLINA

In The South Carolina Supreme Court

APPEAL FROM COMMON PLEAS
Post-Conviction Relief
Brooks P. Goldsmith, Circuit Court Judge

RECEIVED

FEB 08 2019

S.C. SUPREME COURT

DAQWAN MARQUELL JOHNSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2018-001084

APPENDIX

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1 CLERK: Is it still your verdict?
2 JUROR: It is.
3 CLERK: Number 242, was this your verdict?
4 JUROR: It is.
5 CLERK: Is it still your verdict?
6 JUROR: It is.
7 CLERK: Number 133, was this your verdict?
8 JUROR: It is.
9 CLERK: Is it still your verdict?
10 JUROR: It is.
11 CLERK: Number 254, was this your verdict?
12 JUROR: It was.
13 CLERK: Is it still your verdict?
14 JUROR: It is.
15 CLERK: Number 226, was this your verdict?
16 JUROR: It was.
17 CLERK: Is it still your verdict?
18 JUROR: It is.
19 CLERK: Number 288, was this your verdict?
20 JUROR: It was.
21 CLERK: Is it still your verdict?
22 JUROR: It is.
23 CLERK: Number 242, was this your verdict?
24 JUROR: It is.
25 CLERK: Is it still your verdict?

1 JUROR: Yes, it is.

2 CLERK: Number 14, was this your verdict?

3 JUROR: Yes.

4 CLERK: Is it still your verdict?

5 JUROR: Yes.

6 CLERK: Number 233, was this your verdict?

7 JUROR: Yes.

8 CLERK: Is it still your verdict?

9 JUROR: Yes, ma'am.

10 CLERK: Number 264, was this your verdict?

11 JUROR: Yes.

12 CLERK: Is it still your verdict?

13 JUROR: Yes.

14 CLERK: Number 101, was this your verdict?

15 JUROR: Yes.

16 CLERK: Is it still your verdict?

17 JUROR: Yes.

18 CLERK: The jury is polled, Your Honor.

19 THE COURT: Anything further from the jury for
20 the defense?

21 MR. COLLINS: No, Your Honor.

22 THE COURT: Thank you. Thank you very much.

23 Mr. Foreman, ladies and gentlemen of the jury. I never
24 criticize nor commend a jury for its verdict. I will
25 say if you ever find yourself part of the system

1 again -- and I hope you do not -- by way of witness,
2 party, or otherwise, I hope the jury in that case would
3 be as hard working and focused, as attentive, as patient
4 as you have been throughout the proceedings in this
5 trial towards all of the parties.

6 I further say I realize it has been a long
7 week for you. Here we are at about 8:00 o'clock on
8 Friday night. I'm sure you never thought that you would
9 still be here at this time on Friday when you arrived
10 Monday morning.

11 I am sure you had other things to do, both in
12 your personal and professional lives. I guess we could
13 go out and find 12 people in Richland County that didn't
14 have other things to do in their personal or
15 professional lives.

16 That's not the folks we want on juries. We
17 want people that are engaged in life, in their personal
18 lives and professional lives, to sit and listen to these
19 cases and decide what these facts are and reach those
20 verdicts that do justice in the cases.

21 It has been my pleasure and privilege to be
22 with you this week. This will conclude your service for
23 the week. Again, I apologize I could not manage your
24 time more efficiently throughout these last few days.
25 It has been my pleasure and privilege to serve with

1 y'all this week.

2 Without your participation the parties could
3 not be about the very business -- and this goes for both
4 the State and the defense -- for administering your and
5 our criminal justice system. Thank you very much for
6 your service. If you would go back to your jury room
7 with your bailiff, the clerk will give you further
8 instructions. Thank you very much.

9 (The jury is excused.)

10 THE COURT: Any motions from the defense,
11 Mr. Collins?

12 MR. COLLINS: Yes, Your Honor. We renew all
13 previous motions and objections throughout the trial,
14 specifically the numerous mistrial motions. We also ask
15 for a new trial on the basis -- there was the
16 introduction over our objection of eyewitness
17 identification and an affirmation sheet that goes along
18 with it from the witness Rontrell Henderson.

19 We stand by the position that is extrinsic
20 evidence of a prior inconsistent statement that he
21 admitted to, and it should not have been allowed in. It
22 was stressed in the closing by the solicitor time and
23 time again. We just ask for a new trial based on that
24 reason and all the other previous motions and
25 objections.

1 Your Honor, I would also add that given the
2 fact the jury was given the case at 5:55 on a Friday
3 night and they were only out two hours after an almost
4 week-long trial, given the time and nature and the
5 amount of evidence, it shows that they did not spend
6 enough time deliberating. We would ask for a new trial
7 on that basis as well.

8 THE COURT: Thank you. Thank you very much.
9 Solicitor, do you have any response?

10 MS. CAMPBELL: Your Honor, we just ask that
11 you abide by your earlier rulings.

12 THE COURT: I do renew all my previous trial
13 rulings. I deny the motion for new trial. Specifically
14 as to eyewitness identification -- and I think it's
15 Exhibit 153 and 154, his affirmation, Mr. Henderson's
16 affirmation.

17 Although you would say, Well, he didn't deny
18 making the statement, he denied the credibility of the
19 statement that he made on that specific date. Also, I
20 did not allow the document itself into evidence. I
21 think it complied with State versus Moses and State
22 versus Stokes and that line of cases.

23 I would reaffirm all my denials of the
24 mistrial motions. I did not find anything, as far as
25 the solicitor's closing, that would lead me to grant a

1 mistrial. As far as getting the case at 5:55, they have
2 been out working diligently and attentively throughout
3 the four days of the trial.

4 There were only two charges. Although there
5 are over 150 exhibits, many of those exhibits -- I
6 didn't count the exact numbers -- but many of those
7 exhibits are photographs of either the scene at Gable
8 Oaks or photographs of the defendant and codefendant, I
9 think, and such like that.

10 I think they had more than adequate time,
11 considering they were only presented with two charges,
12 murder and attempted murder, and no lesser-included
13 offenses in that regard.

14 Any other motions, Mr. Collins, Mr. Newton?

15 MR. COLLINS: Your Honor, just for the record
16 the actual photographic lineup and the affirmation of
17 Rontrell Henderson was admitted into evidence over our
18 objection, and it was sent back to the jury, the actual
19 two pieces of paper.

20 THE COURT: I didn't say they weren't. I said
21 the statement --

22 MR. COLLINS: I apologize, Your Honor.

23 THE COURT: -- of Mr. Henderson. I cited 154
24 and 153 as being in evidence, but the statement itself,
25 the statement of Mr. Henderson is what I was referring

1 to.

2 MR. COLLINS: I apologize. I was confused.

3 THE COURT: I think for the record I clarified
4 that. You are right. The photographic lineup was
5 introduced and the affirmation sheet was introduced.
6 The statement, the written statement, itself was not
7 offered, is not in evidence. That's all I'm saying. Is
8 that right?

9 MR. COLLINS: Thank you.

10 THE COURT: Anything further?

11 MR. COLLINS: No, Your Honor.

12 THE COURT: Does the State have any objection
13 if I sentence Mr. Johnson next Wednesday?

14 MS. CAMPBELL: No, sir.

15 THE COURT: Does the defense have any
16 objection if I sentence Mr. Johnson next Wednesday,
17 Mr. Collins, Mr. Newton?

18 MR. COLLINS: I think I actually have the week
19 off from trial next week, which would be the first time
20 in a few weeks. I think Wednesday will work for us,
21 Your Honor.

22 THE COURT: Would that be suitable?

23 MS. CAMPBELL: Yes, sir.

24 THE COURT: My preference is to do that. He
25 is remanded to the custody of the Glenn Detention Center

1 until such time as -- I will sentence him that
2 afternoon. I will be here that morning for another
3 matter.

4 MS. CAMPBELL: If you would just tell us the
5 time, Your Honor, we will be there.

6 THE COURT: We will say 2:30. Do you think we
7 will be through with that other matter we have scheduled
8 by that time?

9 MS. CAMPBELL: We should.

10 THE COURT: We will say 2:30 Wednesday. As
11 far as this case is concerned, Court will be in recess
12 until 2:30 Wednesday.

13 (Whereupon the proceedings are concluded for
14 August 3, 2012.)

15 (The following proceedings are reported on
16 August 8, 2012.)

17 THE COURT: This is 2011-GS-40-0885 and
18 2011-GS-40-0863, indictment for murder and attempted
19 murder, the defendant having been found guilty by
20 verdict of a jury on Friday, the 3rd of August, of 2012.
21 We are here for today for purposes of sentencing
22 Mr. Johnson. He is present with his attorneys,
23 Mr. Collins and Mr. Newton.

24 Is there anything additional from the State,
25 Solicitor?

1 MS. CAMPBELL: Just briefly, Your Honor. As
2 far as his prior record goes, his only convictions are
3 unlawful carrying of a weapon from 2008. He was found
4 guilty on August 22, 2008, of simple possession of
5 marijuana. Then in January of 2010, it looks like he
6 was convicted of resisting arrest and failure to stop on
7 police command.

8 Your Honor, in the courtroom at the
9 appropriate time, I believe the victim's family is here,
10 and I believe at least one person would like to speak to
11 the Court and address the Court on how this has affected
12 them, with the Court's permission.

13 THE COURT: Yes, ma'am, I would be glad to
14 hear from anyone you want me to hear from, Solicitor.

15 MS. CAMPBELL: Do you want them to stay up
16 there, Your Honor?

17 THE COURT: I would prefer they come closer.
18 If they can come to the podium, it would suit me, if the
19 sheriff doesn't object.

20 (Pause.)

21 MR. SANDERS: My name is Darryl Sanders. I'm
22 Gary Reese's father. I am here to address the Court on
23 behalf of the family. Your Honor, we ask that this
24 defendant get the maximum sentence.

25 We lost our son and we lost our

1 daughter-in-law that cares for those kids as well. We
2 have got five kids to care for. The family is grieving
3 very heavily behind us.

4 Some of them have suffered from fear of
5 retaliation and other effects that have been a burden on
6 them since the loss of Gary. We are asking for the
7 maximum sentence on Mr. Johnson.

8 THE COURT: Thank you. Thank you very much.
9 Does anyone else wish to speak? Thank you very much for
10 being here.

11 Anything further, Solicitor?

12 MS. CAMPBELL: No, sir, Your Honor. The facts
13 of the case speak for themselves. It's a miracle more
14 people weren't hurt or killed that night.

15 THE COURT: Mr. Collins, Mr. Newton?

16 MR. COLLINS: Thank you, Your Honor. If it
17 please the Court. Mr. Johnson is 23 years old.
18 Obviously he knows what he is looking at here today, and
19 we are asking the Court to show some sort of mercy and
20 give him a chance to have a life outside of prison after
21 this sentence.

22 The earliest he knows he will be is 53 years
23 old or 51 years old if he gets the minimum. He does
24 have good family support. His mother, I talked to her
25 today. She didn't want to be here today. She wasn't

1 sure if she would be able to keep her composure. I
2 believe you saw the family support throughout the
3 trial.

4 Obviously in Mr. Johnson's life, he is going
5 to have to learn trades and learn different skills in
6 the Department of Corrections, and hopefully he will
7 take advantage of every opportunity he has there. There
8 is nothing he can do that will change anything in the
9 past.

10 Again, Your Honor, given the age of
11 Mr. Johnson, given the facts of who the actual
12 triggerman is in this case, we are asking the Court to
13 show a little bit of mercy and consider giving something
14 in the 30 to 40 range.

15 At one point in this case there was an offer
16 of 30 years. For various reasons Mr. Johnson turned
17 that offer down. All the facts were known at that time,
18 too. We are asking the Court to consider that.

19 He exercised his right to a trial and that was
20 the result he got. He knows he is here to accept the
21 consequences from that. I believe Mr. Newton does have
22 a couple of things to add, Your Honor.

23 THE COURT: Thank you, Mr. Collins.
24 Mr. Newton?

25 MR. NEWTON: Your Honor, I would like to speak

1 for him as a client. He is very undemanding, very
2 pleasant, very intelligent, was able to assist in his
3 trial.

4 Every conversation I have had with him has
5 been one where I don't feel -- I feel like I can talk to
6 him as an adult and as a responsible person, and that's
7 hard to do in my line of work, to find someone that is
8 just gracious of having an attorney help him through
9 this process.

10 I would like to say that. I probably had
11 about 2,000 clients and to have a person like this, I
12 really appreciate that. He has shown us a lot of
13 respect. I want the Court to know that. We bootstrap
14 on that and ask for your mercy, Your Honor.

15 THE COURT: Thank you. Thank you very much,
16 Mr. Newton.

17 Anything you would like to say Mr. Johnson?

18 THE DEFENDANT: Yes, sir. I would like to say
19 I'm sorry for the victim's family and whatnot through my
20 peers of the situation of what happened and whatnot. I
21 want to show my sympathy to what happened to the victim,
22 Gary Reese.

23 THE COURT: Thank you. Thank you very much,
24 Mr. Johnson.

25 Attempted murder carries up to 30?

1 MS. CAMPBELL: Yes, sir.

2 THE COURT: I'm sorry it has to come to this,
3 Mr. Johnson. I am sorry for the family of Mr. Reese and
4 for Mr. Reese himself and the young lady that got shot.
5 I'm sorry that it has come to this point in your life
6 that you are facing this type of sentence, but behavior
7 has consequences.

8 I don't relish putting young men or women --
9 men or women of any age -- in prison for a lengthy
10 prison sentence, but when the facts require it, I do it.
11 You seemed to be a very intelligent young man when I
12 interviewed you during the course of the trial.
13 Mr. Newton has spoke very highly of you. Your lawyers
14 did an excellent job for you. But at the same time
15 behavior has consequences.

16 On 11-GS-40-0885, attempted murder, the
17 defendant is committed to the State Department of
18 Corrections for a determinate term of 30 years. On
19 2011-GS-40-0863, the offense of murder, the defendant is
20 committed to the State Department of Corrections for a
21 determinate term of 50 years. Those are concurrent.
22 Good luck to you, Mr. Johnson. Credit for all time
23 served.

24 MR. NEWTON: Thank you, Your Honor.

25 THE COURT: Thank you. Anything further,

1 Solicitor?

2 MS. CAMPBELL: No, sir.

3 THE COURT: Thank you thank you very much.
4 For the record I have given the court reporter the rest
5 of the juror notes that I received during the trial for
6 her to mark as Court's exhibits.

7 (Court's Exhibit Number 4-10 are marked for
8 purposes of the record.)

9 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

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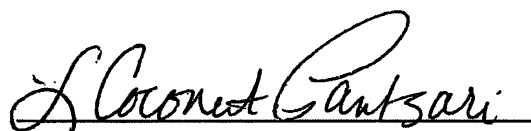
25

C E R T I F I C A T E

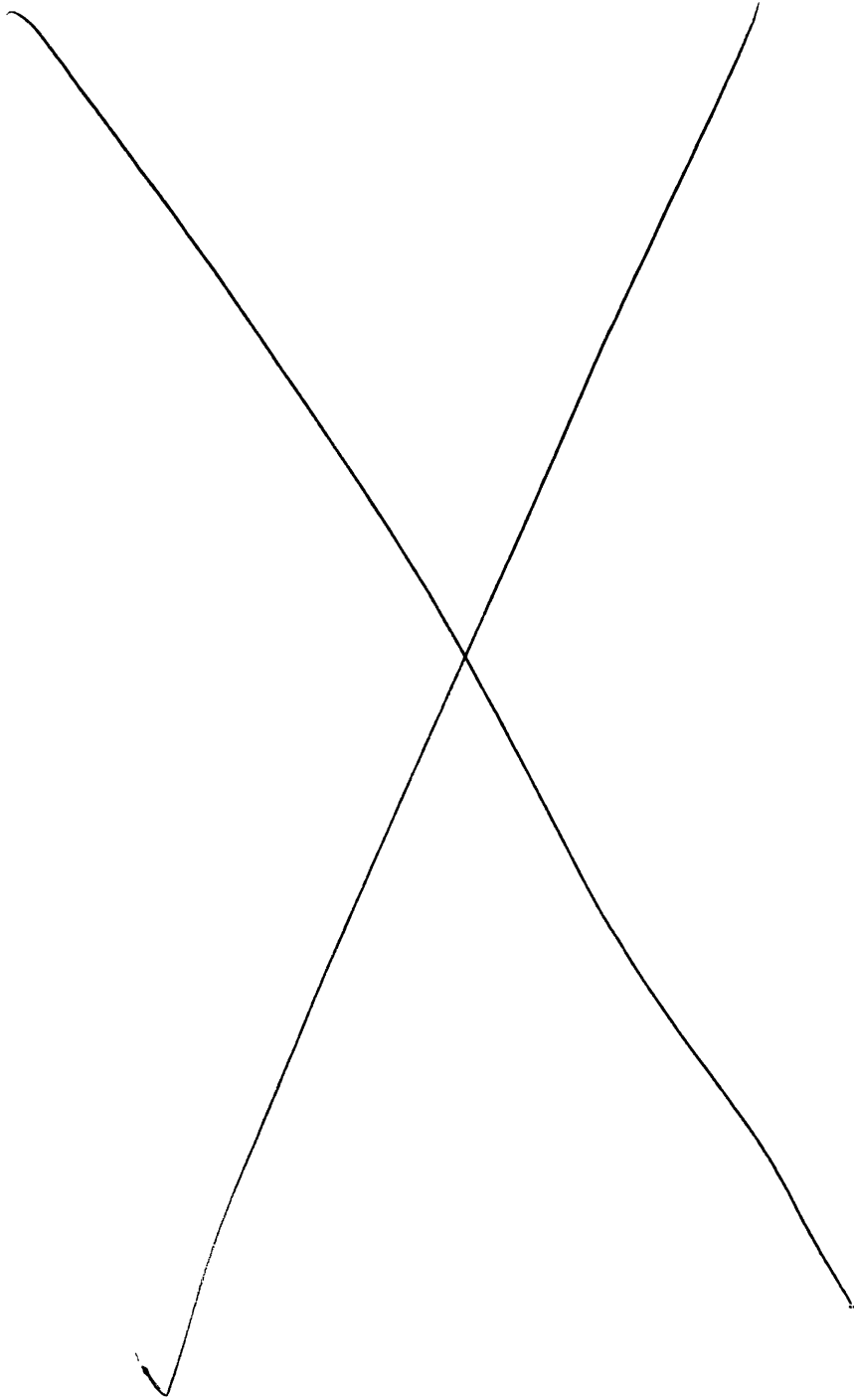
I, the undersigned L. Coconut Pantsari, Official Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of all the proceedings had and the evidence introduced in the trial of the captioned cause, relative to appeal, in the Criminal Court for Richland County, South Carolina on the 26th day of July, the 30th and 31st days of July, the 1st through the 3rd days of August, and the 8th day of August, 2012.

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

September 25, 2012

A handwritten signature in cursive script, reading "L. Coconut Pantsari", written over a horizontal line.

Court Reporter



STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
STATE VS.

