

ORIGINAL

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO SUMTER COUNTY
Brian M. Gibbons, PCR Judge
William H. Seals, Jr., Trial Judge

Appellate Case No. 2017-001292

RECEIVED

JUL 16 2018

S.C. SUPREME COURT

MICKEY MARKELL JOHNSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT PURUSANT TO WHITE V. STATE

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS	4
ARGUMENT	10
The trial court did not abuse its broad discretion by allowing the State to present testimony regarding Petitioner’s gang affiliation during trial because the evidence was relevant and admissible under the <u>res gestae</u> theory and under Rule 404(b), SCRE, as evidence of motive, intent, or a common scheme or plan.	10
CONCLUSION.....	19

TABLE OF AUTHORITIES

Cases

<u>Anderson v. State</u> , 354 S.C. 431, 581 S.E.2d 834 (2003).....	11
<u>Beltran v. State</u> , 99 S.W.3d 807 (Tex. App. 2003).....	16
<u>Brady v. Maryland</u> , 373 U.S. 83 (1963)	3
<u>Butler v. State</u> , 120 Nev. 879, 889, 102 P.3d 71, 78 (Nev. 2005)	17
<u>Garibay v. State</u> , 275 Ga. App. 170, 620 S.E.2d 424 (Ga. 2005).....	15, 16
<u>People v. Contreras</u> , 144 Cal.App.3d 749, 192 Cal.Rptr. 810 (1983)	17
<u>People v. Olivier</u> , Ill.App.3d 872, 279 N.E.2d 363 (Ill. App. 1972)	17
<u>State v. Adams</u> , 322 S.C. 114, 470 S.E.2d 366 (1996).....	11, 12, 15
<u>State v. Alexander</u> , 303 S.C. 377, 401 S.E.2d 146 (1991).....	10
<u>State v. Boot</u> , 950 P.2d 964 (Wash. App. 1998).....	17
<u>State v. Byers</u> , 392 S.C. 438, 710 S.E.2d 55 (2011).....	12
<u>State v. Fonseca</u> , 383 S.C. 640, 681 S.E.2d 1 (Ct. App. 2009).....	17
<u>State v. Gaster</u> , 349 S.C. 545, 564 S.E.2d 87 (2002).....	12
<u>State v. Gilmore</u> , 396 S.C. 72, 719 S.E.2d 688 (Ct. App. 2011)	17
<u>State v. Holland</u> , 261 S.C. 488, 201 S.E.2d 118 (1973)	13
<u>State v. Hough</u> , 319 S.C. 104, 459 S.E.2d 863 (Ct. App. 1995).....	11
<u>State v. Johnson</u> , 306 S.C. 119, 125-26, 410 S.E.2d 547, 551 (1991).....	17
<u>State v. Kelley</u> , 319 S.C. 173, 460 S.E.2d 368 (1995).....	12
<u>State v. Liverman</u> , 386 S.C. 223, 687 S.E.2d 70 (Ct. App. 2009)	12
<u>State v. Liverman</u> , 398 S.C. 130, 727 S.E.2d 422 (2012).....	12
<u>State v. Mancilla</u> , 197 Wash. App. 631, 644, 391 P.3d 507, 513 (Wash. App. 2017)	15
<u>State v. Martucci</u> , 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008).....	11
<u>State v. McDonald</u> , 343 S.C. 319, 540 S.E.2d 464 (2000)	12
<u>State v. Preslar</u> , 364 S.C. 466, 613 S.E.2d 381 (Ct. App. 2005)	11
<u>State v. Price</u> , 368 S.C. 494, 629 S.E.2d 363 (2006)	13
<u>State v. Robinson</u> , 305 S.C. 469, 474-76, 409 S.E.2d 404, 408-09 (1991)	13
<u>State v. Schmidt</u> , 288 S.C. 301, 342 S.E.2d 401 (1986).....	10
<u>State v. Sobers</u> , 404 S.C. 263, 268, 744 S.E.2d 588, 590-91 (Ct. App. 2013)	13
<u>State v. Spears</u> , 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013).....	13
<u>State v. Ward</u> , 347 S.C. 606, 649 S.E.2d 145 (Ct. App. 2007).....	13
<u>State v. Winston</u> , 281 Kan. 1114, 135 P.3d 1072 (2006)	15
<u>United States v. Abel</u> , 469 U.S. 45(1984).....	14
<u>United States v. Ozuna</u> , 674 F.3d 677 (7th Cir. 2012).....	14-15
<u>Vasquez v. State</u> , 67 S.W.3d 229, 239 (Tex. App. 2002).....	17
<u>White v. State</u> , 263 S.C. 110, 208 S.E.2d 35 (1974).....	3

