VOLUME IV OF V

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2019-000839

RECEIVED

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S.C. SUPREME COURT

Chris A. Liverman, Petitioner,

v.

State of South Carolina, Respondent

APPENDIX

Dayne C. Phillips, Esq.
Price Benowitz LLP
1614 Taylor Street, Suite D
Columbia, SC 29201
(803) 807-0234

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

ATTORNEYS FOR PETITIONER

Other Counsel of Record:
Lindsey A. McCallister
Assistant Attorney General
1000 Assembly Street, Room 519
Columbia, SC 29201
(803) 734-3970

ATTORNEY FOR RESPONDENT

PAGES 1501-2000

INDEX

VOLUME I (PAGES 1–500)

TRANSCRIPT
DATED AUGUST 28, 2006.....1

TRANSCRIPT OF PETITIONER'S TRIAL
DATED OCTOBER 30 – NOVEMBER 9, 2006.....124

VOLUME II (PAGES 501–1000)

TRANSCRIPT OF PETITIONER'S TRIAL (CONTINUED)
DATED OCTOBER 30 – NOVEMBER 9, 2006.....501

VOLUME III (PAGES 1001–1500)

TRANSCRIPT OF PETITIONER'S TRIAL (CONTINUED)
DATED OCTOBER 30 – NOVEMBER 9, 2006.....1001

VOLUME IV (PAGES 1501–2000)

TRANSCRIPT OF PETITIONER'S TRIAL (CONTINUED)
DATED OCTOBER 30 – NOVEMBER 9, 2006.....1501

COURT'S EXHIBIT #3
W.I.S. NEWS ARTICLE.....1552

COURT'S EXHIBIT #4
NOTE.....1556

COURT'S EXHIBIT #5
NOTE.....1557

COURT'S EXHIBIT #6
REQUESTED CHARGES.....1558

DEFENDANT'S EXHIBIT #5
REPORT.....1564

DEFENDANT'S EXHIBIT #8
REPORT.....1569

DEFENDANT'S EXHIBIT #9
BOOK OF KNOWLEDGE.....1572

STATE'S EXHIBIT #72
INCIDENT REPORT 1603

FINAL BRIEF OF APPELLANT
FILED SEPTEMBER 8, 2008 1605

FINAL BRIEF OF RESPONDENT
FILED NOVEMBER 3, 2008 1622

OPINION NO. 4635
FILED DECEMBER 4, 2009 1679

PETITION FOR REHEARING
FILED DECEMBER 17, 2009 1700

ORDER DENYING PETITION FOR REHEARING
FILED JANUARY 20, 2010 1704

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS
FILED MARCH 17, 2010 1706

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS
FILED APRIL 15, 2010 1719

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI TO THE COURT OF
APPEALS FILED MARCH 3, 2011 1750

BRIEF OF PETITIONER
FILED JULY 15, 2011 1751

BRIEF OF RESPONDENT
FILED NOVEMBER 14, 2011 1769

OPINION NO. 27130
FILED JUNE 6, 2012 1809

REMITTITUR
FILED JUNE 26, 2012 1822

APPLICATION FOR POST-CONVICTION RELIEF
FILED JULY 17, 2012 1823

RESPONDENT'S RETURN
FILED OCTOBER 18, 2012 1830

AMENDED APPLICATION FOR POST-CONVICTION RELIEF
FILED MARCH 6, 2013.....1838

MOTION TO CONDUCT DISCOVERY
FILED AUGUST 29, 2013.....1859

ORDER ON MOTION TO CONDUCT DISCOVERY
FILED FEBRUARY 5, 2014.....1865

AMENDED APPLICATION FOR POST-CONVICTION RELIEF
DATED AUGUST 7, 2018.....1895

SECOND AMENDED APPLICATION FOR POST-CONVICTION RELIEF
DATED DECEMBER 11, 2018.....1904

POST-CONVICTION RELIEF HEARING TRANSCRIPT
DATED DECEMBER 17, 2018.....1914

VOLUME V (PAGES 2001–2462)

POST-CONVICTION RELIEF HEARING TRANSCRIPT (CONTINUED)
DATED DECEMBER 17, 2018.....2001

POST-CONVICTION RELIEF EXHIBIT #1
MCQUISTON CV.....2076

POST-CONVICTION RELIEF EXHIBIT #2
ARTICLE.....2088

POST-CONVICTION RELIEF EXHIBIT #3
ARTICLE.....2126

POST-CONVICTION RELIEF EXHIBIT #4
ARTICLE.....2182

POST-CONVICTION RELIEF EXHIBIT #5
ARTICLE.....2206

PETITIONER'S MEMORANDUM IN SUPPORT OF POST-CONVICTION RELIEF
FILED FEBRUARY 12, 2019.....2360

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PCR
DATED MARCH 15, 2019.....2392

ORDER DENYING APPLICATION FOR POST-CONVICTION RELIEF
FILED APRIL 23, 2019.....2413

MOTION TO ALTER OR AMEND PURSUANT TO RULE 59(e), SCRCP
FILED APRIL 30, 2019.....2441

ORDER DENYING PETITIONER'S MOTION TO ALTER OR AMEND
PURSUANT TO RULE 59(e) FILED MAY 10, 2019.....2446

NOTICE OF APPEAL
FILED MAY 21, 2019.....2447

ARREST WARRANTS, INDICTMENTS, SENTENCING SHEETS.....2449

THE FOLLOWING EXHIBITS ARE ON FILE WITH THE RICHLAND COUNTY CLERK OF COURT'S OFFICE: COURT'S EXHIBIT NO. 2 (LETTER FROM JUROR 161), DEFENDANT'S EXHIBIT NOS. 6-7 (PHOTOGRAPHS), STATE'S EXHIBIT NOS. 5-10 (DIAGRAMS), STATE'S EXHIBIT NOS. 11-12 (PHOTOGRAPHS), STATE'S EXHIBIT NO. 23-24 (PHOTOGRAPHS), STATE'S EXHIBIT NOS. 59-61 (PHOTOGRAPHS), STATE'S EXHIBIT NOS. 68-71 (PHOTOGRAPHS).

THE DEFENDANT IS RUNNING FROM BETHEL BISHOP, WHERE THE STATE SUBMITS YOU HEARD TESTIMONY THE POLICE HAD SWOOPED DOWN ON THE COLONY AND SWOOPED DOWN ON THE BISHOP.

HE'S RUNNING FROM THE POLICE AT THIS POINT. THEY'RE IN THE BISHOP. YOU HEARD THE TESTIMONY OF DIEGO. THEY WERE EVERYWHERE. THEY SWOOPED DOWN. THIS MAN IS RUNNING OUT OF BETHEL BISHOP. THERE'S A REASON FOR THAT. IT'S BECAUSE HE'S THE MURDERER. HE'S THE MAN THEY'RE LOOKING FOR. HE'S THE SHOOTER, AND HE KNOWS IT. HE'S RUNNING OUT OF THE BISHOP.

HERE IT'S INCREDIBLY IMPORTANT: THE DEFENDANT IS SWEATING PROFUSELY. OF COURSE, HE IS. OF COURSE, HE IS. HE RUNS FROM T.S. MARTIN, THE SCENE. HE HAS GONE INTO THE BISHOP. HE'S BRAGGED DOWN THERE. THAT'S SOMETHING I WANT YOU TO REMEMBER, THAT THEME, BRAGGING.

HE'S DOWN THERE BRAGGING TO HIS FRIENDS IN BETHEL BISHOP, WHICH IS WHAT OFFICER MAHONEY TESTIFIED, WHAT'S IT CALLED? IT'S CALLED "THE ROCK", BEDROCK, BECAUSE THAT'S WHERE THE FOLKS HANG OUT, THE FOLK NATION. HE'S DOWN IN FOLK NATIONVILLE, FOLK NATION LAND BRAGGING, "I WAS SPRAYING. I SHOT ONE IN THE HEAD AND ONE IN THE STOMACH." HE IS DOWN THERE GETTING HIS JUICE. HE'S GETTING HIS RANK.

HE THINKS HE HAS KILLED A BLOOD, I MEAN A BLOOD. I WAS SPRAYING IN BLOOD LAND, SLOB LAND. I'M BRAGGING ABOUT

IT. I'M TALKING AND HOW I SHOT TWO IN THE ROCK. HE TALKS ABOUT IT IN THE ROCK.

DOES THAT RING TRUE? THE POLICE GO DOWN, AULD CATCHES HIM AT THE CUT BECAUSE HE'S RUNNING BECAUSE THE POLICE ARE COMING. HE BRAGS ABOUT IT, DOWN THERE LONG ENOUGH TO BRAG ABOUT IT. THE POLICE COME, HE RUNS. DOESN'T THAT MAKE SENSE? THE STATE SUBMITS IT DOES. IT DOES.

OH, AND THIS GUNSHOT THAT WENT OFF 20 TO 30 MINUTES LATER, 30 MINUTES AFTER HE'S CAUGHT? WELL, LADIES AND GENTLEMEN, IF YOU THINK THAT THAT WEAPON, THIS .22, IS THE ONLY WEAPON ON THE TRAIN TRACKS BETWEEN BLOOD LAND AND FOLK LAND, AND THAT'S THE ONLY GUN THAT COULD HAVE BEEN SHOT THAT NIGHT? PLEASE. WE KNOW, EVERYONE KNOWS. THAT'S A DIFFERENT GUN, A DIFFERENT CASE, A DIFFERENT TIME, ALL AT THE CUT.

IT DOESN'T STOP THERE BECAUSE LADIES AND GENTLEMEN, BEFORE, BEFORE, AULD CATCHES THE DEFENDANT AT THE CUT, THE POLICE HAVE GONE TO T.S. MARTIN.

FIRST OFF, E.M.S. HAS COME TO T.S. MARTIN TO RELIEVE THIS FATHER (INDICATING) OF THE BURDEN THAT HE HAD IN HIS LAP, WHICH IS HIS DAUGHTER, STEPDAUGHTER. THE POLICE WERE RIGHT ON IT RIGHT AFTER HIM.

THE POLICE GO TO T.S. MARTIN, AND WHAT HAPPENS? TYRONE SMITH, TYRONE SMITH, WHO IS OUT THERE TRYING TO

HELP THE TWO VICTIMS LOOKS AT THE POLICE AND SAYS, "IT'S BABY JESUS. I DON'T KNOW HIS NAME, DON'T KNOW HIS REAL NAME, BUT THE SHOOTER THAT I WATCHED, I WATCHED, FOR FOUR TO FIVE MINUTES, THE SHOOTER WHO HAD HIS BANDANNA DOWN AROUND HIS NECK," WHICH IS ALSO, BY THE WAY WHAT DIEGO TESTIFIED TO, IF YOU REMEMBER, "DOWN AROUND HIS NECK, I WATCHED FOR FOUR TO FIVE MINUTES. I COULD SEE HIS FACE. THE LIGHTING WAS OKAY. IT WAS GOOD."

OF COURSE, SHE WANTS YOU TO BELIEVE THAT'S THE FIRST TIME HE HAS EVER MENTIONED THE LIGHTS ON THE SIDE OF THE HOUSE. DO YOU REMEMBER THAT? THAT'S A MISCHARACTERIZATION. HE HAS TALKED ABOUT IT BEFORE.

TYRONE SMITH SAYS, "IT'S BABY JESUS." GUESS WHAT, LADIES AND GENTLEMEN, HE TELLS HIM THAT BEFORE AULD CATCHING HIM AT THE CUT.

NOW, I ASK YOU, THE STATE ASKS, HOW IF THIS MAN, TYRONE SMITH, IS MAKING THIS UP AND TRYING TO FRAME THIS MAN, HOW DOES HE JUST HAPPEN TO GET THE NAME RIGHT OF THE PERSON THAT'S APPREHENDED ON THE TRACKS?

AULD DOESN'T KNOW WHO HE'S LOOKING FOR. HE DOESN'T KNOW HE'S LOOKING FOR BABY JESUS OR CHRIS LIVERMAN. HE'S JUST LOOKING FOR WHOEVER COMES DOWN THE CUT, THE TRACKS.

HOW DOES TYRONE SMITH KNOW IT'S BABY JESUS? THE STATE SUBMITS IT'S SIMPLE, SIMPLE. HE KNOWS IT'S BABY JESUS BECAUSE HE KNEW BABY JESUS BEFORE, AND HE SAW HIM

SHOOT.

THAT, LADIES AND GENTLEMEN, MAKES WHAT TYRONE SMITH SAYS IN HIS TESTIMONY SO BELIEVABLE. HE TELLS THE FIRST OFFICER THERE THAT. HE THEN TELLS THE FIRST INVESTIGATOR THAT, JOBY GRAY. HE SAYS, "LOOK, I SAW HIM. I SAW IT. IT'S BABY JESUS. THAT'S WHO IT IS. THAT'S WHO IT IS."SURE ENOUGH, THEY'VE CAUGHT HIM.

INVESTIGATOR GRAY TAKES HIM TO THE CUT ON THE TRACKS. HE LOOKS AT HIM. HE SAYS, "THAT'S GUY THERE. THAT'S THE SHOOTER RIGHT THERE." HE SAYS, "THAT'S HIM. THAT IS HIM. I HAVE IDENTIFIED HIM. THAT'S THE SHOOTER."

BY THE WAY, INVESTIGATOR GRAY, THE STATE SUBMITS, IS NOT A LIAR, AS SHE SAID. HE LOOKS AND SAYS THEY'VE GOT A SUSPECT. HE DOESN'T KNOW IT'S CHRIS LIVERMAN. HE DOESN'T KNOW IT'S BABY JESUS. HE TAKES HIM OVER THERE. HE TAKES TYRONE OVER THERE, AND SURE ENOUGH, HE IDENTIFIES HIM.

TYRONE WATCHES THE DEFENDANT FOR FOUR TO FIVE MINUTES, FOUR TO FIVE MINUTES. WE KNOW THAT BECAUSE TYRONE LISTENED TO THE 911 TAPE THAT THE BANKS, HIS COUSINS, THE BANKS WERE ON 911, AND TIME IT. THE TAPE IS FOUR TO FIVE MINUTES. HE'S WATCHING HIM THE WHOLE TIME, FOUR TO FIVE MINUTES.

HE SEES THE DEFENDANT SHOOT A .22, SOME TYPE OF .22. HE SAYS LONG. HE'S RIGHT, DESCRIBES THE GUN AS A LONG SKINNY RIFLE THAT SOUNDS LIKE A .22. A LONG SKINNY RIFLE

THAT SOUNDS LIKE A .22.

HE TELLS THE POLICE AT THE SCENE THE SHOOTER IS BABY JESUS, SHOWS POLICE WHERE SHOTS FIRED FROM. WHY IS THAT IMPORTANT? WHY IS THAT IMPORTANT? BECAUSE HE TELLS HIM WHERE THE SHOTS WERE FIRED FROM, AND GUESS WHAT THEY FIND? THEY FIND THE SHELL CASINGS. THEY FIND THE SHELL CASINGS RIGHT WHERE HE POINTS, FURTHER CORROBORATING, FURTHER CORROBORATING, THAT TYRONE SAW THE SHOOTING. HE POINTS.

THEY HADN'T FOUND ANYTHING. DO YOU REMEMBER PETE CURRIE, "WE HAD NOT FOUND ANYTHING" UNTIL TYRONE SHOWED INVESTIGATOR GRAY WHERE TO SEARCH. "HE POINTED TO THE AREA. WE CORNERED IT OFF, AND WE FOUND THESE SHELLS," THESE TEN SHELLS THAT OH, JUST SO HAPPENED TO MATCH THIS GUN, WERE FIRED BY THIS GUN.

THEY DON'T WANT YOU TO BELIEVE TYRONE SMITH, EVEN THOUGH HE COULD POINT THAT AREA OUT. THEY DON'T WANT YOU TO BELIEVE TYRONE SMITH, EVEN THOUGH HE KNEW IT WAS BABY JESUS BEFORE HE WENT TO SEE HIM. THEY WANT YOU TO IGNORE TYRONE SMITH.

FINALLY, THESE BULLETS HE WAS TALKING ABOUT, HOW DOES IT ADD UP? IF HE FIRES TEN AND THERE ARE FOUR OR FIVE IN THE CARTRIDGE, DO YOU REMEMBER WHAT TYRONE SMITH SAID WHEN HE TESTIFIED? HE SAID, "I SAW HIM SHOOT," HE SAID SIX TO SEVEN. HE WASN'T SURE HOW MANY. WHAT HE WAS DOING WAS EMPTYING, OBVIOUSLY, THE CARTRIDGE BECAUSE IT CARRIES TEN.

HE SHOT TEN, AND THEN HE BENT DOWN. HE INTENT DOWN, THE STATE SUBMITS, BECAUSE HE'S RELOADING. EITHER HE CAN'T GET THEM ALL IN, OR HE'S BEEN THERE TOO LONG, BUT HE GETS UP AND HE RUNS.

IF YOU DON'T BELIEVE HE RELOADED THEN, THE STATE SUBMITS, HE HAD 20 MINUTES TO RELOAD OR 15 UNTIL HE'S CAUGHT, THAT'S WHY. THAT'S WHY POOH IS BELIEVABLE, BECAUSE HE SHOWS POOH THE .22 CALIBER BULLETS. IT ADDS UP. THREE TO FIVE, TEN, FOUR TO FIVE FOUND IN THE GUN IN THE CARTRIDGE. OF COURSE, IT ADDS UP. IT ADDS UP BECAUSE HE SHOT HIM. IT ADDS UP BECAUSE HE HAD THE BULLETS. IT ADDS UP BECAUSE HE SHOT THOSE CHILDREN.

TYRONE -- AND, YOU KNOW, I WATCHED. THEY RIDICULED TYRONE, ASKED HIM QUESTION AFTER QUESTION, QUESTION AFTER QUESTION. LOOK, DID HE MISIDENTIFY THE DEFENDANT THE FIRST, THAT FIRST BATCH THAT THEY WANT YOU TO FOCUS ON WHEN IT WAS REALLY POOH? YEAH, BUT GUESS WHAT, POOH AT THAT TIME HAD HIS BANDANNA UP HERE, AND HE WAS TWO-AND-A-HALF HOUSES AWAY. THAT'S A LONG DISTANCE.

THEY WANT YOU TO -- BECAUSE OF THAT, THEY WANT YOU TO BELIEVE THAT TYRONE IS WRONG; THAT HE NEVER DID SEE THE DEFENDANT AT THE SCENE.

THE FIRST STATEMENT BY THE DEFENDANT, DO YOU REMEMBER IT? READ HIS RIGHTS, MS. CAMPBELL WENT OVER THOSE, SIGNED THEM AWAY. THE FIRST STATEMENT, "I WAS NOT AT T.S.

MARTIN. I WAS NOT AT T.S. MARTIN."

TALKING ABOUT -- WHAT WAS THAT WORD SHE USED? I'LL USE MISREPRESENTATION. "I WAS NOT AT T.S. MARTIN. I WAS NOT AT T.S. MARTIN," OUT OF HIS MOUTH.

JOBY GRAY CONFRONTS HIM AND SAYS, "LOOK, WE'VE GOT EVIDENCE YOU WERE THERE. WE'VE GOT SOMEONE WHO SAYS YOU WERE THERE, SO HE MAKES A WRITTEN STATEMENT." THE GIST OF THAT STATEMENT WAS -- I'M SORRY, THE GIST OF THAT STATEMENT, THIS IS HIS SECOND STATEMENT, THE FIRST WRITTEN, "I WAS AT T.S. MARTIN, BUT I DID NOT SHOOT A GUN."

NOW, WE'RE GOING TO GO OVER THAT FIRST STATEMENT FOR A SECOND BECAUSE THERE'S SOME IMPORTANT THINGS IN THERE. AND, YOU KNOW, THE DEFENSE IN THEIR CLOSING STATEMENT, THEY REALLY DIDN'T TALK ABOUT THESE STATEMENTS MUCH, DID THEY? DO YOU REMEMBER, JUST A WORTH OR TWO ABOUT THEM. THERE'S A REASON FOR THAT, BECAUSE THEY DON'T WANT YOU TO SEE THESE.

THESE TAKE -- THESE, THE STATE SUBMITS, CONVICTS, CONVICTS THE DEFENDANT, ESPECIALLY WHEN YOU ADD THEM TO EVERYTHING ELSE.

WERE YOU AT -- OKAY, 00:35, 12:35, THREE HOUR, LESS THAN THREE HOURS AFTER THOSE TWO CHILDREN WERE GUNNED DOWN, AT JUSTICE SQUARE, CHRIS LIVERMAN, HIS BIRTH DATE. IT'S ABOUT A SHOOTING AT T.S. MARTIN. "QUESTION: WERE

YOU AT T.S. MARTIN TONIGHT?"

ANSWER: "I WAS COMING FROM EVERGREEN APARTMENTS WITH TY AND CHRIS FROM BELVEDERE AND TWO OF THEIR FRIENDS. THEY'RE ALL FROM BELVEDERE."

WAIT A MINUTE. GOSH, THAT'S KIND OF DIFFERENT FROM THAT FIRST STATEMENT, ISN'T IT? "I WAS NOT AT T.S. MARTIN." WELL, YES. YES YOU WERE.

"WHO WAS SHOOTING ON T.S. MARTIN DRIVE?"

ANSWER: "ONE OF THE DARK SKINNED DUDES. I DIDN'T SEE NOTHING BUT ONE GUN. I DIDN'T SEE NOTHING BUT ONE GUN."

IS THERE ANY EVIDENCE IN THIS TRIAL THAT THERE WAS MORE THAN ONE GUN FIRED AT T.S. MARTIN? NO, NONE. "I ONLY SAW ONE GUN."

"WHAT WERE THEY SHOOTING AT?"

"A HOUSE. YOU COULD HEAR THE WINDOWS BREAKING."

NOW, THREE HOURS AFTER THE INCIDENT, HE IS TELLING THE INVESTIGATOR THAT HE COULD HEAR THE WINDOWS BREAKING.

DO YOU REMEMBER THE TESTIMONY OF THE FATHER WHERE THE WINDOWS WERE BROKEN AND THE BULLETS LANDED INSIDE THE HOUSE? ONLY SOMEONE THERE THREE HOURS AFTER THE INCIDENT WOULD KNOW THAT. THAT SHOWS THAT HE WAS THERE. HE WAS THERE.

"WHAT TYPE OF GUN WAS USED?"

I AM GOING TO BRING THIS UP BECAUSE IT IS IMPORTANT,

"A RIFLE WITH A SCOPE, A RIFLE WITH A SCOPE," THREE HOURS AFTER THE INCIDENT. HE HAD TO HAVE KNOWN THAT. HE HAD TO HAVE BEEN THERE. HE HAD TO HAVE BEEN INVOLVED, BECAUSE IT DOES HAVE A SCOPE.

WE KNOW THAT THIS GUN WASN'T FOUND FOR WEEKS AND WEEKS. THAT SHOWS THE TRUTHFULNESS. THAT SHOWS, THAT SHOWS THAT HE WAS THERE. ONLY SOMEONE THERE, ONLY SOMEONE THERE, WOULD KNOW THAT. ONLY SOMEONE THERE WOULD KNOW THAT, AND YEAH, IT WAS SAWED OFF. TAKE A LOOK AT IT. IT'S NOT SAWED OFF, BUT LOOK HOW SHORT THAT BARREL IS. IT SURE LOOKS SAWED OFF, DOESN'T IT?

THEN THEY TALK ABOUT WHO O.B. IS, THEN THEY TALK ABOUT SITTING AT THE BRIDGE. WHAT TIME HE'S SITTING AT THE BRIDGE. "AT AROUND TEN. I WALKED OUT OF MY GRANDMOTHER'S HOUSE AND WAS SITTING ON THE BRIDGE. A WHITE ESCORT CAME BY WITH POOH, LITTLE BOSS, GRADY, AND BRADY DRIVING. THEY SAID THEY WERE GOING TO T.S. MARTIN."

"WHY DID YOU THINK THEY WERE GOING THERE?"

"I DON'T KNOW."

"SO YOU HAD ALREADY COME FROM T.S. MARTIN WHERE THE PERSON WITH YOU WAS SHOOTING?"

"YES. I WAS THERE. I HAD ALREADY COME HOME WHEN I SAW POOH."

"AND THAT WAS AFTER YOU SAW THE GUY SHOOTING AT T.S. MARTIN?"

"YES. I SAW HIM TWICE."

DO YOU KNOW WHAT ELSE IS SO IMPORTANT ABOUT THIS STATEMENT? THEY TALK ABOUT WHAT POOH LOOKS LIKE, LIGHT SKINNED, WHATEVER. THIS PART RIGHT HERE, AND YOU'RE GOING TO HAVE THE STATEMENTS BACK THERE. YOU CAN READ THEM. THIS PART. HE CHANGES IT. HE CHANGES IT. HE SAYS, "THAT'S NOT RIGHT. I'M GOING TO CROSS THIS OUT, AND I'M GOING TO INITIAL IT THAT I DID."

WHAT DOES THAT SHOW? THAT SHOWS HE IS GIVEN THE OPPORTUNITY TO CHANGE HIS STATEMENT AND ANYTHING THAT'S CORRECT -- ANYTHING THAT IS INCORRECT, HE COULD CHANGE. GUESS WHAT? HE DID. HE DID, AND THAT'S SO IMPORTANT BECAUSE HE IS GIVEN THE OPPORTUNITY TO READ IT AND CHANGE WHATEVER HE WANTS, CHANGE WHATEVER HE WANTS, AND HE DOES. HE KNOWS HE CAN BECAUSE HE DID IT.

WHAT DOES THIS SAY? SIGNED "CHRIS LIVERMAN", JUST AS THE OTHER TWO PAGES ARE SIGNED "CHRIS LIVERMAN". THEY WANT YOU TO IGNORE THAT. OH, CHRIS LIVERMAN WASN'T THERE. HE'S JUST TRYING TO LEAVE. HE'S JUST TRYING TO GET OUT OF THE CITY POLICE DEPARTMENT.

WHAT'S SO IMPORTANT ABOUT THAT SECOND STATEMENT ALSO? WHEN HE FINISHES IT, THEY GIVE HIM A COPY OF IT. THAT LAST QUESTION, "DID YOU SHOOT A GUN TODAY OR THAT NIGHT AT ANY TIME?"

ANSWER: "NO."

BECAUSE THE STATE SUBMITS THEY GAVE HIM THAT STATEMENT, THEY TAKE HIM TO JAIL, AND FOR THE NEXT 12 HOURS HE REMEMBERS THAT GUNPOWDER RESIDUE TEST THAT THEY HAD JUST GIVEN HIM.

THE STATE SUBMITS THAT HE KNEW, HE KNEW HE HAD FIRED A WEAPON THAT NIGHT, THAT WEAPON, AND HE KNEW THAT WAS GOING TO BE TROUBLE BECAUSE HE THOUGHT THAT THAT GUNPOWDER RESIDUE TEST WAS GOING TO COME BACK POSITIVE. HE SURE DID. HE SURE DID.

HE DIDN'T KNOW ABOUT SWEATING. HE DIDN'T KNOW ABOUT RUBBING IT OFF. HE DIDN'T KNOW ABOUT THE SHIRT, TAKING THE SHIRT OFF WOULD TAKE THE GUNPOWDER RESIDUE OFF. HE DIDN'T KNOW.

SO WHAT DOES HE DO? THE NEXT MORNING THEY BRING HIM DOWN, AND AFTER BEING READ HIS RIGHTS AGAIN AND WAIVING HIS RIGHTS AGAIN HE SAYS, THIRD STATEMENT, "I WAS AT T.S. MARTIN, AND I SHOT A GUN."

NOW, IS THERE ANY TESTIMONY FROM ANYBODY, ANYWHERE IN THIS CASE, THAT THERE WAS MORE THAN ONE GUNSHOT, GUN FIRED AT T.S. MARTIN? ANSWER? NO.

ONE GUN AND ONE GUN ONLY WAS FIRED. THE STATE SUBMITS HE FIRED THIS GUN (INDICATING). "I WAS SHOOTING A .32 AUTOMATIC," OKAY. WE ALL LEARNED ABOUT AUTOMATIC AND SEMIAUTOMATIC.