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011-GS-40-0868AW#: R668247Date of Offense: June 19 2010S.C. Code §: 16-03-0010CDR Code #: 0116A: Dagwan M Johnsonce: B Sex: M Age: 23B: SS# [REDACTED]

dress: _____

y, State, Zip _____

_____ SID# _____

SENTENCE SHEET

disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS: Murderiolation of § 16-03-0010 of the S.C. Code of Laws, bearing CDR Code # 0116NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45Charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant initial)Plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

TEST:

June 2011 13009 Dagwan M. Johnson 74010
Solicitor SC Bar # Defendant Attorney for Defendant SC Bar #

HEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
a determinate term of 50 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
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 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

il: \$ _____ plus 20% fee: \$ _____

ment Terms: _____

at by SCDPPPS _____

patient: _____

1-206 (Assessments 107.5%)	\$ _____
1-211(A)(1) (Conv. Surcharge)	\$100
1-211(A)(2) (DUI Surcharge)	\$100
5-2995 (DUI Assessment)	\$12
1-286 (DUI Breath Test)	\$25
3 (Public Def/Prob)	\$500
1B TP (Law Enforce. Funding)	\$25
1B TP (Drug Court Surcharge)	\$100
1-114 (BUI Breath Test Fee)	\$50
2942(J) (Vehicle Assessment)	\$40/ea
1 TP (SCCJA Surcharge)	\$5
County (if paid in installments)	\$ _____

PTUP _____ CERTIFIED TRUE COPY

_____ days/hours Public Service Employment

Obtain GED ☐ Jeanette W. McBrideAttend Voc. Rehab. Or Job Co. C.C.C.P.&G.S.May serve W/E beginning _____ RICHLAND COUNTYSubstance Abuse Counseling ☐ SOUTH CAROLINARandom Drug/Alcohol Testing ☐

Fine may be pd. in equal, consecutive weekly/monthly

pmts. Of \$ _____ Beginning _____

\$ _____ paid to Public Defender Fund

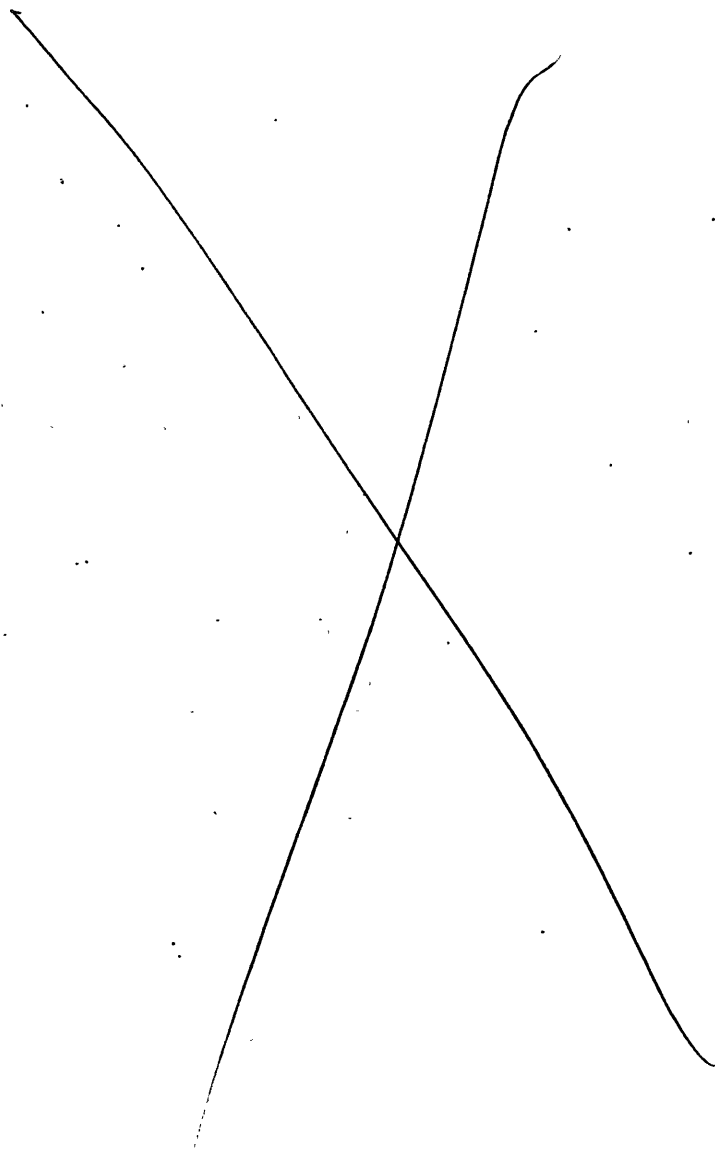
Other: _____

of Court/ Deputy Clerk: Jeanette W. McBride

Reporter: _____

/217 (06/2009)

Presiding Judge: [Signature]Judge Code: 2145Sentence Date: 8 APR 12



STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT

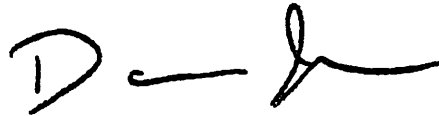
At a Court of General Sessions, convened on FEBRUARY 9, 2011, the
Grand Jurors of Richland County present upon their oath:

MURDER

CDR: 0116 16-03-0010, 0020

That DAQWAN MARQUELL JOHNSON did in Richland County, on or about June 19, 2010, willfully, feloniously, and intentionally kill the victim, GARY REESE, with malice aforethought, either express or implied, by means of GUNSHOT WOUND(S), and the victim did die as a proximate result thereof, in violation of Section 16-03-0010, S. C. Code of Laws, 1976, as amended. ✓

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



DAN JOHNSON, SOLICITOR

WITNESSES

✓
(S) AL THOMAS - Columbia Police Department

ARREST WARRANT NUMBER

K668247

ACTION OF GRAND JURY

TRUE BILL

Mena Gardner
Foreperson of Grand Jury
Date:

FEB 09 2011

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2011-GS-40-0863

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2011

42

THE STATE

vs.

DAQWAN MARQUELL JOHNSON

Indictment for
MURDER

SC Code: 16-03-0010
CDR Code: 0116

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY
OF ORIGINAL FILED
Jeanette W. M. Brade
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

1019

ARREST WARRANT

K-668248

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of
COLUMBIA

 THE STATE
against

DAQUAN M. JOHNSON

 Address: [REDACTED]
COLUMBIA SC 29203

Phone: _____ SSN: _____

Sex: M Race: B Height: 5'00" Weight: 175

DL State: _____ DL#: _____

DOB: [REDACTED] Agency ORI#: SC0400100Prosecuting Agency: CITY OF COLUMBIAProsecuting Officer: THOMAS AL MCDUFFIE AOffense: ATTEMPTED MURDEROffense Code: MACCode/Ordinance Sec: 16-3-29

This Warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☒ Municipality of

 COLUMBIA. The accused
is to be arrested and brought before me to be
dealt with according to law.

Signature of Judge

(L.S.)

Date: _____

RETURN

 A copy of this arrest warrant was delivered to
defendant DAQUAN M. JOHNSON
on 27 JUN 10

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

 CITY OF COLUMBIA
MUNICIPAL COURT
P.O. BOX 644
COLUMBIA, SC 29202

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of
COLUMBIA

AFFIDAVIT

 Form Approved by
S.C. Attorney General
April 21, 2003
SCCA 618

 Personally appeared before me the affiant AL THOMAS who
being duly sworn deposes and says that defendant DAQUAN M. JOHNSON
did within this county and state on 06/19/2010 violate the criminal laws of the
State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of COLUMBIA)
in the following particulars:
DESCRIPTION OF OFFENSE: ATTEMPTED MURDER

16-3-29

 I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:

DEF DID ON 06/19/10 AT 23:05 HOURS COMMIT THE CRIME OF MURDER WHI'
AT [REDACTED] COLLETON ST APT [REDACTED] WITHIN THE CITY LIMITS OF COLUMBIA.
DEF AND FOUR CO-DEF'S DID WITH MALICE, AFORETHOUGHT AND WITH THE IN-
TENT TO KILL, WHILE ARMED WITH HAND GUNS AND ASSAULT RIFLES OPENED
FIRE ON A GROUP OF PEOPLE SITTING IN FRONT OF BUILDING 23 OF GABLE
OAKS APT. VICTIM LAMETRESS STEVENSON WAS STRUCK ON THE SHOULDER,
AND VICTIM GARY REESE WAS STRUCK IN THE BACK, HE DIE ON THE SCENE.
DEF AND FOUR CO-DEF'S ENTERED A GRAY BUICK PARKED AT 5419 NORTH MAI!
ST. DEF'S FLED THE AREA IN THAT VEHICLE. INCIDENT WAS RECORDED ON GABLE OAKS APTS.
VIDEO. ON 06/24/10 DEF WAS IDENTIFIED BY A WITNESS BY A PHOTO LINE UP.

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of
COLUMBIA
Affiant's Address #1 JUSTICE BLDG

COLA, SC

Affiant's Telephone 5453500

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

 It appearing from the above affidavit that there are reasonable grounds to believe that
on 06/19/2010 defendant DAQUAN M. JOHNSON
did violate the criminal laws of the State of South Carolina (or ordinance of COLUMBIA)

☐ County/ ☒ Municipality of COLUMBIA) as set forth below:
DESCRIPTION OF OFFENSE: ATTEMPTED MURDER
 16-3-29
CERTIFIED TRUE COPY
OF ORIGINAL FILED,

 Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said
defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this arrest warrant shall be delivered to
the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on 06/25/2010

Signature of Judge

Judge's Address

Judge's Telephone

Judge's Address CITY OF COLUMBIA, SCJudge's Telephone MUNICIPAL COURT, P.O. BOX 644 29202
 Issuing Court: ☐ Magistrate ☒ Municipal ☐ Circuit

ORIGINAL

Judge

Cooper

on

July 12, 2010

Type and Amount:

Denial

Name of Surety:

BANK OF AMERICA held by

Judge

of

Date of Allowance

Decision:

PROSECUTION before

Judge

on

by

(indicate jury trial, bench trial, plea, not. pros., etc.)

Disposition:

Sentence:

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

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Name: _____

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Name: _____

Address: _____

Telephone: _____

CODEFENDANTS

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

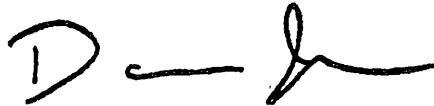
INDICTMENT

At a Court of General Sessions, convened on February 9, 2011, the Grand Jurors of Richland County present upon their oath:

ATTEMPTED MURDER

That Daqwan M Johnson did in Richland County on or about June 19, 2010, did with the intent to kill, attempt to kill Lamettress Stevens with malice aforethought, either expressed or implied. All in violation of SC Code of Laws § 16-3-29 (1976, as amended).

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



DAN JOHNSON, SOLICITOR

WITNESSES

(S) AL Thomas - Columbia Police Department

ARREST WARRANT NUMBER

K668248

ACTION OF GRAND JURY

TRUE BILL

Neena Gardiner

Foreperson of Grand Jury FEB 09 2011
Date:

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2011-GS-40-0885

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

February TERM 2011

42

THE STATE
vs.

Daquan M Johnson

Indictment for
ATTEMPTED MURDER

SC Code: 16-03-0029
CDR Code: 3410

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to.

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY
OF ORIGINAL FILED,
Jeanette W. McBride
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

1023

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
STATE VS.

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011 -GS-40- 0885AMW#: K668248Date of Offense: June 19 2010S.C. Code §: 16-03-0029CDR Code #: 3410

Dagwan M Johnson

A: _____
Sex: M Age: 23

B: _____ SS#: _____

Dress: _____

City, State, Zip _____

_____ SID# _____

SENTENCE SHEET

Disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS

: Attempted Murder

Violation of § 16-03-0029 of the S.C. Code of Laws, bearing CDR Code # 3410

NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45

Charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant initial)

Plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

TEST:

Lawrence C. H. 13009 Dagwan M. Johnson 74010
Solicitor SC Bar # Defendant Attorney for Defendant SC Bar #

HEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
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 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

Cost: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

Set by SCDPPPS _____

Recipient: _____

1-206 (Assessments 107.5%)	\$ _____
1-211(A)(1) (Conv. Surcharge)	\$100
1-211(A)(2) (DUI Surcharge)	\$100
5-2995 (DUI Assessment)	\$12
1-286 (DUI Breath Test)	\$25
13 (Public Def/Prob)	\$500
3, 1B TP (Law Enforce. Funding)	\$25
7, 1B TP (Drug Court Surcharge)	\$100
21-114(BUI Breath Test Fee)	\$50
5-2942(J) (Vehicle Assessment)	\$40/ea
11 TP (SCCJA Surcharge)	\$5
County (if paid in installments)	\$ _____
AL	\$ _____

Clerk of Court/Deputy Clerk: Jeanette W. McBride
Reporter: Pantani

4/217 (06/2000)

PTUP _____ CERTIFIED TRUE COPY
OF ORIGINAL FILED
_____ days/hours Public Service Time
Obtain GED ☐ C.C.C.P.&G.S.
Attend Voc. Rehab. Or Job Corps ☐ RICHLAND COUNTY
SOUTH CAROLINA

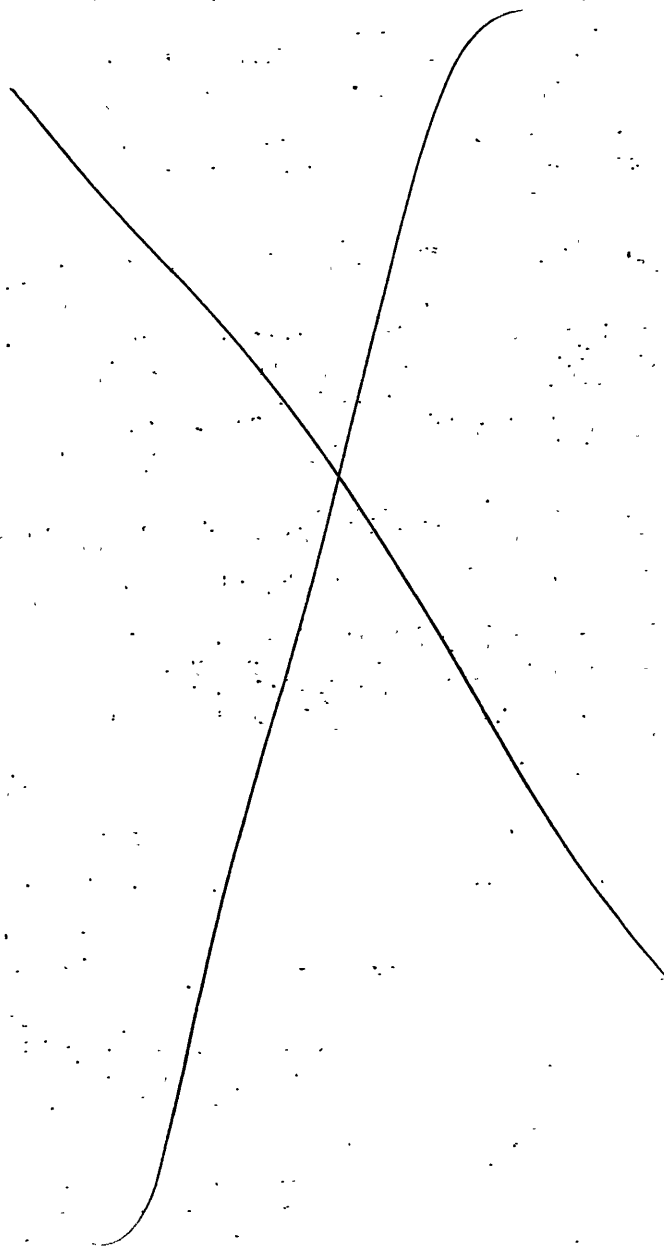
May serve W/E beginning _____
Substance Abuse Counseling ☐

Random Drug/Alcohol Testing ☐
Fine may be pd. in equal, consecutive weekly/monthly
pmts. Of \$ _____ Beginning _____
\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel,
\$35.13 TP, requires \$500 be paid to Clerk
during probation.

Presiding Judge: John M. McRae
Judge Code: 7-145
Sentence Date: 8 April 12



ARREST WARRANT

K-668247

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of
COLUMBIA

THE STATE
against

DARWAN M. JOHNSON

Address: [REDACTED]

COLUMBIA SC 29202

Phone: [REDACTED] SSN: [REDACTED]

Sex: M Race: D Height: 5'7" Weight: 175

DL State: [REDACTED] DL#: [REDACTED]

DOB: [REDACTED] Agency ORI#: SC0400100

Prosecuting Agency: CITY OF COLUMBIA

Prosecuting Officer: THOMAS AL/MCDUFFIE A

Offense: MURDER

Offense Code: HQM

Code/Ordinance Sec: 16-3-13

This Warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☒ Municipality of

COLUMBIA. The accused
is to be arrested and brought before me to be
dealt with according to law.

Signature of Judge (L.S.)

Date: [REDACTED]

RETURN

A copy of this arrest warrant was delivered to
defendant Darwan Johnson
on 27 JUN 10

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

CITY OF COLUMBIA
MUNICIPAL COURT
P.O. BOX 644
COLUMBIA, SC 29202

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of
COLUMBIA

AFFIDAVIT

Form Approved by
S.C. Attorney General
April 21, 2003
SCCA 618

Personally appeared before me the affiant DI THOMAS who
being duly sworn deposes and says that defendant DARWAN M. JOHNSON
did within this county and state on 06/19/2010 violate the criminal laws of the
State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of COLUMBIA)
in the following particulars:

DESCRIPTION OF OFFENSE: MURDER

16-3-10

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:

DEF DID ON 06/19/10 AT 23:05 HOURS COMMIT THE CRIME OF MURDER WHILE
AT 901 COLLETON ST APT 23-E, WITHIN THE CITY LIMITS OF COLUMBIA, SC.
DEF AND FOUR CO-DEF'S DID WITH MALICE, AFORETHOUGHT AND WITH THE INTENT
TO KILL, WHILE ARMED WITH HAND GUNS AND ASSAULT RIFLES OPENED
FIRE ON A GROUP OF PEOPLE SITTING IN FRONT OF BUILDING 23 OF GABLE
OAKS APT. VICTIM LAMETRESS STEVENSON WAS STRUCK ON THE SHOULDER.
AND VICTIM GARY REESE WAS STRUCK IN THE BACK, HE DIED ON THE SCENE.
DEF AND FOUR CO-DEF'S ENTERED A GRAY BUICK PARKED AT 5419 NORTH MAIN
ST. DEF'S FLED THE AREA IN THAT VEHICLE. INCIDENT WAS RECORDED ON GABLE OAKS APTS.
VIDEO. ON 06/24/10 DEF WAS IDENTIFIED BY A WITNESS BY A PHOTO LINE UP.

Signature of Affiant

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of
COLUMBIA

Affiant's Address #1 JUSTICE SQ
COLA, SC
Affiant's Telephone 5453500

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY

It appearing from the above affidavit that there are reasonable grounds to believe that
on 06/19/2010 defendant DARWAN M. JOHNSON
did violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of COLUMBIA) as set forth below:

DESCRIPTION OF OFFENSE: MURDER

16-3-10

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said
defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to
the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on 06/25/2010

Signature of Issuing Judge (L.S.)

Judge Code: 403003

Judge's Address CITY OF COLUMBIA, SC
MUNICIPAL COURT, P.O. BOX 644 29202
Judge's Telephone [REDACTED]

Issuing Court: ☐ Magistrate ☒ Municipal ☐ Circuit

ORIGINAL

CERTIFIED TRUE COPY
OF ORIGINAL FILED,
Janette W. McBride
CLERK
RICHLAND COUNTY
SOUTH CAROLINA

set by

Judge Cooperon July 12, 2010Type and Amount: Denial

Name of Surety: _____

DEFERRED HEARING held by

Judge _____

on _____

Defense Attorney: _____

Decision: _____

trial (pretrial) before

Judge _____

on _____

by _____

(Indicate jury trial, bench trial, plea, n.c., pros., etc.)

Disposition: _____

Sentence: _____

WITNESSES

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

ADJUDICANTS

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
STATE VS.

Dagwan M Johnson

Age: B Sex: M Age: 23

B: _____ SS#: _____

Address: _____

City, State, Zip _____

_____ SID# _____

Disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS

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

NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☐ \$17-25-45

Charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury, _____ (defendant initial)

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

TEST:

June 13, 2011 Dagwan M Johnson 74010
Solicitor SC Bar # _____ Defendant Attorney for Defendant SC Bar # _____

HEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years, d/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment \$ _____; 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 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

PTUP: _____

Stat: \$ _____ plus 20% fee: \$ _____

_____ days/hours Public Service Employment

Payment Terms: _____

Obtain GED ☐

Set by SCDPPPS _____

Attend Voc. Rehab. Or Job Corps. _____

Recipient: _____

May serve W/E beginning _____

Substance Abuse Counseling ☐

Fine _____

Random Drug/Alcohol Testing ☐

4-1-206 (Assessments 107.5%) \$ _____

Fine may be pd. in equal, consecutive weekly/monthly

4-1-211(A)(1) (Conv. Surcharge) \$100 \$ _____

pmts. Of \$ _____ Beginning _____

4-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

\$ _____ paid to Public Defender Fund

16-5-2995 (DUI Assessment) \$12 \$ _____

Other: _____

16-1-286 (DUI Breath Test) \$25 \$ _____

15-13 (Public Def/Prob) \$500 \$ _____

13-3, 1B TP (Law Enforce. Funding) \$25 \$ _____

13-7, 1B TP (Drug Court Surcharge) \$100 \$ _____

10-21-114 (BUI Breath Test Fee) \$50 \$ _____

16-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

10-11 TP (SCCJA Surcharge) \$5 \$ _____

% to County (if paid in installments) \$ _____

TOTAL \$ _____

Clerk of Court/ Deputy Clerk Jeannette W. McBride

Court Reporter: _____

Presiding Judge: _____

Judge Code: 7145

Sentence Date: 8-10-11

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
STATE VS.