Rules

Rule 203, SCACR.....	2
Rule 401, SCRE.....	10
Rule 402, SCRE.....	10
Rule 403, SCRE.....	12
Rule 404, SCRE.....	10, 12, 16

Secondary Sources

John E. Theuman, <u>Admissibility of Evidence of Accused's Membership in Gang</u> , 39 A.L.R.4th 775.....	14
--	----

STATEMENT OF ISSUE ON APPEAL

The trial court did not abuse its broad discretion by allowing the State to present testimony regarding Petitioner's gang affiliation during trial because the evidence was relevant and admissible under the res gestae theory and under Rule 404(b), SCRE, as evidence of motive, intent, or a common scheme or plan.

STATEMENT OF THE CASE

On March 9, 2012, the South Carolina State Grand Jury indicted Petitioner Mickey Markell Johnson (Petitioner) for Criminal Conspiracy, Accessory Before the Fact to Murder, Accessory After the Fact to Murder, Pointing and Presenting a Firearm at a Person, and Unlawful Carrying of a Pistol (2012-GS-47-03). On June 13, 2012, a superseding indictment was returned against Petitioner, adding one count of Accessory before the Fact to First-Degree Burglary. He was represented by Shaun C. Kent, Esquire. The case was prosecuted by Assistant Attorneys General Cary Goings and Curtis Pauling of the South Carolina Attorney General's Office.

On July 16, 2013, Petitioner proceeded to a jury trial before the Honorable William H. Seals, Jr. On July 18, 2013, the jury convicted Petitioner of Accessory Before the Fact to Murder, Pointing and Presenting a Firearm at a Person, Unlawful Carrying of a Pistol, and Criminal Conspiracy. The jury acquitted Petitioner of Accessory After the Fact to Murder. The trial court sentenced Petitioner to concurrent terms of incarceration of life without the possibility of parole for Accessory Before the Fact to Murder, five years for Pointing and Presenting a Firearm at a Person, one year for Unlawful Carrying of a Pistol, and five years for Criminal Conspiracy.

Petitioner attempted to perfect a direct appeal, but the South Carolina Court of Appeals dismissed the appeal by order filed on November 22, 2013, finding Petitioner had failed to timely serve his notice of appeal on the respondent pursuant to Rule 203(b)(2), SCACR. The Remittitur was issue on December 11, 2013.

Thereafter, on July 22, 2014, Petitioner filed an application for post-conviction relief. On August 15, 2014, Petitioner, through counsel Wendy J. Keefer and Adam Owensby, served a

“Petition in Support of Post-Conviction Relief Pursuant to S.C. Code Ann. § 17-27-20,” alleging the following grounds for relief:

1. Ineffective assistance of counsel for failing to file a timely appeal;
2. Prosecutorial misconduct for failing to provide exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963); and
3. Ineffective assistance of counsel for failing to investigate and present alibi witnesses.