IF YOU FIRED A .32 AUTOMATIC, WHERE ARE THE SHELLS?

WHERE ARE THE CASINGS? WHERE ARE THEY? NOT THERE. DO YOU KNOW WHY THEY'RE NOT THERE? BECAUSE HE DIDN'T SHOOT A .32 AUTOMATIC. HE SHOT A .22 SEMIAUTOMATIC. "I SHOT AT ANOTHER HOUSE."

THIS INVESTIGATION WAS A FRAME UP? THIS INVESTIGATION THAT THE POLICE QUIT INVESTIGATING THAT THEY WANT YOU TO BELIEVE? WHAT DID JOBY GRAY DO? HE WENT BACK THERE WITH PETE CURRIE TO SEE IF THEY COULD CONFIRM IT, AND THEY LOOKED AT EVERY HOUSE ON THAT STREET. NO BULLET HOLES ANYWHERE.

HE EVEN SAID HE SAW IT HIT THE HOUSE. NONE ANYWHERE. IT'S BECAUSE HE IS THE MURDERER, AND LET'S LOOK AT THAT STATEMENT VERY QUICKLY.

THIS IS AT 13:30 THAT SAME DAY, WHICH IS 1:30 IN THE AFTERNOON, JUSTICE SQUARE AGAIN, JOBY GRAY AGAIN. "IN REFERENCE TO YOUR ORIGINAL STATEMENT, DO YOU NOW GIVE MORE INFORMATION ABOUT THE SHOOTING?"

ANSWER: "YES, SIR."

"WERE YOU SHOOTING A GUN ON T.S. MARTIN LAST NIGHT?"

"YES." HIS WORDS, "YES. I WAS SHOOTING A .32 AUTOMATIC. I ONLY HAD TWO BULLETS. I SHOT AT A HOUSE ON THE CORNER WITH A RED DOOR. I WAS SHOOTING AT A WINDOW WITH A ROUND HOLE LIKE AN ATTIC."

THEN HE TALKS ABOUT THE OTHER PEOPLE THAT WERE THERE WITH HIM AND WHAT WAS FIRED. "THE BARREL AND THE WOOD

STOCK WERE SAWED OFF AND HAD A SCOPE."

"WHAT WAS THE OTHER PERSON SHOOTING AT?"

"HE WAS SHOOTING DOWN THE STREET IN THE DARK."

"DID YOU SHOOT DOWN THE STREET?"

"NO."

BY THE WAY, LADIES AND GENTLEMEN, THEY DON'T WANT YOU TO BELIEVE TYRONE SMITH WHEN HE SAYS, "I SAW HIM AT THE SCENE" BECAUSE IT'S NOT RELIABLE. THIS MAN PUTS HIMSELF AT THE SCENE. HIS SIGNATURE ON BOTH OF THEM. HE PUTS HIM THERE, PUTS HIM FIRING A GUN. HIS WORDS, HIS WORDS. NOT TYRONE SMITH'S, HIS.

WHAT DO THOSE STATEMENTS DO? IF THIS TYRONE SMITH THAT THEY TALKED ABOUT IS AN UNRELIABLE WITNESS, AN EYEWITNESS, THE DEFENDANT CORROBORATES TYRONE SMITH.

"I WAS AT -- I WAS AT T.S. MARTIN WHEN THE VICTIM WAS SHOT."

TYRONE SAYS THE SAME THING. "I WAS WITH OTHER PEOPLE." TYRONE SAYS THE SAME THING. "I WAS ARMED." TYRONE SAYS THE SAME THING, SAME THING. "I FIRED SHOTS AT THE SCENE." TYRONE SAYS THE SAME THING.

THEY DON'T WANT YOU TO BELIEVE TYRONE. "I RAN." THAT'S WHAT TYRONE SAYS. SOMEHOW TYRONE IS NOT BELIEVABLE? HE CONFIRMS THE VERACITY AND THE TRUTHFULNESS OF TYRONE SMITH, THE EYEWITNESS. IT DOESN'T END THERE. THE STATE SUBMITS IT SHOULD.

PHYSICAL EVIDENCE: ONLY .22 CASINGS RECOVERED AT THE SCENE, THE ONLY DAMAGE TO ANY HOUSE WAS [redacted] T.S. MARTIN. THE .22 RUGER RIFLE RECOVERED MATCHES THE TEN CASINGS. IT DOESN'T STOP THERE.

TWO TEARDROP TATTOOS, AND I PUT THE STATE'S EXHIBIT BACK UP THERE SO WE CAN TALK ABOUT THAT JUST VERY BRIEFLY. WE KNOW THIS: THEY WEREN'T ON HIS FACE THE NIGHT HE WAS ARRESTED, GOT A PICTURE, PEOPLE TESTIFIED TO IT.

WE KNOW THAT THE DEFENDANT IS AN ADMITTED FOLK NATION GANG MEMBER. WE KNOW THAT, AND WE KNOW THIS: WE KNOW THAT HE HAS THEM ON HIS FACE AS HE SITS RIGHT OVER THERE TODAY, ON HIS FACE, TWO TEARDROPS. OH, AND BY THE WAY, THERE ARE TWO VICTIMS. COINCIDENCE? THE STATE SUBMITS IT'S NOT. IT'S NOT.

ALL THREE EXPERTS THAT TESTIFIED ABOUT THIS, ALL THREE ON STATE'S EXHIBIT 73, ALL OF THEM, ALL THREE OF THEM SAID A TEARDROP ON THE FACE CAN MEAN THEY COMMITTED A MURDER. DO YOU REMEMBER? WHETHER IT'S THE COLORED IN ONE OR THE ONE -- THE UNCOLORED IN ONE, I DON'T KNOW, BECAUSE THEY DISAGREED ON THAT, BUT ALL THREE OF THEM, INCLUDING THE DEFENSE'S WITNESS, SAID IT MEANS A MURDER.

TWO TEARDROPS, TWO VICTIMS. ONE THAT HE TAKES CREDIT FOR ON HIS FACE FOR BEING A BLOOD; THE OTHER, THE STATE SUBMITS, IS THE INNOCENT 12 YEAR OLD THAT HE CAN'T TAKE CREDIT FOR, AN INNOCENT 12 YEAR OLD. HE SHOULDN'T TAKE

CREDIT FOR T.M. EITHER, BUT HE DOES.

HE SITS THERE TODAY BRAGGING TO YOU, TO US, AND TO OUR COMMUNITY, THAT HE DID THIS. YOU KNOW WHY? YOU KNOW WHY? I HOPE THIS CAME OUT. THROUGH THEIR OWN GANG EXPERT, ALL THIS, TWO YOUNG DEATHS, A TRAGEDY, ALL FOR JUICE, ALL FOR RANK, ALL FOR ADVERTISING, ALL TO MOVE UP, ALL TO MOVE UP IN THE FOLK.

LADIES AND GENTLEMEN, HE DID IT. HE MOVED UP. FOR THAT FAMILIES' CHILDREN'S BODIES, ALL FOR JUICE.

SHE SAID, "LET HIM GO," DIDN'T SHE? SHE SAID, "LET HIM GO." SEND HIM BACK TO THE COMMUNITY. SEND HIM BACK TO HIS FAMILY. SEND HIM BACK TO HIS GANG. THE STATE SUBMITS WHEN YOU LOOK AT ALL THIS, HOW CAN YOU? HOW CAN YOU?

A COUPLE MORE THINGS, AND I'M DONE. WE PUT OFFICER MAHONEY UP, LADIES AND GENTLEMEN, A FINE OFFICER. HE WORKS WITH THE GANGS EVERY DAY, TRYING TO HELP, TRYING TO HELP.

HE GOT UP HERE, AND HE TESTIFIED, AND HE SAID SOMETHING THAT I HAVE TO ADMIT I DISAGREE WITH. HE TESTIFIED, HE SAID, "YOU KNOW, IN THE BETHEL BISHOP" -- IT IS NO OFFENSE TO OFFICER MAHONEY, "THE BETHEL BISHOP SIDE AND THE COLONY SIDE OF THE RAILROAD TRACKS IS FOLK NATION TURF." HE SAID "EVERYTHING ON THE OTHER SIDE OF THE TRACKS IS BLOOD TURF." DO YOU REMEMBER THAT?

LADIES AND GENTLEMEN, I DISAGREE WITH THAT. I DISAGREE TO THE BOTTOM OF MY HEART BECAUSE THAT'S NOT FOLK NATION TURF. THAT'S NOT BLOOD TURF. THAT'S OUR COMMUNITY TURF. WE OWN THAT LAND. WE RAISE OUR FAMILIES THERE. IT'S NOT THEIRS. IT'S OURS.

SEND HIM BACK? NO. IT'S OUR COMMUNITY. WE OWN IT. WE LIVE THERE.

AT THIS POINT OF THE CLOSING ARGUMENT OF A TRIAL, AND I'VE DONE THIS A LONG TIME, I ALWAYS WONDER AT THE POWER THAT A JURY HAS. YOU HAVE TO POWER IN THIS CASE. YOU HAVE THE POWER TO SEND HIM BACK. YOU HAVE THE POWER TO CONVICT, TO FIND HIM NOT GUILTY. THAT'S YOUR POWER. YOU HAVE THAT POWER. THE POWER YOU DON'T HAVE THAT I WISH YOU DID: YOU DO NOT HAVE THE POWER TO RETURN THOSE TWO CHILDREN, THOSE TWO CHILDREN, TO THESE FAMILY MEMBERS. YOU JUST DON'T. I WISH YOU DID. I REALLY DO, BUT YOU DON'T.

WE ASK THIS, THAT YOU GIVE HIM JUSTICE. THAT'S ALL. NO MORE, NO LESS. NO MORE, NO LESS. JUSTICE ARE TWO GUILTY VERDICTS. NO MORE, NO LESS.

EACH OF YOU, TWO WEEKS AGO ON MONDAY, STOOD UP AND TOOK AN OATH, AND IT'S A BEAUTIFUL OATH. IT GOES BACK TO GREEK, GRECIAN TIMES. IT'S THE FIRST TIME IT'S EVER BEEN REPORTED. YOU ALL RAISED YOUR HAND. THEY ASKED YOU, "DO YOU SWEAR OR AFFIRM THAT YOU SHALL WELL AND TRULY TRY, AND

TRUE DELIVERANCE MAKE, BETWEEN THE STATE OF SOUTH CAROLINA AND THE DEFENDANT AT BAR, WHOM YOU SHALL HAVE IN CHARGE, AND A TRUE VERDICT, ACCORDING TO THE LAW AND THE EVIDENCE," A TRUE VERDICT, ACCORDING TO THE LAW AND THE EVIDENCE. YOU ALL ANSWERED. THEY SAID, "SO HELP YOU GOD. SO HELP YOU GOD."

THE STATE ASKS IN THIS CASE, PLEASE, REMEMBER YOUR OATH, DO YOUR DUTY. REMEMBER THESE WITNESSES, WHAT THEY SAID, WHAT THEY DID, BECAUSE THE STATE SUBMITS WHEN YOU DO THAT, WHEN YOU DO THAT, YOU WILL BE DOING JUSTICE.

JUSTICE IN THIS CASE IS NOTHING LESS THAN A CONVICTION AGAINST THAT MAN, THE SENSELESS GANG-RELATED MURDERERS OF THOSE TWO INNOCENT CHILDREN. PLEASE, DO WHAT'S RIGHT.

JURY CHARGE:

THE COURT: ALL RIGHT. MR. FOREMAN AND LADIES AND GENTLEMEN, AT THIS TIME IN THE TRIAL, IT BECOMES THE DUTY OF THE COURT TO CHARGE YOU, THAT SIMPLY MEANS TO INSTRUCT YOU, ON THE LAW THAT APPLIES IN THIS CASE.

BEFORE I START GOING OVER MY INSTRUCTIONS, I WILL BEGIN -- WELL, I NEED TO TELL YOU THAT I'VE HAD JURIES IN SOME PLACES THINK THAT WHEN THIS WAS -- WHEN I HAD COMPLETED THE CHARGE, AND WHEN THE COURT HAD COMPLETED THE CHARGE, AND YOU WENT BACK TO YOUR JURY ROOM, YOU WOULD GET A COPY OF THE LAW THAT I'M ABOUT TO GO OVER WITH YOU.

IT IS NOT IN THAT FORM, SO YOU'RE NOT GOING TO GET A COPY OF IT. I TOLD YOU, YOU CAN MAKE NOTES, YOUR PERSONAL NOTES, BUT DON'T EXPECT TO HAVE A COPY. THE TRUE AND TRIED WAY WE DO IT IN SOUTH CAROLINA IS FOR YOU TO SIT AND LISTEN TO THE INSTRUCTIONS OF THE LAW.

AGAIN, AT THIS TIME, IT BECOMES THE DUTY OF THE COURT UNDER THE CONSTITUTION OF THIS STATE TO CHARGE AND INSTRUCT YOU THE LAW THAT APPLIES IN THIS CASE.

IT IS YOUR DUTY, AS JURORS, TO ACCEPT AND APPLY THE LAW AS THE COURT IS NOW GOING TO STATE IT TO YOU. AS JURORS, IT IS YOUR EXCLUSIVE DUTY TO DECIDE ALL THE ISSUES OF FACT IN THIS CASE, AND FOR THAT PURPOSE TO DETERMINE THE EFFECT, THE VALUE, THE WEIGHT, AND THE TRUTH OF THE EVIDENCE PRESENTED DURING THE TRIAL OF THIS CASE.

BOTH THE STATE OF SOUTH CAROLINA AND THE DEFENDANT, MR. LIVERMAN, HAVE A RIGHT TO EXPECT THAT YOU WILL INDIVIDUALLY AND COLLECTIVELY, CONSCIENTIOUSLY CONSIDER AND EVALUATE THE EVIDENCE IN THIS CASE AND APPLY THE LAW OF THE CASE TO THAT EVIDENCE TO THE END THAT BOTH THE STATE OF SOUTH CAROLINA AND THE DEFENDANT, MR. LIVERMAN, WILL RECEIVE AND OBTAIN A FAIR AND IMPARTIAL TRIAL IN THIS CASE.

I'M GOING TO GO OVER WITH YOU IN JUST A MOMENT IN PART THE CHARGES THAT ARE MADE IN THE INDICTMENTS IN THIS CASE. AGAIN, I WOULD INSTRUCT YOU AND INFORM YOU THAT THE

INDICTMENTS, WHILE THEY DO CONTAIN THE CHARGES, THEY ARE NOT EVIDENCE OF THOSE CHARGES, AND THEY CANNOT BE CONSIDERED BY THE JURY AS EVIDENCE OF THE CHARGES THAT THEY DO CONTAIN.

AS I'VE INDICATED TO YOU PREVIOUSLY IN THIS CASE, THERE ARE TWO SEPARATE INDICTMENTS, INDICTMENT 05-GS-40-6831 ENTITLED THE STATE VS. CHRIS LIVERMAN.

IT IS ALLEGED IN THIS INDICTMENT THAT CHRIS LIVERMAN DID IN RICHLAND COUNTY ON OR ABOUT AUGUST 26TH, 2004 FELONIOUSLY, WILLFULLY, AND WITH MALICE AFORETHOUGHT KILL ONE C.D. BY MEANS OF A GUNSHOT AND THAT SAID VICTIM DIED AS A PROXIMATE RESULT THEREOF, ALL IN VIOLATION OF THE SOUTH CAROLINA CODE OF LAWS SECTION 16-3-10.

THE OTHER INDICTMENT IS 05-GS-40-06832, ENTITLED THE STATE VS. CHRIS LIVERMAN. IT IS ALLEGED, IN PART IN THIS INDICTMENT, THAT CHRIS LIVERMAN DID IN RICHLAND COUNTY ON OR ABOUT AUGUST 26TH, 2004 FELONIOUSLY, WILLFULLY AND WITH MALICE AFORETHOUGHT KILL ONE T.M. BY MEANS OF A GUNSHOT AND THAT THE SAID VICTIM DIED AS A PROXIMATE RESULT THEREOF, ALL IN VIOLATION OF SOUTH CAROLINA CODE OF LAWS SECTION 16-3-10.

THOSE ARE THE CHARGES THAT ARE MADE IN THE INDICTMENTS IN THIS CASE. OF COURSE, THROUGHOUT THESE INSTRUCTIONS WHEN I USE THE WORD "DEFENDANT" I'M REFERRING

TO CHRIS LIVERMAN.

TO THE CHARGES THAT ARE MADE IN THESE INDICTMENTS, THE DEFENDANT, MR. LIVERMAN, HAS ENTERED A PLEA OF NOT GUILTY.

THIS PLEA OF NOT GUILTY BY THE DEFENDANT PLACES THE BURDEN OF PROOF ON THE STATE TO PROVE THE GUILT OF THE DEFENDANT BEYOND A REASONABLE DOUBT BEFORE YOU, THE JURY, CAN FIND THE DEFENDANT GUILTY.

THE DEFENDANT IS PRESUMED IN LAW INNOCENT OF THE CHARGES MADE IN THESE INDICTMENTS. IT IS A CARDINAL AND A FUNDAMENTAL RULE OF THE LAW OF EVIDENCE IN THIS STATE THAT A DEFENDANT, REGARDLESS OF THE CHARGE OR CHARGES AGAINST HIM, WILL ALWAYS BE PRESUMED INNOCENT OF THE OFFENSES FOR WHICH HE HAS BEEN INDICTED UNLESS AND UNTIL THE GUILT OF THE DEFENDANT HAS BEEN PROVEN BY EVIDENCE THAT SATISFIES YOU, THE JURY, OF HIS GUILT BEYOND A REASONABLE DOUBT.

THIS PRESUMPTION OF INNOCENCE IS NOT JUST A MERE LEGAL THEORY. IT'S NOT JUST A LEGAL PHRASE. THE PRESUMPTION OF INNOCENCE IS A SUBSTANTIAL RIGHT TO WHICH EVERY DEFENDANT, INCLUDING MR. LIVERMAN, IS ENTITLED.

THE SUPREME COURT OF THIS STATE HAS DECLARED THAT THE PRESUMPTION OF INNOCENCE IS LIKE A ROBE OF RIGHTEOUSNESS PLACED ABOUT THE SHOULDERS OF A DEFENDANT, AND IT REMAINS WITH THE DEFENDANT AND ASSIGNS THE DEFENDANT TO THAT CLASS, THE INNOCENT, UNTIL THAT PRESUMPTIVE ROPE OF

RIGHTEOUSNESS HAS BEEN STRIPPED FROM THE DEFENDANT'S PERSON BY EVIDENCE THAT SATISFIES YOU, THE JURY, OF THE GUILT OF THE DEFENDANT BEYOND A REASONABLE DOUBT.

THE PRESUMPTION OF INNOCENCE ACCOMPANIES THE DEFENDANT FROM THE TIME OF HIS ARRAIGNMENT, FROM THE TIME OF HIS APPEARANCE IN THIS COURT AND THROUGHOUT EVERY STAGE OF THE TRIAL AND CONTINUES WITH THE DEFENDANT, EVEN AFTER YOU RETIRE INTO THE JURY ROOM TO CONSIDER YOUR VERDICT IN THIS CASE.

THE PRESUMPTION OF INNOCENCE CONTINUES TO EXIST TO THE BENEFIT OF THE DEFENDANT UNTIL YOU, THE JURY, REACH THE CONCLUSION THAT THE STATE HAS PROVEN THE GUILT OF THIS DEFENDANT BEYOND A REASONABLE DOUBT.

I INSTRUCTED YOU, MR. FOREMAN AND LADIES AND GENTLEMEN, THAT THE FACT THAT A DEFENDANT IN THE TRIAL OF A CRIMINAL CASE DOES NOT TESTIFY IN HIS OWN BEHALF IS NOT A FACTOR TO BE CONSIDERED BY YOU IN ANY WAY IN YOUR DELIBERATION AND IN YOUR CONSIDERATION ON THE QUESTION OF THE GUILT OR THE INNOCENCE OF THE ACCUSED.

IT MUST NOT BE CONSIDERED BY YOU IN ANY MANNER AGAINST THE DEFENDANT OR MITIGATE AGAINST HIM IN ANY RESPECT.

A DEFENDANT HAS A CONSTITUTIONAL RIGHT TO REMAIN SILENT, AND THE ASSERTION OF THAT CONSTITUTIONAL RIGHT CANNOT AND MUST NOT BE CONSIDERED BY YOU IN YOUR

DELIBERATIONS.

UNDER YOUR OATH, YOU ARE TO REACH NO INFERENCE AND DRAW NO CONCLUSION FROM THE FACT THAT A DEFENDANT IN THIS CASE DID NOT TESTIFY HIMSELF. AGAIN, THE FACT THAT A DEFENDANT DOES NOT TESTIFY SHOULD NOT EVEN BE DISCUSSED IN THE JURY ROOM.

THE BURDEN OF PROOF, AS I STATED TO YOU, IS UPON THE STATE. IT IS NOT INCUMBENT UPON AN ACCUSED TO PROVE HIS INNOCENCE.

THE BURDEN OF PROOF REMAINS UPON THE STATE TO PROVE GUILT BEYOND A REASONABLE DOUBT, AND AGAIN, THE FACT THAT A DEFENDANT DOES NOT TESTIFY IS NOT A FACTOR TO BE CONSIDERED BY YOU IN DETERMINING THE GUILT OR THE INNOCENCE OF THE DEFENDANT.

THE STATE IS NOT REQUIRED TO PROVE THE GUILT OF THE DEFENDANT BEYOND ALL DOUBT OR BEYOND EVERY DOUBT BUT BEYOND A REASONABLE DOUBT. WHEN WE SAY THAT PROOF MUST BE ESTABLISHED BEYOND A REASONABLE DOUBT, THOSE WORDS SHOULD BE GIVEN THEIR PLAIN AND ORDINARY MEANING.

A REASONABLE DOUBT IS THE KIND OF DOUBT THAT WOULD CAUSE A REASONABLE PERSON TO HESITATE TO ACT. A REASONABLE DOUBT CAN ARISE WHEN THE EVIDENCE PRESENTED IN A CASE OR THE LACK OF EVIDENCE IN A CASE.

TO THINK THAT A DEFENDANT IS PROBABLY GUILTY OR THAT THE CIRCUMSTANCES ARE SUSPICIOUS IS NOT ENOUGH. PROOF

BEYOND A REASONABLE DOUBT IS PROOF THAT LEAVES YOU FIRMLY CONVINCED OF THE DEFENDANT'S GUILT.

THERE ARE FEW THINGS IN THE WORLD THAT WE KNOW WITH ABSOLUTE CERTAINTY, AND IN CRIMINAL CASES, THE LAW DOES NOT REQUIRE PROOF THAT OVERCOMES EVERY POSSIBLE DOUBT.

IF, BASED ON YOUR CONSIDERATION OF THE EVIDENCE, YOU ARE FIRMLY CONVINCED THAT THE DEFENDANT IS GUILTY OF THE CRIME OR CRIMES CHARGED, YOU MUST FIND HIM GUILTY.

IF, ON THE OTHER HAND, YOU THINK THERE IS A REAL POSSIBILITY THAT HE IS NOT GUILTY, YOU MUST GIVE HIM THE BENEFIT OF THE DOUBT AND FIND HIM NOT GUILTY.

YOU ALONE MUST MAKE THE DETERMINATION OF WHETHER OR NOT REASONABLE DOUBT EXISTS AS TO THE GUILT OF THIS DEFENDANT. I WOULD INSTRUCT YOU THAT THE DEFENDANT IS ENTITLED TO EVERY REASONABLE DOUBT ARISING IN THE WHOLE CASE.

IF UPON ANY ISSUE OF FACT THAT IS ESSENTIAL TO CONVICTION AND THE VERDICT OF GUILTY, IF YOU HAVE A REASONABLE DOUBT AS TO HOW THAT ISSUE SHOULD BE RESOLVED, IT WOULD BE YOUR DUTY TO RESOLVE THAT REASONABLE DOUBT IN FAVOR OF THE DEFENDANT.

A DEFENDANT, LADIES AND GENTLEMEN, IS NOT REQUIRED TO PROVE HIS INNOCENCE, BUT THE STATE IS REQUIRED UNDER THE LAW TO PROVE EVERY ESSENTIAL ELEMENT OF THE OFFENSES CHARGED AGAINST HIM BY EVIDENCE THAT SATISFIES YOU, THE

JURY, OF THE GUILT OF THE DEFENDANT BEYOND A REASONABLE DOUBT BEFORE YOU CAN CONVICT THE DEFENDANT AND FIND HIM GUILTY.

IF THEN UPON THE WHOLE CASE YOU HAVE A REASONABLE DOUBT AS TO THE GUILT OR THE INNOCENCE OF THIS DEFENDANT, HE IS ENTITLED TO THAT REASONABLE DOUBT AND WOULD BE ENTITLED TO AN ACQUITTAL AND A VERDICT OF NOT GUILTY, BUT ON THE OTHER HAND, IF UPON THE WHOLE CASE YOU FIND THAT THE STATE HAS PROVEN BY EVIDENCE THAT SATISFIES YOU OF THE GUILT OF THIS DEFENDANT BEYOND A REASONABLE DOUBT, THEN IN THAT CIRCUMSTANCE, IT WOULD EQUALLY BE YOUR DUTY TO CONVICT THE DEFENDANT AND FIND HIM GUILTY.

I WOULD INSTRUCT YOU AGAIN THAT THE INDICTMENTS IN THIS CASE ARE NOT EVIDENCE OF THE CHARGES THAT THEY CONTAIN AND CANNOT BE CONSIDERED BY YOU AS EVIDENCE IN THE CASE. AGAIN, THE INDICTMENTS ARE THE FORMAL WRITTEN DOCUMENTS THAT CONTAIN THE CHARGES IN THE CASE, AND THEY ARE THE DOCUMENTS THAT HAS PROCESSED THE CASE THROUGH THE COURT SYSTEM.

NOW, DURING THE TRIAL, YOU AND I, LADIES AND GENTLEMEN, HAVE CERTAIN DUTIES TO PERFORM. AS THE TRIAL JUDGE IT IS MY RESPONSIBILITY TO PRESIDE OVER THE TRIAL OF THE CASE, AND I ALSO HAVE THE DUTY TO RULE UPON OR PASS UPON THE ADMISSIBILITY OF THE EVIDENCE THAT HAS BEEN OFFERED DURING THE TRIAL.

YOU ARE TO CONSIDER ONLY THE COMPETENT EVIDENCE BEFORE YOU, AND YOU ARE TO DISREGARD AND DISABUSE FROM YOUR MIND ANY TESTIMONY THAT WAS ORDERED STRICKEN FROM THE RECORD IN THIS CASE DURING THE PROGRESS OF THE TRIAL, IF THERE WAS ANY.

YOU ARE TO CONSIDER ONLY THE TESTIMONY THAT HAS BEEN PRESENTED FROM THE WITNESS STAND, TOGETHER WITH ANY EXHIBITS THAT HAVE BEEN MADE A PART OF THE RECORD IN THE CASE, AND ANY STIPULATIONS OF COUNSEL THAT WERE MADE INTO THE RECORD.

I DO HAVE THE ADDITIONAL DUTY TO CHARGE YOU THE LAW THAT APPLIES IN THIS CASE. AS THE PRESIDING JUDGE, I AM THE SOLE JUDGE OF THE LAW IN THE CASE, AND IT IS YOUR DUTY AS JURORS TO ACCEPT AND APPLY THE LAW AS IT IS NOW EXPLAINED TO YOU.

IF YOU HAVE A PRECONCEIVED IDEA AS TO WHAT YOU THOUGHT THE LAW WAS OR WHAT YOU THOUGHT THE LAW OUGHT TO BE AND THAT PRECONCEPTION DOES NOT AGREE WITH WHAT I'M NOW EXPLAINING TO YOU, THEN UNDER YOUR OATH, YOU ARE OBLIGATED TO ABANDON THAT PRECONCEPTION BECAUSE YOU HAVE BEEN SWORN AND HAVE AGREED TO ACCEPT AND APPLY THE LAW PRECISELY AS THE COURT IS EXPLAINING IT TO YOU.