Dagwan M Johnson

A: _____

ce: B Sex: M Age: 23

IB: _____ SS#: _____

dress: _____

y, State, Zip _____

_____ SID# _____

disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS

violation of Attempted Murder

violation of 16-03-0029 of the S.C. Code of Laws, bearing CDR Code # 3410

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45

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

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

TEST:

Lawrence C. Hill 13009 Dagwan M. Johnson By 66 74010
Solicitor SC Bar # Defendant Attorney for Defendant SC Bar #

HEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 30 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
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ursuant 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 PTUP: _____

stat \$ _____ plus 20% fee: _____ \$ _____

_____ days/hours Public Service Employment

ayment Terms: _____

Obtain GED ☐

Set by SCDPPPS _____

Attend Voc. Rehab. Or Job Corps. _____

ecipient: _____

May serve W/E beginning _____
Substance Abuse Counseling ☐

fine _____

Random Drug/Alcohol Testing ☐

14-1-206 (Assessments 107.5%) _____

Fine may be pd. in equal, consecutive weekly/monthly

14-1-211(A)(1) (Conv. Surcharge) \$100 _____

pmts. Of \$ _____ Beginning _____

14-1-211(A)(2) (DUI Surcharge) \$100 _____

\$ _____ paid to Public Defender Fund

56-5-2995 (DUI Assessment) \$12 _____

56-1-286 (DUI Breath Test) \$25 _____

Other: _____

35.13 (Public Def/Prob) \$500 _____

73.3, 1B TP (Law Enforce. Funding) \$25 _____

33.7, 1B TP (Drug Court Surcharge) \$100 _____

50-21-114(BUI Breath Test Fee) \$50 _____

56-5-2942(J) (Vehicle Assessment) \$40/ea _____

30.11 TP (SCCJA Surcharge) \$5 _____

% to County (if paid in installments) _____

OTAL _____

lerk of Court/ Deputy Clerk Jeannette W. McRide
ourt Reporter: Partani

Presiding Judge: Cheryl E. Miller

Judge Code: 7-146

Sentence Date: 8 Aug 12

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAQWAN M. JOHNSON,

APPELLANT

APPELLATE CASE NO. 2012-212696

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

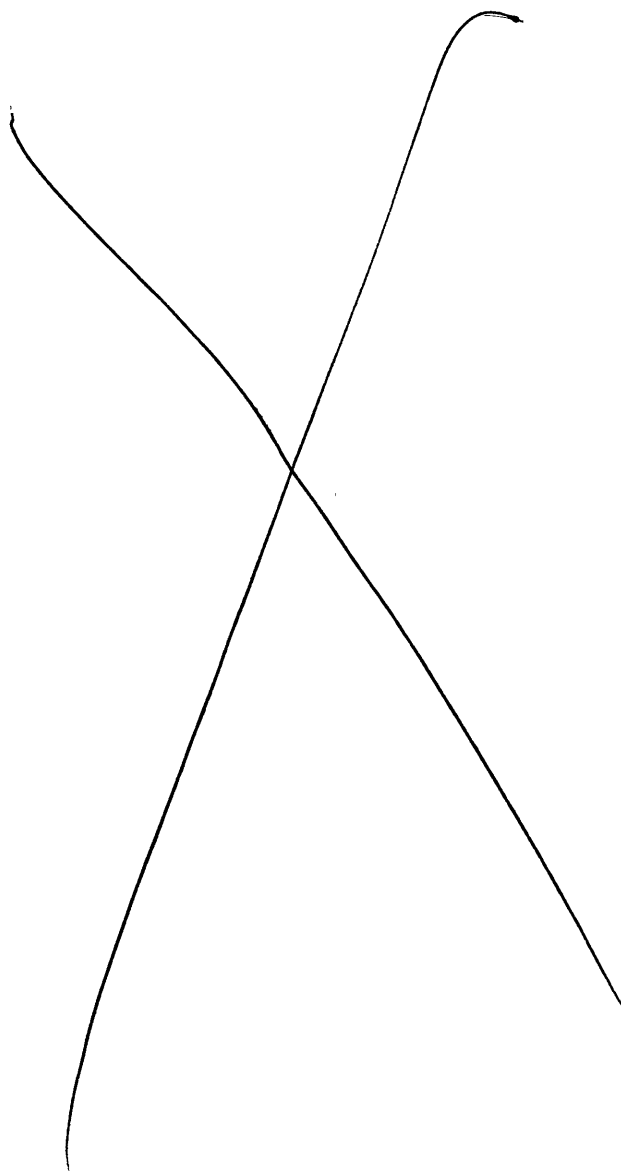


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2. The court erred by ruling the defense opened the door to evidence appellant was in a gang simply by agreeing in its opening statement that, while the murder committed by others may have been gang related appellant was not at the scene of the shooting, and evidence appellant was in a gang constituted highly prejudicial impermissible bad character evidence.....	14
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STATEMENT OF ISSUES ON APPEAL

1.

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

2.

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

STATEMENT OF THE CASE

Appellant was indicted by the Richland County Grand Jury for the offenses of murder and attempted murder. R. p. 868. The solicitor would later tell the jury in closing that the state did not have to prove appellant fired the fatal shots but that he was guilty under the theory of "hand of one is the hand of all" if the jury believed he was present with the other young men involved in the shooting. R. p. 793, l. 16 – 795, l. 20. Appellant's case was called to trial on July 26, 2012, July 30, 2012–August 3, 2012, and August 8, 2012 before the Honorable R. Knox McMahon, and a jury. Appellant was represented by Greg Collins and John Newton. K. Luck Campbell, Meghan Walker, and Jeremiah Shellenberg, II were the assistant solicitors. R. p. 1.

At the conclusion of the trial the jury found appellant guilty on both counts. R. p. 865, l. 18 – 866, l. 3. Judge McMahon sentenced appellant to fifty years imprisonment for murder and thirty years imprisonment for attempted murder. R. p. 867, ll. 16-23.

This appeal follows.

STATEMENT OF FACTS

Prior to trial Defense Counsel Collins noted that this case had been “noticed for trial many, many, many, many times. Dating back to the beginning of 2011, it has been scheduled for trial anywhere from six to eight different times.” Collins complained the state’s discovery “continued to trickle in . . .” R. p. 32, l. 5 – 51, l. 17.

Further, the defense recently learned there had been a federal indictment against about 37 Blood gang members in Richland County. Some of them were also apparently involved in the shooting in this case, which the state asserted was gang related. There was also a federal investigation involving this incident. R. p. 32, l. 5 – 51, l. 17. In addition, the defense also wanted to know the results of the Richland County gang database for its trial preparation. R. p. 50, l. 15 – 94, l. 24. R. p. 25, l. 3 – 28, l. 15.

Further, a key witness, Rontrell Henderson, who had implicated appellant in the shooting had been arrested “over the weekend.” Henderson allegedly now was telling the police he lied when he implicated appellant. The defense therefore urgently needed to interview Henderson who had not been appointed a lawyer yet. R. p. 28, l. 8 – 33, l. 10.

There were also the matter of Crime Stoppers tips outstanding about appellant, and the shooting. Defense counsel told the judge their subpoena had not been fully compiled with in this regard. R. p. 28, l. 16 – 95, l. 5.

Collins argued that the solicitors had complete control of the docket and he objected to the “Solicitor-controlled” docket because the defense had done “everything in our power to get ready” but the defense now faced the prospect of being forced to go to trial not adequately prepared because the solicitor controlled the docket. Counsel noted that this case was very complex, and there were many potential witnesses. The judge ruled that the

solicitors controlled the docket, he denied the motion, and directly cited S.C. Code § 1-7-330 in support of his ruling. R. p. 94, ll. 9-24.

Making this case more complex was the fact that the defense objected to any evidence about appellant being in a gang as inadmissible bad character evidence. The solicitor stated that she did not want to attack anyone's character but she claimed it was appellant's "beef that happened to be with the Bloods." She alleged appellant being in a gang led to the fatal shooting with rival gang. As will be seen infra, the defense did not offer any evidence, and it tested the state's case on cross-examination, and put the state to its burden of proof. R. p. 90, l. 9 – 94, l. 25.

Opening Statements

In his opening statement, Assistant Solicitor Shellenberg told the jury that the victim "and some of the other witnesses you are going to hear from are gang members. They are know as the Bloods. Some of the other people you are going to hear from are members of the Folk Nation. Those are rival gangs. Ladies and Gentlemen, this is gang violence." R. p. 112, ll. 9-15.

Defense Counsel Newton responded in his opening statement:

What the State wants you to do is they want to talk about gang warfare, rival gangs, fighting each other, killing each other. That's what happened here. Okay? Five people went in to Gable Oaks Apartments and shot it up because they were fighting with another gang. But Daqwan Johnson was not there. Okay?

R. p. 115, l. 23 – 116, l. 3. (emphasis added).

As will be seen infra, from defense counsel's mere mention of gangs, in response to the state's opening argument, to tell the jury appellant was not present at the crime scene,

the trial judge would rule that the state could offer evidence appellant was a member of a gang because the door had been opened to it.

State's evidence

Investigator Andrew Richbourg was a patrolman with the Columbia Police Department at the time of the shooting at the Gable Oaks Apartments in Eau Claire. He responded to a "shots fired" call and he observed a large group of people in the common grounds of the apartment complex. He was directed to Apartment E where the police observed a large amount of blood on the wall and the dead victim in the back room. Richbourg estimated there were about fifty people milling around outside of the apartment complex at the time. R. p. 125, l. 6 – 126, l. 22.

Kenneth St. John lived at the Gable Oaks Apartments with his five foster children. He remembered on the night of June 19, 2010 he heard thirty to forty gunshots. The shooting lasted for three to four minutes. St. John testified earlier, at about 12:30 that afternoon, his friend Mr. Whitney was going to the garbage can when a car drove by and the driver and passenger leaned out the window and started shooting at Whitney. R. p. 128, l. 12 – 132, l. 10. St. John did not get a good look at the shooters because they were wearing masks. R. p. 135, l. 3 – 136, l. 1.

The state introduced a security camera videotape through property manager Jerome Singleton. It merely showed the shooting. There was no assertion appellant was readily identified from the videotape. R. p. 143, l. 5 – 147, l. 23. The state also offered evidence that paperwork with appellant's name on it was found in a Buick that apparently had been riddled in bullets. However, the date of the paperwork in appellant's name was remote. R. p. 238, l. 3 – 239, l. 12.

Prior to the testimony of Marquez Prophet, the judge ruled that Prophet could make an in-court identification of appellant. Marquez was twenty years old and presently incarcerated at the Alvin S. Glenn Detention Center. R. p. 297, l. 8 – 298, l. 24.

The solicitor asked Prophet if he was in a gang and Prophet denied being in a gang. Prophet said he knew people in gangs, and he identified Terrance Patterson as one of them. R. p. 298, ll. 2-10. The solicitor then asked Prophet if he knew “who else do you hang with that’s in a gang?” Prophet answered “G-man [appellant].” R. p. 298, ll. 11-12. The defense immediately objected and the jury was removed from the courtroom. R. p. 298, ll. 14-22.

Defense counsel argued this was impermissible character evidence against appellant. Counsel noted: “the State has said that we said in our opening that this was gang-related activities; however, we are saying our client wasn’t involved in that. . . . We had a motion at the beginning of this trial asking - - [to remove] any references to that.” Counsel argued evidence that appellant was in a gang was inadmissible, and he asked that it be struck from the record as impermissible bad character evidence. R. p. 298, l. 11 – 299, l. 25.

The assistant solicitor repeated her pre-trial assertion that this gang membership evidence was not meant to be an impermissible comment on appellant’s “character.” She argued the state’s theory of the case was that this shooting was gang retaliation. R. p. 300, ll. 2-23.

The judge then noted that the defense had requested *voir dire* on gang activity and although the evidence of appellant’s bad character may not be admissible, the judge reasoned that this same evidence that appellant was allegedly in a gang could be admissible “on another issue.” The judge blamed the defense for mentioning the subject of gangs in its

opening statement, and wanting *voir dire* on the subject. "I don't mean that by way of fussing." R. p. 301, l. 23 – 303, l. 21.

Defense Counsel Newton further complained that if Prophet was not in a gang, how could he allege first-hand knowledge of appellant's alleged gang affiliation. The judge responded: "I'm not at the Knights of Columbus, but I can guarantee you I can tell who might be there tonight." Defense counsel again argued: "He's not in a gang; therefore, he's not there and wasn't a part of it. That's what we are saying, Your Honor. Again, I believe it was improper to go that route." The judge overruled the defense objection. R. p. 301, l. 23 – 303, l. 21.

In the presence of the jury Prophet then testified that appellant was in a gang. R. p. 304, ll. 6-19. Prophet said appellant also drove a Buick which the state suspected may have been the vehicle from which shots were fired in the earlier shooting at the apartment complex. R. p. 310, l. 11 – 312, l. 19.

In addition, Prophet asserted appellant had been in a fight with a man named "Weeny," and that the fight was over gangs. Prophet testified Weeny shot at them while he was in appellant's car with two other men. Appellant was not present. Prophet said he did not know if Weeny was in a gang. Prophet said he telephoned appellant to tell him that his "car got shot up." Prophet said no one got hurt and he said did not shoot back. Prophet said appellant was angry and told him to bring him his car back. R. p. 310, l. 11 – 312, l. 19.

Prophet maintained appellant then told the men "to get the guns." Prophet claimed the men then retrieved assault rifles, other weapons and a handgun. They went to

the apartment building, and Prophet heard gunshots being fired. Prophet testified he did not know who had done the shooting. R. p. 311, l. 10 – 321, l. 18.

The state's physical evidence showed that .223 shells were found under appellant's bed at his grandmother's house. Two of these rounds found at the crime scene matched rounds found in appellant's weapon. R. p. 699, l. 1 – 700, l. 25.

Armed with the judge's approval that the defense opened the door to the gang evidence the state closed its case with the testimony of Vince Goggins of the Richland County Sheriff's Department gang unit. Goggins testified that a person [obviously appellant] who would change his name from "B-Man" to "G-Man" would be doing so as a sign of disrespect to the Blood gang. Goggins offered there were different sections of the Folk Nation in Columbia. R. p. 774, l. 23 – 779, l. 25.

Goggins also testified that the Bloods were formed in the 1970's in California, and the Folk Nation was a Chicago based gang that was formed in the prison system in that state. R. p. 777, ll. 9-23. The state's ended its case as follows:

Q. In 2010 you were with the gang unit then?

A. Yes, I was.

Q. How were the relationships between the Bloods and the Folk in 2010?

A. They have been rivalries since the inception of the Folk Nation and Bloods nation. So it has always been a rivalry here in Richland County as well.

Q. So violence between those two gangs, was that going on in 2010 here in Columbia?

A. Yes, it was.

R. p. 780, ll. 6-15.

ARGUMENT

1.

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

As seen, Defense Counsel Collins argued that the solicitors had complete control of the docket and he objected to the “Solicitor-controlled” docket because the defense had done “everything in our power to get ready” but the defense now faced the prospect of being forced to go to trial not adequately prepared because the solicitor controlled the docket. Counsel noted that this case was very complex, and there were many potential witnesses. The judge ruled that the solicitors controlled the docket, he denied the motion, and directly cited S.C. Code § 1-7-330 in support of his ruling. R. p. 94, ll. 9-24.

In *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012) our Supreme Court held that the S.C. Code § 1-7-330 was unconstitutional. This Court found the issue preserved even though it was never raised to the trial judge. In the present case, defense counsel was correct and partially clairvoyant in objecting to the solicitors having exclusive control of the dockets for General Sessions court. The trial here, as seen above, cited S.C. Code § 1-7-330 in support of his ruling that the solicitor controlled the docket, and they had the right to call the present case to trial at the time of their choosing.

Our Supreme Court noted that the only reference to solicitors in the Constitution was in the Article creating the Judicial Department. S.C. Const. art. V, § 24. However, the section provides that the General Assembly shall provide by law for their duties. “To

that end, S. C. Code § 1-1-110 squarely places the solicitors in the Judicial Branch.”
State v. Langford, 400 S.C. at 434, 735 S.E.2d at 478.

The Court in Langford held that “setting the trial docket therefore is the prerogative of the court.” Therefore the preparation of the docket being exclusively in the hands of the Circuit Solicitor, as stated in S.C. Code § 1-7-330, constituted “a complete invasion into the Court’s domain.” State v. Langford, 400 S.C. 421, 435, 735 S.E.2d at 478.

In Langford the defendant asserted prejudice because he was denied his right to a speedy trial, and because solicitor control allowed the solicitor to “judge shop.” The Supreme Court rejected a finding of prejudice under both alleged grounds.

Here, conversely, appellant asserted prejudice because this was a very complex case with many witnesses. As seen above, at the time the solicitor called the case to trial the defense was at a great disadvantage. Counsel needed more time to be ready for this complicated trial. Yet the judge ruled the defense was at the mercy of the solicitor because she controlled the docket, and had the unconstitutional power to choose the time the case was called to trial.

If the judge had continued the trial as requested defense counsel could have been prepared to handle the many issues that arose during this trial without the jury constantly being sent out of the courtroom as this record shows. There is every reason to think the jury would conclude the defense was attempting to hide evidence from them because they were constantly being removed from the courtroom since these matters could not be resolved pre-trial because of the late discovery.

The trial did indeed involve many witnesses and complex issues as defense counsel correctly argued to the court. The defense was attempting to obtain data on a "gang database" in Richland County for its trial preparation. A key witness had also recanted his statement against appellant immediately before trial, and the defense wanted to interview him with time for some reflection and trial strategy.

It is important to note that the judge's ruling here was simply that the solicitor by statute controlled the docket, and the solicitor had called the case to trial. Appellant had stated meritorious grounds for a minimal continuance where appellant was incarcerated and the state was not prejudiced. Consequently, appellant should be granted a new trial given the highly unusual facts of this case.

2.

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

As seen above, the judge ruled that the defense opened the door to this gang evidence merely because it mentioned gang activity in its opening statement in response to the state's opening statement. The judge also found the defense wanting voir dire on the subject opened the door to evidence **appellant was in a gang.**

In Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989), our Supreme Court reiterated that in a criminal case, the state cannot not attack the character of the defendant unless the defendant himself places his character at issue. See State v. McElveen, 280 S.C. 325, 313 S.E.2d 289 (1984); State v. Swords, 279 S.C. 554, 309 S.E.2d 750 (1983). In Mitchell v. State, the solicitor introduced evidence alleging appellant was a "mafia" member and introduced evidence that she selected different colors of candles for the people she knew. In addition, the state presented evidence that people would come to Mitchell's home to "work the candles." Mitchell v. State, 298 S.C. at 188, 379 S.E.2d at 125.

Here, the state introduced evidence over appellant's objection that he was a gang member. Particularly in Richland County, South Carolina, for the last several years "gang activity" has been a sore spot with many citizens, who are also jurors. Introducing evidence that appellant was a member of a gang was very damning evidence. This Court can take

judicial notice of the fact that the front page of yesterday's State Newspaper, October 22, 2013 was dominated with news stories about the importance of stopping gang activity.

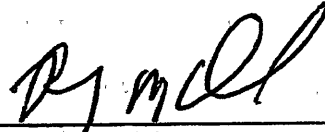
The defense also did not open the door to this testimony. When placing the handling of the "gang" matter in context, it was clear the defense was asserting appellant was not a gang member although it is understood the state's case was going to be that the victim was killed during a gang retaliation. In his opening statement defense counsel only said that he understood the state was going to raise gang retaliation as an issue, which the solicitor already had in his opening anyway, but the defense insisted appellant was not a member of a gang and that evidence he was a member of a gang was impermissible bad character evidence. Appellant did not open the door to evidence he allegedly was a gang member, and too all of this evidence about gangs, their origins, and presence in Richland County.

Appellant did not testify in this case, and he did not offer a defense. He put the state to its burden of proof and the state impermissibly attacked appellant's character where he did not put it at issue. The state's case against appellant was far from overwhelming, and the smearing of his character entitles him to a new trial. Mitchell v. State, supra.

CONCLUSION

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

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

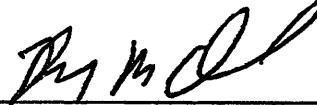
ATTORNEY FOR APPELLANT

This 30th day of October, 2014.

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 April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 30, 2014



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAQWAN M. JOHNSON,

APPELLANT

APPELLATE CASE NO. 2012-212696

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 Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 30th day of October, 2014.



Robert M. Dudek
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ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of October, 2014.

Rhonda Demese Zappworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021 .

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

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

THE STATE,

Respondent,

vs.

DAQWAN MARQUELL JOHNSON,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

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COUNTER STATEMENT OF ISSUES ON APPEAL

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

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

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

STATEMENT OF THE CASE

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

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

STATEMENT OF FACTS

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

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

Bloods.

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

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

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

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

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

The first shooting occurred on the afternoon of June 19, 2010. Kenneth St. John and Whitney Wilson testified that they saw a silver, or tan, colored four-door Buick LeSabre pull into their Columbia, South Carolina, apartment complex, which had children outside of the apartments. The passenger in the Buick leaned out the window and fired several shots at Wilson, as he was taking out his trash. Wilson then he ran into his apartment and stayed there for hours. The Buick drove a short distance, made a U-turn and waited for several minutes, before it sped away from the scene. R. p. 130, line 17 – p. 132, line 16; p. 133, line 14 – p. 135, line 17; p. 254, line 5 – p. 255, line 24.² Wilson saw but did not recognize the car’s driver. When police showed him a photographic lineup (State’s Exhibit 142), however, he circled three individuals and Johnson’s photograph was one of the pictures that he circled. R. p. 255, lines 5-8; p. 257, line 20 – p. 259, line 1; p. 614, line 24 – p. 615, line 9; p. 709, lines 3-22.