The State (Respondent) served its return on October 22, 2014, requesting an evidentiary hearing and consenting to Petitioner’s claim that he was denied his right to appellate review and therefore entitled to belated appellate review of direct appeals issues pursuant to White v. State, 263 S.C 110, 208 S.E.2d 35 (1974). An evidentiary hearing was convened on November 9, 2016, before the Honorable Brian M. Gibbons, circuit court judge. Petitioner was present and represented by Lance S. Boozer. Respondent was represented by Assistant Attorney General LaRone K. Washington of the South Carolina Attorney General’s Office. At the hearing, Petitioner testified and presented testimony from trial counsel Kent, Willie J. Johnson, and Trevaugh Jackson. By written order filed on June 1, 2017, the court granted Petitioner belated appellate review of direct appeal issues pursuant to White and denied Petitioner’s remaining allegations.

Petitioner filed a notice of appeal. On January 5, 2018, Petitioner filed a Petition for a Writ of Certiorari and a Brief of Appellant Pursuant to White. This Brief of Respondent Pursuant to White and an accompanying Return to Petition for Writ of Certiorari follow.

STATEMENT OF FACTS

On the afternoon of March 22, 2011, Petitioner, who was the leader of the local Sumter affiliate of the 135 Piru gang, and his subordinate gang members were working out and socializing at an apartment complex in Sumter, South Carolina. (App. 92, 101-02, 209, 219-20, 258, 260-63). At some point during the afternoon, several men alleged to be members of the rival Folk Nation gang returned from a nearby funeral for one of their friends and engaged in a verbal altercation with Petitioner and his subordinates. (App. 263). Petitioner told the men that the apartment complex was his gang's territory and they needed to leave. (App. 265). After an exchange of words, the other men left the apartment complex; however, they returned a short while later. (App. 265-66). William Morgan, a friend of Petitioner's who had previously been in gangs with him but was not a member of 135 Piru, grabbed a firearm, cocked it, and pointed it at the group of men who had just returned. (App. 267-270). Petitioner then grabbed the gun from Morgan and began firing at the opposing group, who returned fire at Petitioner and his subordinates and associates. (App. 170-71, 200, 271). Luckily, no one was struck by the flurry of bullets and everyone scattered. (App. 272). Law enforcement arrived, but left without making any arrests or speaking with Petitioner and his subordinates, (App. 272-73).

Hours later that same day, Adrian Davis returned home to his apartment that he share with girlfriend Annesia Allen, which was in the same complex where the earlier shooting had occurred. (App. 158-61, 166). Davis had not been home for the prior shooting, as he was working as the shift manager of a local Pizza Hut store. (App. 155-62). Shortly after arriving home, Davis was sitting at the computer table when there was a knock on the door. (App. 166-68). Allen answer the door and discovered Rasheed Brandon standing at an angle with his hand behind his back. (App. 168-70). Brandon, who was a subordinate member of 135 Piru and had

been at the complex during the earlier shooting, looked Allen in the face and asked how she was doing. (App. 168, 170). Before Allen could react, Brandon pulled out a weapon, aimed at Davis, and fired one fatal shot. (App. 168). Allen slammed the door, locked it, and called law enforcement for help. (App. 168-69).

Detective William Lyons began investigating the shooting that evening. (App. 105, 112-13). Lyons, who was trained in gang detection and was employed as the Sumter Police Department gang detective until funding for the gang detection program expired, began speaking with witnesses that evening and learned of the shooting earlier that day. (App. 109-10, 114-15). He was able to identify Brandon as the shooter after speaking with Allen and subsequently arrested Brandon. (App. 115). Further investigation led to the arrest of Petitioner and several of his subordinates and associates, including Bryan Bradley, John Wesley Stamps, Garnett Davis, and Morgan. (App. 115-16). Numerous witnesses gave statements that Petitioner, as leader of the Sumter affiliate of 135 Piru, ordered the hit on Davis as retaliation for the earlier shooting and territory encroachment by a rival gang. (App. 341, 468-69).