IN EVERY CASE THAT IS TRIED IN THIS COURT BEFORE A JURY, THE JURY BECOMES THE SOLE AND THE EXCLUSIVE JUDGE OF THE FACTS IN A CASE, AND YOU, THE JURY, ARE THE JUDGE OF

THE FACTS IN THIS CASE. AGAIN, THE COURT IS THE JUDGE OF THE LAW IN THIS CASE.

THE CONSTITUTION OF THIS STATE HAS DECLARED THAT A TRIAL JUDGE SHALL NOT INTIMATE, STATE, COMMENT UPON OR MAKE ANY STATEMENT TO A TRIAL JURY ABOUT THE FACTS IN A CASE.

SINCE YOU, THE JURY, ARE THE SOLE JUDGE OF THE FACTS OF THIS CASE, YOU ARE NOT TO INFER FROM ANYTHING THAT I HAVE SAID DURING THE PROGRESS OF THIS TRIAL IN RULING UPON THE ADMISSIBILITY OF EVIDENCE OR OTHERWISE, OR ANYTHING THAT I SAY NOW DURING THE COURSE OF THESE INSTRUCTIONS TO YOU, THAT I HAVE ANY OPINION ABOUT THE FACTS IN THIS CASE.

THE LAW DOES NOT PERMIT ME TO HAVE AN OPINION ABOUT THE FACTS OF THE CASE. THIS IS A MATTER SOLELY FOR YOU, THE JURY, TO DETERMINE.

AS JURORS THEN IT IS YOUR DUTY, AS I HAVE INSTRUCTED YOU, TO DETERMINE THE EFFECT, THE VALUE, THE WEIGHT, AND THE TRUTH OF THE EVIDENCE THAT HAS BEEN PRESENTED DURING THE TRIAL.

BY NECESSITY, YOU MUST ASSESS THE CREDIBILITY OF WITNESSES WHO HAVE TESTIFIED IN THIS CASE. CREDIBILITY SIMPLY IS A LEGALISTIC TERM THAT MEANS BELIEVABILITY.

IT BECOMES YOUR DUTY AS JURORS TO ANALYZE AND TO EVALUATE THE EVIDENCE AND TO DETERMINE THAT EVIDENCE WHICH CONVINCES YOU OF ITS TRUTH.

I WOULD INSTRUCT YOU THAT IN DETERMINING THE QUESTION OF THE CREDIBILITY OR THE BELIEVABILITY OF THE WITNESSES WHO HAVE TESTIFIED IN THIS CASE, YOU MAY BELIEVE ONE WITNESS AS AGAINST SEVERAL WITNESSES OR SEVERAL WITNESSES AS AGAINST ONE WITNESS.

YOU MAY BELIEVE A PART OF THE TESTIMONY OF A WITNESS AND REJECT THE REMAINING PART OF THE TESTIMONY OF THAT SAME WITNESS. YOU MAY BELIEVE THE TESTIMONY OF A WITNESS IN ITS ENTIRETY OR REJECT THE TESTIMONY OF A WITNESS IN ITS ENTIRETY.

YOU MAY CONSIDER WHETHER ANY WITNESS HAS EXHIBITED TO YOU ANY INTEREST, ANY MOTIVE, ANY BIAS, OR ANY PREJUDICE IN THE CASE. YOU MAY CONSIDER WHETHER ANY WITNESS HAS MADE A PRIOR STATEMENT, WHETHER CONSISTENT OR INCONSISTENT. EARLIER CONTRADICTORY STATEMENTS ARE ALSO ADMISSIBLE TO ESTABLISH THE TRUTH OF THESE STATEMENTS.

YOU MAY CONSIDER THE DEMEANOR OF A WITNESS, THAT IS THE APPEARANCE OF A WITNESS FROM THE WITNESS STAND, AND YOU MAY, OF COURSE, CONSIDER THE OPPORTUNITY FOR KNOWLEDGE CONCERNING THOSE THINGS ABOUT WHICH A WITNESS HAS TESTIFIED.

YOUR OBJECTIVE, MR. FOREMAN AND LADIES AND GENTLEMEN, IS TO SEEK THE TRUTH REGARDLESS OF ITS SOURCE, AND IN DOING SO, IN EXERCISING YOUR MENTAL PROCESSES AND IN DETERMINING WHAT YOU CONSIDER TO BE TRUE, THE LAW SIMPLY

REQUIRES THAT YOU EXERCISE YOUR GOOD JUDGMENT, YOUR COMMON SENSE, YOUR SENSE OF LOGIC AND REASON AND YOUR EXPERIENCES IN LIFE.

YOU THEN APPLY THESE ATTRIBUTES OF ABILITY TO THE EVIDENCE AND DETERMINE WHAT YOU, THE JURY, CONSIDER TO BE TRUTHFUL EVIDENCE, AND TO THIS STATE OF FACTS AS DETERMINED BY YOU, THE JURY, YOU THEN TAKE AND APPLY THE LAW AS I'M NOW GOING TO STATE IT TO YOU AND THUS ARRIVE AT A TRUE VERDICT IN THE CASE.

THERE ARE TWO TYPES OF EVIDENCE THAT ARE GENERALLY PRESENTED DURING A TRIAL: DIRECT EVIDENCE AND CIRCUMSTANTIAL EVIDENCE.

DIRECT EVIDENCE IS THE TESTIMONY OF A PERSON WHO ASSERTS OR CLAIMS TO HAVE ACTUAL KNOWLEDGE OF A FACT SUCH AS AN EYEWITNESS.

CIRCUMSTANTIAL EVIDENCE IS PROOF OF A CHAIN OF FACTS AND CIRCUMSTANCES INDICATING THE EXISTENCE OF A FACT. THE LAW MAKES ABSOLUTELY NO DISTINCTION BETWEEN THE WEIGHT OR THE VALUE TO BE GIVEN TO EITHER DIRECT OR CIRCUMSTANTIAL EVIDENCE, NOR IS A GREATER DEGREE OF CERTAINTY REQUIRED OF CIRCUMSTANTIAL EVIDENCE THAN OF DIRECT EVIDENCE.

YOU SHOULD WEIGH ALL OF THE EVIDENCE IN THE CASE. AFTER WEIGHING ALL THE EVIDENCE, IF YOU ARE NOT CONVINCED OF THE GUILT OF THE DEFENDANT BEYOND A REASONABLE DOUBT, THEN YOU MUST FIND THE DEFENDANT NOT GUILTY.

I WOULD FURTHER CHARGE YOU, MR. FOREMAN AND LADIES AND GENTLEMEN, THAT DURING THE TRIAL OF THIS MATTER WE'VE HAD WHAT WE CALL EXPERT TESTIMONY. IN THAT CONNECTION, I WILL TELL YOU THAT ORDINARILY WITNESSES ARE NOT PERMITTED TO TESTIFY AS TO THEIR OPINION OF A PARTICULAR MATTER. AN EXCEPTION TO THIS RULE IS WHERE A WITNESS IS QUALIFIED AS AN EXPERT.

IN THAT EVENT, SUCH A WITNESS MAY VOICE HIS OR HER OPINION IN THAT PARTICULAR FIELD. INSOFAR AS OPINION EVIDENCE IS CONCERNED, THAT IS TO SAY THE EFFECT OF ANY EXPERT, THAT IS A MATTER OF OPINION, YOU ARE NOT TO PLACE ANY OPINIONS ABOVE THE IDEA OF YOUR OWN OPINIONS ON THE SUBJECT, BUT YOU ARE TO CONSIDER THESE OPINIONS ALONG WITH ALL THE OTHER EVIDENCE IN THE CASE IN FORMING YOUR OWN CONCLUSIONS.

I WOULD ALSO CHARGE YOU, MR. FOREMAN AND LADIES AND GENTLEMEN, THAT THERE WAS ADMITTED INTO THE RECORD OF THIS CASE EVIDENCE OF AN ALLEGED PRIOR RECORD OF A WITNESS OR WITNESSES.

THIS EVIDENCE WAS ADMITTED FOR A LIMITED PURPOSE. THIS EVIDENCE WAS ADMITTED AND MAY BE CONSIDERED BY YOU, THE JURY, IF YOU CONCLUDE IT TRUE ONLY FOR THE PURPOSE OF EVALUATING THE CREDIBILITY OR THE BELIEVABILITY OF THAT WITNESS.

YOU MAY GIVE TO THIS EVIDENCE SUCH WEIGHT AND SUCH

VALUE, IF ANY, TO WHICH YOU FIND IT IS ENTITLED ON THE SOLE ISSUE OF THE CREDIBILITY OR THE BELIEVABILITY OF THE TESTIMONY OFFERED BY THAT WITNESS HIMSELF OR HERSELF.

I WOULD ALSO CHARGE YOU THAT CERTAIN EVIDENCE WAS ALLOWED IN THE TRIAL FOR A PARTICULAR AND LIMITED PURPOSE. WHEN YOU CONSIDER THIS EVIDENCE, YOU MUST LIMIT YOUR CONSIDERATION TO THAT PURPOSE.

IT HAS BEEN INTRODUCED INTO EVIDENCE, EVIDENCE OF GANGS AND GANG MEMBERSHIP FOR THE SOLE PURPOSE OF MOTIVE. THEREFORE, YOU CAN ONLY CONSIDER GANG ACTIVITY AS IN ITS CAPACITY TO ESTABLISH MOTIVE, NOT TO THE DEFENDANT'S PROPENSITY TO COMMIT CRIMINAL ACTS. THIS EVIDENCE SHOULD NOT BE CONSIDERED AS EVIDENCE OF ONE'S PROPENSITY TO ENGAGE IN CRIMINAL ACTIVITY.

I WOULD FURTHER CHARGE YOU, MR. FOREMAN AND LADIES AND GENTLEMEN, THAT IN APPRAISING IDENTIFICATION TESTIMONY OF A WITNESS, YOU SHOULD CONSIDER THE FOLLOWING: ARE YOU CONVINCED THAT THE WITNESS HAD THE CAPACITY AND AN ADEQUATE OPPORTUNITY TO OBSERVE THE OFFENDER; WHETHER THE WITNESS OR A WITNESS HAD AN ADEQUATE OPPORTUNITY TO OBSERVE AN OFFENDER AT THE TIME OF THE OFFENSE WILL BE AFFECTED BY SUCH MATTERS AS HOW LONG OR SHORT A TIME WAS AVAILABLE; THE CIRCUMSTANCES UNDER WHICH AN ACCUSED IS PRESENTED FOR IDENTIFICATION, HOW FAR OR HOW CLOSE THE WITNESS WAS; HOW GOOD THE LIGHTING CONDITIONS WERE;

WHETHER THE WITNESS HAD HAD AN OCCASION TO SEE OR KNOW THE PERSON IN THE PAST.

AGAIN, I WILL CHARGE YOU THAT THE BURDEN OF PROOF ON THE PROSECUTION EXTENDS TO EVERY ELEMENT OF THE OFFENSE CHARGED, AND THIS INCLUDES THE BURDEN OF PROOF AND BEYOND A REASONABLE DOUBT THE IDENTITY OF THE DEFENDANT AS THE PERPETRATOR OF THE OFFENSES WITH WHICH HE STANDS CHARGED.

IF EXAMINING THIS TESTIMONY YOU HAVE A REASONABLE DOUBT AS TO THE ACCURACY OF THE IDENTIFICATION, YOU MUST FIND THE DEFENDANT NOT GUILTY.

I WOULD ALSO CHARGE YOU, MR. FOREMAN AND LADIES AND GENTLEMEN, THAT WHILE THE COURT DETERMINES THE ADMISSIBILITY OF EVIDENCE, YOU THE JURY MUST DETERMINE THE EXISTENCE, THE VOLUNTARINESS AND THE WEIGHT, IF ANY, OF ANY ALLEGED STATEMENT MADE BY THE DEFENDANT.

YOU MUST MAKE THE ULTIMATE DETERMINATION OF WHETHER OR NOT THE DEFENDANT, IN FACT, MADE THE ALLEGED STATEMENT OR STATEMENTS.

YOU MUST DETERMINE IF THE DEFENDANT MADE -- IF YOU DETERMINE THAT THE DEFENDANT MADE THE STATEMENT, YOU MUST THEN DETERMINE WHETHER THE STATEMENT WAS MADE VOLUNTARILY. FINALLY, YOU WILL DECIDE WHAT WEIGHT, IF ANY, SHOULD BE GIVEN TO ANY ALLEGED STATEMENT OF THE DEFENDANT.

YOU MUST DETERMINE WHETHER THE ALLEGED STATEMENT WAS A PRODUCT OF AN ESSENTIALLY FREE AND UNCONSTRAINED CHOICE

BY ITS MAKER.

THE STATE MUST PROVE THE VOLUNTARINESS OF A STATEMENT BEYOND A REASONABLE DOUBT. IF YOU DETERMINE BEYOND A REASONABLE DOUBT THAT A STATEMENT WAS GIVEN FREELY AND VOLUNTARILY, THEN YOU MAY GIVE THE STATEMENT SUCH FURTHER CONSIDERATION AS YOU DEEM PROPER.

IF YOU DETERMINE THAT THE ALLEGED STATEMENT WAS NOT THE FREE AND VOLUNTARY WILLED EXPRESSION OF THE DEFENDANT, THEN YOU SHOULD NOT CONSIDER THE STATEMENT AS EVIDENCE.

IN DETERMINING WHETHER A DEFENDANT'S WILL WAS OVERCOME IN OBTAINING THIS STATEMENT, THE LAW REQUIRES YOU TO CONSIDER WHAT IS KNOWN AS THE TOTALITY OF THE CIRCUMSTANCES.

YOU SHOULD CONSIDER BOTH THE CHARACTERISTICS OF THE DEFENDANT AND THE CIRCUMSTANCES SURROUNDING ANY QUESTIONING OR INTERROGATION. SOME OF THE FACTORS THAT THE LAW SAYS YOU MAY CONSIDER ARE THE AGE OF THE DEFENDANT, THE DEFENDANT'S EDUCATIONAL BACKGROUND, THE DEFENDANT'S MENTAL ABILITY OR CAPACITY, AND THE DEFENDANT'S BACKGROUND, ALONG WITH ALL THE OTHER FACTS AND CIRCUMSTANCES SURROUNDING THE MAKING OF THE ALLEGED STATEMENT.

IN DETERMINING THE VOLUNTARINESS OF ANY ALLEGED STATEMENT, YOU SHOULD CONSIDER WHETHER THE DEFENDANT WAS ADVISED OF AND UNDERSTOOD HIS CONSTITUTIONAL RIGHTS.

THE LAW REQUIRES THAT BEFORE ANY INTERROGATION OR QUESTIONING OF A PERSON IN CUSTODY MAY BEGIN, LAW ENFORCEMENT MUST ADVISE THE ACCUSED OF HIS MIRANDA RIGHTS. THIS MEANS THAT THE AUTHORITY HAS ADVISED THE ACCUSED THAT THE ACCUSED HAS A RIGHT TO REMAIN SILENT; THAT ANY STATEMENT COULD BE USED AGAINST THE ACCUSED IN A COURT OF LAW; THAT THE ACCUSED HAS A RIGHT TO HAVE A LAWYER PRESENT; THAT IF THE ACCUSED CANNOT AFFORD A LAWYER, THEN A LAWYER WILL BE APPOINTED TO REPRESENT HIM OR HER WITHOUT ANY COST, AND THAT THE ACCUSED CAN STOP MAKING A STATEMENT AT ANY TIME. OTHER FACTORS TO CONSIDER ARE THE PLACE AND THE LENGTH OF ANY DETENTION AND THE NATURE OF THE QUESTIONING.

YOU SHOULD SCRUTINIZE ALL OF THE SURROUNDING CIRCUMSTANCES BEFORE YOU GIVE ANY WEIGHT TO AN ALLEGED STATEMENT. YOU MUST BE SATISFIED BEYOND A REASONABLE DOUBT THAT THE STATEMENT WAS MADE BY THE DEFENDANT UNINFLUENCED BY PROMISE OF REWARD OR THREAT OF HARM.

IF YOU FIND BEYOND A REASONABLE DOUBT THAT ANY ALLEGED STATEMENT WAS GIVEN VOLUNTARILY, THEN YOU MUST DECIDE WHAT WEIGHT, IF ANY, SHOULD BE GIVEN TO THE STATEMENT. IF YOU FIND THAT THE STATEMENT WAS NOT VOLUNTARY, IN THAT EVENT, YOU MUST NOT CONSIDER THE STATEMENT AS EVIDENCE FOR ANY PURPOSE.

AS I HAVE EXPLAINED TO YOU, MR. FOREMAN AND LADIES

AND GENTLEMEN, THERE ARE TWO SEPARATE INDICTMENTS IN THIS CASE. EACH INDICTMENT CONTAINS A CHARGE OF MURDER.

I'M NOW GOING TO EXPLAIN TO YOU THE ELEMENTS THAT THE STATE MUST PROVE BEYOND A REASONABLE DOUBT BEFORE A DEFENDANT CAN BE CONVICTED OF THE CHARGE OF MURDER.

CRIMINAL INTENT IS A NECESSARY ELEMENT OF EACH CRIME THAT MUST BE PROVEN BY THE STATE BEYOND A REASONABLE DOUBT. CRIMINAL INTENT IS ALWAYS A MATTER THAT MUST BE DETERMINED BY THE JURY FROM THE CIRCUMSTANCES SURROUNDING THE SITUATION.

THERE IS NO WAY TO PROVE INTENT TO A MATHEMATICAL CERTAINTY. THERE IS NO WAY THAT MEDICAL SCIENCE CAN DISSECT A PERSON'S BRAIN AND DETERMINE WHAT THAT PERSON HAD IN MIND, SO THE LAW SAYS THAT CRIMINAL INTENT MAY BE INFERRED FROM THE CIRCUMSTANCES SHOWN TO HAVE EXISTED. THIS IS HOW A JURY MAKES A DETERMINATION OF WHETHER OR NOT THE ELEMENT REQUIRING INTENT WAS PRESENT.

CRIMINAL INTENT IS A STATE OF MIND WHICH OPERATED JOINTLY WITH AN ACT IN THE COMMISSION OF A CRIME. CRIMINAL INTENT IS A MENTAL STATE, A CONSCIOUS WRONGDOING, SO IT IS UP TO YOU, THE JURY, TO DETERMINE WHAT THE DEFENDANT INTENDED TO DO BASED ON THE CIRCUMSTANCES THAT ARE SHOWN TO HAVE EXISTED.

AGAIN, THE STATE MUST PROVE CRIMINAL INTENT BEYOND A REASONABLE DOUBT JUST AS THE STATE MUST PROVE EVERY

ELEMENT BEYOND A REASONABLE DOUBT, AS I HAVE EXPLAINED THAT TO YOU.

THE CHARGE OF MURDER IS FOUND IN THE SOUTH CAROLINA CODE OF LAWS IN SECTION 16-3-10. MURDER IS DEFINED AS THE KILLING OF ANY PERSON WITH MALICE AFORETHOUGHT EITHER EXPRESSED OR INFERRED.

THE DEFENDANT IS CHARGED WITH MURDER IN EACH INDICTMENT. AGAIN, THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT KILLED ANOTHER PERSON WITH MALICE AFORETHOUGHT.

MALICE IS DEFINED IN THE LAW OF HOMICIDE AS A TERM OF ART. IT IS A TECHNICAL TERM IMPORTING WICKEDNESS AND EXCLUDING JUST CAUSE OR LEGAL EXCUSE.

IT IS SOMETHING WHICH SPRINGS FROM WICKEDNESS, FROM DEPRAVITY, FROM A DEPRAVED SPIRIT, FROM A HEART DEVOID OF SOCIAL DUTY AND FATALLY BENT ON MISCHIEF.

MALICE IS HATRED, ILL WILL, OR HOSTILITY TOWARD ANOTHER PERSON. IT IS THE INTENTIONAL DOING OF A WRONGFUL ACT WITHOUT JUST CAUSE OR EXCUSE AND WITH THE INTENT TO INFLICT AN INJURY UNDER CIRCUMSTANCES THAT THE LAW WILL INFER AN EVIL INTENT.

MALICE AFORETHOUGHT DOES NOT REQUIRE THAT MALICE EXISTS FOR ANY PARTICULAR TIME BEFORE THE ACT IS COMMITTED, BUT MALICE MUST EXIST IN THE MIND OF THE DEFENDANT JUST BEFORE AND AT THE TIME THAT THE ACT WAS

COMMITTED. THEREFORE, THERE MUST BE A COMBINATION OF THE PREVIOUS EVIL INTENT AND THE ACT.

MALICE AFORETHOUGHT MAY BE EXPRESSED OR INFERRED. NOW, THESE TERMS "EXPRESSED" AND "INFERRED" DO NOT MEAN DIFFERENT MINDS OF MALICE, BUT MERELY THE MANNER IN WHICH MALICE MAY BE SHOWN TO EXIST, THAT IS EITHER BY DIRECT EVIDENCE OR BY INFERENCE FROM THE FACTS AND CIRCUMSTANCES THAT ARE PROVEN.

EXPRESSED MALICE IS SHOWN WHEN A PERSON SPEAKS WORDS WHICH EXPRESS HATRED OR ILL WILL FOR ANOTHER OR WHEN THE PERSON PREPARED BEFOREHAND TO DO THE ACT WHICH WAS LATER ACCOMPLISHED.

MALICE MAY BE INFERRED FROM CONDUCT SHOWING A TOTAL DISREGARD FOR HUMAN LIFE. INFERRED MALICE MAY ALSO ARISE WHEN THE DEED IS DONE WITH A DEADLY WEAPON.

AGAIN, EACH OF THESE ESSENTIALLY ELEMENTS MUST BE PROVEN BY THE STATE BEYOND A REASONABLE DOUBT BEFORE THE DEFENDANT CAN BE CONVICTED FOR THE CHARGE OF MURDER.

MR. FOREMAN AND, LADIES AND GENTLEMEN, IN THIS CASE AS I'VE INDICATED, THERE ARE TWO SEPARATE CHARGES, TWO SEPARATE INDICTMENTS. YOU'RE GOING TO BE ASKED TO WRITE A VERDICT AS TO EACH CHARGE, EACH INDICTMENT. I HAVE HAD PREPARED FOR YOU SEPARATE VERDICT FORMS PERTAINING TO EACH INDICTMENT.

WHATEVER YOUR VERDICT IS IN THIS CASE, MR. FOREMAN

AND LADIES AND GENTLEMEN, IT MUST BE UNANIMOUS, MEANING THAT ALL 12 JURORS MUST AGREE ON THE VERDICT. IT CANNOT BE TEN TO TWO OR EIGHT TO FOUR OR ANYTHING LESS THAN A UNANIMOUS VERDICT.

IN JUST A FEW MINUTES, I'M GOING TO SEND YOU OUT AND ASK YOU TO BEGIN YOUR DELIBERATIONS, BUT BEFORE I DO THAT, I DO NEED TO EXPLAIN TO YOU THAT THE VERDICT FORMS THAT YOU WILL HAVE WITH YOU HAVE TWO POSSIBLE VERDICTS ON EACH CHARGE.

PLEASE DON'T ATTACH ANY SIGNIFICANCE TO THE ORDER THAT I GIVE YOU THE POSSIBLE VERDICTS. I HAVE TO GIVE THEM TO YOU IN SOME ORDER.

ON EACH CHARGE, THE POSSIBLE VERDICTS ARE: WE, THE JURY, FIND THE DEFENDANT OF MURDER, OR WE, THE JURY, FIND THE DEFENDANT NOT GUILTY.

AFTER THE JURY HAS DELIBERATED AND REACHED A VERDICT, THEN MR. FOREMAN, YOU WOULD SIMPLY SIGN YOUR NAME UNDER WHICHEVER VERDICT THE JURY'S VERDICT IS. YOU WOULD THEN KNOCK ON THE DOOR AND NOTIFY THE BAILIFF THAT YOU HAVE REACHED A VERDICT. DON'T TELL HIM WHAT THE VERDICT IS. WE'LL BRING YOU BACK IN THE COURTROOM AND TAKE YOUR VERDICT AT THAT TIME.

FROM TIME TO TIME JURIES HAVE QUESTIONS. I WOULD AGAIN REMIND YOU THAT I CANNOT RESPOND OR COMMENT ON ANYTHING THAT DEALS WITH THE FACTS. THAT IS SOMETHING

THAT THE JURY HAS TO DETERMINE.

IF YOU HAVE A QUESTION CONCERNING THE LAW, IF YOU WILL WRITE IT OUT AND HAND IT OUT TO THE BAILIFF, I MAY OR MAY NOT BE ABLE TO RESPOND TO IT. IN SOME INSTANCES I CAN WRITE OUT AN ANSWER. SOMETIMES THE JURY IS BROUGHT BACK IN THE COURTROOM, AND I RESPOND TO A QUESTION ABOUT THE LAW IN THAT FASHION.

IN MANY CASES THAT IS NOT NECESSARY, BUT IF YOU HAVE A QUESTION, THEN THAT IS HOW YOU WOULD HANDLE THAT SITUATION.

IN JUST A MOMENT, I'M GOING TO SEND YOU TO YOUR JURY ROOM AND ASK YOU NOT TO BEGIN YOUR DELIBERATIONS UNTIL THE EXHIBITS ARE BROUGHT TO YOU AND THE VERDICT FORMS ARE BROUGHT TO YOU. THAT IS YOUR SIGNAL TO GO AHEAD AND BEGIN DELIBERATING.

ONCE YOU HAVE GONE BACK IN THE JURY ROOM, I'LL DISCUSS THE CHARGE THAT I'VE JUST GIVEN YOU WITH THE ATTORNEYS. IF I HAVE OMITTED ANYTHING OR NEED TO EXPLAIN ANYTHING IN MORE DETAIL, I WILL DO THAT IMMEDIATELY. IF THAT IS NOT NECESSARY, THEN THE BAILIFF OR THE CLERK WILL BRING YOU THE EXHIBITS AND THE VERDICT FORMS, AND YOU CAN BEGIN YOUR DELIBERATIONS.

WE HAD PLANNED FOR YOUR LUNCH TO BE HERE ABOUT ONE O'CLOCK. THAT CLOCK SAYS IT'S FIVE TILL, SO MAYBE THE TIMING HAS BEEN PRETTY GOOD.

WHETHER YOU DELIBERATE WHILE YOU EAT OR WHETHER YOU WANT TO GO AHEAD AND EAT AND THEN DELIBERATE, THAT WILL BE TOTALLY UP TO WHAT YOU FOLKS DECIDE THAT YOU WOULD LIKE TO DO.

I WILL TELL YOU THIS: IN SOME CASES I'VE HAD JURIES SEND OUT A QUESTION THAT WE WOULD LIKE FOR YOU TO SEND US BACK A PARTICULAR DOCUMENT OR SOMETHING THAT MAY HAVE BEEN MENTIONED DURING THE TRIAL.

IF IT'S NOT AN EXHIBIT, I CAN'T SEND IT TO YOU, AND WE WILL ENSURE THAT ALL OF THE EXHIBITS THAT ARE IN EVIDENCE WILL BE WITH YOU IN THE JURY ROOM. THERE IS NO SENSE IN ASKING FOR SOMETHING ELSE.

WITH THOSE INSTRUCTIONS, IF YOU WILL STEP BACK TO YOUR JURY ROOM. DO NOT BEGIN DELIBERATING UNTIL THESE ITEMS ARE BROUGHT BACK TO YOU.

MY ALTERNATE JUROR, IF YOU WILL STAY WITH ME HERE IN THE COURTROOM, PLEASE, SIR.

THE REST OF YOU ARE EXCLUDED TO YOUR JURY ROOM.

(WHEREUPON, THE JURY LEFT OPEN COURT AT APPROXIMATELY ONE O'CLOCK P.M.)

THE COURT: SINCE I'VE GOT 12 JURORS, AND YOU HAVE NOT BEEN SEATED, THEN YOU'RE NOT GOING TO BE BACK IN THE JURY ROOM WITH THEM WHILE THEY'RE DELIBERATING TO HELP THEM MAKE A DECISION.