Mr. Kenneth St. John testified that the Buick returned roughly thirty minutes later. This time a female was driving but there was a male in the back seat. The car’s occupants spoke to Whitney and others who were present in the apartment complex. Mr. St. John heard the disparaging term “doughnuts” exclaimed by a person in the apartment complex to one of the occupant’s in Johnson’s car. R. p. 135, lines 12-17; p. 778, lines 4-14.³

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

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

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

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

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

R. p. 371, line 19 – p. 392, line 2.

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

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

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

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

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

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

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

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

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

He later surrendered and told police what had happened. He was arrested and charged with murder and attempted murder. He had not received any deals in exchange for his testimony. **R. p. 325, line 25 – p. 331, line 23.**⁶

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

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

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

R. p. 361, line 23 – p. 362, line 24.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Inv. David Collins, of the Richland County Sheriff Department's forensic services laboratory, is an expert in firearms examination and identification. R. p. 486, line 25 – p. 489, line 1. He examined the various weapons, cartridges, shell casings and bullet fragments that the City of Columbia Police Department recovered in this case. He opined that the .223 semi-automatic pistol retrieved from under Johnson's bed, which was a Eubanks Model EMAKN, had fired items 4-23 (or twenty shell casings);¹⁰ that State's 150, the .45 caliber handgun recovered from Gary Reese's gravesite, fired all five of the .45 caliber casings (items 37-41) found at the scene; that a .40 caliber Smith and Wesson had fired items 24-28, 30-36, 43 and 47; and that a Norenko Model SKS had not fired any items submitted in this case. He further opined that the two unfired .223 cartridges (Items 27-28, State's Exhibit 125) found at scene were consistent with the ammunition that was in the weapon seized from under Johnson's bed; that this ammunition, which was imported from Korea; was "unusual;" and that he had never seen it in the thousands of examinations that he had done. R. p. 491, line 7 – p. 527, line 4; p. 528, line 10 – p. 536, line 24.¹¹

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

Counsel stated that "the main issue that we have ... from the defense's standpoint" was a recent federal indictment returned against thirty-seven members of the Bloods gang in Richland County, following a two year investigation. "A number of the names listed in that indictment are specifically referenced in the discovery of this case and are potential witnesses [who] possibly have information" that could be used in Johnson's defense or for impeachment. Counsel admittedly was "not sure" that the defense could obtain anything useful from the federal investigation and indictment. However, he noted that these witnesses were also involved in a shooting at Studio 54, a Richland County nightclub, several hours after the victim in this case was shot. The witnesses that he listed were Titus Bowman, Darryl Austin, Craig Austin, Bernard Breland, Torrian Sims, Antwon Brisbane, [and] Michael Taylor." R. p. 25, line 22 – p. 27, line 1; p. 30, lines 4-20; p. 31, lines 8-14.¹⁴

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

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

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

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

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

Senior Assistant Solicitor Campbell stated that she had contacted the United States Attorney's Office (USAO) and an attorney from that Office told her that no wiretaps were "in place until June of 2011," which was almost a year after the murder in this case. Also, the defense had not contacted the USAO until the afternoon before the motions hearing. Nevertheless, the USAO was attempting to provide counsel with the information that he had requested on fifteen individuals. Using a chart¹⁵ with the names of the individuals named in the federal indictment, Ms. Campbell explained that only three of those people were involved in the shooting at Studio 54, which had been resolved by one person pleading guilty to it. Ms. Campbell explained the facts surrounding this case and the Studio 54 shooting,¹⁶ and she explained that the defense already had the information relating to that crime, including any information in the USAO's case. R. p. 32, line 5 – p. 35, line 12.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

R. p. 48, line 5 – p. 49, line 13.

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

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

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

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

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

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

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

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

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

Number seven, Your Honor, just to put it on the record, this case has been noticed for trial many, many, many, many times. Since dating back to the beginning of 2011, it has been scheduled for trial anywhere from six to eight different times.

Discovery has continued to trickle in throughout the over two years of this case. As I mentioned before, we got a written statement yesterday that we did not have up until yesterday. The fact that the solicitors have complete control of the docket and decide when to schedule the case, we were not consulted with this trial date of July 30th.

We have done everything in our power to get ready. We were noticed July 18th, technically ... outside the ten days notice required. However, we just want to put on the record we object to the solicitor-controlled docket, considering the complexity of this case, the number of potential witnesses.

We were not consulted with on a specific trial date. We were just told 12 days before to be ready to go to trial. I just want to put on the record that we object to the solicitor-controlled docket for those reasons.

R. p. 93, line 22 – p. 94, line 20.

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

C. There was no abuse of discretion.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. How issue arose at trial.

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

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

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

his character.

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

R. p. 90, line 25 – p. 91, line 5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As we continued this investigation, we found that the incident itself was gang related. The area which I just showed you is known as a Blood gang territory. All subjects in that area are Bloods, and they protect that area.

We were receiving information that the perpetrators in this particular incident were Folk Nation members or associates and that there was an ongoing beef between them, ongoing shootings throughout the City and the County. So we decided to get with the task force and join together to look at it this particular situation.

R. p. 627, lines 2-13.

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

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

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

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

B. Discussion.

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

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

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

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

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

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

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

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

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

offenses of murder and attempted murder.

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

“The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred.” *State v. King*, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999). “The evidence admitted must logically relate to the crime with which the defendant has been charged.” *Wiles*, 383 S.C. at 158, 679 S.E.2d at 176.

One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context or the *res gestae* or the uncharged offense is so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ... [and is thus] part of the *res gestae* of the crime charged. And where evidence is admissible to provide this full presentation of the offense, [t]here is no reason to fragmentize the event under inquiry by suppressing parts of the *res gestae*.

State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370–71 (1996) (alterations in original) (internal quotation marks omitted), overruled on other grounds by *State v. Giles*, 407 S.C. 14, 754 S.E.2d 261 (2014). “When evidence is admissible to provide this full presentation of the offense, there is no reason to fragmentize the event under inquiry by suppressing parts of the *res gestae*.” *State v. Preslar*, 364 S.C. 466, 474, 613 S.E.2d 381, 385 (Ct.App.2005) (internal quotation marks omitted). Under this theory, the temporal proximity of the prior bad act should be closely related to the charged crime. *State v. Owens*, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001), overruled on other grounds by *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

State v. McGee, 408 S.C. 278, 287–88, 758 S.E.2d 730, 735–36 (2014).¹⁹

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

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

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

Clasby, 385 S.C. at 155, 682 S.E.2d at 895 (citations and internal quotation marks omitted).

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

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

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

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

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

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

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

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

In *Price, supra*, the Court held that an officer's testimony that the appellant was a supreme or an officer within criminal street gang was inadmissible hearsay because the testimony was not based on his personal knowledge, but on information relayed to him by an informant. *Price*, 368 S.C. at 498-99, 629 S.E.2d at 365-66. It should be noted that the Court did not hold that a witness who had first-hand knowledge of a defendant's gang membership could not testify that the defendant was in a gang, provided his testimony was otherwise relevant.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

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DANIEL EDWARD JOHNSON
Solicitor, Fifth Judicial Circuit
1701 Main St., Third Floor
Columbia, SC 29201
(803) 576-1802

November 19, 2014.

By: 

WILLIAM EDGAR SALTER, III

ATTORNEYS FOR RESPONDENT

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

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

THE STATE,

Respondent,

vs.

DAQWAN MARQUELL JOHNSON,

Appellant.

CERTIFICATE OF COMPLIANCE

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

This 19th day of November, 2014.

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

vs.

DAQWAN MARQUELL JOHNSON,

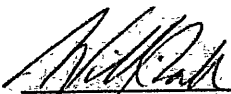
Appellant.

CERTIFICATE OF SERVICE

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

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

This 19th day of November, 2014.


WILLIAM EDGAR SALTER, III
Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Daqwan M. Johnson, Appellant.

Appellate Case No. 2012-212696

Appeal From Richland County
R. Knox McMahon, Circuit Court Judge

Unpublished Opinion No. 2015-UP-192
Submitted March 1, 2015 – Filed April 8, 2015

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Donald J. Zelenka, Senior
Assistant Attorney General W. Edgar Salter, III, and
Solicitor Daniel Edward Johnson, all of Columbia, for
Respondent.

PER CURIAM: Daqwan M. Johnson appeals his convictions for murder and attempted murder, arguing the trial court erred by (1) denying his motion for a continuance and (2) allowing the State to introduce evidence of his alleged gang affiliation. Johnson argues he should be granted a new trial under *State v. Langford*¹ due to the trial court's refusal to grant a continuance. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to the trial court's refusal to grant a continuance: *State v. Meggett*, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012) ("The denial of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion resulting in prejudice."); *Langford*, 400 S.C. at 436, 735 S.E.2d at 479 ("Our determination that section 1-7-330 violates separation of powers is not dispositive To warrant reversal, [a defendant] must demonstrate that he sustained prejudice as a result of the solicitor setting when his case was called for trial. ").
2. As to the evidence of Johnson's alleged gang affiliation: *State v. Page*, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008) ("Whether a person opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the sound discretion of the trial [court]."); *State v. Brown*, 344 S.C. 70, 75, 543 S.E.2d 552, 555 (2001) ("The erroneous admission of character evidence is harmless beyond a reasonable doubt if its impact is minimal in the context of the entire record."); *State v. Kirton*, 381 S.C. 7, 37-38, 671 S.E.2d 107, 122-23 (Ct. App. 2008) (holding the introduction of inadmissible evidence is harmless when the evidence is merely cumulative to other unobjected-to evidence).

AFFIRMED.²

THOMAS, KONDUROS, AND GEATHERS, JJ., concur.

¹ 400 S.C. 421, 735 S.E.2d 471 (2012) (ruling section 1-7-330 of the South Carolina Code (2005), which vests exclusive control of the criminal docket in the circuit solicitor, is unconstitutional).

² We decide this case without oral argument pursuant to Rule 215, SCACR.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
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April 29, 2015

The Honorable Jeanette W. McBride
PO Box 2766
Columbia SC 29202-2766

REMITTITUR

Re: The State v. Daqwan M. Johnson
Lower Court Case No. 2011GS4000863, 2011GS4000885
Appellate Case No. 2012-212696

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

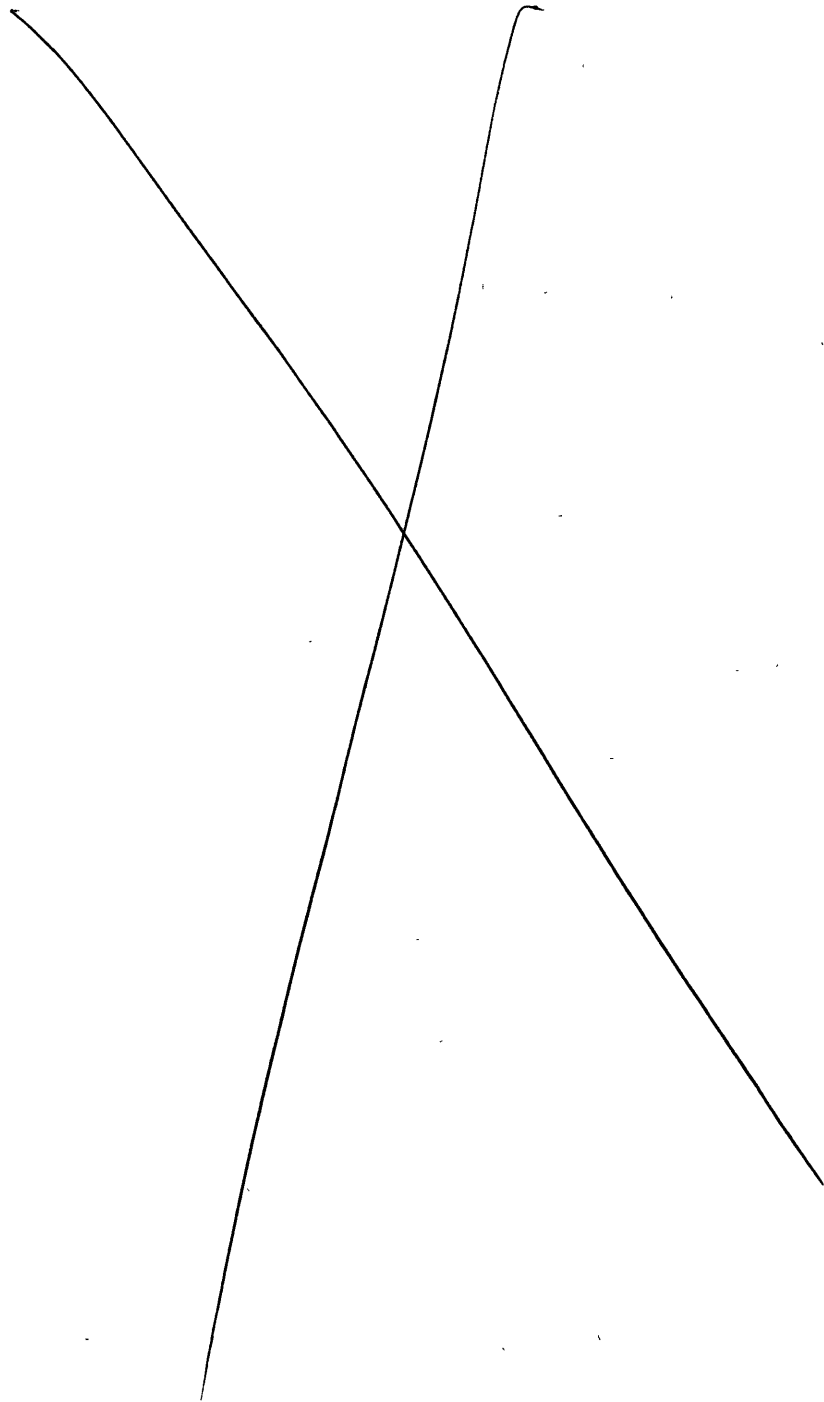
Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Robert Michael Dudek, Esquire
Alan McCrory Wilson, Esquire
John W. McIntosh, Esquire
W. Edgar Salter, III, Esquire
Donald J. Zelenka, Esquire
Daniel Edward Johnson, Esquire



FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF RichlandDacwan Johnson 351891
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

2015 CP4005213
IN THE COURT OF COMMON PLEASAPPLICATION FOR
POST-CONVICTION RELIEF2015 AUG 25 PM 3:44
JEANETTE W. MCBRIDE
CLERK
RICHLAND COUNTY
FILED**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 therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay 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 Alvin S Glem Detention Center
2. Name and location of Court which imposed sentence Richland County General Sessions
3. Name(s) of co-defendant(s) (if any) Marquez Prophet Detrick Walker Brain Campbell
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 11-GS-40-00863
 - (b) 11-GS-40-00885
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) _____
 - (b) _____

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty I was convicted by a jury.
- (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. State of South Carolina Courts of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. The conviction was Affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. April 8, 2015
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- 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:

- (a) Ineffective Assistance Trial Counsel
- (b) Ineffective Assistance Appellate Counsel
- (c) Due Process violation of 5th and 14th Amendment

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) See attached memorandum of law
- (b) See attached memorandum of law
- (c) See attached memorandum of law

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? No.
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No.
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.
- (d) any other petitions, motions or applications in this or any other Court? No.

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. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (c) the disposition thereof:
 - i. _____
 - ii. _____
 - iii. _____

- iv. _____
- (d) the date of each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. _____
- ii. _____
- iii. _____
- 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?
~~Yes~~ No.
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. _____
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. _____
- ii. _____
- iii. _____
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) _____
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
- (b) your trial, if any? Greg Collins
- (c) your sentencing? Greg Collins
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Robert M. Dwyer
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Direct Appeal

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. Greg Collins
 - ii. Robert M. Dwyer 1330 Lady st. Suite 401 Columbia, SC
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. Trial Counselor
 - ii. Direct Appeal
 - iii. _____

19. State clearly the relief you seek in filing this application:

Sentence Vacated Reversed remanded for New trial

20. Are you now under sentence from any other court that you have not challenged?

No.

STATE OF SOUTH CAROLINA

County of

)
)
)

VERIFICATION

I, JD, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Dogman M Johnson

SWORN to and subscribed before me this 11th
day of August, 2015

Michael Canine
Notary Public (L.S.)

My Commission Expires: July 9, 2025

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, DJ, 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.

Dogman M Johnson
Applicant

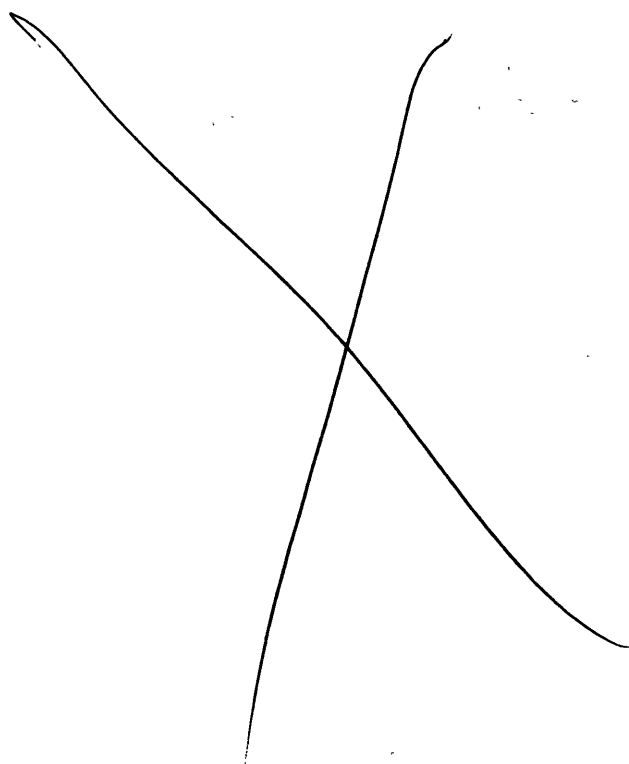
SWORN or affirmed to and subscribed before me this

11th day of August, 2015.

Michael Canare
Notary Public

My Commission Expires: July 9, 2025

RICHLAND COUNTY
FILED
2015 AUG 25 PM 3:44
JEANETTE W. McBRIDE
C.C.P. & G.S.



STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

DaQwan, Johnson, #351891

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2015-CP-40-5213

RETURN

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed August 25, 2015, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted at the February 2011 term of the Court of General Sessions for Richland County for murder (2011-GS-40-0863) and attempted murder (2012-GS-40-0885). Applicant was represented by Gregory B. Collins, Esq and John C. Newton, Esq. Applicant proceeded to trial on July 26, July 30-August 3, and August 8, 2012, before the Honorable R. Knox McMahon and a jury. He was convicted as indicted. Judge McMahon sentenced Applicant to a term of fifty (50) years' imprisonment for murder and a term of thirty (30) years' for attempted murder. These sentences were to be served concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Robert M. Dudek, Esq. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences. State v. Johnson, No. 2015-UP-192 (filed April 8, 2015). The Remittitur was issued on April 29, 2015.

Attached herewith and incorporated herein by reference are the records of the Richland County Clerk of Court regarding the subject conviction(s), the transcript from Applicant's trial hearing, Applicant's records for the Department of Corrections, and Applicant's appellate records. Respondent reserves the right to amend its return upon the receipt of other relevant records.

II.

In his 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. "Trial Counsel failed to put the State's case through the adversarial process"
 - b. "Trial Counsel failed to investigate"
2. Ineffective Assistance of Appellate Counsel, in that;
 - a. "Appellate counsel denied applicant the right to fair process and the opportunity to obtain an adjudication on the merits of his voluntary manslaughter request that was denied by the trial courts"
3. Due Process Violation of 5th and 14th Amendment[s], in that;
 - a. "Appellate Counsel denied applicant effective assistance in violation of the South Carolina Constitution Article one Sections three and fourteen and the United States Constitution's sixth and fourteenth amendments."

III.

Applicant's first claim is an allegation of ineffective assistance of trial counsel. Respondent contends that Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, 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, 80 L.Ed.2d 674, 692 (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, 80 L.Ed.2d 674. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, 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, 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.

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 cannot be conclusively refuted by the record. 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.

The allegation that appellate counsel was ineffective is without merit. Respondent contends that Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. *Id.* Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. *Id.* Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (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).

When a claim of ineffective assistance of appellate 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.*

Respondent submits that Applicant cannot satisfy either requirement of the Strickland v. Washington test with regard to the ineffectiveness claims against appellate counsel. However, the allegation of ineffective assistance of appellate counsel probably raises questions of fact that

cannot be conclusively refuted by the record. Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Respondent interprets Applicant's final claim as an allegation that he was denied due process of law. Applicant's allegation claims infringement of his rights under certain amendments to the United States Constitution. However, Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that Applicant must specifically set forth the grounds upon which the application is based. Section 17-27-50 of the Code of Laws of South Carolina (1976). In an application for Post-Conviction Relief, it is incumbent upon Applicant to make at least a prima facie showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Since Applicant has failed to make even a prima facie showing, Respondent would submit that this allegation should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. This allegation is so vague that it is impossible for the State to respond.

VI.

Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of trial counsel and ineffective assistance of appellate counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VII.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code §17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

VIII.

Each and every allegation contained within the application not either expressly admitted, qualified or explained is hereby denied.

IX.

WHEREFORE, having made its Return, Respondent requests that a hearing be held solely on the claims of ineffective assistance of counsel.