Petitioner was subsequently arrested and indicted for Criminal Conspiracy, Accessory Before the Fact to Murder, Accessory After the Fact to Murder, Pointing and Presenting a Firearm at a Person, and Unlawful Carrying of a Pistol for his role in the two incidents on March 22, 2011. Petitioner proceeded to trial on these indictments. Before the jury was selected, Petitioner moved to suppress any evidence or testimony pertaining to Petitioner's gang affiliation. (App. 6-20). Petitioner asserted any reference to gang affiliation would be unduly prejudicial and would deprive him the right to a fair trial. Petitioner informed the trial court he would not challenging evidence related to the shooting earlier in the afternoon, which he conceded was admissible. (App. 10). The State responded it intended to call the investigators

who investigated this gang shooting as well as several co-defendants who would all testify as to the 135 Piru structure and Petitioner's involvement in the organization. (App. 11-12). The State argued the evidence regarding the gang structure and Petitioner's involvement was an integral part of its case and was necessary for the jury to understand how and why the murder took place. (App. 12-13). The State further argued the testimony was highly probative to the motive and intent for the shooting. (App. 13-14). After listening to arguments from both parties, the trial court ruled evidence pertaining to gang affiliation was relevant and that its probative value substantially outweighed its prejudicial effect. (App. 19).

After the trial court ruled evidence of Petitioner's gang affiliation was admissible, the State called Detective Lyons, who was admitted as an expert in gang investigations over Petitioner's objection. (App. 80-89). Detective Lyons testified that Petitioner was the leader of the Sumter affiliate of 135 Piru, an east-coast Bloods gang. (App. 92, 96). He testified 135 Piru operates in Sumter and eight other counties in South Carolina, as well as North Carolina, Georgia, Pennsylvania, and New Jersey. (App. 92-93). Detective Lyons described 135 Piru's structure and practices, including mandatory meetings and dues, as well as the initiation process. (App. 93-103). Detective Lyons testified that as leader of the 135 Piru affiliate in Sumter, the subordinate members took and followed orders from Petitioner and could be punished for failing to comply with Petitioner's demands. (App. 94-95). Detective Lyons testified that his investigation determined that Petitioner had ordered the shooting that killed Davis in retaliation for the incident earlier that day. (App. 128-29).

The State also presented Dontae Crayton, a subordinate member of Petitioner's 135 Piru affiliate, who testified about the gang's organization and structure. Crayton testified that Petitioner was the leader of the Sumter affiliate of 135 Piru, as well as earlier gangs with whom

Crayton was affiliated. (App. 206-10, 215). Crayton testified that Petitioner gave and took power from subordinate gang members based on the members' actions. (App. 210-11).

Morgan, who was not a member of 135 Piru but had previously been a subordinate in other Sumter County Bloods-affiliated gangs that Petitioner led, testified he was hanging out with Petitioner and other members of 135 Piru during the afternoon, including during the earlier shooting. (App. 237-39, 257-61). Morgan testified Petitioner told him he was the leader of the Sumter affiliate of the 135 Piru gang. (App. 245-47). He testified Petitioner told the group of men to leave the apartment complex because it was their territory as Bloods. (App. 265).

Stamps, a subordinate member of Petitioner's 135 Piru affiliate, testified regarding his involvement in 135 Piru and in the shooting. (App. 303-62). Stamps testified he was initiated into 135 Piru in January 2011, a few months before the shooting. (App. 305-06). He described Petitioner's recruitment of him as "threatening me to get down in the gang." (App. 312, 313-14). He testified Petitioner did not participate in his initiation "beat-in" but directed those who participated. (App. 314). He testified that as leader of the Sumter affiliate of 135 Piru, Petitioner made the decisions for the gang, including doling out punishments and determining who could join. (App. 317-19, 323-24). He testified he did not believe a lower level member of 135 Piru could make the decision for a hit or murder. (App. 319). He testified Petitioner called regular meetings and the members were responsible for paying dues. (App. 320-22). He testified that on March 22, 2011, he was hanging out with Petitioner and others at the apartment complex when a group of mourners from a funeral came into the complex in black shirts, which drew the ire of Petitioner. (App. 328-30). Petitioner spoke to the group in black, who left the complex. (App. 330-31). Stamps testified the group returned a short time later and a gunfight ensued. (App. 332-35). He testified that a short time later, a carful of people came back to the complex, and one of