WE DO HAVE LUNCH, AND WE'LL FIND A PLACE FOR YOU TO

EAT YOUR LUNCH, OR YOU CAN TAKE IT WITH YOU AND LEAVE, WHATEVER.

I'M GOING TO ASK THE BAILIFF TO HAVE YOU HAVE A SEAT OUT HERE IN THE HALL. THE CLERK WILL COME TALK TO YOU IN JUST A MINUTE ABOUT ADMINISTRATIVE MATTERS, BUT IF YOU WOULD STEP OUT INTO THE HALLWAY. THANK YOU VERY MUCH FOR BEING HERE, SIR.

(WHEREUPON, THE ALTERNATE JUROR LEFT THE COURTROOM.)

ALL RIGHT. EXCEPTIONS OR ADDITIONS FROM THE STATE?

MS. CAMPBELL: BEG THE COURT'S INDULGENCE.

(PAUSE).

MS. FENT: THE ONLY THING THAT I NOTICED WASN'T MENTIONED, I DON'T KNOW IF YOUR HONOR WANTS TO DO IT, IS REGARDING THE NOTES, THAT THEY HAD ALL BEEN TAKING NOTES DURING THE TRIAL.

THE COURT: I MENTIONED THAT RIGHT AT THE FIRST AND AGAIN TOLD THEM THAT THEY WERE FOR THEIR PERSONAL USE. I THINK THAT THE INSTRUCTIONS I GAVE THEM WHEN I GAVE THEM PERMISSION TO TAKE NOTES, I THINK THEY UNDERSTAND.

MS. FRANKLIN?

MS. FRANKLIN: NO PROBLEMS HERE, YOUR HONOR.

THE COURT: ALL RIGHT. GO THROUGH THE EXHIBITS. BE SURE WE HAVE GOT THEM ALL. TAKE A LOOK AT THE VERDICT FORMS TO BE SURE YOU DON'T HAVE A PROBLEM WITH THOSE.

WE'LL STAND IN RECESS UNTIL WE HEAR FROM THE JURY.

(WHEREUPON, THE JURY BEGAN THEIR DELIBERATIONS AT 1:09 P.M.)

(A RECESS WAS TAKEN.)

(WHEREUPON, COURT'S EXHIBIT NO. 5 WAS MARKED FOR IDENTIFICATION ONLY.)

THE COURT: MS. FRANKLIN, YOU HAD A MOTION YOU WANTED TO MAKE.

I HAVE BEEN ADVISED THE JURY HAS REACHED A VERDICT, AND YOU HAVE A MOTION TO MAKE BEFORE THE JURY IS BROUGHT IN.

MS. FRANKLIN: YES, YOUR HONOR, MAY IT PLEASE THE COURT. AT THIS POINT, I WOULD MOVE FOR A MISTRIAL BASED ON THE NOTE THAT THE JURORS SENT TO YOUR HONOR.

CLEARLY, THE JURY IS MORE CONCERNED ABOUT THEIR SAFETY THAN THEY ARE ABOUT THIS CASE.

I THINK THAT WE'RE RUNNING INTO THE SAME PROBLEMS THAT WE HAD WHEN WE TRIED TO FIRST PULL A JURY BACK IN AUGUST OF THIS YEAR, AND I THINK THAT THIS HAS RESULTED IN DENYING MY CLIENT THE RIGHT TO A FAIR TRIAL. THAT'S THE BASIS FOR MY MOTION, YOUR HONOR.

THE COURT: ALL RIGHT. DOES THE STATE WISH TO BE HEARD?

MR. GIESE: NO, YOUR HONOR.

THE COURT: ALL RIGHT. JUST FOR THE RECORD, I WILL NOTE THAT A NOTE WAS SENT BY THE JURY MAYBE TEN OR 15

MINUTES AGO THAT STARTED OUT BY SAYING "REGARDLESS OF WHAT THE VERDICT IS, THE JURORS WERE CURIOUS OF WHETHER ANY SAFETY PRECAUTIONS HAD BEEN TAKEN."

I RESPONDED TO THAT THAT I WOULD ADDRESS THAT WITH THE JURY AFTER THE TRIAL HAD BEEN CONCLUDED.

THE MOTION FOR A MISTRIAL IS DENIED.

FOR THE BENEFIT OF THOSE HERE IN THE COURTROOM, THE COURT CANNOT AND DOES NOT ALLOW ANY KIND OF EMOTIONAL OUTBURST FROM ANYONE. I HAVE NO IDEA, AS NO ONE IN THIS COURTROOM HAS ANY IDEA, OF WHAT THE JURY'S VERDICT IS.

IF THERE'S ANYONE IN THE COURTROOM WHO FEELS LIKE THEY ARE NOT GOING TO BE ABLE TO CONTROL THEIR EMOTIONS REGARDLESS OF THE VERDICT, THEY NEED TO EXCUSE THEMSELVES FROM THE COURTROOM AT THIS TIME.

IF THERE IS ANY KIND OF OUTBURST, THE INDIVIDUAL WILL BE HELD IN CONTEMPT OF COURT. I HAVE THE AUTHORITY TO IMPRISON THAT PERSON FOR UP TO SIX MONTHS WITHOUT A JURY TRIAL, AND I WON'T HESITATE TO EXERCISE THAT AUTHORITY.

ALL RIGHT. BRING THE JURY IN PLEASE, SIR.

(WHEREUPON, THE JURY RETURNED TO OPEN COURT WITH THE VERDICT AT 2:50 P.M.)

THE BAILIFF: THE JURY IS PRESENT, YOUR HONOR.

THE COURT: THANK YOU. MR. FOREMAN, I HAVE BEEN ADVISED THAT THE JURY HAS REACHED A VERDICT; IS THAT CORRECT?

THE FOREMAN: WE HAVE, YOUR HONOR.

THE COURT: IS IT A UNANIMOUS VERDICT?

THE FOREMAN: IT IS.

THE COURT: WOULD YOU HAND IT TO THE BAILIFF, PLEASE, SIR?

(COMPLIES).

ALL RIGHT. MADAM CLERK, IF YOU WILL PUBLISH THE VERDICT, PLEASE.

THE CLERK: YES, SIR. INDICTMENT NUMBER 2005-GS-40-06831, THE CHARGE, MURDER, THE VICTIM C.D. [redacted] THE STATE OF SOUTH CAROLINA VS. CHRIS LIVERMAN. WE, THE JURY, FIND THE DEFENDANT GUILTY OF MURDER, SIGNED FOREPERSON, NOVEMBER 9TH, 2006.

INDICTMENT NUMBER 2005-GS-40-06832, THE CHARGE, MURDER, THE VICTIM [redacted] T.M. [redacted]. THE STATE OF SOUTH CAROLINA VS. CHRIS LIVERMAN. WE, THE JURY, FIND THE DEFENDANT GUILTY OF MURDER, SIGNED FOREPERSON, NOVEMBER 9TH, 2006.

MR. FOREMAN, WAS THIS YOUR VERDICT AND THE VERDICT OF THE ENTIRE JURY?

THE FOREMAN: IT WAS.

THE CLERK: THANK YOU.

THE COURT: MS. FRANKLIN, DO YOU WANT THE JURY POLLED?

MS. FRANKLIN: YES, YOUR HONOR, PLEASE.

THE COURT: MR. FOREMAN, LADIES AND GENTLEMEN, THE CLERK IS GOING TO POLL THE JURY. SHE WILL DO THAT BY YOUR JUROR NUMBER. SHE WILL CALL YOUR NUMBER AND ASK WHETHER THIS IS YOUR VERDICT AND IF IT'S STILL YOUR VERDICT. IF YOU WILL RESPOND TO THAT QUESTION, PLEASE.

THE CLERK: YES, SIR.

JUROR NUMBER 252, WAS (SIC) THIS YOUR VERDICTS?

JUROR: YES.

THE CLERK: IS IT STILL YOUR VERDICTS (SIC)?

JUROR: YES.

THE CLERK: JUROR NUMBER 161, WAS THIS YOUR VERDICTS?

JUROR: YES.

THE CLERK: IS IT STILL YOUR VERDICTS?

JUROR: YES.

THE CLERK: JUROR NUMBER 172, WAS THIS YOUR VERDICTS?

JUROR: YES.

THE CLERK: IS IT STILL YOUR VERDICTS?

JUROR: YES.

THE CLERK: JUROR NUMBER 170, WAS THIS YOUR VERDICTS?

JUROR: YES.

THE CLERK: IS IT STILL YOUR VERDICTS?

JUROR: YES.

THE CLERK: JUROR NUMBER 36, WAS THIS YOUR VERDICTS?

JUROR: YES.

THE CLERK: IS IT STILL YOUR VERDICTS?

JUROR: YES.
THE CLERK: JUROR NUMBER 44, WAS THIS YOUR VERDICTS?
JUROR: YES.
THE CLERK: IS IT STILL YOUR VERDICTS?
JUROR: YES.
THE CLERK: JUROR NUMBER 268, WAS THIS YOUR VERDICTS?
JUROR: YES.
THE CLERK: IS IT STILL YOUR VERDICTS?
JUROR: YES.
THE CLERK: JUROR NUMBER 238, WAS THIS YOUR VERDICTS?
JUROR: YES.
THE CLERK: IS IT STILL YOUR VERDICTS?
JUROR: YES.
THE CLERK: JUROR NUMBER 26, WAS THIS YOUR VERDICTS?
JUROR: YES.
THE CLERK: IS IT STILL YOUR VERDICTS?
JUROR: YES.
THE CLERK: JUROR NUMBER 102, WAS THIS YOUR VERDICTS?
JUROR: YES.
THE CLERK: IS IT STILL YOUR VERDICTS?
JUROR: YES.
THE CLERK: JUROR NUMBER 180, WAS THIS YOUR VERDICTS?
JUROR: YES.
THE CLERK: IS IT STILL YOUR VERDICTS?
JUROR: YES.

THE CLERK: JUROR NUMBER 223, WAS THIS YOUR VERDICTS?

JUROR: YES.

THE CLERK: IS IT STILL YOUR VERDICTS?

JUROR: YES.

THE CLERK: THE JURY HAS BEEN POLLED, YOUR HONOR.

THE COURT: THE JURY HAS BEEN POLLED.

IS THERE ANYTHING FURTHER FROM THE JURY AT THIS TIME, MS. FRANKLIN?

MS. FRANKLIN: NOTHING FROM THE JURY, YOUR HONOR.

THE COURT: ALL RIGHT.

ALL RIGHT. THE COURT WILL ACCEPT THE VERDICTS OF THE JURY.

ANY MOTIONS AT THIS TIME?

MS. FRANKLIN: YES, YOUR HONOR. MAY IT PLEASE THE COURT. AT THIS POINT, THE DEFENSE WOULD MAKE A MOTION FOR A NEW TRIAL BASED ON PRETRIAL PUBLICITY, ALSO THE PUBLICITY THAT'S BEEN GOING ON THROUGHOUT THIS TRIAL, ESPECIALLY AS IT RELATES TO ALL THE GANG -- ALL THE GANG INFORMATION THAT'S BEEN OUT THERE.

I MEAN, I THINK IT'S CLEAR THAT WHAT'S BEEN PUBLISHED IN THE PAPER, WHAT'S BEEN ON THE NEWS HAS BEEN INFLAMMATORY. I THINK IT'S BEEN UNDULY PREJUDICIAL. I THINK IT HAS IN THIS CASE RESULTED IN THE DENIAL TO MY CLIENT'S RIGHT TO A FAIR TRIAL.

I WOULD ALSO, SORT OF A SECOND GROUND, I DON'T

BELIEVE THE JURY HAS HAD LONG ENOUGH, HAS TAKEN LONG ENOUGH, TO DELIBERATE IN THE CASE.

I DON'T KNOW THAT THEY COULD COME TO A CONCLUSION WITH ALL OF THE FACTS THAT HAVE BEEN PRESENTED IN THIS CASE IN SUCH A SHORT AMOUNT OF TIME. THOSE ARE MY BASES FOR A NEW TRIAL, YOUR HONOR.

THE COURT: ALL RIGHT. THE MOTION FOR A NEW TRIAL IS DENIED. I THINK THERE HAS BEEN SUFFICIENT EVIDENCE PRESENTED TO THE JURY TO SUPPORT THE VERDICT THAT HAS BEEN REACHED.

AS FAR AS THE MOTION, THE BASIS BEING THE PUBLICITY BOTH PRETRIAL, THAT WAS HANDLED IN VOIR DIRE, AS WELL AS DURING THE TRIAL. THAT HAS ALSO BEEN ADDRESSED, AND THE MOTION FOR A NEW TRIAL, THAT BASIS IS ALSO DENIED.

ALL RIGHT. LET'S CONTINUE. IF YOU WILL COME FORWARD.

SOLICITOR, I'LL BE GLAD TO HEAR FROM THE STATE.

YES, SIR.

MR. GIESE: MAY IT PLEASE THE COURT, YOUR HONOR. I JUST TALKED TO THE VICTIM'S FAMILY -- THE VICTIMS' FAMILIES, AND THEY DON'T WISH TO SAY ANYTHING EXCEPT TO THANK THE JURORS FOR THESE EIGHT DAYS OR NINE DAYS THAT THEY'VE BEEN HERE.

AS FOR THE STATE'S POSITION, YOUR HONOR, I CAN'T IMAGINE THERE BEING A WORSE CASE OF MURDER, ESPECIALLY TWO

COUNTS. I THINK HE OUGHT TO GET EVERY DAY HE CAN GET.

THE PRIOR RECORD, MS. CAMPBELL HAS THAT.

THE COURT: ALL RIGHT. MS. CAMPBELL?

MS. CAMPBELL: HE HAS A 2003 CONVICTION FOR GRAND LARCENY OF A MOTOR VEHICLE.

THE COURT: ALL RIGHT.

ALL RIGHT. MS. FRANKLIN, MR. SHARDT?

MS. FRANKLIN: I'LL DEFER TO MR. SHARDT.

MR. SHARDT: YOUR HONOR, MAY IT PLEASE THE COURT. MR. LIVERMAN STANDS HERE TODAY 21 YEARS OF AGE. HE WAS 18 YEARS OF AGE ON [redacted] 2004.

HE HAS LIVED IN COLUMBIA MUCH OF HIS LIFE. HE HAS A MOTHER, AN AUNT, A GRANDMOTHER, AND AN UNCLE WHO WE HAVE ALL MET WHO CARE ABOUT HIM VERY MUCH. I'M SURE HE HAS OTHERS THAT FEEL THE SAME.

YOUR HONOR, THIS IS CERTAINLY A TRAGEDY. THERE WOULD BE NO -- NOTHING THAT CAN BE SAID TO DIMINISH THAT POINT, AND CERTAINLY THROUGHOUT THIS TRIAL, IT HAS NOT BEEN OUR INTENT TO DIMINISH THAT.

YOUR HONOR, THROUGHOUT THIS TRIAL WE'VE HEARD ABOUT GANGS, ABOUT MR. LIVERMAN BEING IN A GANG. WE'VE HEARD IT AGAIN AND AGAIN. IT HAS BEEN PRESENTED, AND I'M SURE IN MANY PEOPLE'S EYES, THAT CASTS MR. LIVERMAN IN A BAD LIGHT.

I'M ALSO SURE THERE'S MANY REASONS, MANY REASONS, WHY

MR. LIVERMAN HAS BEEN ASSOCIATED WITH THIS GANG AT SUCH A YOUNG AGE.

I WOULD LIKE THE COURT TO TAKE INTO CONSIDERATION SOME OF THE THINGS THAT WERE GOING ON IN HIS LIFE, SOME OF THE PLACES THAT HE'S BEEN, THE FACT THAT HE IS FROM THESE NEIGHBORHOODS.

AS FAR AS MY DEALING WITH MR. LIVERMAN, IT'S BEEN NOTHING BUT A PLEASURE. I'M PROUD TO KNOW HIM. HE'S BEEN A GRACIOUS CLIENT. HE'S BEEN -- IN MY DEALINGS WITH HIM, HE'S BEEN NOTHING BUT A GENTLEMAN.

YOUR HONOR, WE WOULD ASK THAT YOU WOULD CONSIDER A 30-YEAR SENTENCE IN THIS MATTER.

MR. LIVERMAN, IN OUR OPINION, IN MY OPINION, IS NOT A LOST CAUSE. MR. LIVERMAN HAS SHOWN MATURITY IN MY DEALINGS WITH HIM.

MR. LIVERMAN HAS THINGS HE CAN OFFER, AND WE WOULD ASK THAT THE COURT CONSIDER THE FACT THAT HE DOES HAVE SOMETHING TO OFFER SOCIETY. HE CAN WORK. HE HAS DEALT WITH ME AS A GENTLEMAN, AND I WILL SAY THAT TO THE COURT AND TO CONSIDER THAT IN YOUR SENTENCE.

WE APPRECIATE THE TRAGEDY THAT HAS OCCURRED, BUT WE ALSO FEEL THAT MR. LIVERMAN MAY BE WORTHY OF BEING SHOWN SOME MERCY BY THE COURT, AS WELL.

THE COURT: ALL RIGHT. DID HE WISH TO ADDRESS THE COURT?

(THE DEFENDANT SHAKES HEAD IN THE NEGATIVE).

MS. FRANKLIN: NO, YOUR HONOR.

THE COURT: ALL RIGHT. IT'S THE SENTENCE OF THIS COURT ON INDICTMENT 05-40-6831 THAT THE DEFENDANT, MR. LIVERMAN, BE COMMITTED TO THE DEPARTMENT OF CORRECTIONS FOR A PERIOD OF LIFE.

ON INDICTMENT 6832, THE SENTENCE OF THE COURT IS THAT MR. LIVERMAN, THE DEFENDANT, BE COMMITTED TO THE DEPARTMENT OF CORRECTIONS FOR A PERIOD OF LIFE. THOSE WILL RUN CONSECUTIVELY.

MR. GIESE: THANK YOU, YOUR HONOR.

THE COURT: LADIES AND GENTLEMEN OF THE JURY, THAT WILL CONCLUDE YOUR SERVICE IN THIS CASE. IF YOU WILL STEP BACK TO YOUR JURY ROOM, I WOULD LIKE TO SPEAK WITH YOU IN THE JURY ROOM, PLEASE.

EVERYONE STAY SEATED WHILE THE JURY IS EXCUSED.

(WHEREUPON, THE JURY LEFT OPEN COURT AT APPROXIMATELY 3:01 P.M.)

THE COURT: COURT IS ADJOURNED.

(WHEREUPON, COURT'S EXHIBIT NO. 6 WAS MARKED FOR IDENTIFICATION ONLY.)

(WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, KAREN TRACY, 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 GENERAL SESSIONS FOR RICHLAND COUNTY, SOUTH CAROLINA, ON THE 30TH DAY OF OCTOBER, 2006.

DECEMBER 19TH, 2006

Karen Tracy

KAREN TRACY, COURT REPORTER

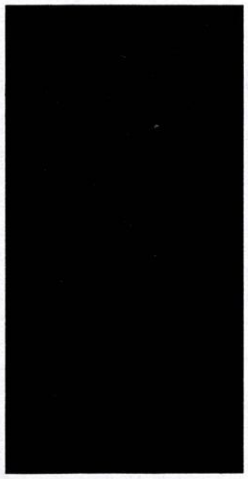
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(Midlands) November 6, 2006 - These have been violent days in our area. One of the biggest crime problems in the past few years has been the growth of gangs. They are in our neighborhoods, our schools, our families.

WIS is taking an honest and sometimes graphic look at local gang members. We think it's important for parents, families and neighbors to be able recognize the signs and take action.

We're not using the gang members' real names.

One gang member, "Fat Daddy," tells WIS how you start as a gang member, "You get in the center of the circle. It's you and the highest ranking six people in that set and they stack you up, put the knowledge on you, bless you. Then once they say go, you scrap for your life cause they gone beat you like you just any other n..."

Craig: "How do girls get in the gang?
KP: "They can get beat down by a bunch of girls or they can take the hard way."
Craig: "What's the hard way?"
KP: "You get sexed in. You gotta ... six

Co. parking lot

North Myrtle Beach man dies in apartment fire

Dugan's closing after more than 60 calls to officers

Suspect in Charleston shooting arrested

dudes."

Some girls like the 17-year-old we're calling Katie aren't sexed in or beat in, but "blessed" in. That's when gang leaders let you in in if you commit a certain type of crime, "You can do robberies. You can do shootings. You can sell drugs, anything to put work in."

"It started when I was in the sixth grade, when I was at Sanders. I wore the color red and a group of people, Crips, came up and approached me and said I was a gang member, I was a Blood. So then I realized I'm by myself. I need somebody with me or whatever, so then I decided I'm not wearing red again. That's when I became a Folk."

"How did you end up in a gang?" Craig asked KP. "I don't know. I used to always get into trouble."

In fact, all four say they've gotten into trouble since they can remember. All four have been kicked out of a school at some point, "I've been arrested seven times."

Not all gang bangers are black kids from broken homes. J lives with mom and dad, "I got adopted, so I moved down here with my adopted parents and then my older brother is kind of involved so I got involved and I just do everything they do."

She says her brother is a Crip.

One 18-year-old we're calling Fat Daddy says family brought him into the fold too, and at an early age. "Since I was about 12. They put me down ... my brother and a bunch of his other n... ... because I asked to get down."

For some, being "down" is about an elaborate handshake they'll readily demonstrate, tattoos, and the graffiti.

The hand-shaking, tat sporting, sign-spraying bangers aren't the ones worrying Richland County Sheriff Leon Lott, "Well, the first group is a group of kids that get together and hang out, the groups we are talking about are the groups that are going out and shooting and robbing people. That's the ones that we're looking at, and that's where we're seeing the growth."

An 18-year-old we're calling Busta could be the poster-boy for that second group. We talked to him right after his arrest on a weapons charge. He says it started in the fourth grade when teachers discovered something. "I've got a learning disability. I'm kind of slow."

Busta: I get frustrated too easily. I used to play sports, but I gave up on it.
Craig: Why?
Busta: Cause I started smoking.

Craig: You started smoking weed?
Busta: Pretty much.
Craig: When did you start smoking weed?
Busta: Sixth grade.

He got kicked out of school last year, "I was fighting every time I'd go to school."

He says he was fighting "Slobs."

"Who?" Craig asked again. Busta said, "Bloods."

Busta is a high-ranking member of Folk Nation. He can't read and is in jail with a rap sheet three pages long including several other weapons charges, simple assault, and assault and battery with intent to kill.

What set him off? "They disrespected me. I don't like people disrespecting."

Everyone we talked to say that's what gang banging is all about. "Respect. We're fighting over respect."

"If anybody disrespects us, we're going to retaliate."

Fat Daddy: You tag your spot. Put your set on their spot.
Craig: Why?
Fat Daddy: If they disrespect your spot, you get to bang on 'em.
Craig: Why?
Fat Daddy: What do you mean why? That's like two dogs. If a dog crosses into another dog's territory, they gone fight.

Sometimes it's over territory. Sometimes it's over their sacred greeting. Fat Daddy explains, "Say two Crips is walking down the hall and there's a Blood, Crips do their handshake and throw Bs down. That's disrespect right there in front of a dude."

Even a rival gang member saying certain words is considered disrespectful.

Busta: Like they'll say a word I don't like.
Craig: What's a word you wouldn't like?
Busta: I can't say because I don't want to disrespect myself.
Craig: Give me an example of a word.
Busta: It's something ya'll eat when ya'll drink coffee.
Craig: Doughnut?

Legend has it the Folk Nation founder was killed in a doughnut shop in the early 70s. The concept of fighting over disrespect might sound silly, but it's turned deadly.

Prosecutors say Chris Liverman killed two children while trying to shoot at rival gang members who had disrespected his gang.

Cornelius Williams, 21, is in jail on a $3.5 million bond. Investigators say he shot two people outside Williams-Brice Stadium at this year's Capital City Classic football game "as a result of two gangs reportedly disrespecting one another."

"As long as no one disrespects me, I'm on chill mode," one girl told Craig. Craig asked, "If I found your mother and said your daughter is in a gang, would she be surprised?"

She replied, "Yeah."

We found her mother. She was surprised.

"Did you know your daughter is in a gang?" Tuesday at six, that mother answers the question. You'll also meet a father who knows his son is a gang-banger - but can't stop it. We'll also show you how gangs have changed and what you can do to protect your child, your family, and your neighborhood.

Reported by Craig Melvin

Posted 6:31pm by Chantelle Janelle

Gangs in the Midlands: Send us your comments

First Name (not just initial):

Last Name (not just initial):

Email Address:

City:

Phone:

Comments:

Send Clear Form

(WIS reserves the right not to post questionable or offensive material. WIS will not post flamed or all-caps e-mails. WIS will not post anonymous e-mails. The comments do not reflect the opinions of WIS or its employees)

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JUDGE—

JUROR # 97 REPORTED THAT A GANG SYMBOL WAS PLACE IN THE STREET OUTSIDE HER HOME YESTERDAY— THERE WERE OTHERS IN THE NEIGHBORHOOD AS WELL, AND THE COUNTY HAS COVERED THEM OVER—

JUST THOUGHT YOU SHOULD KNOW—

FOREMAN #252



REGARDLESS OF THE VERDICT,
THE JURY IS CONCERNED ABOUT OUR
SAFETY NOT ONLY WHEN WE MOVE TO THE
PARKING GARAGE, BUT AFTER WE LEAVE
IN OUR CARS.
ARE ANY ADDITIONAL PRECAUTIONS IN
PLACE?
CAN WE HAVE PHONE NUMBERS TO CALL
IF ANY JUROR IS CONCERNED ABOUT BEING
FOLLOWED OR IF ANYTHING UNUSUAL
OCCURS AFTER ARRIVING HOME?
WE KNOW THE COURT BEGAN USING
JUROR NUMBERS IN LIEU OF NAMES AS A
PRECAUTION AND WE CERTAINLY APPRECIA-
THAT.

FOREMAN #252

I will address your concerns after the trial is completed.

J. W. Johnson

Defendant's Requested Instruction Number 1

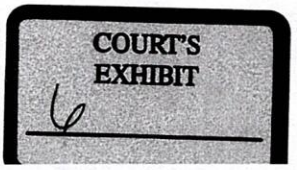
BIAS -- INFORMER OR OTHER WITNESS WITH POSSIBLE GAIN

The credibility of all witnesses is a matter for you, the jury, to determine. In making this determination you may consider whether a particular witness was an informer providing evidence for pay, or a witness who has been granted immunity from punishment, or a witness who has entered a plea after a bargain with the state, or a witness who may gain some other reward, payment, personal advantage, or vindication through his testimony.

covered

NO

See, e.g., State v. Ferebee, 115 S.C. 235, 105 S.E. 345 (1920) (effect of possible bias resulting from receipt of payment for conviction relevant and a matter for jury to determine; charge that bias alone created reasonable doubt properly refused).



Defendant's Requested Instruction Number 2

CHARACTER -- CRIME

The testimony of a witness may be discredited or impeached by showing that the witness has been convicted of a crime of moral turpitude. Prior conviction does not render a witness incompetent to testify, or necessarily indicate the witness is not reliable. Such conviction is merely a circumstance which you may consider in determining the credibility of the witness. It is for you to determine the weight, if any, to be given to any prior conviction as impeachment in determining credibility.

ms/longer the std.

use my prior record chart

w/drawn

cut

See, e.g., State v. Harrison, 298 S.C. 333, 380 S.E.2d 818 (1989); W. Reiser, A Comparison of the Federal Rules of Evidence With South Carolina Evidence Law 43-47 (5th ed. 1993).

Defendant's Requested Instruction Number 3

PRIOR INCONSISTENT STATEMENT

The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. The earlier contradictory statements are also admissible to establish the truth of these statements. It is the province of the jury to determine the credibility, if any, to be given the earlier statements and to be given the testimony of a witness who has been impeached.