(signatures on following page)

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Assistant Deputy Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General

By: 
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12/3, 2015

STATE OF SOUTH CAROLINA
COUNT OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

DAQWAN JOHNSON, #351891

2015-CP-40-05213

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

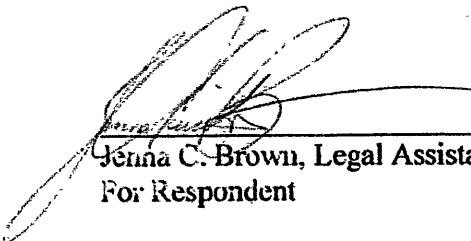
STATE OF SOUTH CAROLINA,

Respondent.

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 in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

David K. Allen, Esquire
Allen Law Firm
PO Box 3241
West Columbia, SC 29171

DATED this 3rd day of December, 2015


Jenna C. Brown, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
County of Richland	)	2015-CP-40-05213
	)	
DAQWAN JOHNSON,	)	
	)	
APPLICANT,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
RESPONDENT,	)	

March 19, 2018
Columbia, South Carolina

BEFORE:

THE HONORABLE BROOKS P. GOLDSMITH, JUDGE.

APPEARANCES:

TOMMY THOMAS, ESQ.
Attorney for the Applicant

JESSICA KINARD, ASSISTANT ATTORNEY GENERAL
Attorney for the State

KAREN AMBROZIAK
Official Court Reporter

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(No exhibits were introduced)

CERTIFICATE OF REPORTER 71

1 MS. KINARD: May it please the Court. This is the
2 matter of DaQwan Johnson vs. the State of South Carolina,
3 case number 2015-CP-40-5213. We're before the Court on an
4 application for Post Conviction Relief that was filed
5 August 25th, 2015.

6 Mr. Johnson is presently confined in the South
7 Carolina Department of Corrections pursuant to orders
8 presented at the Richland County Clerk of Court. He was
9 indicted in the February 2011 term of Richland County
10 Grand Jury for murder and attempted murder. At trial, he
11 was represented by Gregory Collins and John Clark Newton.
12 He proceeded to trial on July 26th, July 30th through
13 August 3rd, and August 8th, 2012, before the Honorable R.
14 Knox McMahon and a jury. He was convicted as indicted.
15 Judge McMahon sentenced him to a term of 50 years
16 imprisonment for murder and 30 years for attempted murder.
17 These sentences to be served concurrently.

18 A timely Notice of Appeal was filed on his behalf and
19 an appeal was perfected by Robert N. Dudek of the Office
20 of the Appellate Defense. South Carolina Court of Appeals
21 affirmed his convictions and sentences in an unpublished
22 opinion filed April 8th, 2016, and remittitur issued
23 April 29th, 2015.

24 The State is present and ready to proceed.
25 Mr. Johnson is present and represented by Tommy Thomas.

1 MR. THOMAS: Your Honor, may it please the Court.
2 Your Honor, just for -- this is a pretty complicated
3 trial, lots of objections. To try to speed things along,
4 it's my practice anyway, Your Honor, with the Court's
5 permission, when I ask certain questions, I'll give the
6 Court the information in regards to where this is in the
7 transcript, transcript page and line, just for the Court's
8 information, Your Honor. Rather than have my client read
9 from the transcript, I find that kind of moves things
10 along a little bit better, especially in this case, Your
11 Honor.

12 THE COURT: All right. You may call your first
13 witness.

14 MR. THOMAS: Your Honor, if it please the Court.
15 We'd call Gregory Collins to the stand.

16 GREGORY COLLINS, after being duly
17 sworn, testified as follows:

18 THE COURT: Please be seated.

19 MR. THOMAS: May it please the Court.

20 DIRECT EXAMINATION:

21 BY MR. THOMAS

22 Q All right. Mr. Collins, you had an opportunity to
23 represent DaQwan Johnson?

24 A Yes, I did.

25 Q All right, sir. And you were working in the Public

1 Defender's office at the time?

2 A I was.

3 Q So you were appointed to represent him?

4 A Yes.

5 Q When did you come onboard as far as representation of
6 Mr. Johnson?

7 A I'm not 100 percent positive. It could have come
8 from another attorney in the office, but I think I was
9 involved fairly early on in this case.

10 Q So do you know how long your involvement was,
11 roughly?

12 A It's hard to tell. Typically, with cases here in
13 Richland County, it was anywhere from a year-and-a-half to
14 three years before he got a trial from the date of arrest.

15 Q And this is a pretty complicated case?

16 A There were a lot of moving parts to this case, yes.

17 Q Yes, sir. Just for our information, would you please
18 kind of give us a summary of what this case was about?

19 A It started with a shooting that happened, I believe
20 it was a case with the Gable Oaks apartments, and there
21 was a night vision video of, I believe, five people
22 running through a cut in the woods that they had going to
23 the apartment, and then there was a shooting. There were
24 a number of different firearms used by a number of
25 different people that you could see on the video. But it

1 was very hard to discern who the people were on the video.

2 Q What was the State's reasoning as to why this
3 shooting occurred? I mean, what was their --

4 A Their theory was gang violence.

5 Q All right.

6 A I believe this was -- what year was the trial again?

7 Q '12?

8 A 2012. It was a pretty hot topic around 2011, 2012.
9 Every chance the State had to introduce gang evidence,
10 they would. With this one, it was -- there was a
11 number -- I believe there were two other shootings the
12 afternoon before the actual shooting that killed the
13 person at the Gable Oaks apartment, but there were a lot
14 of tips that came in, a lot of information the officers
15 put in their notes during their investigation. At one
16 point in time, an individual that went by O.B. Williams, a
17 warrant was actually sworn out for his arrest for murder
18 on this case.

19 After they swore that warrant out, another individual
20 was arrested, I believe, Brian Campbell, but there were
21 four other codefendants along with Mr. Johnson. They were
22 arrested before him and statements were taken, and after
23 statements were taken, then the warrant against O.B.
24 Williams was dismissed. And I believe the reasoning of
25 the investigator was that it didn't corroborate, and that

1 was about it.

2 So there was a large investigation. There was also
3 another shooting. There were two shootings in the
4 afternoon that they said were linked to the night shooting
5 at Gable Oaks. And then after the night shooting at the
6 Gable Oaks apartment, there was yet another shooting at
7 Studio 54 nightclub, which was allegedly in retaliation.

8 The shooting at the nightclub was investigated by
9 county or city -- whoever investigated the nightclub
10 shooting was not the department that investigated the
11 shooting that we were on trial for. So you had two
12 different departments that didn't really communicate what
13 evidence they had even though it was within a few hours of
14 each other. So that led to a lot of confusion about
15 discovery material and who had what and what was tested
16 because you had two different departments that didn't
17 really communicate.

18 Q In this case -- actually, this case went to trial?

19 A Yes.

20 Q Okay.

21 A It was called to trial the first time we got the
22 classic, we call it, discovery dump the week before trial
23 with a ton of new evidence from the Solicitor's Office. I
24 believe I even had two or three other trials on the docket
25 the week before and the week after.

1 We made a motion to continue. At the motion to
2 continue, a DNA report was supplied to us that had not
3 been supplied in the two years before for no reason.

4 The judge actually granted, I believe, like a
5 two-week continuance. So we had two weeks with that
6 information before the case was called to trial again, and
7 this was before the docket control was pulled from the
8 Solicitor's Office. So at this time, they had full
9 authority to call whatever cases they wanted.

10 Q Right. Now, as far as your representation, I guess
11 you would have been assigned to this case?

12 A Yes. Mr. Strickler would assign cases.

13 Q All right. And what would your procedure be once you
14 were assigned?

15 A Within two days, you've got to go down to the jail
16 and meet your client and you talk about it. You go
17 through discovery when it comes in with your client.

18 We had a policy, I believe, that was once a month or
19 once every two months, you had to make in-face, in-person
20 contact with anybody that was incarcerated, as Mr. Johnson
21 was.

22 Q Okay.

23 A So I would try to stop in his dorm every time I was
24 down at the jail.

25 Q Do you know whether or not he made bond or was he

1 continuously kept in the detention center?

2 A I believe he was continuously kept in from the time
3 of arrest.

4 Q Okay. Now, from your meeting with him -- and I know
5 this is kind of a broad question, but did you develop any
6 kind of -- what was his defense or theory of defense in
7 this case?

8 A The theory of defense -- because of the gang
9 allegations and the fact that before trial we thought
10 possibly there were going to be up to four different
11 codefendants testifying against us, the theory was that
12 these codefendants had an incentive to lie to not face
13 life themselves. And, also, that they were covering for
14 the real gang leader that was involved, Mr. O.B. Williams
15 by blaming it on DaQwan because his car was being used by
16 one of the other codefendants during the day, which then
17 brought him into the case.

18 Q Was that one of the previous shootings?

19 A The previous shootings --

20 Q The car?

21 A Brian Campbell was driving Mr. Johnson's car
22 throughout the day. It was involved in two different
23 shootings on that day with Brian Campbell driving it. And
24 that's how the police eventually got to DaQwan Johnson,
25 was that his car was implicated in those different

1 shootings.

2 Q Do you know who was -- who was the intended target of
3 these other gentlemen who were involved in this crime?

4 A I'm not sure. Someone named Weenie, maybe. I think
5 believe that was his nickname. I'm not sure what his real
6 name was.

7 Q Was he the actual victim of the shooting, of the
8 death?

9 A No.

10 Q Okay.

11 A It was somebody else that was outside that night.

12 Q All right. Now, you had -- did you hire an
13 investigator?

14 A We had an investigator. I don't recall which
15 investigator we had assigned to this case, but I know that
16 we had one.

17 Q And in preparing this case for trial, you would go
18 through the discovery materials that you were provided by
19 the State?

20 A We would go through discovery materials and, you
21 know, 99.9 percent of the cases, you would see reference
22 to material that had not been turned over, so then you
23 would have to request material they hadn't turned over and
24 then wait for them to turn it over. It was kind of a
25 process. And then when the case got called to trial,

1 normally, we would then get another two to 300 pages of
2 discovery at that time.

3 MR. THOMAS: Your Honor, may I approach?

4 THE COURT: Yes, sir.

5 BY MR. THOMAS:

6 Q Counsel, I'm just going to give you my transcript. I
7 don't think you have one with you.

8 A And I apologize for that. I should have brought it
9 with me.

10 Q That's fine. And just to kind of speed things along,
11 I'll make reference to these pages and let you look at
12 them if you need to refresh your --

13 You have one? Thank you.

14 MR. THOMAS: I'll bring this one up to you then.

15 THE COURT: Thank you.

16 BY MR. THOMAS:

17 Q Counsel, I'm going to start on Page 18 of the
18 transcript, Lines 11 through 21?

19 A Okay.

20 Q And just ask you about that. That was a pretrial
21 motion in regards for a continuance?

22 A That is true. Before this transcript started, we had
23 another hearing. I believe we drove up to Lexington
24 County to go in front of Judge McMahon on it.

25 Q Right. And this motion for a continuance was based

1 upon testing of swabs, I guess, that were taken for DNA?

2 A Yes, there was -- David Collins is a ballistics
3 expert for Richland County, and he did the ballistics
4 review of this case. And in his report, he noted that --
5 well, actually, I don't think he did note that he swabbed
6 the shell casings and the ammunition, but apparently, he
7 did. And we found out that they had been swabbed and,
8 yet, we had no DNA report.

9 Q When did you find that out?

10 A I believe we got that -- it was after the first time
11 it was called to trial, but in between the --

12 Q Was that the reason for the continuance?

13 A I believe so. I'm not sure exactly. We had a number
14 of reasons for the judge, but I believe that was one of
15 the main reasons.

16 Q All right.

17 A So that would have been July 12th, and then the trial
18 started July 30th, I believe, or a couple weeks after.

19 Q All right. And then I think there was also a
20 notation in the transcript that around July 12th, you
21 received 400 pages of additional discovery?

22 A That sounds about right. We got all the information.
23 There was a gang task force at the time. They're
24 notorious for having bad information on people. So it
25 takes a lot of time to go through all their files on who's

1 in what gang and who can be tied to what. That was turned
2 over very late in the ballgame. I would say within three
3 or four days of the trial.

4 Q And my question was, were you able to digest that
5 much information between the 12th and when this case was
6 called to trial?

7 A Probably not to the point that we should be able to
8 for somebody that's facing life in prison, but we spent a
9 lot of time going through everything.

10 Q And you also mentioned -- and this is Page 18, Lines
11 22 through 25, something about a federal investigation
12 that's going on, that was ongoing?

13 A And that goes back to what I was saying earlier,
14 there was a hot button topic at this time regarding gangs.
15 Because this was right around the time when federal -- the
16 assistant AUSA did an investigation into the Blood gang
17 where, I think, 30 to 40 Midlands suspects were arrested
18 as being involved with the Blood gang and a litany of
19 different charges, and a lot of those names coincided with
20 people that had been arrested for the Studio 54 shooting
21 after our shooting.

22 Q Some of the same players?

23 A A lot of the same players.

24 Q All right. Now, on Page 20, Lines 8 through 15, you
25 talk about wire taps. I assume you're talking about feds?

1 A That is true.

2 Q Why was that of interest to you?

3 A With my experience in federal cases, because I've
4 done a little bit of that before I went back to the Public
5 Defender's office the second time, when the feds do an
6 investigation on somebody and it's that broad, typically,
7 there's a lot of wire taps, and there's a lot of
8 information and recordings out there.

9 We didn't have any concrete information that that was
10 actually in their possession because it was very new
11 indictment, but our intuition was that there was probably
12 a lot of recorded phone calls out there that could be
13 important to us that could have been from the night of
14 this shooting.

15 The investigation was underway during that time, and
16 we feel that given access to that, we possibly could have
17 found some exculpatory evidence as far as some of the
18 players talking about the shooting.

19 Q Did you ever obtain that information?

20 A That was never obtained.

21 Q Now, on Page 21 and 22, Line one and Line 17 through
22 22, you talk about a witness, Rontrell Henderson, and
23 something about a change in his statement?

24 A I believe Rontrell Henderson was represented by
25 Victor Li, and we got information from the Solicitor's

1 Office that he said everything in his written statement
2 was a lie, I believe. But we also got information from
3 his attorney that he had provided additional information
4 to that basic --

5 Q When did you receive that information?

6 A Well, we heard from his attorney, Victor Li, before
7 we heard from the Solicitor's Office. We actually brought
8 it up to the Solicitor's Office, and that's when they told
9 us he said everything in his statement was a lie. But the
10 initial information was how he was pressured into making
11 that original statement, which we believed was very
12 relevant to our defense in our case.

13 Q And I think you also were concerned about not having
14 the transcript from the May hearing. I guess that was
15 when you were in court about the DNA?

16 A I believe so, yes.

17 Q All right. And did you have trouble getting
18 information from the Solicitor's Office?

19 A Did I have trouble getting information --

20 Q Yes.

21 A -- from the Solicitor's Office? Like throughout my
22 entire career or just on this case?

23 Q On this case.

24 A On this case, yes. Absolutely.

25 Q Because, I mean, there's just objection after

1 objection in this transcript, mainly, regarding discovery.

2 A This case, because there was a large amount of
3 discovery, I believe we were given a large number of
4 pages, but I don't think that -- I'm just assuming here,
5 but I don't think they went through it in as much detail
6 as Mr. Newton and I did. We were able to see references
7 to different things that we did not have and we
8 continuously requested more and more information.

9 Regarding the DNA, you know, the original continuance
10 motion in front of Judge McMahon before -- the first time
11 the case was called to trial, it was stated on the record
12 there was no DNA testing on any of the swabs that were
13 taken. A few days later, we got the report from the DNA
14 testing of the swabs that had been done.

15 Q Right. That allegedly didn't exist?

16 A That allegedly didn't exist and, potentially,
17 allegedly could have been requested by the Solicitor's
18 Office, who said they didn't exist.

19 But we got those and we learned from that report that
20 the suspects had been excluded from a weak DNA profile
21 taken off one of the -- either shell casings and full
22 ammunition from a jammed gun at the scene, which in my
23 view was extremely important for this case, especially,
24 since we're alleging that the testifying codefendants are
25 covering for somebody else.

1 But it was in between our continuance motion and the
2 time of the trial when we got that report, and we never
3 got the full printouts from any comparison in CODIS or we
4 were never informed that that weak profile was actually
5 run through the local CODIS. We learned of that during
6 testimony in the trial.

7 Q All right. Now, your motion for continuance was
8 denied?

9 A Yes.

10 MR. THOMAS: Your Honor, just for the Court, that's
11 Page 37, Line 24.

12 Now, you continued to make objections and argue
13 problems that you were having in discovery even after the
14 denial of the continuance motion?

15 THE WITNESS: That's because issues continued to come
16 up of information that had not been supplied to us.

17 BY MR. THOMAS:

18 Q Right. And I think you just spoke about that. You
19 said that -- I notice that you make an objection on Page
20 59, Lines 13 through 25. And again, you're talking about
21 the testing had been conducted on, I guess it was the
22 swabs of the guns and some cartridges?

23 A Yes. This was when we discovered that the -- the
24 request for that DNA testing. There was a name as the
25 person requesting it was Ms. Luck Campbell. That was when

1 the issue came up, and we realized that she had stated to
2 the Court in the prior hearing that the results of DNA
3 testing did not exist when, in fact, she had requested two
4 or three years earlier.

5 Mr. Newton and I had to confer with Professor
6 Freeman, the ethics professor at the South Carolina Law
7 School because we were concerned. There are rules for
8 reporting, and we wanted to make sure we followed all of
9 the rules and we sent an email.

10 There wasn't an attempt to make it part of the trial
11 because we knew that we had the DNA evidence at that point
12 in time. We were just concerned about any kind of
13 miscommunication that Ms. Campbell had made to the Court.

14 Q Actually, there was an explanations given by
15 Ms. Campbell throughout in regards to intent. She was
16 arguing that she didn't intentionally not provide this
17 information?

18 A That is correct. I mean, I believe her official
19 response was that she had forgotten about the request if
20 she made it. She wasn't sure.

21 Q Just an oversight. I mean, it was huge amounts of
22 information in this case.

23 A The defense for not turning it over was it was an
24 oversight, which, again, is hard for me to believe. It
25 was the only DNA evidence in the case.

1 Q Okay. Now, I noticed in your -- on Page 26, Lines 3
2 through 12 -- actually, I guess, this is Page 67, Lines 13
3 through 17, you renew your Rule 5 and Brady motions?

4 A Yes. That's something we do in every case as one of
5 our pretrial motions to cover our basis for an appeal or
6 any other situation.

7 Q And you indicate on those -- in those lines of the
8 transcript, you indicate that you were actually given some
9 discovery the day before the trial?

10 A That would not surprise me at all.

11 Q And then you talk about on Page 68, Lines 19 through
12 25, you start talking about viewing the evidence?

13 A Yes. This was an issue that occurred a few different
14 times where we would have an opportunity to review the
15 evidence prior to trial and they would invite us to the
16 Solicitor's Office to review it.

17 In this case, when I got there, a lot of the
18 different pieces of evidence were in different manila
19 envelopes set out on a table. The envelopes were open.
20 Things were out on the table. There was nobody from the
21 sheriff's department there. There was no custodian of
22 records or anybody to monitor who was handling the
23 evidence and where it was placed, and I didn't feel
24 comfortable going through it.

25 As an attorney on the case, I didn't want to be made

1 a witness as part of the chain of custody. So I refused
2 to go through it until they had some sort of evidence
3 custodian to monitor who was handling the evidence.

4 Q Did you ever get an opportunity to go through it?

5 A I believe we did, but it was after the trial started.

6 Q All right.

7 A And after the judge ordered the Solicitor's Office to
8 have an evidence custodian present for viewing the
9 evidence.

10 Q At trial?

11 A At trial.

12 Q Okay. Now, you also note that -- you make, I guess,
13 an objection to the Court about someone placed in
14 handcuffs after the shooting, you said at 11:46, and
15 that's Page 69, Lines 14 through 18?

16 A There was mention in one of the police reports that
17 somebody was -- no, it was mentioned either in a police
18 report or the apartment security report, one of the two,
19 that someone was placed in handcuffs at the scene the
20 night of the shooting. And we requested who that would be
21 and we were never provided that. The answer was that
22 sometimes they handcuff people and don't put it in the
23 report.

24 Q Is that important?

25 A I believe so. It was some -- somebody that they felt

1 the need to handcuff at the scene of the shooting within
2 30 minutes of somebody being killed. So I believe it was
3 pretty important.

4 Q All right. Did you ever get that information?

5 A No, the response we got is that they can't figure
6 that out because they don't typically put that in a report
7 when they just detain somebody at a scene.

8 Q Now --

9 Your Honor, beg the Court's indulgence just for a
10 second.

11 (Pause).

12 On Page 69, Lines 19 through 24, you go forward and
13 start talking about radio logs. What was important about
14 the radio logs?

15 A I believe we wanted to get those to try to -- in an
16 attempt to find out who was handcuffed or detained at the
17 scene. A lot of times when you get incident reports from
18 large investigations like that, a lot of details are left
19 out. The radio logs, you can -- it gleans a lot of
20 information about what was actually going on in real time
21 when they responded to the scene.