the occupants shot at Stamps and threatened him. (App. p. 336-37). Stamps testified he reported this to Petitioner, who wanted to know from what apartment the shooter had come. (App. 337-38). He testified Petitioner and fellow members of 135 Piru came and picked him up a little while later, and while in the car, Stamps heard Petitioner tell a fellow gang member to shoot whoever came to the door. (App. 341). He testified he was waiting outside the apartment when he heard a single gunshot followed by a woman's screams. (App. 344-47). He testified he was involved in the shooting because he feared retaliation from the gang. (App. 346-47). He testified that following the shooting, he met up with Petitioner and other members and overheard Petitioner ask, "[D]id you get him?" (App. p. 347-48). Stamps testified Petitioner "promoted" him and two other members for their participation in the murder of Davis. (App. 348).

The State also presented Bradley as a witness. Bradley, Petitioner's cousin, testified he joined 135 Piru after Petitioner misled him about the organization's mission:

He tricked me and manipulated me and stuff, talking it's nothing but love. You're uplifting the community. Filled my head up with lies and basically used us to crimes and stuff like that. Once you done joined, then he'll tell you what it is. Then he asks you to join. He asks you to join and he's got others, not a community and stuff like that. Then when we join, he wants us to go out there and do crimes and stuff, but he'll never put himself in a crime. He gets us to do it for him.

(App. 424-26). Bryant testified that Petitioner was the leader of the Sumter affiliate of 135 Piru, and as leader, he called meetings and determined who was punished and initiated. (App. 429, 435-40, 443). He testified he was the lowest rank until the murder, after which Petitioner promoted him. (App. 430, 444). He testified the apartment complex was 135 Piru's territory and "something bad would happen" if another gang came into their territory. (App. 434). He testified on March 22, 2011, Petitioner approached the group of men dressed in black and told them to leave the apartment complex because it was "Piru territory." (App. 450-53). He testified that

following the afternoon shootout, Petitioner called the leader of the Florence affiliate of 135 Piru to try to get some of their members to come act as shooters but was unsuccessful. (App. 465-68). He testified that Petitioner then developed a plan to have local members of 135 Piru participate in the retaliation shooting, instructing the participants to go to Apartment 7 and if there was no answer, then Apartment 50 and shoot the first male. (App. 468-69, 471). He testified he was assigned the role of getaway driver. (App. 469-70). He testified he did not want to be involved, but when he told Petitioner of his reservations, Petitioner said, "be loyal or otherwise die." (App. 469).

The State also presented Special Agent Mark Berube from the South Carolina Law Enforcement Division (SLED), who was admitted over Petitioner's objection as an expert in gang investigations. (App. 529-47). Special Agent Berube testified he assisted with the investigation of this case at the request of the Sumter Police Department. (App. p. 534-35). Special Agent Berube testified that he has interviewed numerous members of 135 Piru from across the State and he estimated there are more than one-hundred members of 135 Piru in South Carolina. (App. 537). He testified that unlike many other gangs in South Carolina that lacked structure, 135 Piru is very organized. (App. 539). He testified his investigation revealed that Petitioner was head of the Sumter affiliate of 135 Piru and described the ranks of local members. (App. 539-41). He testified territory was very important to well organized gangs like 135 Piru. (App. 541-42). He further testified that the events of March 22, 2011, including the ultimate fatal shooting of Davis, was likely over a territory dispute. (App. 542-43).