If a witness is shown knowingly to have testified falsely concerning any material matter, you may consider this in determining whether to trust such witness' testimony in other particulars. You may reject all the testimony of that witness or give all or part of such testimony the credibility you think it deserves.

See my prior inconsistent statement chg

uncomplicated

See, e.g., State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982), cert. denied, 460 U.S. 1103 (1983) and 463 U.S. 1214 (1983) (inconsistent statements as substantive evidence)

Defendant's Requested Instruction Number 4

EYEWITNESS -- RELIABILITY IN GENERAL

You have heard testimony of eyewitness identification. Such eyewitness testimony is a statement of an impression by the witness. As with any other witness, you must first decide whether the eyewitness is telling the truth as he understands it.

You must also decide how accurate the identification was, whether the witness in fact saw what he thought he saw given the extent of how much of an opportunity the witness had to observe the offender at the time of the driving and given the circumstances under which the witness later made the identification. A witness may be mistaken even though he is truthful in the sense that he honestly believes what he says is the truth. Consequently, it is up to you to determine not only truthfulness but also accuracy and reliability as you assess the testimony of a witness.

In evaluating the eyewitness testimony, you should remember that the State must prove the identity of the defendant as the person who committed a crime beyond a reasonable doubt.

use my identification

See State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992) (proof of identity by State); cf. State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991).

Defendant's Requested Instruction Number 5

RESOLUTION OF DOUBT IN FAVOR OF DEFENDANT -- ACQUITTAL

If you have a reasonable doubt as to whether defendant is guilty of murder, then you must resolve that doubt in favor of defendant and find him/her not guilty of murder.

Covered

See, e.g., State v. Robinson, 307 S.C. 169, 414 S.E.2d 142 (1992).

26

6

Defendant's Requested Instruction Number 6

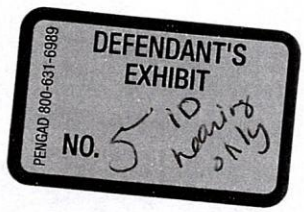
INFERENCE FROM FACT THAT WITNESS NOT CALLED BY STATE

You will remember that [A] said that [B] was not called as a witness to answer questions in this trial. If you believe that the testimony of [B] would have been important, and if you also believe that the state could have brought [B] to court to testify in this trial, then you may consider the State's failure to do so when you decide whether the state has proved, beyond a reasonable doubt, that the defendant committed the crime of _____. You may infer that the reason the state did not call [B] as a witness is that his/her testimony would have hurt the state's case.

w/d Neuw

NO - can argue - but no charge -

See, e.g., Arnold v. Yarborough, 281 S.C. 570, 316 S.E.2d 416 (Ct. App. 1984) (civil case); cf., e.g., Gathers v. South Carolina Electric and Gas Co., _____S.C._____, 427 S.E.2d 687 (Ct. App. 1993); State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991) (lost or destroyed evidence); but see State v. Hammond, 270 S.C. 347, 242 S.E.2d 411 (1978) (instruction not necessarily required)



Report on Language Assessment and Interview of Reginald Joyner

Steven D. Collins, Ph.D., CDI
Cynthia B. Roy, Ph.D., CSC

August 28, 2006

Background

At the request of Elizabeth Franklin, Attorney at Law, Dr. Steven D. Collins agreed to interview and assess the linguistic abilities of Reginald Joyner on August 25, 2006, in Columbia, South Carolina. Dr. Cynthia Roy agreed to act as interpreter for all participants and assist in the linguistic analysis. Dr. Collins conducted an interview with Reginald Joyner for approximately fifteen minutes and determined that he was fully capable of answering questions and relaying information. Upon that determination, Ms. Franklin, Mr. Maxwell Schardt, Attorney at Law, Mr. James May, law clerk, and Dr. Roy returned to the room to talk further with Mr. Joyner. That interview lasted approximately two or more hours.

Dr.Collins was asked to render a professional opinion on Mr. Joyner's ability to comprehend, respond and in general conduct a conversation in American Sign Language. In addition, both Dr. Collins and Dr. Roy were asked to determine: (1) whether his communication skills are such that an interpreter can interpret Mr. Joyner reliably, and (2) whether he can communicate with a 9th grader who has absolutely no experience with sign language.

Linguistic Assessment

Reginald Joyner (RJ) is a competent and coherent user of American Sign Language (ASL), the primary language of Deaf persons in the United States. RJ also uses lexical items in wide use in African-American Deaf communities in the South. For example, signs for concepts such as 'basketball,' 'light-skinned,' and 'stopping an activity,' are signs used by African-American Deaf persons. He also used signs clearly borrowed from sign systems widely in use in deaf mainstream programs in the US educational system.

RJ's communication was clear and confident. He was able to describe events, people and places with details. He was able to explain his own actions and reasons for his behavior, ask questions, and use conversational features such as storytelling. RJ can be easily understood by any Deaf adult or fluent users of ASL. He appears to be the only Deaf

person in his family, typical of 90% of Deaf Americans, and so has learned ASL from other deaf adults, peers, and friends.

Communication with others

RJ is aware that people who hear typically do not sign. Deaf people in the US are used to trying to create meaning from inadequate communication contexts and they are used to cooperating with authority figures, often pretending to understand more than they actually do. Evidence of this might be found in answers that are generally on the topic of the question but diverge from it.

In contrast, Deaf people, including RJ, are also hesitant to engage in extensive communication with most people, as he is aware that he cannot really understand them nor can they truly understand him. His reluctance to engage in communication, therefore, might be perceived, by authority figures, as an unwillingness to cooperate, even hostility.

He does, of course, communicate with family and friends through gestures, signs created within his immediate family that may or may not be vocabulary associated with ASL, and he has taught both family and friends how to fingerspell. Fingerspelling is a way to spell individual words one wants to convey. It is not, however a way to communicate in full, complete sentences nor is it efficient for communicating details or explanations that require more than a few words. RJ can explain how his communication with friends is not detailed and that both his comprehension of their messages and their comprehension of his messages is quite limited. Thus, we surmise that any interaction with the 9th grade student was limited at best and RJ informed us that he was unwilling to talk to the 9th grader as he knew she would not understand him completely.

RJ has had an interpreter in his classroom since elementary school. But he is also aware that the interpreters in his classroom do not communicate as easily or fluently as other deaf friends. Many interpreters in classrooms learn artificial sign systems, lack adequate training in interpreting, and generally have not reached a sufficient level of fluency in ASL. Many classroom interpreters know individual deaf children and have not met deaf adults nor been involved in their communities.

Linguistic assessment based on English

English is a language based on sound, which also has a written form. ASL is a language based on vision, which has no written form. Although ASL is the primary language of Deaf persons in the US, Deaf people must acquire this language through interaction with other Deaf persons. Most Deaf people are born into families who can hear and thus are not exposed to ASL until later in life. In fact, many Deaf people are forced to try to learn English before they learn ASL. Someone who is Deaf cannot learn a language based on sound without a prior linguistic foundation in a visual language.

Thus Deaf people often do not learn English well and score poorly on standardized tests, which are typically written. Most Deaf adults score on the fourth grade level in reading and writing, even those with a college degree. RJ's scores on standardized tests do NOT reflect his intellectual or linguistic ability in his primary language. The ability to read and write English does not accurately reflect his ability to comprehend and communicate in ASL. RJ is a competent ASL user who can ask and respond to questions, tell a story, explain the past and present and think about the future, compose grammatical utterances, discuss events and use details.

Sadly, many educational programs for deaf children insist that it's possible to teach English by using signs in English word order. This has been attempted for over 200 years and has yet to be successful. But this does account for RJ's ability to look at written sentences and try to create meaning. While individual English words may be comprehended, the impact of their order may not be perceived or understood. This also accounts for RJ's attempts to structure English sentences which native speakers find difficult to interpret.

Communicating through interpreters

Educating interpreters is still in its infancy. Not all interpreters have a post-secondary education nor are they required to have a degree before taking the national certification examination. Many interpreters have received training in associate of arts degree programs that try to teach ASL and interpreting almost simultaneously. Students graduate with some ability to sign but there is no guarantee or promise of a level of fluency or their ability to interpret accurately. Most graduates are trained to interpret well-educated, white Deaf persons and lack any awareness of the diversity of the Deaf community or its linguistic varieties.

It was reported to us that one interpreter said RJ was making up his own language. Dr. Collins quickly demonstrated that RJ was not making up a language and is, in fact, a proficient user of ASL. It is not unusual for interpreters who do not understand a Deaf person to make these kinds of statements, rather than admit their inability to understand someone and ask for help or another interpreter.

We were also shown the written form of an interpretation rendered by one or two interpreters. The statement says that RJ said he walked past three houses. During the interview, RJ stated that he had never said that and, in fact, signed a concept that meant he had walked down a street with houses on it. In ASL, one can point at general locations and repeat this pointing to indicate that there was more than one entity. RJ most likely repeated this pointing three times and thus was interpreted as walking past three houses. This was not what he meant.

RJ told us that while explaining what he had done on that day, he mentioned that he had gone to his friend John's house. But John's name was not in the written statement. Again, many interpreters who are second-language learners of ASL find fingerspelling to be difficult to interpret. Although it was possible to ask RJ to repeat the name, no one did

and so this piece of information was not accurately conveyed. With these two examples of inaccurate interpretation, it calls into question the entire statement.

RJ also told us that the interpreter at his school had been interpreting in his classroom since he was a small boy. In classroom situations, however, communication is often a one-way street—from teacher to student. In mainstream classrooms, no matter how student-oriented the teacher may be, deaf students are often not called upon or asked to give an answer or report because of the awkwardness of going through an interpreter. Thus many of these interpreters never have to interpret what deaf students say.

In interpreted situations, judgments about interpretations can be reached by noting responses to questions. If the response is not precisely on topic, it may not be due to the respondent's willingness to answer, it may, in fact, be the result of the quality of the interpretation. Of serious concern in such situations is the fact that the interrogating officers assume that their questions are being transmitted accurately and fully and therefore may conclude that divergence from the questions reflects a lack of cooperation or evasiveness.

Other issues arising in the interview

First, RJ told us that both law enforcement and the state's attorneys questioned him without the presence of an interpreter. We believe that this is a violation of current laws regarding deaf persons' rights to an interpreter in such proceedings. He explained that when he was questioned without an interpreter he was very reluctant to say much as he knew the possibility for misunderstanding. He also explained that he understood very little of the communication and was both confused and upset. When questioned with an interpreter, he could not judge if the interpretation was accurate.

At this interview, RJ said that this was the first time in two years that someone has explained what happened in the past and what is currently happened in full and in depth. We believe that he is also not fully aware of the nature of the proceedings that resulted in his current sentence.

Standards of Practice in Interpretation

Sign language interpretation is a field that has spent a good deal of time talking about ethical behavior and high quality of standards of practice. Virtually all training materials for those who would become sign language interpreters are heavy with discussions of ethical conduct, how to insure a true and accurate interpretation, and how to manage the interpreting situation to the benefit of better communication for both deaf and hearing parties to the event.

We are concerned with the knowledge that the school interpreter may have reported RJ's conversation with his peers at school to law enforcement. First, we would question her ability to understand the rapid and subtle nature of communication among young, African-American deaf friends. One of the major stumbling blocks to fluency in ASL for

second language learners is reference to persons, places, and things. The interpreter could have easily misunderstood who was doing the action, who was reporting the action, and what the action itself was.

Second, and more importantly, we question her ethics in reporting such a conversation. While we understand that in schools, adults are required to report weapons, drugs, or threats to self or others, this was a conversation among students about an event outside of school. Our national association, the Registry of Interpreters for the Deaf, requires its members to abide by a Code of Professional Conduct, which includes the practice of maintaining confidentiality. Her report did not include a notice of immediate or future harm to students or others.

Our professional opinions have been rendered based on our years of practice as linguists and interpreters, and our combined fifty years of study of American Sign Language and its role in interpretations. Dr. Collins is a Deaf American who is a native speaker of ASL, holds a Ph.D. in Linguistics, and is a certified Deaf Interpreter. Dr. Roy has used ASL for over thirty years, holds a Ph.D. in Linguistics, and is a certified Interpreter.

Signed: Steven Collins 8/28/06

Steven D. Collins, Ph.D., CDI
Consulting Linguist and Interpreter

Signed: Cynthia B. Roy 8/26/06

Cynthia B. Roy, Ph.D., CSC
Consulting Linguist and Interpreter

COLUMBIA POLICE
SC0400100

INCIDENT REPORT

INFORMATION ONLY: [ ]
CASE NUMBER: 04-18499
NCIC IND.: [ ] NCIC ENTD.: [ ]

EVENT

INCIDENT TYPE	COMPLETED	FORCED ENTRY	PREMISE TYPE	UNITS ENTERED
1. AUTO BREAKIN-	YES NO	YES NO	RESIDENCE	
2. GRAND LARCENY	YES NO	YES NO	11	
3.	YES NO	YES NO		

TYPE VICTIM: Individual; Business; Financial Inst.; Government; Relig. Orgn.; Soc./Public; Other; Unknown; Police Off.

INCIDENT LOCATION (SUBDIVISION, APARTMENT AND NUMBER, STREET NAME, AND NUMBER): [redacted] COLUMBIA, SC. | ZIP CODE: 29205 | WEAPON TYPE:

INCIDENT DATE	24 HR. CLOCK	U	DATE	24 HR. CLOCK	DISPATCH DATE/TIME 24 HR. CLOCK: DISP. DATE	DISP. TIME	TIME ARRIVED	DEPART. TIME	LOCATION NO.
061404	0200		061404	0515	061404	0631	0540	0906	403

VICTIM NO. 1

COMPLAINANT'S NAME (LAST, FIRST, MIDDLE)	RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT	RACE	SEX	AGE	ETH.	DAYTIME PHONE	EVENING PHONE
SAME AS VICTIM	UNK			O S O U	W	M	62	N		

ADDRESS: | CITY: | STATE: | ZIP CODE: | LOCATION NO: 403

VICTIM'S NAME (LAST, FIRST, MIDDLE)	RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT	RACE	SEX	AGE	ETH.	DAYTIME PHONE	EVENING PHONE
FLOREA - TIMOTHY L.	UNK			J O U	W	M	62	N	SAME	—

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

ADDRESS: [redacted] | CITY: COLUMBIA | STATE: SC | ZIP CODE: 29205 | LOCATION NO: 403

VISIBLE INJURY (VICT 1) YES NO EXPLAIN- | COMPLAINT OF ANY NON-VISIBLE INJURIES: YES NO

VICTIM (NO. 1) USING ALCOHOL YES NO UNK. | DRUGS: YES NO UNK. | TYPE:

TWO-MAN VEH. | ONE-MAN VEH. DETECTIVE/SPL. ASMT | OTHER | ALONE | ABBIDED | J—This Jurisdiction. S—State. O—Out of State. U—Unknown.

SUBJECT NO. 1

SUSPECT / RUNAWAY / WANTED / WARRANT / ARREST / JAIL / SUMMONS

NAME (LAST, FIRST, MIDDLE)	RACE	SEX	AGE	ETH.	DATE OF BIRTH	HEIGHT	WEIGHT	HAIR	EYES

FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.:

ADDRESS: | CITY: | STATE: | ZIP CODE: | LOCATION NO.:

SUBJECT (NO. 1) USING ALCOHOL YES NO UNK. | DRUGS: YES NO UNK. TYPE: | ARRESTED NEAR OFFENSE SCENE YES NO | TOTAL # ARRESTED | DATE/TIME OF OFFENSE: | DATE/TIME OF ARREST:

DAY OF THE WEEK: S M T W T F S UNK (1 2 3 4 5 6 7 8) | HOW REPORTED: A B C D E F | A- OFFICER DISPATCHED ON CALL; B- REPORT TAKEN BY PHONE; C- COMPLAINANT WALKED IN; D- COMPLAINT WRITTEN IN; E- OFFICER INITIATED; F- OTHER | DISP. FACTOR: — N — | A- RESISTANCE/MOBILITY; B- WEAPONS; C- UNFOUNDED CALLS; D- MENTAL SUBJECT; E- COMPLAINANT PRE-QUENTLY INTOXICATED; F- DOMESTIC; N- NORMAL

NARRATIVE

THE COMPLAINANT REPORTS THAT ON ABOVE DATE AND BETWEEN ABOVE TIMES, A SUBJECT(S) DID ENTER THE VICTIM'S LISTED VEHICLE WITH OUT PERMISSION; NO SIGNS OF FORCED ENTRY ONCE INSIDE, THE SUBJECT(S) DID REMOVE 1-) 22 CALIBER RUGER RIFLE $500, 1-) SOLID SILVER MONEY CLIP $400, AND $500 IN U.S. CURRENCY.

JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY: COLUMBIA POLICE DEPT. | JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY:

PROPERTY EST.

TYPE (GROUP)	FIREARM	US CURRENCY	MISC				TOTAL VALUE
STOLEN	500	500	400		BK 10-15		1400
DAMAGED							
BURNED							
RECOVERED							
SEIZED							

ADMINISTRATIVE

SUBJECT IDENTIFIED: YES NO | SUBJECT LOCATED: YES NO | S.F. AN | ACTIVE; ADM. CLOSED; UNFOUNDED | ARRESTED UNDER 18; ARRESTED 18 AND OVER | EX-CLEAR UNDER 18; EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE: 1. OFFENDER DEATH 2. NO PROSECUTION 3. EXTRADITION DENIED 4. VICTIM DECLINES COOPERATION 5. JUVENILE - NO CUSTODY

REPORTING OFFICER (LAST, FIRST)	DATE	NUMBER	REVIEWING OFFICER	DATE	NUMBER
ISOMUNOS - T.C.	061406	985	ROWINE - S	061409	8233

FOLLOW-UP INVESTIGATION YES NO | OFFICER

RECORDS

FORM 1:99 REV

DEFENDANT'S EXHIBIT NO. 8
PENGAD 800-631-6989

COLUMBIA POLICE
SC0400100

SUPPLEMENTAL INCIDENT REPORT

CASE NUMBER: 04-18499 | NCIC INC. | NCIC ENTD.

☒ ORIGINAL REPORT ☐ SUPPLEMENTAL REPORT ☐ ADDITIONAL VICTIMS ☐ ADDITIONAL STOLEN PROPERTY
☐ MODIFIES ORIGINAL ☐ CASE STATUS CHANGE ☐ ADDITIONAL OFFENDERS ☐ ADDITIONAL RECOVERED PROPERTY
PAGE 2 OF 3 PAGES.

VICT./SUBJ. I.D. OVERFLOW

☐ COMPLAINANT ☐ VICTIM # ☐ SUBJECT # ☐ RUNAWAY ☐ WANTED ☐ WARRANT ☐ ARREST ☐ JAIL ☐ SUMMONS ☐

NAME (LAST, FIRST, MIDDLE) | VICTIM RELATIONSHIP TO SUBJECT #1 #2 #3 | RESIDENT J S O U | RACE | SEX | AGE | D.O.B | ETH.

HEIGHT | WEIGHT | HAIR | EYES | FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

ADDRESS | CITY | STATE | ZIP CODE | LOCATION NO. | DAY PHONE H B | EVENING PHONE H B

☐ VICTIM NO ____ VISIBLE INJURY ☐ NO ☐ YES | COMPLAINT OF NON-VISIBLE INJURIES ☐ NO ☐ YES | VICTIM USING ALCOHOL ☐ NO ☐ YES ☐ UNK. DRUGS ☐ NO ☐ YES TYPE ☐ UNK. | ☐ TWO-MAN VEHICLE ☐ DETECTIVE/BPLASMT. ☐ ONE-MAN VEHICLE ☐ OTHER | ☐ ALONE ☐ ASSISTED
EXPLAIN:

☐ SUBJECT NO ____ USING ALCOHOL: ☐ NO ☐ YES
USING DRUGS: ☐ NO ☐ YES → TYPE: ☐ UNK.

VICT./SUBJ. I.D. OVERFLOW

☐ COMPLAINANT ☐ VICTIM # ☐ SUBJECT # ☐ RUNAWAY ☐ WANTED ☐ WARRANT ☐ ARREST ☐ JAIL ☐ SUMMONS ☐

NAME (LAST, FIRST, MIDDLE) | VICTIM RELATIONSHIP TO SUBJECT #1 #2 #3 | RESIDENT J S O U | RACE | SEX | AGE | D.O.B | ETH.

HEIGHT | WEIGHT | HAIR | EYES | FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

ADDRESS | CITY | STATE | ZIP CODE | LOCATION NO. | DAY PHONE H B | EVENING PHONE H B

☐ VICTIM NO ____ VISIBLE INJURY ☐ NO ☐ YES | COMPLAINT OF NON-VISIBLE INJURIES ☐ NO ☐ YES | VICTIM USING ALCOHOL ☐ NO ☐ YES ☐ UNK. DRUGS ☐ NO ☐ YES TYPE ☐ UNK. | ☐ TWO-MAN VEHICLE ☐ DETECTIVE/BPLASMT. ☐ ONE-MAN VEHICLE ☐ OTHER | ☐ ALONE ☐ ASSISTED
EXPLAIN:

☐ SUBJECT NO ____ USING ALCOHOL: ☐ NO ☐ YES
USING DRUGS: ☐ NO ☐ YES → TYPE: ☐ UNK.

J – This Jurisdiction. S – State. O – Out of State. U – Unknown

NARRATIVE

I.D. TEH ROSS RESPONDED TO THE SCENE. THE VICTIM DOES NOT HAVE THE SERIAL # AVAILABLE AT THIS TIME. HOWEVER, THE VICTIM DOES HAVE HIS SOCIAL SECURITY # ENGRAVED ON THE BELLE AS FOLLOWS: [redacted]

JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY

JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY

VEH. / GUN / ETC. 1

STATUS: ☐ STOLEN ☐ RECOVERED ☐ FOUND ☐ TOWED ☐ SUSPECT ☒ VICTIM
TYPE: ☒ VEHICLE ☐ GUN ☐ BOAT ☐ LICENSE PLATE ☐ SECURITIES/BONDS, STOCKS ☐ ARTICLE

[redacted] | BOAT HULL NO. AND/OR REG. NO.
OWNER APPLIED NO. | STATE: SC
YEAR OF REGISTRATION | YEAR OF EXPIRATION | YEAR: 2000 | MAKE: TOYT | TYPE
MODEL: TUNDRA | STYLE: 4DR TRK | COLOR: BURGANDY | BRAND NAME | CALIBER
NIC NO. | DENOMINATION | ISSUER | SECURITIES DATE
MISCELLANEOUS: SC TAG [redacted]

PROPERTY EST.

TYPE (GROUP)							
STOLEN							
DAMAGED							
BURNED							
RECOVERED							
SEIZED							

ADMINISTRATIVE

SUBJECT IDENTIFIED ☐ YES ☒ NO | SUBJECT LOCATED ☐ YES ☒ NO | S.F. AN | ☒ ACTIVE ☐ ADM. CLOSED ☐ UNFOUNDED | ☐ ARRESTED UNDER 18 ☐ ARRESTED 18 AND OVER | ☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ EXTRADITION DENIED 4. ☐ VICTIM DECLINES COOPERATION 5. ☐ JUVENILE - NO CUSTODY

REPORTING OFFICER(S)	DATE	UNIT NUMBER	APPROVING OFFICER	DATE	UNIT NUMBER
EDMUNDS-T.L.	06140499	5	ROWLAND-S	06140499	823

FOLLOW-UP INVESTIGATION ☐ YES ☐ NO | OFFICER

RECORDS

FORM 2-91

COLUMBIA POLICE
SC0400100

SUPPLEMENTAL INCIDENT REPORT

CASE NUMBER: 04-18499

NCIC: ING. | ENTD.

☑ ORIGINAL REPORT ☐ MODIFIED ORIGINAL ☐ SUPPLEMENTAL REPORT ☐ CASE STATUS CHANGE ☐ ADDITIONAL VICTIMS ☐ ADDITIONAL OFFENDERS ☐ ADDITIONAL STOLEN PROPERTY ☐ ADDITIONAL RECOVERED PROPERTY

PAGE 3 of 3 PAGES

VICT/SUBJ. I.D. OVERFLOW

☐ COMPLAINANT ☐ VICTIM # ☐ SUBJECT # ☐ RUNAWAY ☐ WANTED ☐ WARRANT ☑ ARREST ☐ JAIL ☐ SUMMONS ☐

NAME (LAST, FIRST, MIDDLE) | VICTIM RELATIONSHIP TO SUBJECT: #1 #2 #3 | RESIDENT * J S O U | RACE | SEX | AGE | D.O.B. | ETH.

HEIGHT | WEIGHT | HAIR | EYES | FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

ADDRESS | CITY | STATE | ZIP CODE | LOCATION NO. | DAY PHONE H O | EVENING PHONE H O

☐ VICTIM NO. ____ VISIBLE INJURY ☐ NO ☐ YES EXPLAIN: | COMPLAINT OF NON-VISIBLE INJURIES: ☐ NO ☐ YES | VICTIM USING ALCOHOL ☐ NO ☐ YES ☐ UNK DRUGS: ☐ NO ☐ YES TYPE: ☐ UNK. | ☐ TWO-MAN VEHICLE ☐ DETECTIVE/SPLASHT. ☐ ONE-MAN VEHICLE ☐ OTHER | ☐ ALONE ☐ ASSISTED

☐ SUBJECT NO ____ USING ALCOHOL: ☐ NO ☐ YES USING DRUGS: ☐ NO ☐ YES → TYPE: ☐ UNK.

VICT/SUBJ. I.D. OVERFLOW

☐ COMPLAINANT ☐ VICTIM # ☐ SUBJECT # ☐ RUNAWAY ☐ WANTED ☐ WARRANT ☐ ARREST ☐ JAIL ☐ SUMMONS ☐

NAME (LAST, FIRST, MIDDLE) | VICTIM RELATIONSHIP TO SUBJECT: #1 #2 #3 | RESIDENT * J S O U | RACE | SEX | AGE | D.O.B. | ETH.

HEIGHT | WEIGHT | HAIR | EYES | FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

ADDRESS | CITY | STATE | ZIP CODE | LOCATION NO. | DAY PHONE H B | EVENING PHONE H B

☐ VICTIM NO. ____ VISIBLE INJURY ☐ NO ☐ YES EXPLAIN: | COMPLAINT OF NON-VISIBLE INJURIES: ☐ NO ☐ YES | VICTIM USING ALCOHOL ☐ NO ☐ YES ☐ UNK. DRUGS: ☐ NO ☐ YES TYPE: ☐ UNK | ☐ TWO-MAN VEHICLE ☐ DETECTIVE/SPLASHT ☐ ONE-MAN VEHICLE ☐ OTHER | ☐ ALONE ☐ ASSISTED

☐ SUBJECT NO ____ USING ALCOHOL: ☐ NO ☐ YES USING DRUGS: ☐ NO ☐ YES → TYPE: ☐ UNK.

*J – This Jurisdiction. S – State. O – Out of State. U – Unknown

NARRATIVE

JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY | JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY

VEH. / GUN / ETC. 1

STATUS: ☑ STOLEN ☐ RECOVERED ☐ FOUND ☐ TOWED ☐ SUSPECT ☑ VICTIM

TYPE: ☐ VEHICLE ☑ GUN ☐ BOAT ☐ LICENSE PLATE ☐ SECURITIES/BONDS, STOCKS ☐ ARTICLE

VIN AND/OR LICENSE NO. | BOAT HULL NO. AND/OR DECAL NO.

SERIAL AND/OR OWNER APPLIED NO. | STATE

YEAR OF REGISTRATION | YEAR OF EXPIRATION | YEAR | MAKE | TYPE

MODEL | STYLE | COLOR | BRAND NAME: RUGER | CALIBER: .22

NIC NO. | DENOMINATION | ISSUED | SECURITIES DATE

MISCELLANEOUS: RIFLE WITH SSN# [redacted] ENGRAVED ON IT.

PROPERTY EST.