22 Q Were you able to obtain that information?

23 A I am not positive if we ever got that or not.

24 Q Okay. And then on Page 70, Lines 1 through 8 --

25 A If I may back up?

1 Q Yes, sir.

2 A This is after we started the trial?

3 Q This is after you started, yes. This is in the
4 transcript.

5 A If I'm asking for it, then we never got it.

6 Q Okay. Now, on Page 70, Lines 1 through 8, and 71,
7 Lines 1 through 4, you're talking about the Crime
8 Stopper's report. What kind of problem did you have with
9 that?

10 A Crime Stopper report or tip information, there's a
11 statute on it as far as it being remaining anonymous,
12 except in certain situations when there's good cause for
13 it. Which I believe, this case was good cause for
14 uncovering any information from a Crime Stopper tip. We
15 asked for all the printouts of everybody that called in on
16 this.

17 This was a pretty well known incident that happened.
18 It was in the press a lot, and we imagined there was
19 probably a lot of information that came in through the
20 Crime Stopper hotline.

21 Q Yes.

22 A We were only given one Crime Stopper report, and it
23 was the only one that led them to the first codefendant in
24 the case. And then we asked for some more, and after the
25 trial started, we got maybe one more call.

1 Q Is that how this broke? I mean, they got a Crime
2 Stopper's tip and then they started finding people based
3 upon that?

4 A Yes. Investigator Thomas would bring people in and
5 he and, I believe, Reeves would just interview or
6 interrogate people and get information from that. That's
7 how they ended up making all the arrests.

8 Q Which, ultimately, led their attention to
9 Mr. Johnson?

10 A Ultimately, led to Mr. Johnson, yes. After they got
11 to, I believe Brian Campbell was the first that kind of
12 broke it open to Mr. Johnson.

13 Q Okay. And I think on Pages 73 and 74, maybe
14 something we've already talked about, Lines 17 through 24
15 and Lines 1 through 12, you're talking again about being
16 able to view the property?

17 A That's correct. That was just my practice. If I was
18 invited into a room and there was unsealed evidence bags
19 and stuff laying out on the table, I wasn't going to get
20 in there and touch it.

21 Q And I think if you look at Page 74, Lines 1 through
22 12, at the end of that is a comment made that you would be
23 allowed to view the evidence at trial?

24 A Are you talking about the swabs?

25 Q Yeah.

1 A DNA swabs. Yeah, we never saw those. And if my
2 recollection is correct, I believe the swabs were
3 destroyed during the original testing.

4 Q Okay.

5 A The excuse being that they only had a small amount.

6 Q All right. If you had had access to the swabs, what,
7 if anything, would you have done with it?

8 A We would have asked a judge for approval for the
9 funding to either do independent testing, which wasn't
10 typically approved, but we would have, at least, looked
11 and inspected the condition of the swabs and maybe done
12 the higher touch DNA type testing trying to get a better
13 profile from one of those swabs.

14 Q Okay. I don't want to get too far off track, but
15 that kind of makes me think about -- I mean, in this case,
16 you talk about touch DNA. Was that important?

17 A I believe so. There was numerous shell casings found
18 at the scene. There were two spent cartridges from a --
19 that were a certain caliber that fit a gun that was
20 eventually found with Mr. Johnson when he was arrested.
21 And when you load a magazine, especially for an
22 assault-type rifle or something of that nature, you have
23 to load each bullet in there.

24 Q Right.

25 A And you have to touch each one, and I think the

1 person that's loading those guns is really important when
2 you're trying to figure out who maybe fired that gun.

3 Q There's some question, I guess, in all of this about
4 which guns were used, which fired what?

5 A That was -- we were -- I believe that was kind of
6 almost figured out as far as who was firing what gun,
7 according to the testing. But there was still the fact
8 they were alleging this was a gang violence type thing and
9 that these guys all knew each other and they planned it
10 together, went out there together. And if we can find a
11 DNA profile that doesn't match any of the people on trial,
12 then we have a pretty good argument that maybe we're
13 missing somebody, and that went to our theme that this was
14 not Mr. Johnson. This was Mr. Williams, the first person
15 they swore the warrant out.

16 Q Were they able to identify which gun fired the bullet
17 that killed the gentleman?

18 A I don't think the State tried to pinpoint that. They
19 were going on the hand of one, hand of all theory. We had
20 a pretty good guess as far as which one killed him.

21 Q Okay. So you thought you knew?

22 A We had a pretty good guess as to who fired the fatal
23 bullet, yes.

24 Q And was it Mr. Johnson?

25 A There was never an allegation that he was the one

1 that fired the fatal bullet. There were two spent
2 cartridges from the -- that were the caliber that fit the
3 gun they found with him, which would have indicated that
4 the gun jammed. He cocked it trying to unjam it, there
5 were two. But there were no shell casings from the
6 caliber gun they found on Mr. Johnson a couple months
7 later.

8 Q And his defense was actually alibi?

9 A Yes.

10 Q And notice of alibi was given?

11 A Yes, it was.

12 Q Now, on Page 99, there's an out-of-court
13 identification question that comes up and you indicated in
14 there that there was a discovery problem. Can you
15 remember what that problem was?

16 A Give me just a minute to refresh my memory.

17 Q Okay.

18 (Pause.)

19 A You said Page 99?

20 Q I'm sorry. Yes, sir, Page 99, Lines 8 through 12?

21 A I don't remember it specifically, but from reading
22 the transcript, it appears that I'm indicating that all of
23 the codefendants were shown lineups and Mr. Henderson was
24 the only one that picked Mr. Johnson out. That means
25 there are, at least, three other people that did not pick

1 him out of a lineup, which would be pretty important.

2 Q And, actually, some of the codefendants did an
3 in-court identification?

4 A I believe so, yes.

5 Q Which got them around the problem of lineup?

6 A Yes.

7 Q Okay. Now, if you look at Page 283, Lines 1 through
8 12, you're talking about a couple of things. It was like
9 DNA problem, something that you learned this morning. I
10 think that's where you make your concerns about having the
11 cutting independently tested?

12 A I believe so. This is where the Court was asking why
13 we hadn't handled all the DNA stuff beforehand. And the
14 reason being, we didn't have it. We were actually told it
15 didn't exist.

16 So at the very most, we had a couple weeks to deal
17 with the DNA report that was given to us, and typical wait
18 time on DNA report back from SLED from the Solicitor's
19 Office is anywhere six months to eight months. So even if
20 we had time to do anything with it, we never would have
21 gotten the results back in time for the trial when it's
22 called by the Solicitor's Office.

23 Q And then you also talk -- start talking about the
24 importance of the touch DNA?

25 A Yeah, that goes back to the loading of shell casings

1 and things of that nature.

2 Q Page 87, Lines 16 through 18, appears that you're
3 voicing your concern about your numbers of days notice for
4 trial, 12 days?

5 A Page 87?

6 Q Yes, page 87.

7 A That goes back to -- I believe I had a number of
8 other trials before and after. And yes, we were given a
9 12-day notice for this trial, which involved four other
10 codefendants, two different investigating agencies and,
11 obviously, a myriad of different legal issues in this
12 case.

13 Q Let me draw your attention to Page 496, and this is
14 Lines 5 through 9?

15 A Okay.

16 Q What was your objection there?

17 A This is dealing with the calling of witnesses?

18 Q Yeah. This was, I think, Rontrell Henderson -- no,
19 actually, I think that was -- that was one of the State
20 witnesses in the chain and I think you made an objection
21 that they weren't on the witness list?

22 A Yes. Okay. That was where the Court allowed them to
23 have a witness that wasn't originally on the witness list;
24 is that right?

25 Q Yes.

1 A Yeah, that would be my objection, was that the
2 witness wasn't provided to us beforehand.

3 Q And that's just a very short blurb. Then I think we
4 move onto to Page 543, Lines 16 through 19. And that one
5 is in regards to Mr. Rontrell Henderson. And I think this
6 one revolves around granting immunity to him?

7 A That was when Mr. Li, Victor Li, who was counsel for
8 Mr. Henderson --

9 Q Right.

10 A -- was asserting to the court that his client did not
11 wish to testify and would be asserting his Fifth Amendment
12 right, and right there on the spot, the Solicitor's Office
13 attempted to grant him immunity. And Mr. Li correctly
14 pointed out that that would not give him immunity from any
15 federal prosecution, which was significant because they
16 had just arrested 37 people on a federal indictment from a
17 federal investigation, and the solicitors were attempting
18 to give immunity right there on the spot.

19 Q And I think he notes some concern about notice, as
20 well?

21 A Mr. Li was just taken aback that he was in court
22 during the trial when the Solicitor's Office was offering
23 immunity to his client without giving him the opportunity
24 to investigate and make sure the immunity would actually
25 hold up, which was very important.

1 Q And would you mind reading 16, Line 16 and 17 for me?

2 A From Page 543?

3 Q Yes, sir.

4 A And this is Mr. Li talking?

5 Q Yes, sir.

6 A He said his client's Constitutional Right was at
7 stake via ambush and he had no idea what cases the
8 Solicitor's Office was citing that would justify giving
9 immunity to his client.

10 Q Would it be fair to say that was your concern of
11 dealings at some point in this trial, as well?

12 A That we were being tried by ambush?

13 Q Yes, sir.

14 A Yes.

15 Q Now, from my reading of this transcript, I think
16 there were two motions made for mistrials?

17 A I believe so.

18 Q All right, sir. And I think your first motion for
19 mistrial is on Page 574, Lines 1 through 11. I think it
20 goes over to 575, Lines 4 through 6?

21 A This is the one I remember very clearly.

22 Q Yes.

23 A This was when we were -- during the testimony, during
24 the trial, it came out that they had compared the weak DNA
25 profile taken off one of the shell casings with a local

1 CODIS, which is not the SLED database, it's just a local
2 one with the sheriff's department, I guess. That had
3 never been disclosed to us. And then they additionally
4 had the witness testify that Mr. O.B. Williams was on that
5 local CODIS and that he was excluded from this weak DNA
6 profile.

7 Again, we were never told there was a local CODIS.
8 We were never told it was compared to the local CODIS.
9 And we were never told that Mr. O.B. Williams was on that
10 local CODIS. Had we known that, it could have shifted our
11 entire strategy in defense of the case, and it came out
12 very late in the State's presentation of the case.

13 There was no remedy course at that point in time. We
14 were never given the printouts from the parameters that
15 they ran the profile through CODIS because you can adjust
16 the different levels of different alleles and different
17 loci to determine if they had been excluded or how
18 detailed the comparison is.

19 We were never given any of those printouts. We were
20 never able to look at that, and that would have been
21 extremely important because our entire defense was
22 potentially that Mr. O.B. Williams or another individual
23 within the gang was the leader of this thing and they were
24 all covering for him. There was no remedy for that. That
25 was completely dropped on us during trial by a witness.

1 Q Okay.

2 A And I believe Ms. Campbell stated she told me that
3 Mr. O.B. Williams was on that local CODIS, and I can sit
4 here today and tell you that is absolutely not true. We
5 were never told that until the witness testified to it.

6 Q On Page 709, Lines 1 through 6, you're talking about
7 phone records?

8 THE COURT: Which page, I'm sorry?

9 MR. THOMAS: 709.

10 THE COURT: 709?

11 MR. THOMAS: 709, yes, sir.

12 BY MR. THOMAS:

13 Q And maybe you can help me a little bit. The phone
14 records situation was kind of confusing. I couldn't
15 follow all of that. Was there a problem with the phone
16 records?

17 A Just give me one minute to review, see if I
18 refreshes.

19 Q All right. If we could get do this, I don't want to
20 get too confusing, it's in different spots of the
21 transcript, but the phone records are also talked about on
22 Page 360?

23 A Okay.

24 Q Okay.

25 A It looks like one of our objections was that the

1 relevance of the records were established by
2 non-testifying witnesses, which is why we were objecting
3 to hearsay.

4 Q Right.

5 A And it appears there was another issue about when we
6 were told the records were requested and from what years
7 they were obtained.

8 Q And the pattern was, this was later rather than
9 earlier?

10 A It appears so from my reading of the transcript, but
11 I don't have a specific memory to that.

12 Q Now, let's go to 360. We'll jump around just a
13 little bit. If you look at Lines 1 through 5, I think you
14 make a notation about some discovery problems there?

15 A Which lines was that?

16 Q 1 through 5 on Page 360.

17 A Reading this doesn't -- I do remember the fact that I
18 did get some records late in the game on this one. I do
19 remember that now. But our issue with the phone records,
20 we were given a large spreadsheet of records, I believe
21 made by Officer McDonald.

22 Q Yes, sir.

23 A He's their phone expert, and he would create a
24 spreadsheet from the records. But when you receive
25 records from cell phone companies or any phone provider,

1 the first two or three pages are the key for how to read
2 those records because there's a lot of abbreviations and
3 codes used. Without that key, it's really hard to discern
4 what's on the records.

5 Q Were you ever given the key?

6 A If we were given the key, it was during trial or
7 we -- from communications from the Solicitor's Office, we
8 were able to figure out which carrier's key would apply to
9 those records.

10 Q All right. Now, this brings us to the second motion
11 for a mistrial, and these are on Pages 766, 767 and 768.
12 The 766 is Lines 19 through 25, and then that follows over
13 to the front of the first page, Lines 1 and 2 of the next
14 page?

15 A Looks like the first issue was that during the
16 opening statement of the solicitor's -- the solicitor's
17 opening statement, they indicated a certain number of
18 codefendants would be testifying against us, and then it
19 turned out they didn't have those codefendants testifying
20 against us.

21 As it turned out that a number of those people went
22 back on their original written statements given to police
23 and, therefore, didn't testify. So we were moving for a
24 mistrial on that just because of the improper way that it
25 was presented to a jury.

1 Q And I think that must have been at the end of the day
2 because you come back and you said you had spoken to
3 cocounsel and some other folks about it and you made a
4 motion for mistrial the next morning?

5 A I believe so.

6 Q All right. And there was some concern about
7 timeliness of that motion?

8 A That is correct. When you're involved in these
9 cases, it's a constant battle to try to preserve the
10 record, but also not be a broken record saying objection
11 every five minutes in front of the jury.

12 Q Right.

13 A So we were trying to work our way through that maze
14 to come out with a good result.

15 Q Right.

16 A But I believe this might be the other issue --
17 mistrial from the testimony of one of the witnesses. Is
18 that in here, too?

19 Q Yeah. Corroborative, where it said -- I think the
20 police officer said something about being able to
21 corroborate who they thought was involved in this crime.
22 Is that correct?

23 A It was a nonresponsive answer to one of my questions.

24 Q Yes.

25 A And it went completely off with the answer that had

1 nothing to do with my question. When he got into it, I
2 made an objection, move to strike it and for a mistrial.
3 And it was originally, the judge denied my motion and
4 overruled my objection and went on. But I believe he then
5 thought about it and it was eventually struck from the
6 record, but the mistrial was denied.

7 And it was just a conversation that the
8 investigator -- we were talking about the warrant he swore
9 out, that there was probable cause that O.B. Williams was
10 one of the suspects in this case and he said that that
11 routinely happens, which was surprising to me. And I
12 believe I asked him how many times has that happened
13 before.

14 In response to that, he went on a long diatribe about
15 how he interviewed all of the other codefendants and
16 everything didn't corroborate that it was O.B. Williams,
17 which was hearsay evidence and, also, pitting witnesses
18 and providing statements from the codefendants. It was
19 completely improper.

20 Q Let me ask you this, and I think this kind of falls
21 in with that second motion for a mistrial, there was some
22 argument about an opening the door in regards to your
23 initial opening statement?

24 A I believe they were trying to argue that I opened the
25 door to allow the investigator to talk about what the

1 codefendant said. And I don't understand their reasoning
2 for that or their logic in support of that.

3 MR. THOMAS: Your Honor, if I could beg the Court's
4 indulgence just for one second.

5 THE COURT: Sure.

6 (Pause.)

7 BY MR. THOMAS:

8 Q I know I have it in my notes somewhere, but I just
9 can't find it. I think that --

10 A I'm sorry, if I could back --

11 Q I found it. It's Page 84, Lines 1 through 11. I
12 think you had made the argument that you were trying to
13 keep out any gang affiliation for your client?

14 A That is true. I mean, there was -- in every report
15 in this case and in a lot of the evidence, there was
16 mentions of gang violence and members of gangs. It was a
17 part of the case. We were trying to keep them from
18 associating Mr. Johnson with a gang without having clear
19 and convincing evidence of it.

20 We were in a position where our defense was we
21 were -- we were using the gang affiliations as part of our
22 defense, so we knew we couldn't keep it out completely.
23 We were just trying to keep any mention of Mr. Johnson's
24 involvement without evidence to support it.

25 Q And you did, in fact, in your opening statement, you

1 mentioned a gang, gang activity?

2 A Yes.

3 Q And then they tried -- they attempted -- was there an
4 attempt to use that against you later in the trial?

5 A I'm sure they did.

6 Q Okay. About opening the door?

7 A Yes.

8 Q Okay. One thing -- moving on from that. One thing I
9 didn't really understand is what was the play on
10 third-party guilt in this case?

11 A As far as?

12 Q Do you remember that? I know there was argument --
13 I'm not sure, I think it came more from the State. If
14 this helps you any at all, I noted Page 816 about
15 third-party guilt?

16 A What page was that again?

17 Q 816. And I didn't understand it. I didn't
18 understand what play it had in the trial?

19 A Well, our theory was that either Mr. O.B. Williams or
20 another unknown individual was the actual leader of the
21 set of this gang from some of the other codefendants and
22 that the other codefendants were covering for that second
23 leader by implicating Mr. Johnson instead of the true
24 person that was with him. And that was our theory. And I
25 believe they didn't want us to argue that because of the

1 third-party guilt in the case they would allude to.

2 Q Right. Okay. Now --

3 MR. THOMAS: Beg the Court's indulgence, Your Honor.

4 (Pause.)

5 Q That kind of brings us towards the end of the trial
6 where everything just kind of, you know, ends. I mean, it
7 kind of culminates and then it's over. What was the
8 evidence they had against Mr. Johnson? I had a little
9 problem with that in reading the transcript.

10 A They had the testimony of one or two codefendants. I
11 know Brian Campbell was one, who they didn't make an offer
12 to before he testified, but he definitely got an offer
13 after he testified.

14 Q Right.

15 A But that's their policy. They don't make offers
16 until after they've testified, but they had that
17 testimony, the fact that the car that was implicating
18 Mr. Johnson was involved in some of the shootings in the
19 afternoon, even though we thought it was pretty clearly
20 established that Brian Campbell was driving the car at the
21 time.

22 Q And Mr. Johnson, was he the first one that went to
23 trial in this?

24 A Yes.

25 Q Okay.

1 A And then when Mr. Johnson was eventually arrested
2 after the fact, a gun similar to the -- would fire the
3 same caliber ammunition of what was found at the scene and
4 then matched the description from some of the other
5 codefendants' statements as far as what Mr. Johnson had on
6 that night. But that would be the evidence, mostly
7 testifying.

8 Q Now, there was video?

9 A There was video. The codefendants claimed to pick
10 people out from the video and identify people, but outside
11 of the codefendants, nobody else could identify anybody on
12 the video. It was in night vision.

13 Q And I know that you asked for a Biggers hearing in
14 that you were concerned about the identification off the
15 video; is that correct?

16 A I believe so.

17 Q Okay. And the way they got around that was
18 through -- from the two codefendants was through in-court
19 identification?

20 A I believe that's how they handled it. Most of the
21 other witnesses were familiar with Mr. Johnson, as well,
22 which would make it tough for us to prevail on a Biggers
23 hearing.

24 Q Everybody knew about it?

25 A I think so, yes.

1 Q Now, as far as jury charge, did you -- do you
2 remember -- what were your specific requests for jury
3 charge? Did you have any?

4 A I can't recall off the top of my head what exactly we
5 asked for.

6 Q How about as far as manslaughter?

7 A I do remember the discussion and our strategy for
8 dealing with the voluntary manslaughter charge. We were
9 torn, and it's always a decision to make in a defense of a
10 murder case whether or not you want the lesser included
11 charge included.

12 We felt we had a pretty strong defense. We felt like
13 things went about as well as they could have gone
14 regarding the other codefendants not testifying against
15 us, and we decided from a strategy position not to ask for
16 a lesser included in hopes that the jury wouldn't split
17 the baby and come back with a voluntary, because we knew
18 if he was convicted of voluntary manslaughter, the judge
19 was going to give him the maximum anyway. So we were
20 attempting to try to get the -- what we thought would be
21 the correct result, which was a complete not guilty as
22 opposed to a mix.

23 Q And I guess that was complicated anyway by the alibi
24 defense?

25 A Yes.

1 Q Did you see anything, any problems -- and I'm just
2 asking this. I didn't see anything, but, you know, I
3 wasn't there. Did you see anything that you were
4 concerned about in the judge's charges?

5 A Nothing stuck out to me, but I didn't go through it
6 with a fine tooth comb.

7 Q Right. And how about as far as opening and closing
8 statements?

9 A My issue with the opening statement was mentioning
10 the other codefendants they were going to hear from that
11 they didn't hear from. I believe that was misleading and
12 confusing to the jury, more than likely, especially when
13 the Solicitor's Office was stomping around about gang
14 violence.