ARGUMENT

The trial court did not abuse its broad discretion by allowing the State to present testimony regarding Petitioner's gang affiliation during trial because the evidence was relevant and admissible under the res gestae theory and under Rule 404(b), SCRE, as evidence of motive, intent, or a common scheme or plan.

Petitioner contends the trial court committed reversible error when it permitted testimony from both expert and lay witnesses regarding gang activity, and in particular Petitioner's own gang involvement as the leader of the Sumter affiliate of 135 Piru, an offset of the Bloods organization, as such testimony "suggested prior bad acts, criminal propensity, was unduly prejudicial, and it bolstered the testimony of the co-defendants who testified for the State." Contrary to Petitioner's contentions, the trial court properly admitted evidence regarding Petitioner's gang affiliation because the evidence was relevant and admissible under the res gestae theory and as a motive, intent, or common scheme or plan under Rule 404(b), SCRE. Petitioner's conviction should be affirmed.

Only evidence that is relevant should be admitted during trial. Rule 402, SCRE. "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'"). Evidence which could assist the jury in arriving at the truth of an issue is relevant and should be admitted during trial. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986).

However, 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." "This is so because under our system of justice, a conviction must be based upon

evidence of the offense for which the accused is on trial rather than upon prior criminal or immoral acts.” State v. Hough, 319 S.C. 104, 107, 459 S.E.2d 863, 865 (Ct. App. 1995). Evidence of a defendant’s prior crimes or bad acts is limited to establish motive, intent, the absence of mistake or accident, the existence of a common scheme or plan, or the identity of the perpetrator. State v. Martucci, 380 S.C. 232, 251-252, 669 S.E.2d 598, 608 (Ct. App. 2008).

Furthermore, evidence of a defendant’s prior crimes or bad acts may also properly be admitted if those acts form part of the res gestae of the charged offense. Anderson v. State, 354 S.C. 431, 435, 581 S.E.2d 834, 836 (2003). The res gestae theory recognizes that evidence of other bad acts may be an integral part of a charged crime or may be necessary to aid the fact finder in understanding the context in which the crime occurred. State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005). To constitute part of the res gestae of an offense, it is important that the prior bad acts have a close temporal proximity to the charged crime. Martucci, 380 S.C. at 258, 669 S.E.2d at 612.

In State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-371 (1996), this Court explained the res gestae theory:

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.”

(citations omitted and alteration in original). Thus, where a prior bad act is “inextricably intertwined” with a charged offense, the evidence of the prior bad act is admissible as part of the res gestae of the crime. Id. at 122, 470 S.E.2d at 371.

Significantly, “[a] trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice.” State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). Decisions to admit or exclude evidence rest in the sound discretion of the trial judge and will only be reversed on appeal for a prejudicial abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). “Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury’s verdict.” State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

In South Carolina, several cases have indirectly upheld the introduction of evidence pertaining to gang affiliation.¹ However, as of yet, no South Carolina published decision has directly found such evidence to be admissible.

¹ In State v. Liverman, 386 S.C. 223, 687 S.E.2d 70 (Ct. App. 2009), 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, 386 S.C. at 242, 687 S.E.2d at 79. However, the Court of Appeals 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 of Appeals 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 of Appeals did not address whether the testimony was admissible. Further, the admissibility of this testimony was not raised on certiorari and was not addressed in this Court’s review of Liverman’s convictions. State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012).

Although no South Carolina case has yet directly found that such evidence of gang affiliation is admissible, the United States Supreme Court and many other courts from other

In State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006), this Court held that an officer's testimony that the appellant was a supreme or an officer within criminal street gang was inadmissible hearsay because the testimony was not based on his personal knowledge, but on information relayed to him by an informant. Price, 368 S.C. at 498-99, 629 SE2d at 365-66. However, it is important to note that this 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.

In State v. Sobers, 404 S.C. 263, 268, 744 S.E.2d 588, 590-91 (Ct. App. 2013), the Court of Appeals 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."