TYPE (GROUP)							
STOLEN							
DAMAGED							
BURNED							
RECOVERED							
SEIZED							

ADMINISTRATIVE

SUBJECT IDENTIFIED ☐ YES ☑ NO | SUBJECT LOCATED ☐ YES ☐ NO | S.F. AM | ☑ ACTIVE ☐ ADM. CLOSED ☐ UNFOUNDED | ☐ ARRESTED UNDER 18 ☐ ARRESTED 18 AND OVER | ☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER

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RAMINE S	06/14/04	8233	RAMINE S	06/14/04	8233

FOLLOW-UP INVESTIGATION ☐ YES ☐ NO | OFFICER

RECORDS

FORM-2:91

Knowledge

What does Folks stand for? For Our Lord Hill Slobs.

What does IGD stand for? Insane Gangsta Disciple

What does CBG stand for? Cross Brige Gangsta

What does Boss stand for? Brothers Of Strong Struggle

What words you can't say? fish, doughnut, crab, frog, bitch, snowflake, shrimp, dog

What words you say instead? ish, o-nut, c-rab, rog, itch, flake, shrimp, og.

What did you eat for breakfast? a bowl of oatmeal, 3 hard-boiled eggs, 3 strips of bacon, a cup of dead kool-aid and a book of knowledge

How many bricks are on the yellow bricc road? 360, 3666, 365, 666, 1000, or 66666.

What are the 3 p's? poise, patience, and payoff

What are the 3 G's ? God, Ghost, and Gangsta

What's on the ride side of King David? a Gangsta staccin the G.

What time does the sunset? 6:36

DEFENDANT'S EXHIBIT NO. 91
PENGAD 800-631-6989

What's at the top of the ladder? Queen Sheeva's blacc pearl.

What does 357 mean? From the donut shop King Heaver ran 3miles, walked 5, and crawled 7.

What's behind King Soloman's throne? Queen Sheeva's Palace

What's behind the blacc moon? Soloman's throne

What did you eat for lunch? A wrapper and a couple of slobs on the side.

The Pledge

My duty is to uplift unity, and to strive to maintain oneness throughout the entire membership. My duty is to help RIDDEALS, teachings, and practices that interfere with unity. It's my duty to stand strong against & expose those individuals who place themselves above the struggle. And who are not willing to work as a team. This is my pledge, my duty and till death I will not part from it.

Folk Prayer

When I die show no pity bury my soul in gangsta city. Lay 2 nines across my chest and tell king David I done my best.

Death Pledge

Blue is true. Red is dead. When I die show no pity send my soul to gangsta city. Dig a hole 6 feet deep and lay 2 staffs at my feet, put two shotguns across my chest and tell king Hoover I did my best.

I.G.D Banks

Foot Soldier 1,2,3
Soldier 1,2,3
Warrior 1,2,3
Knight
Blacc knight
Assassin
B.G
First Lieutenant
Secand Lieutenant
Third Lieutenant
Right hand man
Set king
O.G
Double O.G
Triple O.G
Godfather

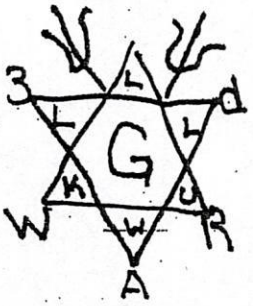
The letters of the Alphabet

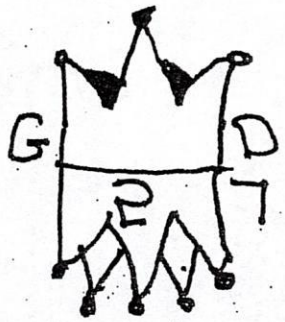
A: Is for the ass kicking a GD will give to anyone under the 5
B: Is for bothers of the struggle
C: Is for crushing the five points
D: Is for dedication, determination, and discipline
E: Is for eternal life
F: Is for Folks
G: Is for Gangster
H: Is for Hells kitchen
I: Is for Imperial
J: Is for Jacking the 5 points
K: Is for King killer
L: Is for Love, Life, and Loyalty.
M: Is for Money, Mack, and Murder
N: Is for Nothing is impossible for us
O: Is for Opening our eyes that all is not well
P: Is for popping the five points
Q: Is for the Quitness before the storm
R: Is for Righteousness
S: Is for the six points
T: Is for Taking out all Hooks and Slobs
U: Is for Universal Knowledge
V: Is for victory in our struggle
W: Is for the war we will win
X: Is for the [illegible]

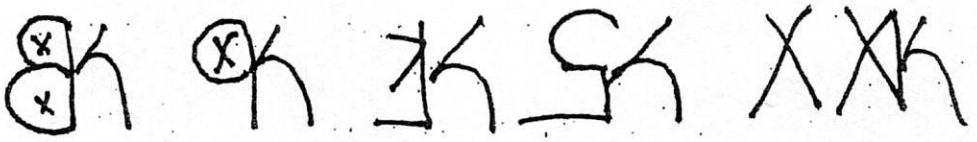
Y: is for our Youth, which is who we are fighting for
Z: is for the zoo we refuse to be kept in.

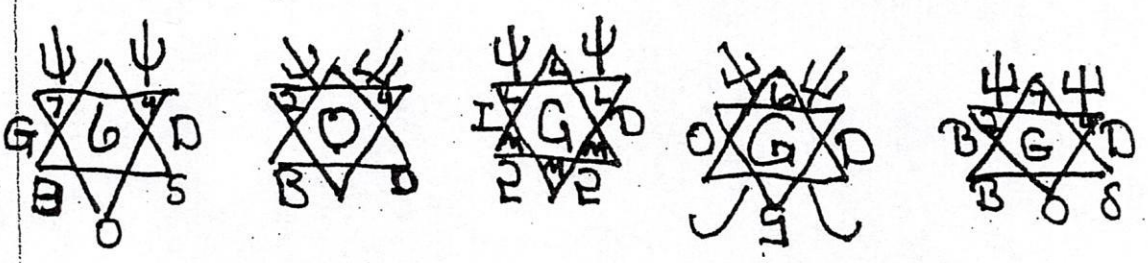


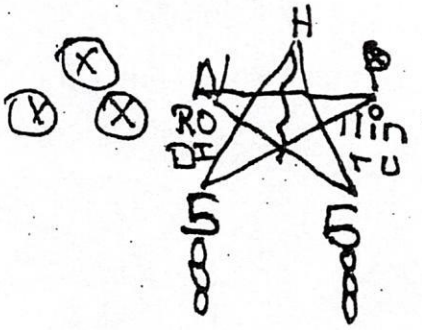
BLACC
GANGSTAS









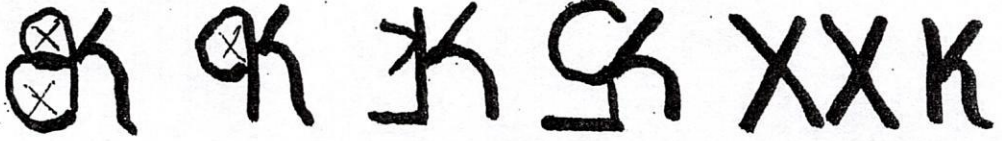


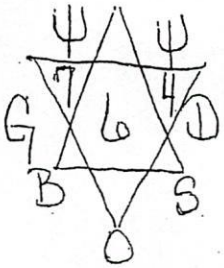
BLACC
GANGSTAS

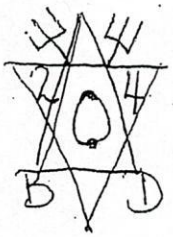










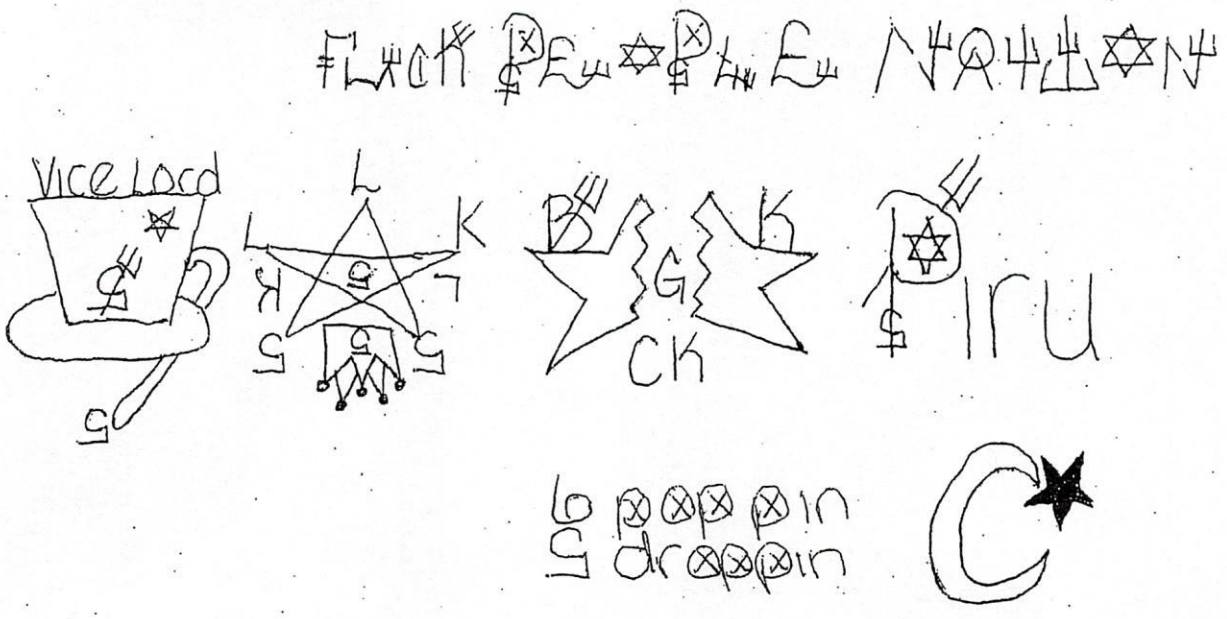






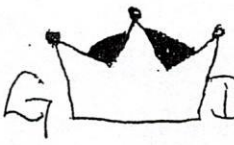


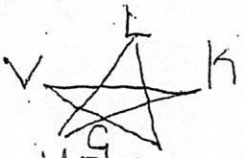


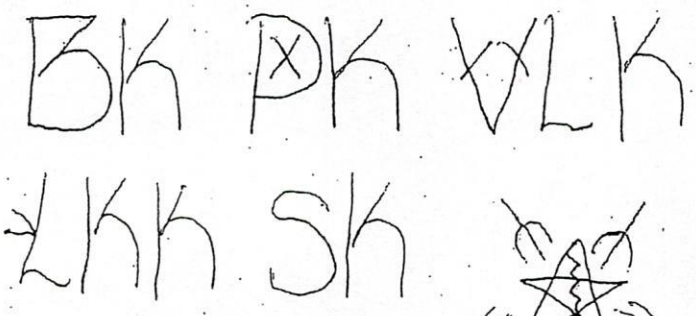


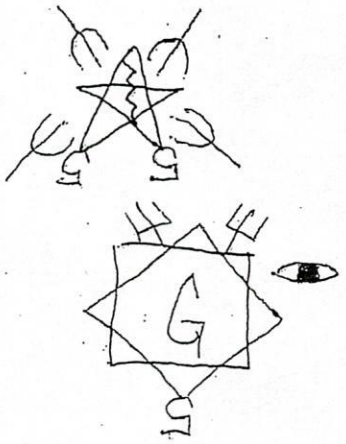
Stacc em high Stacc em tall
Stacc em against on the wall
If you can't stacc em like a G
Don't stacc em at all

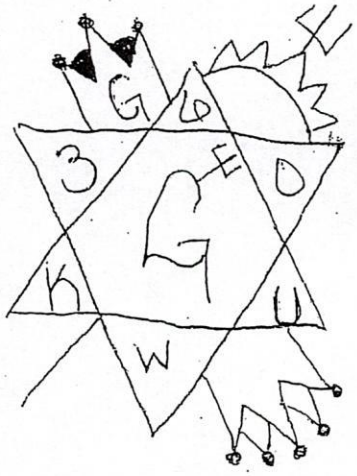


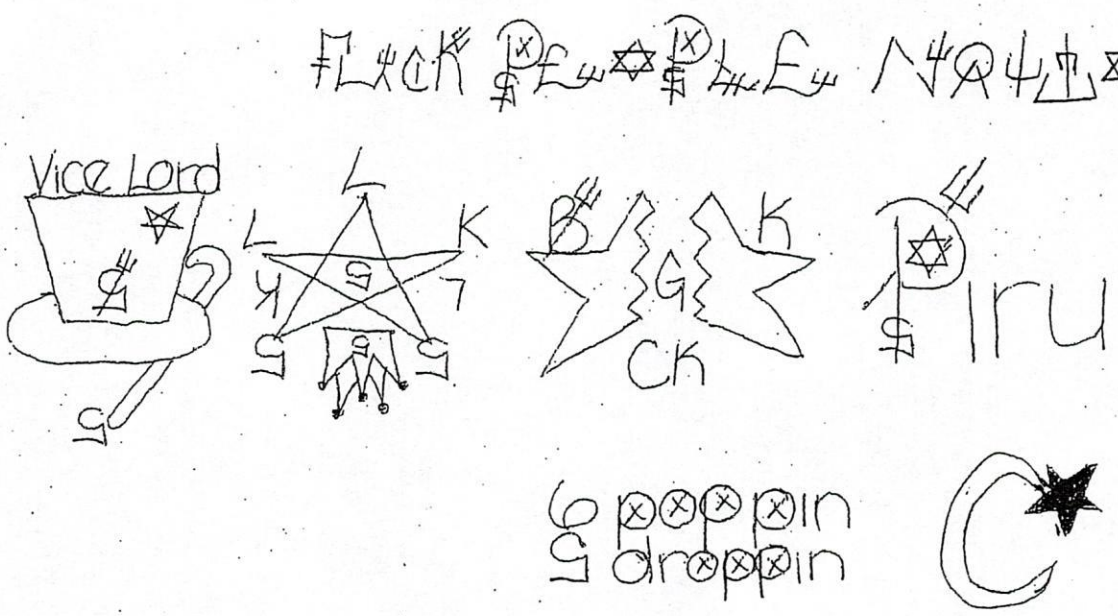






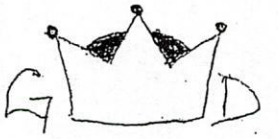


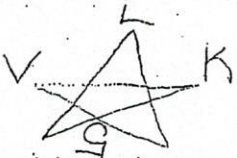


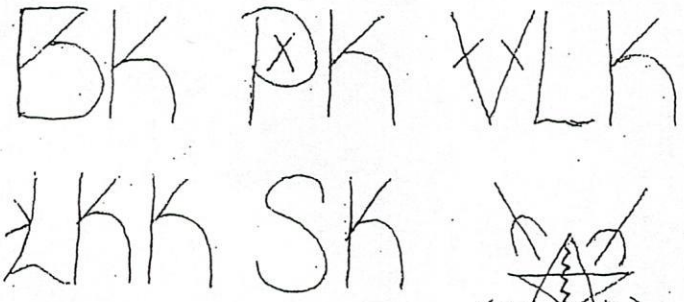


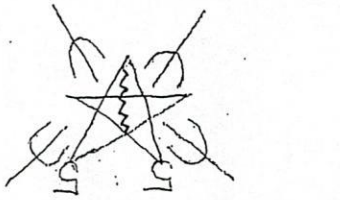
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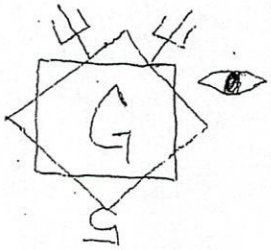


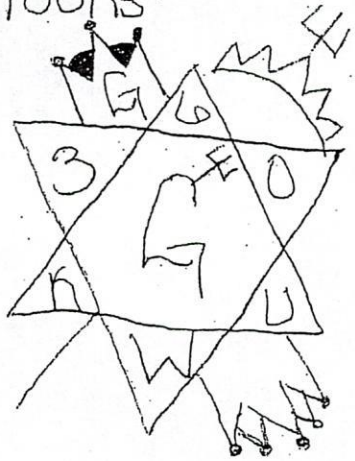













G
6
G
41
79


6
G
B

What do you sleep with? A 9mm under your mattress, a 327 under your pillow and a shotgun under your bed

How many eyes do Folks have? Three

What's behind the sun? 2 golden pitchforks

What's behind the moon? A 6 point star

How many Kings are there? Three

Who are the three Kings? King David, King Hoover, and King Shorty

How many degrees of knowledge did King David Have before he died? 180°

What do you do when a loc/cuz ask you a question and you don't know the answer? You say G enlighten me

Who put the G on the crown? King Hoover.

Who holds the star in the North sky? King David

Why do we have 362 bricks on the yellow brick road? Some slobs stole one

Where does the yellow brick road led to? To the six point star

What's in the middle of a 6 point star? A pitch fork

What's Behind the pitchfork? The golden gate

What's Behind the Golden gate? Golden Gates City

What's Behind the Golden Gates City? Gheavens

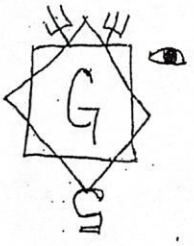
What's behind Gheavens? Gparadise

What's behind the moon? A burning pitchfork

Who are your enemies? Slobs, false-claimers, and those that make themselves enemies.

Folk Creed

We are the future, and the pride of our shining star king David. We shall come as one, if not, we shall not come at all 360° 3rd world 6th demension organization of gangsta nation.



Folk rules

colors: black, purple, white, grey, khaki, royal blue, and pink.
All Folks bang to the right.
All Folks help the nation in war.

Basic knowledge

3 kings / David, Hoover, Shorty
1 Queen / Sheeva
8 / for all the dope IGD have in the set.
3 / disrespect vice lords
♡ / everlasting love
⚅ / for the 6th nation
360° / pure knowledge
180° / half knowledge
VLK / vice lord killa
LKK / Latin king killa
BK / Blood killa



When you put the Folk and Crip sign together and when a Crip and Folk set are together.

Behind the sun is 2 golden pitchforks. Behind the moon is a 6 point star. Behind ~~the~~ 6 point star is a book of knowledge and on the right side of the yellow bricc road king Hoover staccin the 6 point star. Under the yellow bricc road is Gangsta City there are 6 cherries on the cherry tree All boss niggas and girls go to heaven when the clouds are blue.

Blacc / insane
grey / knowledge
blue / water
yellow / loyalty
green / money
Folk / 4
heart / ♡
wings / Ɛ ∃
horns / ( )
tail / 6
Pitchfork / 4

6 on top can't be stopped ⚔ dead from 6 shots to the head the number 6 runnin shit the number ⚔ can't fucc wit it 6 poppin ⚔ droppin.

Nation sheild of armor
O.G's and high ranker officers are authorized to have this tatted.

Wings- the nation elevation
heart- the love and unity of nation
pitchfork- reps. the staff (mind, body, soul, love, life, loyalty)

78- the year Hoover pass down the crown to any member who was taken the oath and pledge and learned the creed and basic history literature

Black horns- represents the strength of the nation

Tail- reminder that the nation sits on enemies.

Staff- represents the degree of 1300

Code of color

Blacc- death crown

blue- tru

yellow- [redacted]

purple- loyalty

white- peace

khaki- soldier

royal blue- tru

pink- gangsta

grey- knowledge

Set shield of armor

for any member past B.G rank

3 point crown

represents the kings

Death pledge

Blue is tru. Red is dead. When I die show no pity send my soul to Gangsta City. Dig a hole 6 feet deep and lay 2 staffs at my feet. Lay 2 shotguns cross my chest tell king I did my best.

Ragtown pledge

Peace to the 6, death to the dread, lay blue rose peddles across my bed. Raise the staff drop the cane let our enemies die in pain. Raise the 6 fucc the G, Ragtown when you see it fly a white dove, when it's all over call it Folk love.

6 pledge

The night I was born Folh was the night I died. My breathen cast my body into the lake of fire and knowledge, I was baptized, one with my nation by my kings blessings. With a pitchfork in my hand and a 6 on my chest others will speak my name and know the name of death. I [redacted] live by the nations creed loyal to my nation loyal to my breed. When my flag fall so does my body fall. But my nation will stand in shrive of the 6. All [redacted] is one, one is all.

360° pledge

We are strong together, my love your love forever we as one. Oh yes king Hoover it must be done. As GOD put the star in the sky the reflection that they may shine oh yeah king Hoover said we must combine mind, body, and soul. See this gangsta thing is like anything else it had to begin. Love, Life, Loyalty got it all started, but without <u>pure</u> wisdom, knowledge, understanding it will soon be departed. The 6 point star connected it all together, by being the star of David it will last 4 ever. By using our 180° of pure faith and our 360° of pure knowledge nothin is impossible. For a gangsta disciple nation will remain the same. Where ever, whenever I meet another member of IGD I will greet him with clenching of the fist showin the warrior sign. I will repeat " I will not affiliate myself with the opposite now let us pray. First let us give praise to our late and great King David. Now let us show our love to our newly elected chairman King Hoover. Let us give our love to King Shorty

And last but not least shout our love to our minister of defense Don Deshes. I will pray once more by sayin these words "I am what I am, and what I'm not I will never be."

Yellow Bricc Brad

These are 1000 briccs on the yellow bricc road. Under the yellow bricc road is Gangsta City. On the yellow bricc road is the tree of life which bears dead fruit 361 briccs are for war, 365 are for peace. At the end of the yellow bricc road are the pearlly gates to the left is the booh of knowledge to the right is King David staccin the 6.

In the concept of Idealogy of organization, in aiding, and assisting my fellow brothers and sisters of the struggle in all righteous endeators. In standing strong, upon on the six points utilizing, knowledge, wisdom, and understanding. As we strive for our struggle for education, political and social development that we are social group of people with dignity and integrity.

Through one unit and becoming as one unity we can become a reason power beyond boundaries without measure.

History

Under the money, mane, murder concepts the nation was divided into many sets.

974 (IGD)- Insane Gangsta Disciple
274 (BGD)- Blacc Gangsta Disciple
74 (GD)- Gangsta Disciple
24 (BD)- Blacc Disciple
25.7.4 (YGD) Young Gangsta Disciple

Under the brothers of struggle and sisters of struggle concept. the maxton dropped all B's, I's, and 4's to become one under the same nation Gangsta Disciple (GD) 74

Under the 7.4. concept, Hoover changed the name of the nation to clear it from bad media exposure and became committed to blacc communities. A council was formed who wrote mostly of the 900° of knowledge. And literature. Hoover blessed it as laws. We are still known as GD's or Disciple Folks

The beginners

Once there 5 men, out of the 5 one got killed and one out of the 4 did it. Out of the 4 one left and started the nation under the 5. That left 3. Out of the 3 one left in search of himself on a journey, that left 2. Out of the 2 one left and tried his own thing. That left 1. The 1 looked in his heart and realized his own hate for dead. The 3rd man bought a boat and went out to sea. One day he looked up at the sky and said "the sky is blue" so true, and it looked over all men who have shed their flood in our struggle. He returned to find the 4th one laying up under the man yelling "all is well". And the 2nd is doing his own thing. The 3rd returned with the 1st and discovered that love, life, loyalty got is all started, but without pure knowledge, ~~[illegible]~~ wisdom, and understanding It will soon be departed. They welcomed back the 2nd and started an allicree among the three. Disciples were born from the ashes Blacc Devil Disciples and the Satan Disciples. A new nation led by a king and formed Folk Nation

The willing

We the willing lead by the knowledge. To do the impossible for the ungreatful, we have done so much for so long, we are capable of doing anything without nothin at all

All is not well

All is well Almighty ... Almighty and nobody, All is well, the creators better.

knowledge

knowledge is power. It has been coming a long time among the ranks at our gangstas. But it is on the scene today. It is making us see what our natural enemy has always had in store for us. And it isn't freedom, justice, or equality. It's now and it's always been slavery, suffering, and death. knowledge of "G" knowledge of Hooks, and knowledge of the disciples in america is defentelly worth examining. These gangstas would overtan this system without hesitation because they have absolutely nothing to lose. The fact of the matter is GD's of this country either by the bullet or bullet will acheive, would domination be if ele of violent there will be a Gangsta Resolution.

Wings

Spread your wings and raise them high, G's and D's shall never die. Hold your b above your head. Raise king David from the dead. The chairman Hoover a king like him about that struggle limb to limb. About a firm grip to your sword raise your pitchforks we are at war. Death before dishonor Folks

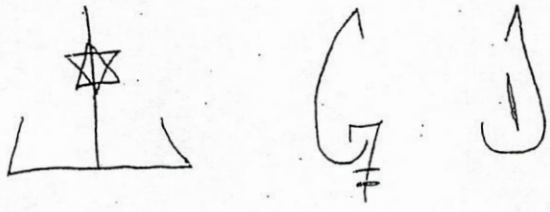
alive! About that 6 no love for G. Brothers of struggle we have won. All ain't well but all is one.

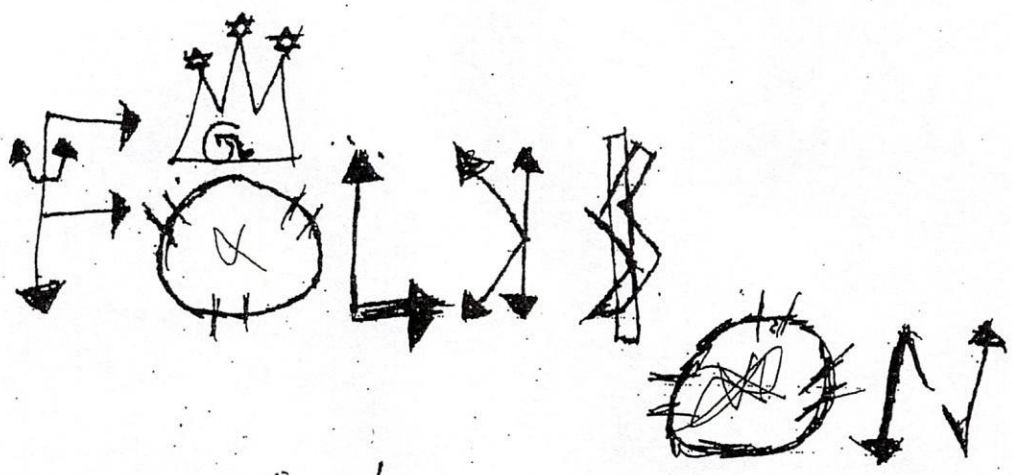
X-mas

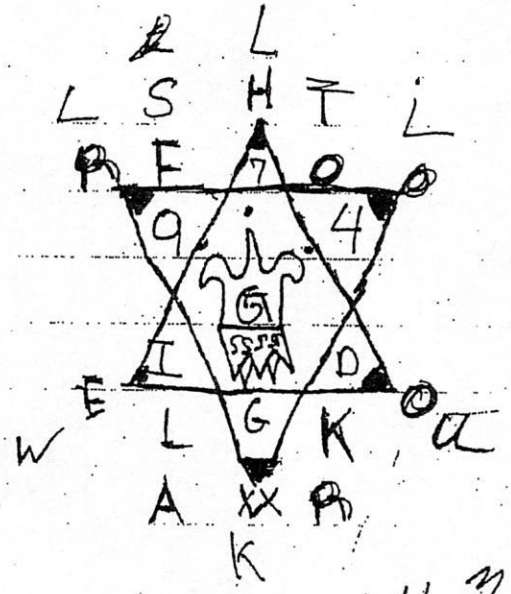
The night before banging and it was all in my dream, not a gangsta, was staring not even a Queen. The pitchforks were hung on the 6 points with care in hopes that King Hoover would soon be there. The disciples were snuggled, cuddled in their beds while visions of 6 points dances in their heads.

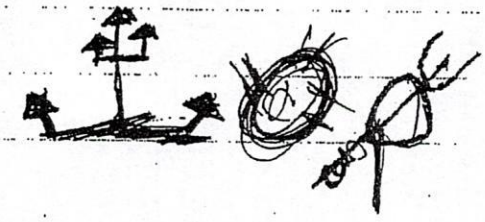
Gangsta

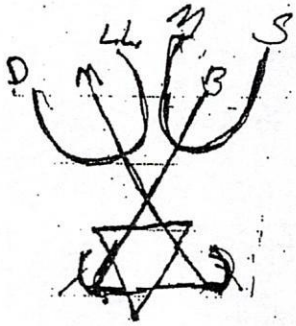
In every city under the sun my name is ass of the educational circle of crime and ~~poop~~ philosophy. Had it not for me, no prisons would have been built. or no guns or bombs would have been created. I am the source that provokes originallity of thought, I am the hand I am Gangsta Everlasting.