15 I think the danger was a juror may try to connect the
16 dots and thought somebody was intimidated. Nobody ever
17 said that, but I believe that's something that could have
18 come into play because of the comments made during opening
19 statements.

20 Q And one of the codefendants was supposed to come to
21 trial. You mentioned it in your opening and he didn't
22 come?

23 A That sounds about right.

24 Q Okay.

25 A There were a number of surprises during trial

1 regarding the witnesses about who would testify to what.
2 Closing statements, I think there were a number of things
3 Ms. Campbell stated that were just facts not in evidence
4 or completely misstatements of what was presented. I
5 think those were the only objections I had during closing
6 arguments.

7 Q Now, let's go back to the problems that you were
8 having with the discovery. You think that impacted your
9 ability to represent him?

10 A Definitely. I mean, when you're getting bombarded
11 with hundreds and hundreds of pages of documents when
12 you're trying to prepare for what was definitely going to
13 be a week-long trial, it was very hard. We were
14 constantly trying to fine tune our theory of defense as we
15 were given more and more information about the case.

16 Q Did you think this was prejudicial?

17 A I believe so. Had we had more time with the DNA
18 evidence, specifically, and the reports from that and
19 enough time to process that and deal with it and,
20 potentially, get approval from the Court for independent
21 testing or independent analysis by our own expert, we
22 could have combated the State's assertions that they
23 excluded O.B. Williams or we could have found another
24 match to somebody else that was possibly connected to one
25 of these gangs, but we were never afforded that

1 opportunity because we were forced into trial by a
2 solicitor's controlled docket.

3 Q Do you think the prejudice was reached as far as to
4 interfere with his Constitutional Rights to a fair trial?

5 A I believe so. I mean, the only physical evidence in
6 this case were the DNA swabs from the shell casings and
7 other pieces of evidence. And we were told that didn't
8 exist for over two years.

9 MR. THOMAS: Your Honor, if I could beg the Court's
10 indulgence.

11 THE COURT: All right, sir.

12 (Pause.)

13 MR. THOMAS: Your Honor, I have no further questions.

14 THE COURT: All right. Cross-examination?

15 MS. KINARD: Thank you, Your Honor.

16 CROSS-EXAMINATION:

17 BY MS. KINARD:

18 Q Very briefly because Mr. Thomas was so thorough. I
19 mostly have questions about the beginning of the trial and
20 some advice you might have provided Mr. Johnson. You
21 mentioned briefly the May call of the case and the
22 continuances that led up to that. When the case was
23 originally called, was it going to be a joint trial?

24 A I don't believe so.

25 Q With Brian Campbell?

1 A Actually, yes. Alex Postic represented Brian
2 Campbell, and I believe it was supposed to be a joint
3 trial at that point in time.

4 Q Do you recall moving to sever that trial?

5 A It's possible. If there's a transcript of it.

6 Q Okay. There is a transcript of it.

7 MS. KINARD: I don't know if it made it to your
8 judge's packets, Your Honor.

9 Q That's not personal to the matter, but point of the
10 story is when it did go to trial, it was just Mr. Johnson,
11 correct?

12 A That's correct, yes.

13 Q So moving forward from that, in your meetings with
14 him, what did you discuss as far as potential defense
15 strategies?

16 A What did I discuss with Mr. Johnson?

17 Q Yes.

18 A What I testified about earlier, is that what you --
19 you know, the attempt was going to be why are those people
20 testifying against you? We would need to explain that to
21 a jury, especially if there were multiple codefendants
22 that were going to get on the stand and say that they were
23 there and they participated and they were with Mr.
24 Johnson. We needed a really good explanation for why they
25 were saying that.

1 Q Did Mr. Johnson understand all the charges that he
2 was facing?

3 A Yes, I believe so.

4 Q He understood the elements that the State would have
5 to prove?

6 A I believe so, yes.

7 Q Were there any plea negotiations?

8 A I don't believe any offer was ever made to us.

9 Q Did you ever have any problem communicating with
10 Mr. Johnson?

11 A Not with Mr. Johnson, no.

12 Q And you believe he understood all of your
13 conversations?

14 A Yes.

15 Q And you believed he felt free to ask you any
16 questions that may have arisen?

17 A I believe so, yes.

18 Q Now, with all of these discovery issues, did you
19 discuss them with Mr. Johnson as they arose?

20 A When we had this. I mean, during the trial, it was
21 hard to discuss everything with him while the trial was
22 still going on.

23 Q Certainly. But beforehand, I believe you testified
24 that whenever you did have time and you did prep for
25 trial, you discussed all the discovery you received?

1 A I would go down to the jail, we would go through the
2 discovery, we would go through our strategy for trial and
3 discuss things with Mr. Johnson, yes.

4 Q And you believe that in order to receive the
5 discovery you did get, you made every motion necessary and
6 possible, including your Rule 5 or any motions at the time
7 of trial?

8 A I don't know if I made every motion possible. I'm
9 sure there's a mistrial motion I missed in this thing.
10 I'm not going to sit up here and say I made every motion
11 possible, no.

12 Q Certainly. And I phrased that poorly. But every
13 time there was chance or every time you thought something
14 was missing, for example, you would make a Rule 5 or Brady
15 motion to supplement discovery?

16 A I wouldn't make a Rule 5 or Brady motion. I'd make a
17 motion for a mistrial if I thought it was proper, or I
18 would object to the introduction of it. I don't recall
19 all the different type of motions and objections I made
20 because this, obviously, was probably the most objections
21 I think I've ever had to make in a trial.

22 Q Thank you. That clarifies the poorly asked question.
23 I apologize. Unless there's anything else you'd like to
24 tell the judge about your representation, I have no
25 further questions.

1 A I don't have anything else to add.

2 MS. KINARD: Thank you.

3 MR. THOMAS: Nothing further, Your Honor.

4 THE COURT: Thank you, sir. You may step down.

5 Call your next witness.

6 MS. KINARD: Mr. Collins is here under my subpoena.

7 I'd ask he be free to leave if he so desires.

8 THE COURT: Any objection?

9 MR. THOMAS: No objection, Your Honor.

10 THE COURT: Thank you, sir. You're excused from your
11 subpoena.

12 MR. THOMAS: Your Honor, if it please the Court, we
13 would call our client Mr. Johnson to the stand.

14 THE COURT: All right, sir.

15 DAQWAN JOHNSON, after being duly
16 sworn, testified as follows:

17 THE COURT: Please be seated.

18 MR. THOMAS: May it please the Court.

19 DIRECT EXAMINATION:

20 BY MR. THOMAS:

21 Q Mr. Johnson, you're currently within the South
22 Carolina Department of Corrections?

23 A That's correct.

24 Q And you're serving time for what?

25 A Murder and attempted murder.

1 Q And how long was your sentence?

2 A Fifty years, plus 30, like 60 -- 50.

3 Q Running concurrent?

4 A Yes.

5 Q So you got 50 day for day?

6 A Correct.

7 Q You're how old now?

8 A Twenty-eight -- 29.

9 Q Twenty-nine, 50, 60, 70, you'll be 79 when you're
10 released?

11 A 2060.

12 Q 2060. All right, sir. Now, you're asking for Post
13 Conviction Relief action?

14 A Correct.

15 Q And you're asking that your conviction be set aside?

16 A Correct.

17 Q Which means that -- and for a new trial, which means
18 that you could potentially be retried?

19 A Correct.

20 Q You would have some exposure in that. I don't know
21 how that would play, but you could get life on the murder?

22 A Correct.

23 Q You understand that?

24 A Yes, sir.

25 Q And you understand that's a risk. You're willing to

1 accept that risk?

2 A Yes, sir.

3 Q And you want to go forward today?

4 A Correct.

5 Q Okay. Now, Mr. Johnson, you were arrested roughly
6 when, do you remember?

7 A June 24th, 2010.

8 Q Two thousand when?

9 A Ten.

10 Q Ten. So you were in the county jail for how long
11 prior to this case coming up for trial?

12 A Two years.

13 Q Now, did you ever make bond?

14 A No, sir.

15 Q And your trial date was July 26th, 2012?

16 A That was the first trial date.

17 Q First trial date?

18 A Correct.

19 Q And then what was the second trial date?

20 A August the 8th -- August the 3rd.

21 Q All right. And you were represented by whom?

22 A Collins and Newton, Greg Collins and Newton.

23 Q And was Mr. Collins always on your case?

24 A No, sir.

25 Q When did he come onto your case?

1 A Mr. Collins came on my case in 2012, July -- I mean,
2 January, I want to say, the beginning of January.

3 Q Okay. So he had how long to help you or represent
4 you?

5 A Well, when the case was called to trial, I was
6 arrested about six, seven months.

7 Q Okay. Now, did you have any concern about him being
8 able to be ready for trial in that period of time?

9 A Of course.

10 Q And what was that concern?

11 A Newly discovered evidence. Most of the discovery,
12 being the fact that the lawyer that I did have before was
13 previous -- just vanished off my case, so I was -- the
14 complex of the case, the witnesses, all the evidence.

15 Q This is a complicated case?

16 A Correct.

17 Q Did you sit down with Mr. Collins and go through all
18 of this with him?

19 A Well, what I was able to.

20 Q Okay. And you're not an attorney, are you?

21 A No, sir.

22 Q Did you understand all this?

23 A In the beginning, like, I didn't know what was going
24 on. I was just, basically, just reading the information
25 that was sent to me previous from my previous attorney.

1 Q Okay. Did you have -- let me ask you this. What
2 concerns did you have about this case going into the
3 trial?

4 A Again, the complex of the case and the time that he
5 was on the case.

6 Q All right. And there were codefendants in this case?

7 A Alleged codefendants, correct.

8 Q How many codefendants were there?

9 A Four.

10 Q And did you go to trial with them or you went by
11 yourself?

12 A By myself.

13 Q And who got the most time in this case, the sentence?

14 A I did.

15 Q Do you know what the other folks got?

16 A Seventeen, 23, 35 and 30, I want to say.

17 Q Okay.

18 THE COURT: And you got 50?

19 THE DEFENDANT: Correct.

20 BY MR. THOMAS:

21 Q Did you understand how counsel was going to defend
22 you, what I call the theory of the defense? Did you know
23 what that defense was going to be?

24 A I tried to understand it. Like I said, I was just
25 coming to court or whatnot, just getting information on

1 the discovery Rule 5, so I was trying to understand it.

2 Q And it was -- your position was an alibi defense. Do
3 you know what -- that's a legal term. Do you know what
4 that is?

5 A Correct.

6 Q And what was your -- the alibi defense?

7 A The alibi defense that I wasn't at the crime scene.

8 Q All right. And I think they tried to link you with a
9 Buick automobile; is that correct?

10 A Correct.

11 Q Were you driving that automobile earlier that day?

12 A No, actually, I wasn't. I was with -- the friend
13 girl I was with, I was with her. My alleged codefendants
14 had the car that I was driving on that day.

15 Q Did you own that car?

16 A No, sir.

17 Q Who owned the car?

18 A I'm not really sure who the owner of the car was.

19 Q Yeah, I was confused about that. Because when they
20 talked about it, they never actually showed that you owned
21 that vehicle?

22 A Correct.

23 Q And now, there was some sort of altercation and a --
24 in a bar later that night?

25 A Yes. At the club.

1 Q And were you there?

2 A Yes, I was at the club.

3 Q And why were you at the club?

4 A Well, the friend girl who I was with, it was her
5 party, her birthday party, which was followed by mine, so
6 we were celebrating our birthdays at the same time. Her
7 name was on the flyer, so I was there attending with her,
8 helping her out with the party and celebrating.

9 Q And there was a fight that broke out at the club?

10 A Yes.

11 Q Were you involved with that?

12 A No, sir.

13 Q And your counsel alluded to a shooting prior that
14 day, the incident the day the gentleman got killed. Do
15 you have any knowledge of that?

16 A Once the fight broke out at the club, I had knowledge
17 of what was going on then.

18 Q That's when you learned about it?

19 A Correct.

20 Q And do you know -- I guess that's information that
21 you received from your attorney?

22 A Yes, sir.

23 Q In discovery about that other incident?

24 A Yes, sir.

25 Q And what was that other incident?

1 A Later that night?

2 Q No, earlier.

3 A Earlier that day. It was actually like three other
4 incidents that took place as far as the upcoming of this
5 shooting, the crime scene as far as dealing with the
6 victim that was killed.

7 Q Okay. And this was some beef going on between a
8 rival -- rival gangs?

9 A Yes, sir.

10 Q Okay. Were you a member of any of those gangs?

11 A No, sir.

12 Q Do you know what gangs were fighting?

13 A It was all different types. I don't know exactly who
14 was there.

15 Q Okay.

16 A But I know it was multiple.

17 Q Did you know the gentlemen that were -- the other
18 gentleman who were allegedly involved in these incidents?

19 A The victim?

20 Q Well, did you --

21 A I knew of him. I didn't know him personally.

22 Q And how about the other alleged shooters, your
23 codefendants, did you know them?

24 A I know them personally from school, went to school
25 with some of them.

1 Q So they were people that you knew?

2 A Correct.

3 Q Now, in going over the discovery with your attorney,
4 did you view the video? There was a video of the
5 location.

6 A Yes, sir.

7 Q All right. And could you make out anybody's faces or
8 anything on that video?

9 A No, sir.

10 Q Were you on that video?

11 A No, sir.

12 Q And did counsel go over with you about the
13 ballistics, any ballistic reports or anything that he had?

14 A I don't remember anything about no really ballistics
15 that was discovered before coming to trial. I know of
16 that once we was continued in the trial as far as the
17 ballistics test that was going on, being tested, being
18 points of evidence.

19 Q All right. Now, you heard your attorney testify
20 about receiving certain evidence during the trial. Did
21 you ever have an opportunity to sit down with him when he
22 received that discovery and talk with him about it?

23 A No, sir.

24 Q And why not?

25 A I guess because we was -- during the trial, it was so

1 much going on, I guess we didn't have time to.

2 Q Things were happening quickly?

3 A Yes.

4 Q Were you concerned?

5 A Really concerned.

6 Q Did you voice that concern?

7 A Correct.

8 Q Okay. That continued or that got better, or got
9 worse or what happened?

10 A I want to say it got worse. Because like I said, he
11 was just six, seven months into the case, so a whole bunch
12 of complex evidence, witnesses, most of the discovery,
13 ballistics, all that was coming in, not prior to the six
14 or seven months he was on the case, but during the trial.

15 Q All right. And how about the DNA evidence? Did you
16 have an opportunity to go over with your attorney about
17 DNA evidence?

18 A During the first trial before we had the motion, I
19 had notice of the DNA when I had to take the swab.

20 Q Okay.

21 A Before the continuance for the July 26th trial.

22 Q Now, I think you mentioned it and your attorney
23 mentioned it as well, that it was your contention that
24 there was some other shooter involved?

25 A Correct.

1 Q Not you?

2 A Correct.

3 Q Okay. And did you -- how do I phrase this question
4 properly for you? Do you feel like you or your attorney
5 were able to go through the discovery and properly come up
6 with some other thoughts as to who this other shooter
7 could be?

8 A No, sir.

9 Q Okay. And in your going over the discovery with your
10 attorney, did y'all talk about DNA evidence in regards to
11 maybe another shooter?

12 A No, sir.

13 Q Were you ever offered -- I know your attorney said
14 no, but were you ever offered a plea?

15 A Not to my knowledge. If I was -- I want to say one
16 time -- when I had Rhodes Bailey, I want to say a plea
17 came about, a 30-year plea, but that was the only plea and
18 it was only one time.

19 Q But you didn't accept the plea?

20 A No, sir.

21 Q Why didn't you take it?

22 A I wasn't guilty. I didn't feel like I was going to
23 take a 30-year plea for something I didn't do.

24 Q Yes, sir. Now, I'm not going to go over with you all
25 the technical stuff that I talked to your attorney about

1 on the discovery. I mean, you were there, but do you
2 understand a lot of that?

3 A I didn't understand it then. I was just there.

4 Q All right. Now, there were certain other evidence
5 that they had, like phone records. I guess those were
6 records of individual cell phones?

7 A Correct.

8 Q Did you ever have an opportunity to go through that
9 information with your attorney?

10 A One time, but like he was saying when he was on the
11 stand, it wasn't key coded, so my only understanding was
12 my number that was on the paper.

13 Q Okay. So you were unable to go over that with him?

14 A Correct.

15 Q And, Your Honor, if it please the Court, can I ask
16 him one last question, and this is important, and it's
17 not -- we've talked about this.

18 This doesn't imply that I've got something or that
19 I've missed something, but it gives you an opportunity to
20 tell us.

21 Now, this is your day in court. You've been waiting
22 a long time, since 2012, to come in here today. Is there
23 anything else that I may have missed or I may have
24 forgotten that you feel is important for this Court to
25 know?

1 A I feel like you covered all the grounds as far as
2 arguments that I filed in my brief.

3 Q Yes, sir.

4 A To the State. Like you covered all the grounds. I
5 just want to put on the record that during the trial, I do
6 feel like my lawyer, he represented me to the point that
7 he could as far as the complex of the witnesses and the
8 evidence of trial, so everything.

9 Q Okay. But do you feel like that he was hindered in
10 any way in properly representing you to the fullest?

11 A To the certain extent as far as with the evidence
12 from the Solicitor's Office, from the State. But other
13 than that, no.

14 Q And this -- do you feel like that impacted your
15 trial?

16 A Correct.

17 Q I'll use the legal term and you know the answer to
18 it. Do you feel like you were prejudiced by that?

19 A Correct.

20 MR. THOMAS: Your Honor, I have no further questions.

21 THE COURT: Thank you.

22 Cross-examination?

23 CROSS-EXAMINATION:

24 BY MS. KINARD:

25 Q Mr. Johnson, you met with Mr. Collins and/or

1 Mr. Newton before your trial; is that correct?

2 A Correct.

3 Q And when you met with them, you discussed about the
4 discovery that you had at that time?

5 A Yes, ma'am.

6 Q And while looking at the discovery and talking to
7 them, did you discuss possible defense strategies for your
8 cases?

9 A That's correct.

10 Q And that's how you came up with alibi?

11 A Yes, ma'am.

12 Q Did you talk about any others, any other strategies?

13 A No, ma'am.

14 Q Okay. And you said that someone else was driving
15 your car, for lack of a better term, that day?

16 A Correct.

17 Q Okay. And you were at a party, it was your
18 friend's -- your friend's girl, is that what you said?

19 A No, it was my friend girl.

20 Q Your friend, okay.

21 A Correct.

22 Q So when you were meeting with your attorneys, you
23 discussed the discovery you had and that did not include
24 DNA evidence?

25 A Repeat the question again.

1 Q When you were discussing discovery with your
2 attorneys, that did not include the DNA evidence?

3 A No, ma'am.

4 Q And it did not include ballistics?

5 A No, ma'am.

6 Q And that came about later?

7 A It came at trial.

8 Q Okay. Did you feel like you could talk to your
9 attorneys freely?

10 A Of course.

11 Q You felt you could ask them any questions you had or
12 say hey, what's going on?

13 A I said from the knowledge I had of the case, yes.

14 Q Okay. Did you bring up your concerns to them during
15 the trial?

16 A Like I said, I didn't really understand what was
17 going on, so I was really just going with the flow.

18 Q Okay. And Mr. Thomas asked you about DNA and the
19 question was that you didn't have time to discuss who
20 else's DNA may have been involved?

21 A No, I said I didn't have time to discuss DNA.

22 Q Because that came through during the trial?

23 A Correct.

24 Q Okay. But you did testify you felt Mr. Collins
25 represented you to the best of his ability?

1 A Yes, ma'am.

2 Q Okay.

3 MS. KINARD: I have no further questions.

4 Thank you, Mr. Johnson.

5 MR. THOMAS: Your Honor, nothing further.

6 THE COURT: Thank you. You may step down.

7 Call your next witness.

8 MR. THOMAS: Your Honor, if it please the Court,
9 that's the Applicant's case.

10 THE COURT: The Applicant rests.

11 MS. KINARD: The State has no witnesses, but request
12 a brief closing argument.

13 THE COURT: Request what?

14 MS. KINARD: Brief closing argument.

15 THE COURT: Oh, certainly.

16 MR. THOMAS: Your Honor, if it please the Court, what
17 I'd like to do, if the Court would allow, is rather than a
18 closing, if I could submit just a one to two-page, keep it
19 very short, post-trial brief. I think it might be easier,
20 Your Honor, if I can set that out in a very easy to follow
21 format for the Court. I'd prefer to do that if it's
22 possible.

23 MS. KINARD: I personally would prefer argument or,
24 at least, the ability to make a couple motions. Also, I
25 feel like sometimes briefs are duplicative of effort and

1 maybe proposed orders would be more reasonable. It
2 depends on Your Honor's preference and inclination of
3 ruling.

4 THE COURT: I normally prefer oral argument, but if
5 you're going to file a -- did you say a brief?

6 MR. THOMAS: Your Honor, yes, sir, just to outline.
7 That way I can cite any case law that I may have, and what
8 I'd like to do -- I don't want to do something that's
9 going to be five or six or ten pages long, I've rather
10 keep to it a page or two.