In State v. Ward, 347 S.C. 606, 649 S.E.2d 145 (Ct. App. 2007), the Court of Appeals found appellant was not entitled to a mistrial where the State's references to gangs were not "completely gratuitous" and were unobjected to for the most part.

In State v. Robinson, 305 S.C. 469, 474-76, 409 S.E.2d 404, 408-09 (1991), this Court found 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.

In State v. Holland, 261 S.C. 488, 500-02, 201 S.E.2d 118, 124-25 (1973), this Court found the trial court properly denied a motion for directed verdict in murder case, where State presented evidence that defendants, who were members of or connected 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.

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 John E. Theuman, Admissibility of Evidence of Accused's Membership in Gang, 39 A.L.R.4th 775 (“While commonly recognizing that evidence identifying a defendant as a member of a gang may be prejudicial, since juries may associate such groups with criminal activity and improperly convict on the basis of inferences as to the defendant's character, many courts have held that such evidence may nevertheless be admissible if it is sufficiently relevant to a proper issue in the case, weighing this probative value against the danger of unfair prejudice. Gang membership has frequently been found to be probative and admissible, for example, as evidence of a possible motive for the crime, particularly in homicide cases where the defendant and his victim are shown to have been members of rival gangs; as an indication of possible bias on the part of defense witnesses who are shown to be members of the defendant's gang; as evidence of a common design or purpose in crimes committed by a group; or as bolstering the identification of the defendant, such as in cases where witnesses describe the perpetrators as having worn gang colors. Courts holding that such evidence should have been excluded in the case at hand have generally held that it had not been shown to be probative of the issues presented, that the point it related to was relatively minor, or that that point could have been made with other, less prejudicial evidence.” (footnotes omitted)); see also United States v. Abel, 469 U.S. 45, 49 (1984) (finding 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 bank robbery); United States v. Ozuna, 674 F.3d 677, 683 (7th Cir. 2012) (finding evidence of the defendant's gang affiliation

was properly admitted where the prejudice to the defendant did not substantially outweigh the considerable probative value of the evidence in establishing a witness' bias or motivation for testifying that he carried the handgun on the night in question); State v. Mancilla, 197 Wash. App. 631, 644, 391 P.3d 507, 513 (Wash. App. 2017) (finding a police officer's expert testimony regarding gang affiliation and gang related activity was admissible as other-bad-acts evidence in prosecution for first degree assault and drive-by shooting, where the state presented evidence of defendants' gang affiliation, and testimony supported the state's theory of motive and explained why defendants would seek to target a house affiliated with rival gang); State v. Winston, 281 Kan. 1114, 1129, 135 P.3d 1072, 1083 (2006) (finding sufficient foundation was laid for evidence of defendant's affiliation with criminal street gang in order to show that motive for shooting was gang-related, in trial for first-degree murder and attempted first-degree murder, where the defendant and co-defendant had referenced prior gang-related murder of victim's brother during encounter with victim and informed victim that he would soon meet same fate, and victim was shot several months later in gang-style ambush attack); Garibay v. State, 275 Ga. App. 170, 172, 620 S.E.2d 424, 427 (Ga. 2005) (finding that because these gang-related markings explained the circumstances surrounding the commission of the crimes, the trial court did not err in admitting them under a res gestae theory).

In the case at bar, the evidence presented regarding Petitioner's gang affiliation as the leader of the Sumter affiliate of 135 Piru was admissible as part of the res gestae of the crimes charged because it was "so intimately connected with and explanatory of [the accessory before the fact to murder and related crimes for which Petitioner 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. Simply put,