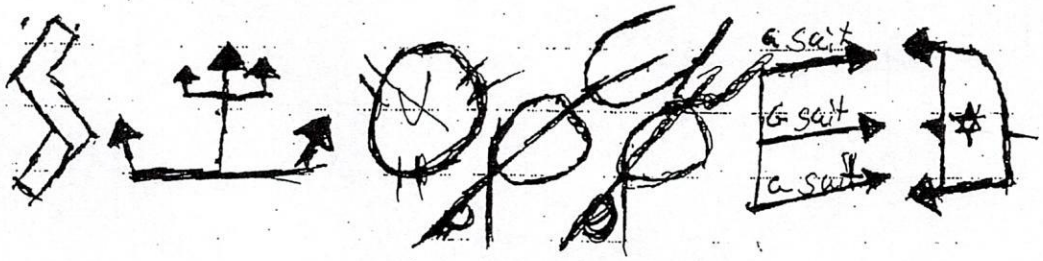


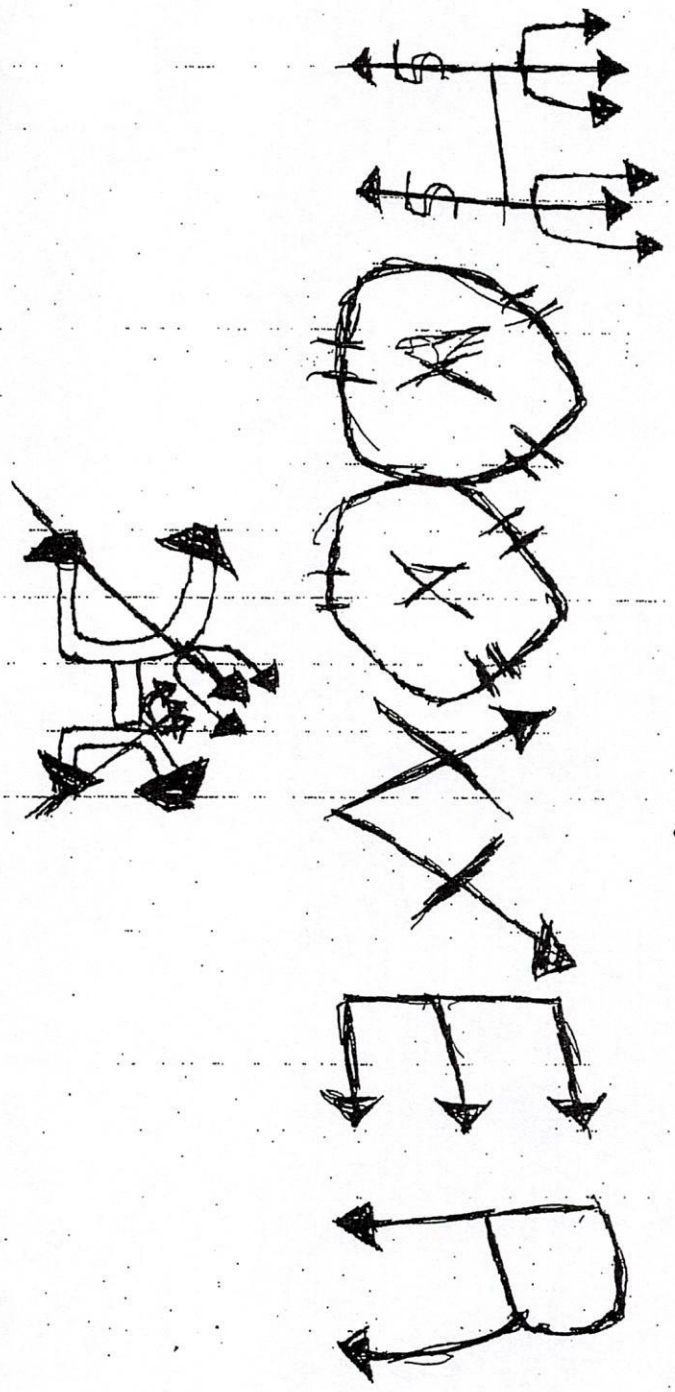


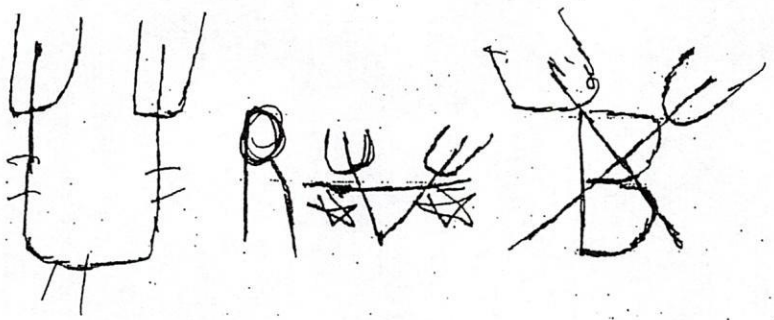


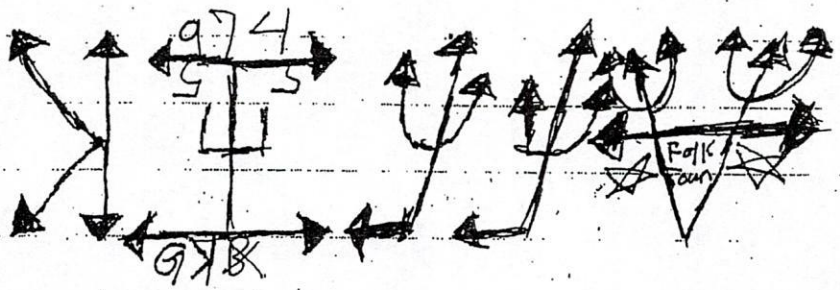


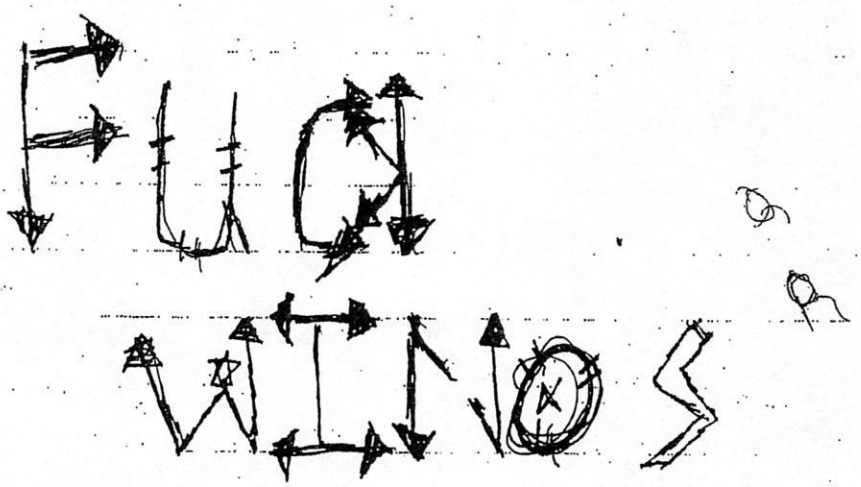



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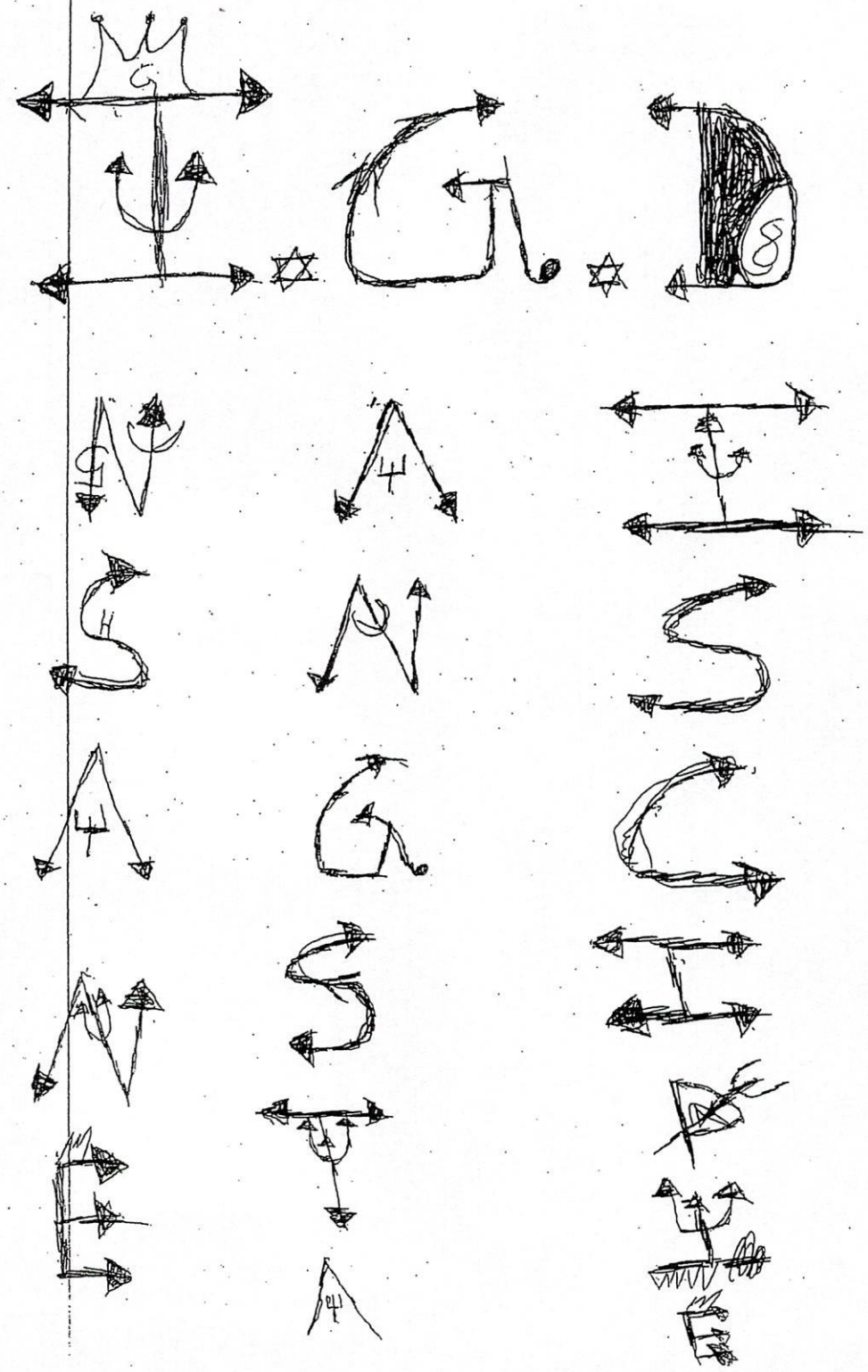


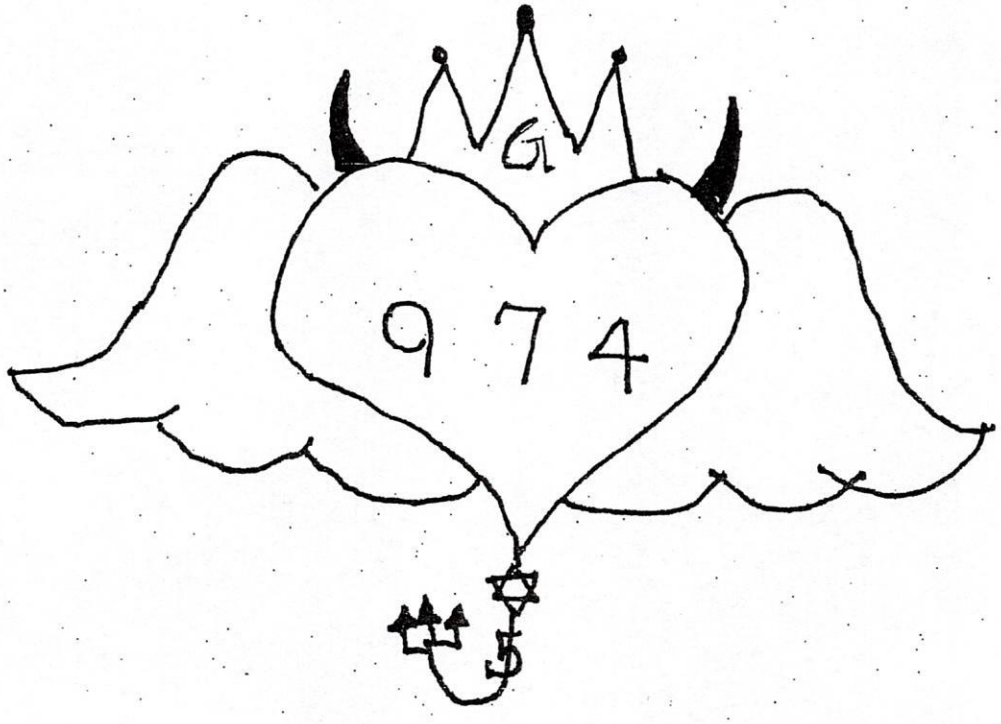


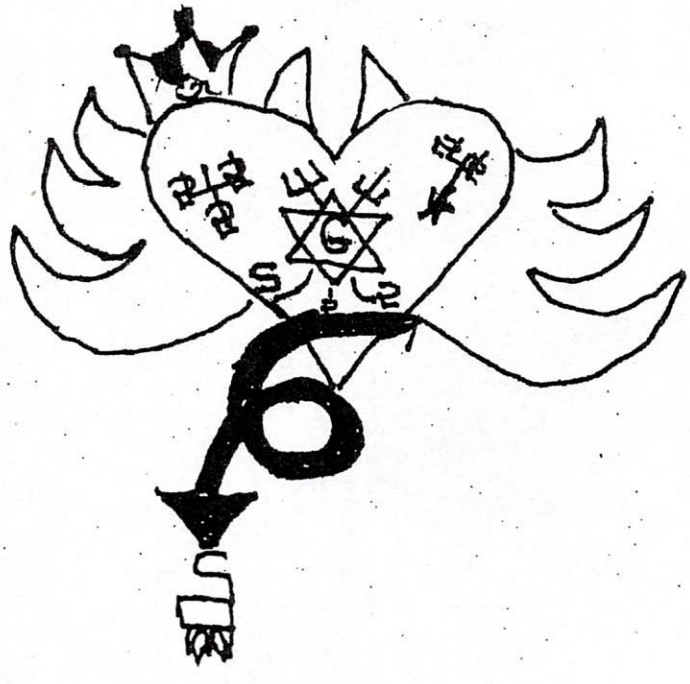

Folk
Four



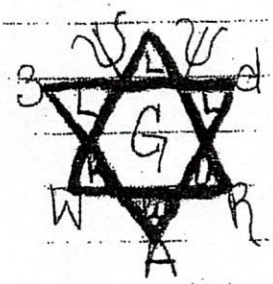
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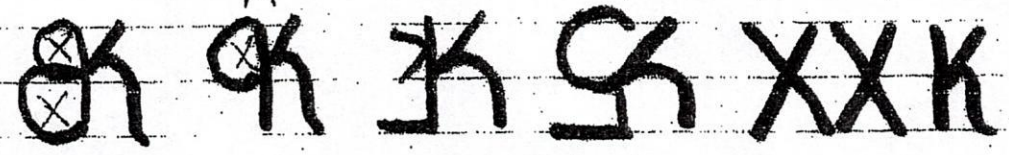

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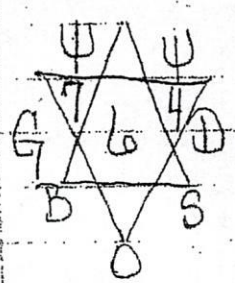








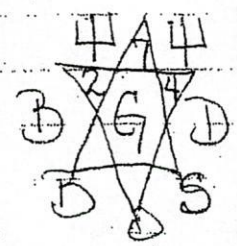


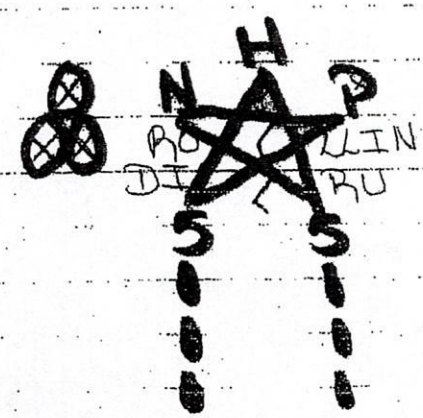




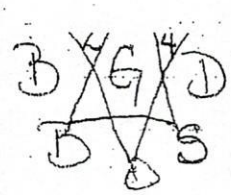














COLUMBIA POLICE
SC0400100

INCIDENT REPORT

Hold placed on Gun

INFORMATION ONLY

CASE NUMBER: 04-30187

NCI INC. 1603

INCIDENT TYPE		COMPLETED	FORCED ENTRY	PREMISE TYPE	UNITS ENTERED	TYPE VI
1. Found Property	09-15-04 by J.G. Joanne Page Clerk	☑ YES ☐ NO	☐ YES ☑ NO	Roadway		☑ Individ
2.		☐ YES ☐ NO	☐ YES ☐ NO			☐ Busine
3.		☐ YES ☐ NO	☐ YES ☐ NO			☐ Financi

☐ Govern
☐ Relig. C
☐ Soc./Pu
☐ Other
☐ Unknow
☐ Police C

EVENT

INCIDENT LOCATION (SUBDIVISION, APARTMENT AND NUMBER, STREET NAME AND NUMBER): 2111 Surrey St. Cola. ZIP CODE: 29203 WEAPON TYPE:

INCIDENT DATE	24 HR. CLOCK	TO	DATE	24 HR. CLOCK	DISPATCH DATE/TIME 24 HR. CLOCK: DISP. DATE	DISP. TIME	TIME ARRIVED	DEPART. TIME	LOCATION NO.
09/14/04	1000				9/14/04	1008	1015	1045	172

VICTIM NO. 1

COMPLAINANT'S NAME (LAST, FIRST, MIDDLE)	RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT J S O U	RACE	SEX	AGE	ETH.	DAYTIME PHONE	EVENING PHON
Church, Harold Jewe	UNK			O	W	M	40	N	[redacted]	

ADDRESS: [redacted] CITY: Pelion STATE: SC ZIP CODE: 29123 LOCATION NO.:

VICTIM'S NAME (LAST, FIRST, MIDDLE)	RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT J S O U	RACE	SEX	AGE	ETH.	DAYTIME PHONE H B	EVENING PHONE
UNKNOWN										

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

ADDRESS | CITY | STATE | ZIP CODE | LOCATION NO.

VISIBLE INJURY (VICT. 1) ☐ YES NO ☐ EXPLAIN– COMPLAINT OF ANY NON-VISIBLE INJURIES: ☐ YES NO ☐

VICTIM (NO. 1) USING: ALCOHOL ☐ YES NO ☐ UNK. ☐ DRUGS: ☐ YES NO ☐ UNK. ☐ TYPE:

TWO-MAN VEH. ☐ ONE-MAN VEH. ☐ DETECTIVE/SPL. ASMT. ☐ OTHER ☐ ALONE ☐ ASSISTED ☐ *J—This Jurisdiction. S—State. O—Out of State. U—Unknown.

SUSPECT NO. 1

☐ SUSPECT ☐ RUNAWAY ☐ WANTED ☐ WARRANT ARREST ☐ JAIL ☐ SUMMONS

NAME (LAST, FIRST, MIDDLE)	RACE	SEX	AGE	ETH.	DATE OF BIRTH	HEIGHT	WEIGHT	HAIR	EYES

FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.)

ADDRESS | CITY | STATE | ZIP CODE | LOCATION NO.

SUBJECT (NO. 1) USING: ALCOHOL ☐ YES NO ☐ UNK. ☐ DRUGS: ☐ YES NO ☐ UNK. ☐ TYPE:

ARRESTED NEAR OFFENSE SCENE ☐ YES NO ☐ TOTAL # ARRESTED

DATE/TIME OF OFFENSE | DATE/TIME OF ARREST

DAY OF THE WEEK: S(1) M(2) T(3) W(4) T(5) F(6) S(7) UNK(8)

HOW REPORTED: A B C D E F

A= OFFICER DISPATCHED ON CALL; B= REPORT TAKEN BY PHONE; C= COMPLAINANT WALKED IN; D= COMPLAINT WRITTEN IN; E= OFFICER INITIATED; F= OTHER

DIFF. FACTOR

A= RESISTANCE/HOSTILITY; B= WEAPONS; C= UNFOUNDED CALLS; D= MENTAL SUBJECT; E= COMPLAINANT FREQUENTLY INTOXICATED; F= DOMESTIC; N= NORMAL

NARRATIVE

Compl. found the below listed item in the shrubbary off incident location and notified R/O. Item was ran through NCIC tagged and turned into Property room. One .38 cal hand gun, Serial # D347477 possible make Ind. Bros.

JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY | JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY

PROPERTY

	TYPE (GROUP)						TOTAL VALUE
STOLEN							
DAMAGED							
BURNED							
RECOVERED	GUN						100
SEIZED							

STATE'S EXHIBIT 7-2

SUBJECT IDENTIFIED ☐ YES NO ☑ | SUBJECT LOCATED ☐ YES NO ☑ | S.F. AJ | ☑ ACTIVE ☐ ADM. CLOSED ☐ UNFOUNDED | ☐ ARRESTED UNDER 18 ☐ ARRESTED 18 AND OVER | ☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER

FOR EXCEPTIONAL CLEARANCE 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ EXTRADITION DENIED 4. ☐ VICTIM DECLINES COOPERATION. 5. ☐ JUVENILE - NO CUSTODY

REPORTING OFFICER(S)	DATE	UNIT NUMBER	APPROVING OFFICER	DATE	UNIT NUMBER
Moore, T.L.	09/14/04	7335			

FOLLOW-UP INVESTIGATION ☐ YES NO ☐ OFFICER

RECORDS

FORM 1-99 REV

1604

COLUMBIA POLICE
SC0400100

SUPPLEMENTAL INCIDENT REPORT

CASE NUMBER: 04-30187

NCIC INQ. | ENTE

☑ ORIGINAL REPORT ☐ SUPPLEMENTAL REPORT ☐ ADDITIONAL VICTIMS ☐ ADDITIONAL STOLEN PROPERTY
☐ MODIFIES ORIGINAL ☐ CASE STATUS CHANGE ☐ ADDITIONAL OFFENDERS ☐ ADDITIONAL RECOVERED PROPERTY

PAGE 2 of 2 PAGES.

VICT./SUBJ. I.D. OVERFLOW

☐ COMPLAINANT ☐ VICTIM # ☐ SUBJECT # ☐ RUNAWAY ☐ WANTED ☐ WARRANT ☐ ARREST ☐ JAIL ☐ SUMMONS ☐

NAME (LAST, FIRST, MIDDLE) | VICTIM RELATIONSHIP TO SUBJECT: #1 #2 #3 | RESIDENT * J S O U | RACE | SEX | AGE | D.O.B. | ETH

HEIGHT | WEIGHT | HAIR | EYES | FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

ADDRESS | CITY | STATE | ZIP CODE | LOCATION NO. | DAY PHONE H B | EVENING PHONE H B

☐ VICTIM NO. ____ VISIBLE INJURY: ☐ NO ☐ YES EXPLAIN: | COMPLAINT OF NON-VISIBLE INJURIES: ☐ NO ☐ YES | VICTIM USING ALCOHOL ☐ NO ☐ YES ☐ UNK. DRUGS: ☐ NO ☐ YES TYPE: ☐ UNK. | ☐ TWO-MAN VEHICLE ☐ DETECTIVE/SPLASMT. ☐ ONE-MAN VEHICLE ☐ OTHER | ☐ ALONE ☐ ASSISTED

☐ SUBJECT NO. ____: USING ALCOHOL: ☐ NO ☐ YES USING DRUGS: ☐ NO ☐ YES ➡ TYPE: ☐ UNK.

VICT./SUBJ. I.D. OVERFLOW

☐ COMPLAINANT ☐ VICTIM # ☐ SUBJECT # ☐ RUNAWAY ☐ WANTED ☐ WARRANT ☐ ARREST ☐ JAIL ☐ SUMMONS ☐

NAME (LAST, FIRST, MIDDLE) | VICTIM RELATIONSHIP TO SUBJECT: #1 #2 #3 | RESIDENT * J S O U | RACE | SEX | AGE | D.O.B. | ETH.

HEIGHT | WEIGHT | HAIR | EYES | FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

ADDRESS | CITY | STATE | ZIP CODE | LOCATION NO. | DAY PHONE H B | EVENING PHONE H B

☐ VICTIM NO. ____ VISIBLE INJURY: ☐ NO ☐ YES EXPLAIN: | COMPLAINT OF NON-VISIBLE INJURIES: ☐ NO ☐ YES | VICTIM USING ALCOHOL ☐ NO ☐ YES ☐ UNK. DRUGS: ☐ NO ☐ YES TYPE: ☐ UNK. | ☐ TWO-MAN VEHICLE ☐ DETECTIVE/SPLASMT. ☐ ONE-MAN VEHICLE ☐ OTHER | ☐ ALONE ☐ ASSISTED

☐ SUBJECT NO. ____: USING ALCOHOL: ☐ NO ☐ YES USING DRUGS: ☐ NO ☐ YES ➡ TYPE: ☐ UNK.

*J – This Jurisdiction. S – State. O – Out of State. U – Unknown

NARRATIVE

Compl. reported the below suspect walked past them several times in a very nervous & suspicious manner s they had stones placed around the gun to mark it's location.
Suspect * Rawlinson, David Wesley B/m 5'10 201 lbs [redacted] Cola, SC 29203 DL# [redacted]

JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY | JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY

VEH./GUN/ETC.