11 I'd rather do that than a proposed order. The
12 proposed orders present problems for the Applicant's
13 standpoint in that you have to assume what the Court could
14 potentially rule in your favor on and you end up with a
15 lot of other stuff in there that may not be, you know,
16 what the Court is thinking.

17 What I have done in the past is that do a proposed --
18 or do a small post-trial brief. Then if the Court is
19 inclined to grant Post Conviction on whatever issues, then
20 I can do a proposed order based upon that, Your Honor.

21 THE COURT: And how soon would you propose?

22 MR. THOMAS: I could do it in 10 days, Your Honor.

23 THE COURT: Less than 10 days?

24 MR. THOMAS: I could do it in five days, Your Honor.

25 THE COURT: Friday?

1 MR. THOMAS: Friday, yes, sir.

2 THE COURT: Two to three-page brief by Friday?

3 MR. THOMAS: Yes, sir.

4 THE COURT: And submitted to me by email.

5 MR. THOMAS: All right, sir. I'll be glad to.

6 THE COURT: All right. And, of course, file the
7 original, but send a copy -- but notice me by email and a
8 copy to the Attorney General.

9 And so if we're going to use that approach, how many
10 days to respond?

11 MS. KINARD: Great question, Your Honor. Since we're
12 going to be in court all five days, I might ask
13 Ms. Cleveland to help me, but if we could have into next
14 week, maybe by Wednesday. I'm actually leaving the
15 office. Wednesday is my last day so, certainly, by that
16 time.

17 THE COURT: You're leaving next Wednesday?

18 MS. KINARD: Yes, sir. We'll have it done. We can
19 do a couple of pages. That's not a problem.

20 MR. THOMAS: I'm sorry.

21 THE COURT: Let me ask you this. I had intended to
22 ask you this anyway before we got to this stage.

23 MS. KINARD: Yes, sir.

24 THE COURT: Are you going to prepare all the orders
25 if instructed to prepare?

1 MS. KINARD: We have a contingency plan. I'll have
2 someone who will be helping with the orders.

3 THE COURT: So we're not going to have to order
4 transcripts?

5 MS. KINARD: I don't believe so, we're hoping not.
6 We'll have somebody in court every day watching the
7 hearing.

8 THE COURT: Okay.

9 MS. KINARD: Unless it's a particularly complex
10 issue.

11 THE COURT: I've just got a lot of problems with
12 people leaving the attorney general's office and not
13 getting the orders.

14 MS. KINARD: Yes, sir. We have a plan in place for
15 all of these.

16 THE COURT: So if you leave, you're going to send me
17 something saying here's who's in charge?

18 MS. KINARD: Sure. Absolutely. I can tell you that
19 by the end of the week as we go forward.

20 If I could make a couple quick motions?

21 THE COURT: Sure.

22 MS. KINARD: First of all, I would move to deem
23 abandoned the appellate allegations that were raised in
24 the application. No testimony or evidence has been
25 presented based on any appellate performance. Second of

1 all, I would also move kind of under 15(a) that there
2 should be no conformity of the evidence -- excuse me,
3 allegations to evidence presented.

4 I feel like there is a lot of evidence presented that
5 could be misconstrued as prosecutorial misconduct
6 allegations. That's not been pled or presented to the
7 Court. So I think the only allegation really before the
8 Court is ineffective assistance of trial counsel. And I
9 would ask that any rulings or any findings made in the
10 brief or any arguments be confined to that.

11 MR. THOMAS: Your Honor, if it please the Court. I
12 will agree there is no evidence presented in regards to
13 ineffective assistance of appellate counsel. I have
14 reviewed all that and made a determination that I think
15 the way we went forward is a better way, Your Honor, so we
16 are not alleging that.

17 In the allegations of Post Conviction is ineffective
18 assistance of counsel and also due process violations,
19 Constitutional violations. I spoke with the attorney
20 general about this in regards to I did not allege
21 prosecutorial misconduct, and the reason I didn't is
22 because if you go through the transcript, there is an
23 explanation for everything as far as why things haven't
24 been provided.

25 I think that prosecutorial misconduct is an

1 intentional act, and I've spoken to counsel about this, as
2 well. I don't believe that all of these failures to
3 provide discovery or lateness in discovery was necessarily
4 intentional. It could have been by mistake, inadvertence
5 or whatever. I don't think that excuses the fact that
6 they weren't provided until trial or they weren't provided
7 prior or there were statements made that we don't have
8 them and turned out they did.

9 So that's why I elected not to go forward on
10 prosecutorial misconduct. I don't think we have to. I
11 think that would have been a great burden for us to have
12 proven, and I'm really, in all candor, not sure that we
13 could prove prosecutorial misconduct, Your Honor, but I
14 think all the other allegations do still stand on their
15 own.

16 THE COURT: All the other allegations --

17 MR. THOMAS: All the other allegations in regards to
18 discovery stand on their own outside of having to allege
19 prosecutorial misconduct.

20 THE COURT: All right. And so you're going to
21 address the issue of ineffective assistance of counsel?

22 MR. THOMAS: Well, as part of the Post Conviction
23 Act, Your Honor, you can -- and I'll be glad to include
24 this in my argument, the Rule 5 and the Brady violations
25 are subject to Post Conviction Relief and so I don't

1 think -- I thought this through. It gets all muddled up
2 in my mind.

3 I think that is Brady violation and Rule 5
4 violations, are they ineffective, yes, they can be.
5 Because there are things that you can do that -- and even
6 Judge McMahon says in this case well, counselor, you had a
7 year or you have -- I think one time he says, you know,
8 you had six months or a month or whatever to obtain this
9 information, look for this information.

10 So in those instances, it can be ineffective, but
11 also there are certain cases that say that just for the
12 failure of the State to give you the information or
13 discovery denies you the right to have Constitutional
14 right to a fair trial. I think that exists in this case,
15 so I think it is all kind of together.

16 So I don't think you have to say it's just one or the
17 other because I think the Court recognizes that you could
18 have Brady violation as an issue of Post Conviction Relief
19 outside of prosecutorial misconduct.

20 THE COURT: All right.

21 MS. KINARD: Be that as it may, that was not pled.
22 It's not in the application and the application has not
23 been amended.

24 MR. THOMAS: Your Honor, my standard -- I understand
25 the attorney general's position, but it upsets me a little

1 bit. My practice, and I've been doing Post Conviction for
2 a long time, is that -- and I'm probably the only attorney
3 that does this. I call the Attorney General who has the
4 case that's coming up for trial on all of my cases, as I
5 get them, as I do my trial notebook and I say these are
6 going to be the issues.

7 I called a couple of times and I spoke with the
8 counsel last week, and I said these are the issues that I
9 found in this case. There were a number of just what I
10 would call common Post Conviction Relief issues, but the
11 issue is going to be failure to provide this information
12 under Rule 5 and Brady.

13 So she did not tell me at that time that she objected
14 to it. She didn't tell me at that time that she wanted me
15 to do a written response to that, which I could have
16 easily done.

17 I would assume that that is consenting to the notice
18 that this is what we intended to go forward with today.
19 That's always been my practice, Your Honor.

20 THE COURT: All right, sir. I'll let you put it in
21 your brief, in your short brief.

22 MR. THOMAS: In my short brief, Your Honor.

23 MS. KINARD: Thank you, Your Honor.

24 (Whereupon, the proceedings were concluded.)
25

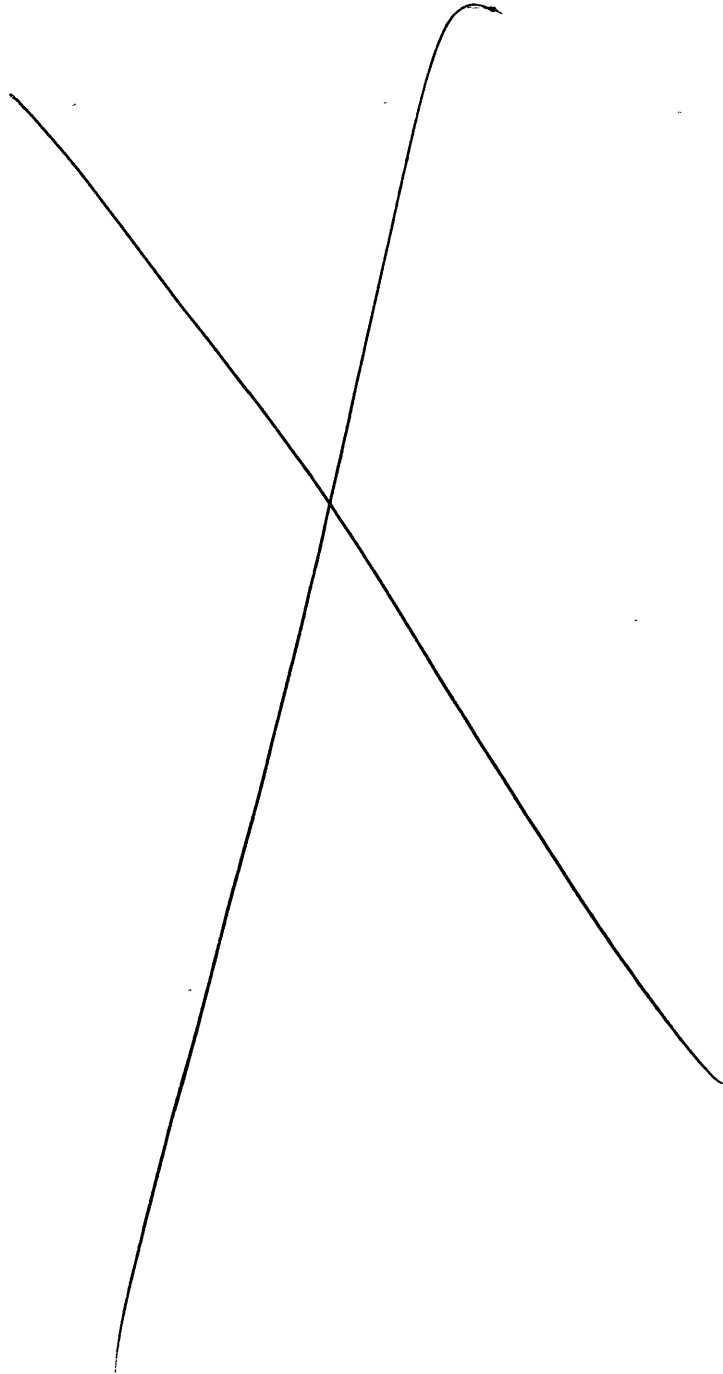
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I, Karen Ambroziak, Official Court Reporter for the 5th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Richland County, South Carolina, on the 19th day of March, 2018.

August 24, 2018

Karen Ambroziak

Karen Ambroziak, RPR
Circuit Court Reporter



STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

DaQwan, Johnson, #351891

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2015-CP-40-5213

ORDER OF DISMISSAL

RECEIVED
2018 MAR 14 AM 11:55
CLERK OF COURT
RICHLAND COUNTY

This matter is before the Court by way of application for post-conviction relief (PCR) filed August 25, 2015 by Da'Quan Johnson ("Applicant"). Respondent submitted its Return on December 3, 2015. An evidentiary hearing was held on Monday, March 19, 2018 at the Richland County Courthouse. Applicant was present at the hearing and represented by Tommy Thomas, Esquire. Assistant Attorney General Jessica E. Kinard, Esquire, represented the State. Applicant testified on his behalf. Gregory Collins, Esquire, was also present and testified.

Also before the Court were the records of the Richland County Clerk of Court regarding the subject conviction(s), the transcript from Applicant's trial hearing, Applicant's records for the Department of Corrections, and Applicant's appellate records.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted at the February 2011 term of the Court of General Sessions for Richland County for murder (2011-GS-40-0863) and attempted murder (2012-GS-40-0885). Applicant was represented by Gregory B. Collins, Esq and John C. Newton, Esq. Applicant proceeded to trial on July 26, July 30-August 3, and August 8, 2012, before the Honorable R. Knox McMahon and a jury. He was

convicted as indicted. Judge McMahon sentenced Applicant to a term of fifty (50) years' imprisonment for murder and a term of thirty (30) years' for attempted murder. These sentences were to be served concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Robert M. Dudek, Esq. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences. State v. Johnson, No. 2015-UP-192 (filed April 8, 2015). The Remittitur was issued on April 29, 2015.

CURRENT APPLICATION

In the application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel, in that;
 - a. "Trial Counsel failed to put the State's case through the adversarial process"
 - b. "Trial Counsel failed to investigate"
2. Ineffective Assistance of Appellate Counsel, in that;
 - a. "Appellate counsel denied applicant the right to fair process and the opportunity to obtain an adjudication on the merits of his voluntary manslaughter request that was denied by the trial courts"
3. Due Process Violation of 5th and 14th Amendment[s], in that;
 - a. "Appellate Counsel denied applicant effective assistance in violation of the South Carolina Constitution Article one Sections three and fourteen and the United States Constitution's sixth and fourteenth amendments.

SUMMARY OF RELEVANT TESTIMONY PRESENTED

Counsel's testimony

Counsel testified he worked for the Richland County Public Defender's office at the time he was appointed to represent Applicant. Counsel recalled the facts of the case were a shooting

occurred in Gable Oaks Apartments, and there was night vision video of five people running. Counsel further recalled it was the State's theory the shooting occurred as a result of gang violence, and two prior shootings which also took place at the Gable Oaks Apartments the day before. Counsel testified he met with Applicant once every month or two before trial. He also recalled the case was called for trial and then there was a discovery dump. Counsel asserted he asked for a continuance of the case because the discovery that was dump on him contained DNA evidence he had not seen before.

Counsel testified he developed a defense theory. The overall theory of defense was that the other co-defendants were placing the blame on Applicant because they were protecting another individual. Counsel testified he had an investigator assigned to the case. Counsel recalled filing pre-trial motions in regards to the request for continuance. He testified his reason for the request was to test the DNA swabs that were taken from Applicant unbeknownst to him. Counsel recalled this occurred on July 12th, and the trial was set to start on July 30th. Counsel further recalled receiving over 400 pages of discovery from the Richland County Gang Unit three to four days before trial. Counsel testified he reviewed all of the discovery but may not have digested it to the point that someone who was going to trial would have.

Counsel recalled his intuition was that wiretap tapes existed from the night of the shooting but he was never able to obtain the information. Regarding the number of objections he made during trial, Counsel testified he made several discovery objections because he had trouble getting information from the Solicitor. Counsel recalled sending several emails to the Solicitor requesting discovery. Counsel testified ultimately the pre-trial motions were denied. Counsel recalled issues continued to come up regarding discovery. Counsel testified one of the main issues with reviewing the evidence was all of the evidence was spread out on a table and there



was no custodian present. Counsel recalled not wanting to go through the discovery without the presence of an evidence custodian. Counsel testified the trial court ordered a custodian to be present, and then they reviewed the discovery but it was after the trial had already started. Counsel contended that it is his practice to not touch evidence if a custodian is not present.

Regarding the DNA swabs that were taken, Counsel testified he never saw and believed they were destroyed during the testing. However, he testified he would have asked for a finding for independent testing of the swabs or to at least get a higher level of testing. Counsel further testified touch DNA was important in the case because there were two bullet cartridges which required someone to touch each one in order to load the gun. Counsel asserted it was their intent to argue if the DNA did not match Applicant, it would've matched one of the co-defendants. Counsel testified he had a good guess about who fired the gun, and it was not Applicant because no shell casings for the caliber of gun used were found in Applicant's possession.

Counsel recalled there was an out of court identification problem involving the night vision video. Counsel testified he requested a Bigger's hearing on the video but got around the issue by some of the co-defendants making in court identifications. Counsel further recalled he objected to the calling of witnesses that were not on the original witness list but the trial court still allowed those witnesses to testify. Additionally, Counsel recalled the Solicitor attempted to give one witness immunity in exchange for their testimony. Counsel further testified the problems with discovery impacted his ability to represent Applicant and he believed those issues interfered with Applicant's constitutional rights to a fair trial.

On cross-examination, Counsel testified the case was originally going to be handled as a joint trial but he moved to sever. He recalled meeting with Applicant to discuss potential defenses and discovery prior to trial.

Applicant's testimony

Applicant testified he was sentenced to fifty years for murder and attempted murder. Applicant recalled the case was first called to trial in July 2012 and for the second time in August 2012. He further recalled Counsel came on in January 2012, roughly about six to seven months before trial. Applicant testified he had doubts about Counsel's ability to be ready for trial due to all of the discovery issues. Applicant recalled he was concerned with the complexity of the case and the length of time Counsel was on the case. Applicant testified he and Counsel discussed an alibi defense being he was not present at the crime scene. Applicant contends he was with a girlfriend that day and was not driving the Buick.

Applicant did not recall going over the ballistics report. He also recalled receiving evidence during trial but did not review the evidence during trial. Applicant testified he voiced concerns with discovery issues, but the issues got worse. Applicant further testified it was during the first trial when he received notice of DNA swab testing. Applicant asserted Counsel did not represent him to the extent he could have because of the complexity of the case.

On cross-examination, Applicant testified Counsel represented him to the best of his abilities. He recalled discussing a defense strategy, and felt he could communicate freely with Counsel. Applicant testified he and Counsel did not have time to discuss the DNA evidence because it came through during trial.

APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; 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, 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, 286 S.C. 441, 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. Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, Petitioner 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 Petitioner 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.

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 further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (1985).

Ineffective Assistance of Counsel

This Court finds Applicant is attempting to frame a claim of Brady violation on the part of the prosecution as a claim of ineffective assistance of counsel. However, Applicant made no

allegation of prosecutorial misconduct in his application, and did not submit any amendments to include such a claim. Furthermore, Counsel cannot be incompetent for failing to receive materials from prosecution that they had no reason to know existed. Judge v. State, 321 S.C. 554 (1996). Counsel testified to a number of disclosure failures on the part of prosecution. Counsel testified that he learned of the DNA testing on swabs taking from Applicant on the morning of trial, and therefore was unable to independently test them. Counsel further testified that when the case was called to trial there was a "discovery dump", and he requested a continuance because he had received evidence that he had never seen before. However, the trial judge denied his request.

Additionally, this Court finds Counsel's performance was not deficient in any way. Counsel took action to ensure that he had received all discovery and reviewed all discover that he knew existed before trial. He testified that he sent various emails regarding the discovery request and made several motions and objections each time an issue regarding discovery would come up. Counsel testified that he went over every piece of discovery that he received. Moreover, Applicant testified he believed Counsel represented him to the best of his abilities.

Finally, Applicant has failed to show how he was prejudiced by trial counsel's performance in the handling of his trial. To establish the prejudice prong an Applicant must show specific prejudice resulting from counsel's lack of time to prepare. U.S. v. Cronin, 466 U.S. 648 (1984). Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.



THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post-Conviction Relief

Brooks P. Goldsmith, Circuit Court Judge

Case No.: 2015-CP-40-05213

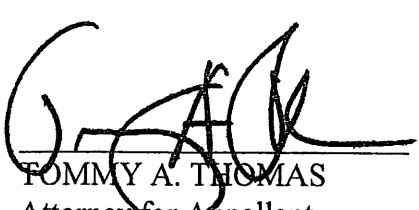
Daqwan Johnson #351891, ... Appellant,

vs.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

Daqwan Johnson #351891 appeals the Order of the Honorable Brooks P. Goldsmith, dated May 7, 2018 and filed on May 14, 2018. Appellant received written notice of entry of this order on May 25, 2018.


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Irmo, South Carolina
June 12, 2018

RICHLAND COUNTY
FILED
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JAMESON

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APPEAL FROM RICHLAND COUNTY
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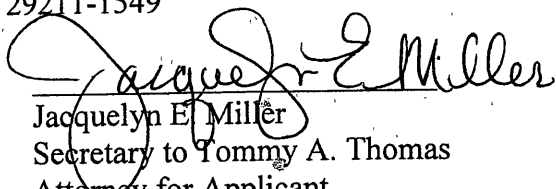
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CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Appellant hereby certify that I placed in the United States Mail, a copy of a Notice of Appeal, with postage prepaid and the return address clearly shown on said envelope to Megan Harrigan Jameson, Esq. of the Attorney General's Office, at:

Megan Harrigan Jameson Esq.
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211-1549


Jacquelyn E. Miller
Secretary to Tommy A. Thomas
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June 12, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post-Conviction Relief

Brooks P. Goldsmith, Circuit Court Judge

Case No.: 2015-CP-40-05213

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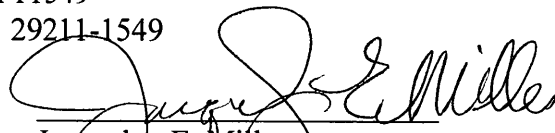
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CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, Secretary for Attorney Tommy A. Thomas, Attorney for the
Appellant hereby certify that I hand delivered an copy of the Petition for Writ of Certiorari and
Appendix, to Lindsey McCallister, Esq. at the Attorney General's Office, at:

Lindsay McCallister Esq.
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211-1549



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February 8th, 2019