evidence of Petitioner's gang affiliation and leadership was an integral part of the offenses for which he was on trial and was necessary to aid the jury in understanding the context in which these crimes occurred. This case centered entirely on a gang-related retaliation murder, which Petitioner readily acknowledged during his pre-trial motion to suppress any testimony regarding gang affiliation. Evidence presented at trial showed that Petitioner was not only in the 135 Piru gang, but was the local Sumter leader of the gang, and therefore, had enormous influence and power over his subordinate members, including the shooter, the getaway driver, and the lookout, who all participated in this gang-related murder at the request of their leader, Petitioner. The testimony from the expert and lay witnesses regarding Petitioner's gang affiliation is highly pertinent to the charged crimes. Thus, the testimony was relevant to Petitioner's case by helping to explain the circumstances and context of the crimes and was necessary for a full presentation of the case. Accordingly, the challenged evidence was admissible as part of the *res gestae* of Petitioner's crime. The trial court did not abuse its discretion in admitting the challenged evidence.

Alternatively, evidence of Petitioner's gang membership was probative of motive, 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 a purported member of a rival gang, who had exchanged gunfire with Petitioner and his fellow (and subordinate) 135 Piru members mere hours earlier in the same apartment complex where the murder later occurred. See e.g., *Garibay*, 275 Ga.App. at 174, 620 S.E.2d at 428 (finding evidence of defendant's gang membership was admissible to show motive); *Beltran v. State*, 99 S.W.3d 807, 811 (Tex. App. 2003) (finding admission of evidence regarding appellant's gang affiliation absolutely necessary to show motive for the crime);

Vasquez v. State, 67 S.W.3d 229, 239 (Tex. App. 2002) (finding 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. 2005) ("This court has repeatedly held that gang-affiliation evidence may be relevant and probative when it is admitted to prove motive"); 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). See also 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); 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 State v. Boot, 950 P.2d 964, 968-69 (Wash. App. 1998); 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"). Finally, the challenged testimony was relevant under the common scheme or plan exception, since it helped to circumstantially tie the gunfire from earlier in the afternoon to the indicted offenses and it was probative on why all of the shootings occurred that fateful day. See People v. Olivier, Ill.App.3d 872, 874-77, 279 N.E.2d 363, 365-67 (Ill. App. 1972) (finding evidence of the defendants' common membership in a gang properly admitted in order to show a common design).

For all the foregoing reasons, the trial judge did not abuse its broad discretion by allowing evidence of Petitioner's leadership of the Sumter affiliate of the 135 Piru gang, as such evidence was admissible under res gestae, and to establish motive, intent, and common scheme or plan. Petitioner's convictions should be affirmed.

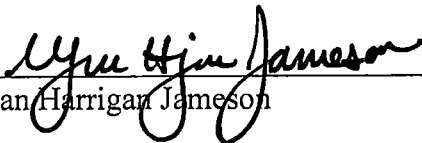
CONCLUSION

For all the foregoing reasons, this Court should affirm Petitioner's convictions and sentences.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

BY: 
Megan Harrigan Jameson

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

, 2018

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO SUMTER COUNTY

Brian M. Gibbons, PCR Judge
William H. Seals, Jr., Trial Judge

Appellate Case No. 2017-001292

MICKEY MARKELL JOHNSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

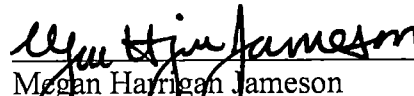
PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within Brief of Respondent pursuant to White v. State on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Appellate Defender Robert M. Pachak
S.C. Commission on Indigent Defense – Appellate Division
PO Box 11589
Columbia, South Carolina 29211

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

This 16th day of July, 2018.


Megan Harrigan Jameson
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737



RECEIVED

JUL 16 2018

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

July 16, 2018

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

Re: Mickey Markell Johnson, #298814 v. State of South Carolina
Appellate Case No. 2017-001292
Lower Court Case No. 2014-CP-43-1491

Dear Mr. Shearouse:

Enclosed please find the original and fourteen (14) copies of the Brief of Respondent pursuant to White v. State. By copy of this letter we are serving opposing counsel today.

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General
SC Bar No. 100108

MHJ/cc
Enclosures

cc: Robert M. Pachak, Esquire (2 copies)