STATUS: ☐ STOLEN ☐ RECOVERED ☑ FOUND ☐ TOWED ☐ SUSPECT ☐ VICTIM
TYPE: ☐ VEHICLE ☐ GUN ☐ BOAT ☐ LICENSE PLATE ☐ SECURITIES/BONDS, STOCKS ☐ ARTICLE

VIN AND/OR LICENSE NO. | BOAT HULL NO. AND/OR REG. NO.
SERIAL AND/OR OWNER APPLIED NO. D347477 | STATE
YEAR OF REGISTRATION | YEAR OF EXPIRATION | YEAR | MAKE | TYPE
MODEL | STYLE | COLOR BLK | BRAND NAME Ind.Bro | CALIBER .38
NIC NO. | DENOMINATION | ISSUER | SECURITIES DATE
MISCELLANEOUS

TYPE (GROUP)							
STOLEN							
DAMAGED							
BURNED							
RECOVERED							
SEIZED							

SUBJECT IDENTIFIED ☐ YES NO ☑ | SUBJECT LOCATED ☐ YES NO ☐ | S.F. A1 | ☑ ACTIVE ☐ ADM. CLOSED ☐ UNFOUNDED | ☐ ARRESTED UNDER 18 ☐ ARRESTED 18 AND OVER | ☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE 1. ☐ OFFENDER DEATH. 2. ☐ NO PROSECUTION 3. ☐ EXTRADITION DENIED 4. ☐ VICTIM DECLINES COOPERATION 5. ☐ JUVENILE - NO CUSTODY

REPORTING OFFICER(S)	DATE	UNIT NUMBER	APPROVING OFFICER	DATE	UNIT NUMBER
Moore, T.L.	9/14/04	1335			
			FOLLOW-UP INVESTIGATION ☐ YES NO ☐	OFFICER	

RECORDS

FORM 2:91

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

James W. Johnson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRIS ANTHONY LIVERMAN,

APPELLANT

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

JOSEPH L. SAVITZ, III
Senior Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF FACTS 2

ARGUMENT 3

CERTIFICATE OF COUNSEL 12

TABLE OF AUTHORITIES

CASES

In Re. McKelvin, 258 A 2d 452 (D.C. App. 1969) 6

In the interest of Robert D., 340 SC 12, 530 SE 2d 137 (Ct. App. 2000) 7

Neil v. Biggers, 409 U.S. 188 (1972) 3, 4, 5, 8

People v. Dones, 279 A.D. 2d 366 (2001) 8

People v. Miller, 137 AD 2d 626 (NY 1988) 6

State v. Beck, 342 SC 129, 526 SE 2d 679 (2000) 10

State v. Blassingame, 338 SC 240, 525 SE 2d 535 (Ct. App. 1999) 6

State v. Cheatham, 349 SC 101, 561 SE 2d 618 (Ct. App. 2002) 7, 8

State v. Cheeseboro, 346 SC 526, 552 SE 2d 300 (2001) 10

State v. Fletcher, 363 SC 221, 609 SE 2d 572 (Ct. App. 2005) 10

State v. Gibbs, 29 N.C. App. 647, 225 SE 2d 837 (1976) 8

State v. Gore, 283 SC 118, 322 SE 2d 12 (1984) 10

State v. Lyle, 125 SC 406, 118 SE 803 (1923) 10

State v. McLeod, 260 S.C. 445, 196 S.E.2d 645 (1973) 3, 4, 6, 7

State v. Moore, 343 SC 282, 540 SE 2d 445 (2000) 6, 8

State v. Price, 368 SC 494, 629 SE 2d 363 (2006) 9

State v. Ramsay, 345 SC 607, 550 SE 2d 294 (2001) 7

Stovall v. Denno, 388 US 293 (1967) 5

RULES

Rule 104(c), SCRE 4, 7, 8

Rule 1103(b), SCRE 7

Rule 403, SCRE 10

Rule 404(b), SCRE 10

STATEMENT OF ISSUES ON APPEAL

1. The trial judge committed reversible error by refusing to conduct an *in camera* hearing pursuant to *Neil v. Biggers*, 409 U.S. 188 (1972), and *Rule 104(c), SCRE*, on the reliability of Tyrone Smith's identification of Liverman as the shooter, especially since Smith had incorrectly identified Liverman as a participant in an earlier incident shortly before the shooting and his identification of Liverman as the triggerman was the product of an inherently suggestive show-up conducted by the police after Liverman was arrested.

2. The trial judge committed reversible error by allowing the State's purported gang expert to testify that one of Liverman's body markings meant that he had committed two prior murders, as this "evidence" placed Liverman's character at issue in violation of *Rules 403* and *404, SCRE.*

STATEMENT OF FACTS

On October 30 through November 9, 2006, Chris Liverman stood trial in Richland County before Judge James W. Johnson, Jr., and a jury on indictments charging him with two counts of murder. The State alleged that two innocent bystanders, 16 year-old T.M. [redacted] and 12 year-old C.D. [redacted], each were shot once in the head after Liverman opened fire in retaliation for an earlier gang-related dispute. The local media exploited the fears aroused by this case extensively.

The defense contended that an associate of Liverman, Diego Thompson, was the actual shooter. Thompson, who testified for the State, claimed that he had been surprised when Liverman produced a rifle from his shorts and opened fire. ROA p. 248, line 7 – p. 249, line 12; ROA p. 302, lines 7-18. But the central State's witness was 19 year-old Tyrone Smith, who testified that he had watched from an upstairs window directly across the street as someone handed Liverman a rifle and he "kneels downs, aims, starts shooting, stands up, keeps shooting." ROA p. 687, line 17 – p. 688, line 16. Liverman himself did not testify.

Before the jury found Liverman guilty of both murders, it sent out a note indicative of its apprehension: "Regardless of what the verdict is, the jurors were curious of whether any safety precautions have been taken." ROA p. 1269, line 24 – p. 1270, line 3. The judge sentenced Liverman to two consecutive life sentences.

ARGUMENT

1.

The trial judge committed reversible error by refusing to conduct an *in camera* hearing pursuant to *Neil v. Biggers*, 409 U.S. 188 (1972), and *Rule 104(c), SCRE*, on the reliability of Tyrone Smith's identification of Liverman as the shooter, especially since Smith had incorrectly identified Liverman as a participant in an earlier incident shortly before the shooting and his identification of Liverman as the triggerman was the product of an inherently suggestive show-up conducted by the police after Liverman was arrested.

At a pretrial hearing, the defense moved to suppress as unreliable Tyrone Smith's identification of Liverman as the shooter and requested an *in camera* hearing on the matter pursuant to *Neil v. Biggers*, 409 U.S. 188 (1972). ROA p. 14, lines 14-16. The State responded that Smith "knew the defendant prior to this day" and so:

> [T]he court doesn't need to go under a basic review of the totality of the circumstances, meaning the opportunity to observe the person, the lighting conditions, the suggestiveness of even a show-up or a line-up.

ROA p. 15, lines 8-18. The State based its objection on *State v. McLeod*, 260 S.C. 445, 196 S.E.2d 645 (1973). ROA p. 14, line 17 – p. 15, line 8. "So basically," the Assistant Solicitor concluded, "*Neil v. Biggers* doesn't apply." ROA p. 16, lines 3-6. The judge ruled:

> Let the State establish whatever relationship or prior knowledge there may be, and then I will see where that falls within *Neil v. Biggers* and *State v. McLeod* and whether there is going to be additional showing or more showing than this relationship at that point in time.

ROA p. 17, lines 10-15. The State and the defense conducted a circumscribed examination of Smith limited to the extent and nature of his prior relationship with Liverman. Defense counsel then renewed her objection "to the lack of … a full *Neil v. Biggers* hearing in this matter." ROA p. 41, lines 17-19. The judge refused to expand the scope of the hearing, noting that the defense "can still argue [to the jury] about its weight." ROA p. 44, line 9 – p. 45, line 9.

The defense again reiterated its motion for a complete *Neil v. Biggers* hearing at the start of trial. ROA p. 74, line 3 – p. 78, line 21. Counsel added that a full *in camera* hearing was also required by *Rule 104(c), SCRE,* which explicitly provides:

> Hearings on the admissibility of … pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury.

ROA p. 79, line 25 – p. 80, line 19. The judge maintained, "[U]nder *McLeod,* a full *Neil v. Biggers* is not required." ROA p. 80, line 20 – p. 81, line 2. This ruling was reversible error.

T.M. and C.D. were killed sometime after 9:00 the night of August 26, 2004. ROA p. 148, lines 1-5. The neighborhood where the incident occurred was dark and the various people moving about the area were indistinct. ROA p. 122, line 23 – p. 123, line 2. Nevertheless, as previously noted, Tyrone Smith testified that, from an upstairs window, he observed a person he identified as Liverman firing a rifle down the street. ROA p. 687, line 17 – p. 688, line 16.

Smith's identification of Liverman as the shooter was crucial to the State's case, but there were substantial problems with the reliability of his testimony in this regard,

deficiencies the defense was prevented from exploring at the truncated pre-trial hearing on the issue.

Although Smith claimed to have known Liverman "[s]ince elementary school," he was unaware of his real name until sometime after he had identified Liverman to the police as the person among several other suspects who had shot T.M. and C.D. ROA p. 677, lines 9-15; ROA p. 691, line 18 – p. 693, line 6. Smith also incorrectly identified Liverman to the police as the leader of a gang who had threatened to kill him a short time before the shooting. ROA p. 516, lines 7-11; ROA p. 682, line 23 – p. 685, line 14. Smith definitively identified Liverman as the shooter following a show-up conducted by the police that same night, shortly after Liverman was arrested. ROA p. 425, lines 6-17; ROA p. 438, line 7 – p. 449, line 20; ROA p. 691, line 18 – p. 693, line 12.

Due process protects against the admission of evidence derived from suggestive identification procedures. *Stovall v. Denno*, 388 US 293 (1967).

> It is the likelihood of misidentification which violates a defendants right to due process… . Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous. But as *Stovall* makes clear, the admission of evidence of a show-up without more does not violate due process.

Neil v. Biggers, 409 US at 199.

The "central question" is "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive," and the factors to be considered in evaluating the likelihood of misidentification include:

> The opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. at *199-200*.

Single person show-ups are "particularly disfavored in the law" because they are suggestive by their very nature. *State v. Moore*, 343 SC 282, 540 SE 2d 445, 448 (2000) (citing *Stovall*); *State v. Blassingame*, 338 SC 240, 525 SE 2d 535 (Ct. App. 1999).

> A recognized exception to the general rule that show-ups are inherently suggestive [citations omitted] exist where the witness recognized the perpetrator at the time of the commission of the crime and the basis for that recognition was the fact the witness knew the perpetrator prior to the commission of the offense. In such situations, the show-up is of the nature of a conformation, rather than an identification [citations omitted].

People v. Miller, 137 AD 2d 626, 628 (NY 1988). ;see *In Re. McKelvin*, 258 A 2d 452 (D.C. App. 1969).

In *State v. McLeod,* the defendant was arrested and taken to the victim's home the morning after she was attacked to make sure he was her assailant.

> It is apparent that she did not know her assailant's first name, but she identified the person arrested as the one who had assaulted her… It is [also] apparent from the record that [the victim] knew the defendant. She had seen him many times at a neighborhood store near their home; she knew the defendant's mother and knew him to be her son.

196 SE 2nd at *645*. The defendant argued that the show-up was "unfair and untrustworthy," relying upon the *Stovall* line of cases. *Id* at *645*. This Court held:

> The rulings in these decisions attempt to avert the danger of mistaken identity by establishing mandatory constitutional and procedural safeguards. The rules are designed for application where the accused and the victim are strangers to each other; they were never intended to apply where the victim knew the accused. The constitutional and procedural safeguards… simply do not apply under the facts of this case.

Id.

Rule 104, SCRE, was adopted in 1995. *Rule 1103(b), SCRE.* Albeit in dicta and without reference to *Rule 104*, *In the interest of Robert D.*, 340 SC 12, 530 SE 2d 137 (Ct. App. 2000), suggested that *McLeod* survived the adoption of *Rule 104*. Subsequently, in *State v. Ramsay*, 345 SC 607, 550 SE 2d 294, 297 (2001), the Supreme Court ruled:

> Where identification is concerned, the general rule is that a trial court must hold an *in camera* hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation.

In recognition of *Ramsay*, this Court held:

> Rule 104(c) unambiguously mandates hearings on the admissibility of out of court identifications of the accused shall in all cases be held outside the presence of the jury. The adoption of Rule 104 did not abrogate the viability of the rulings in the pre-Rules of Evidence cases. The *in camera* hearing required by Rule 104(c) allows a defendant to question a witness more stringently regarding possible mis-identification or bias outside the presence of the jury. If the defendant is required to question a victim/witness… only in the jury's presence, the defendant may be required to severely curtail the questioning so as not to inflame the jury.

State v. Cheatham, 349 SC 101, 561 SE 2d 618, 627 (Ct. App. 2002).

If it is still viable, *State v. McLeod* only applies where the prosecution unequivocally establishes that "[the] defendant and the witness who identified him as the perpetrator had a sufficient relationship prior to the incident so that suggestiveness was not a concern." *People v. Dones*, 279 A.D. 2d 366 (NY 2001). The fact that the witness knew the defendant prior to the commission of the crime is only another factor in the *Neil v. Biggers* analysis when, as here, the witness has incorrectly identified the defendant previously and subsequently participates in an inherently suggestive show-up. See, for example, *State v. Gibbs*, 29 N.C. App. 647, 225 SE 2d 837 (1976). *Neil v. Biggers* itself stressed that "the testimony is undisputed that the victim made no previous identification of any of the show-ups, line-ups or photographic showings. Her record for reliability was thus a good one, as she had previously resisted whatever suggestiveness inheres in a show-up." *409 US* at *201*.

Given the importance of Tyrone Smith's testimony in identifying Liverman as the shooter - instead of, say, Diego Thompson – the failure to hold a full *Neil v. Biggers* could not have been harmless error. For this reason, the Court should either reverse or remand for a new trial or remand for a hearing which complies with that case and *Rule 104(c)*. *State v. Moore*; *State v. Cheatham*.

ARGUMENT

2.

The trial judge committed reversible error by allowing the State's purported gang expert to testify that one of Liverman's body markings meant that he had committed two prior murders, as this "evidence" placed Liverman's character at issue in violation of *Rules 403* and *404, SCRE.*

The State introduced a substantial amount of evidence on purported gang symbols and rituals, such as hand signals, tattoos and other markings. One of these witnesses testified specifically about the various tattoos and brands on Liverman's body. One of these, he suggested, meant that "you have to have bodies attributed to you." ROA p. 825 lines 10-15. Defense counsel objected and moved for a mistrial. ROA p. 823 line 16- p. 826 line 14. The Assistant Solicitor admitted that the marking "could mean this...could mean other things too" and that it was based on hearsay, but argued that the evidence was nevertheless admissible under *State v. Price*, 368 SC 494, 629 SE 2d 363 (2006). ROA p. 826 lines 16-p. 829 line 2. The judge overruled the defense objection. ROA p. 829 line 21- ROA p. 831 line 3.

Direct examination resumed. Pointing to the two marks in question, the Assistant Solicitor asked, "What could those signify?" ROA p. 831 line 11- p. 832 line 3.

> Witness: [I]t could represent bodies attributed to that individual.
> Q: And when you say "bodies attributed to that individual," would that be the person wearing the tattoos?
> A: Yes ma'am.
> Q: And when you say "bodies," what do you mean?
> A: That they have committed some sort of act or murder where bodies-- dead people.

ROA p. 832, lines 2-17. This testimony referred to possible homicides prior to the two for which Liverman was standing trial, which the State contended were symbolized by "two tear drops which are right above the right eye" and which Liverman apparently added after the latter incident while awaiting trial. ROA p. 834 line 4- p. 832 line 16; ROA p. 864 line 23- p. 865 line 9.

At the conclusion of the State's case, the defense renewed its objection, arguing that the prosecution had introduced "inadmissible character propensity evidence." ROA p. 896 line 4- p. 898 line 2. The judge again denied the motion. ROA p. 899 line 20- p. 900 line 2.

Rule 404(b), SCRE, provides:

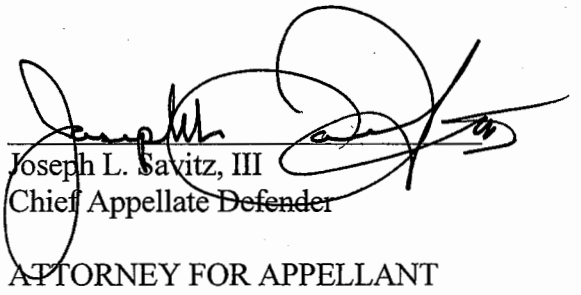
> Evidence of other crimes, wrongs, or acts is no admissible to prove the character of a person in order to show action and conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

See also *State v. Lyle*, 125 SC 406, 118 SE 803 (1923). If not the subject of a conviction, a prior bad act must be established by clear and convincing evidence. *State v. Beck*, 342 SC 129, 526 SE 2d 679 (2000); *State v. Fletcher*, 363 SC 221, 609 SE 2d 572 (Ct. App. 2005).

Even if the "evidence" Liverman had been involved in two prior murders was clear and convincing—and the State conceded it was not—it still would have been inadmissible under *Rule 404* and *State v. Lyle*, not to mention *Rule 403, SCRE* as unduly prejudicial and inflammatory. Compare *State v. Cheeseboro*, 346 SC 526, 552 SE 2d 300 (2001). "When, as here, the previous alleged bad act is strikingly similar to the one for which the [defendant] is being tried, the danger of prejudice is enhanced." *State v. Gore*, 283 SC 118, 322 SE 2d 12, 13 (1984).

The error in admitting this proportionate evidence that Liverman may have committed to prior homicides could not possibly could have been harmless. As noted previously, the state's case hinged primary upon the testimony of Tyrone Smith and there were other possible perpetrators present, such as Diego Thompson. For this reason, the Court should reverse Liverman's convictions and remand for a new trial.

Respectfully submitted,



Joseph L. Savitz, III
Chief Appellate ~~Defender~~

ATTORNEY FOR APPELLANT

This 8th day of September, 2008.

CERTIFICATE OF COUNSEL

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

September 8, 2008

Joseph L. Savitz, III
Chief Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

James W. Johnson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRIS ANTHONY LIVERMAN,

APPELLANT

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 William Edgar Salter, III, Esquire, at the Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 8th day of September, 2008.

Joseph L. Savitz, III
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of September, 2008.

Karen D. Elliott (L.S.)
Notary Public for South Carolina
My Commission Expires: March 19, 2017.

STATE OF SOUTH CAROLINA
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THE STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

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APPELLANT

FINAL BRIEF OF RESPONDENT

HENRY DARGAN MCMASTER
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211
(803) 734-3727

WARREN B. GIESE
Solicitor, Fifth Judicial Circuit
Post Office Box 192
Columbia, SC 29202-0192
(803) 576-1800

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL vii

STATEMENT OF THE CASE 1

ARGUMENT 9

I. Assuming that the issue is preserved for appellate review, despite Appellant's failure to renew his in camera objection when the witness testified before the jury, the trial judge did not abuse his discretion by ruling that the testimony of Tyrone Smith was not subject to the procedural safeguards in *Neil v. Biggers*, where his ruling was consistent with *State v. McLeod*; and he ultimately considered the admissibility of Smith's identification *in camera*, thereby providing Appellant a constitutionally adequate hearing on the issue of identification. 9

A. How issue was raised in the trial court 9

B. Discussion 15

1. Procedural bar 15

2. The trial judge properly relied upon *McLeod* 15

3. The hearing held and the trial judge's alternative findings comport with *Neil v. Biggers* 21

II. Assuming that is argument under Rule 404(b), SCRE, is not procedurally barred by his failure to raise the same argument in the trial court, the trial judge properly denied Appellant's motions for a mistrial based on the State's presentation of expert opinion testimony concerning the the meaning of two hash marks branded on Appellant's back because this testimony did not violate Rules 403 and 404(b), SCRE, since it was tied to the murders for which Appellant was on trial, and it was relevant to both identity of the shooter and motive. Also, Appellant was not prejudiced by the ruling. 27

A. How the matter was raised in the trial court 27

B. Discussion 34

1. Appellant's argument under Rule 404(b), SCRE, is not preserved for appellate review because not raised in the trial court. 34

2. Appellant's mistrial motion was properly denied 34

CONCLUSION 46

TABLE OF AUTHORITIES

FEDERAL CASES

Adams v. Township of Redford, No. 95-1279, 1996 WL 250578 36

Brady v. Maryland, 373 U.S. 83 (1963) 14, 24

Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974) 41

Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967) 18

Manson v. Brathwaite, 432 U.S. 98, 114 (1977) 17

Neil v. Biggers, 409 U.S. 188 (1972) 9, 12, 14, 15, 16, 17, 18

Rios v. Rocha, 299 F.3d 796, 800 n. 5 (9th Cir.2002) 36

State v. Caldwell, Op. No. 4392, 2008 WL 2078139, 6 (Ct.App., May 18, 2008) 16

Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) 17, 18

United States v. Abel, 469 U.S. 45, 49 (1984)..... 35

United States v. Hankey, 203 F.3d 1160 (9th Cir. 2000) 37

United States v. Rodriguez, 925 F.2d 1049, 1053 (7th Cir.1991) 36

United States v. Santiago, 46 F.3d 885, 889 (9th Cir.1995) 36

United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) 18

STATE CASES

People v.Tas, 51 N.Y.2d 915, 916, 415 N.E.2d 967, 967-68, 434 N.Y.S.2d 978, 979 (N.Y. Ct. App. 1980) 20, 24, 25

Connecticut v. Henry, 805 A.2d 823, 837 (Conn. App. Ct. 2002) 37

Deberry v. State, 457 A.2d 744, 754 (Del. 1983) 22, 24

People v. Reynolds, 373 N.E.2d 650, 654 (1978) 22

Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506 (2005) 35

Interest of Robert D., 340 S.C. 12, 18, 530 S.E.2d 137, 140-41 (Ct.App. 2000) ... 18, 19, 22, 24

Langley v. Boyter, 286 S.C. 85, 87, 332 S.E.2d 100, 101 (1985) 20

Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002) 35

People v. Contreras, 144 Cal.App.3d 749, 192 Cal.Rptr. 810 (1983) 35

People v. Dones, 279 A.D.2d 366 (N.Y. 2001) 19

People v. Hairston, 10 Ill.App.3d 678, 294 N.E.2d 748 (1973) 35

People v. Mendez, 221 Ill.App.3d 868, 164 Ill.Dec. 321, 582 N.E.2d 1265, 1267 (1991) 35

People v. Parrish, 152 Cal.App.4th 263, 278, 60 Cal.Rptr.3d 868, 879 (Cal.App. 2 Dist. 2007) 36

Powell v. State, 566 So.2d 1228, 1236 (Miss. 1990) 17

Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct.App.1998) 15

State v. Arnold, 266 S.C. 153, 157, 221 S.E.2d 867, 868 (1976) 38

State v. Bailey, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) 20, 34

State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) 39

State v. Blassingame, 338 S.C. 240, 525 S.E.2d 535 (Ct.App.1999) 23

State v. Brown, 274 S.C. 48, 260 S.E.2d 719 (1979) 21

State v. Brown, 356 S.C. 496, 504, 589 S.E.2d 781, 785 (Ct.App.2003). 17, 23

State v. Byram, 326 S.C. 107, 113, 485 S.E.2d 360, 363 (1997) 20, 34

State v. Caldwell, 283 S.C. 350, 322 S.E.2d 662 (1984) 35

State v. Campbell, 78 Wash.App. 813, 901 P.2d 1050, 1055 (1995) 36

State v. Cheatham, 349 S.C. 101, 117-18, 561 S.E.2d 618, 627 (Ct.App.2002) 19

State v. Cooper, 514 S.E.2d 584 (S.C. 1999) 38

State v. Earl, 702 N.W.2d 711, 716 (Minn.2005) 36

State v. Gagum, 328 S.C. 560, 492 S.E.2d 822 (Ct.App.1997) 15

State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991) 45

State v. Gillian, 373 S.C. 601, 613, 646 S.E.2d 872, 878 (2007) 44

State v. Harris, 340 S.C. 59, 530 S.E.2d 626 (2000) 38

State v. Hart, 306 S.C. 344, 345-46, 412 S.E.2d 380, 381 (1991) 38

State v. Howard, 295 S.C. 462, 369 S.E.2d 132 (1988) 26, 41

State v. Hoyte, 306 S.C. 561, 413 S.E.2d 806 (1992) 23

State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) 38

State v. Kirby, 269 S.C. 25, 236 S.E.2d 33, 34 (1977) 39

State v. Mansfield, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (Ct.App.2000) 23

State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000) 35

State v. McLeod, 260 S.C. 445, 196 SE 2d 645 (1973) 9, 10, 12, 15, 17, 18, 20 22, 24

State v. Mueller, 319 S.C. 266, 460 S.E.2d 409 (Ct.App.1995) 15

State v. Myers, 359 S.C. 40, 596 S.E.2d 488 (2004) 35

State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) 44

State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct.App.1999) 39

State v. Price, 368 S.C. 494, 629 SE2d 363 (2006) 28, 35, 36, 44

State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) 20, 34

State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) 19

State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990) 25, 41

State v. Romero, 178 Ariz. 45, 870 P.2d 1141, 1147-48 (App.1993) 35

State v. Ruof, 296 N.C. 623, 252 S.E.2d 720 (1979) 35

State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) 15

State v. Simmons, 308 S.C. 80, 82-83, 417 S.E.2d 92, 93 (1992) 19

State v. Sinclair, 275 S.C. 608, 274 S.E.2d 411 (1981) 21

Contra State v. Terry, 339 S.C. 352, 356-57, 529 S.E.2d 274, 277 (2000) 44

State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (Ct.App.2003) 38

State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) 16

State v. Tufts, 355 S.C. 493, 497, 585 S.E.2d 523, 525 (S.C.App.,2003) 15

State v. Vickers, 159 Ariz. 532, 768 P.2d 1177, 1182 (1989) 35

State v. Watts, 320 S.C. 377, 465 S.E.2d 359 (Ct.App.1995) 20

State v. Garcia, 99 N.M. 771, 664 P.2d 969 (1983) 35

FEDERAL STATUTES

Rule 703, FRE. ..... .37

STATE STATUTES

Rule 104 (c) , SCRE ..... .vii, 19, 22

Rule 403, SCRE ..... .vii, viii, 27

Rule 404 (b), SCRE ..... vii, viii, 27, 34, 37, 39

Rule 702, SCRE ..... .34

Rule 703, SCRE 32, 37, 40

OTHER AUTHORITIES

Admissibility of Evidence of Accused's Membership in Gang, 39 A.L.R.4th 775 (1985). . . .35, 36

STATEMENT OF ISSUES ON APPEAL

1. The trial judge committed reversible error by refusing to conduct an *in camera* hearing pursuant to *Neil v. Biggers,* 409 U.S. 188 (1972), and *Rule 104(c), SCRE,* on the reliability of Tyrone Smith's identification of Liverman as the shooter, especially since Smith had incorrectly identified Liverman as a participant in an earlier incident shortly before the shooting and his identification of Liverman as the triggerman was the product of an inherently suggestive show-up conducted by the police after Liverman was arrested.

2. The trial judge committed reversible error by allowing the State's purported gang expert to testify that one of Liverman's body markings meant that he had committed two prior murders, as this "evidence" placed Liverman's character at issue in violation of *Rules 403* and *404, SCRE.*

COUNTER STATEMENT OF ISSUE ON APPEAL

I. Whether, assuming that the issue is preserved for appellate review despite Appellant's failure to renew his in camera objection when the witness testified before the jury, the trial judge abused his discretion by ruling that the testimony of Tyrone Smith was not subject to the procedural safeguards in *Neil v. Biggers*, where his ruling was consistent with *State v. McLeod*; and he ultimately considered the admissibility of Smith's identification *in camera*, thereby providing Appellant a constitutionally adequate hearing on the issue of identification?

II. Whether, assuming that his argument under Rule 404(b), SCRE, is not procedurally barred by his failure to raise the same argument in the trial court, the trial judge properly denied Appellant's motions for a mistrial based on the State's presentation of expert opinion testimony concerning the the meaning of two hash marks branded on Appellant's back because this testimony did not violate Rules 403 and 404(b), SCRE, since it was tied to the murders for which Appellant was on trial, and it was relevant to both identity of the shooter and motive. Also, was Appellant prejudiced by the ruling?

STATEMENT OF THE CASE

Chris Anthony Liverman (Appellant) is currently incarcerated in the McCormick Correctional Institution, of the South Carolina Department of Corrections, pursuant to commitment orders from the Richland County Clerk of Court. The Richland County Grand Jury indicted Appellant at the April 20, 2005 term of court for two counts of murder (05-GS-40–6831 and -06832). The charges stemmed from the shooting deaths of two innocent youngsters - sixteen year old T.M. and twelve year old C.D. - each of which had been shot once in the head. Assistant Richland County Public Defenders Elizabeth Franklin, Carolyn Gripp, and Maxwell Schardt represented Appellant on these charges. Fifth Circuit Solicitor Warren B. Giese and Assistant Solicitors Kathryn Luck Campell and Margaret Fent prosecuted the case.

On August 28, 2006 the Honorable James W. Johnson heard motions and selected a jury. Because of concerns expressed by both parties, however, he continued the matter for thirty days. Appellant thereafter received a jury trial before Judge Johnson on October 30-November 9, 2006. The jury convicted him of both murders; and Judge Johnson sentenced him to two consecutive sentences of life imprisonment.

Appellant timely served and filed a notice of appeal.

STATEMENT OF FACTS

The facts of this case are yet another example of the brutally senseless violence caused by gangs that is becoming increasingly prevalent in South Carolina and America as a whole. Two innocent people- twelve year old C.D. and sixteen year old T.M. were killed in a hail of gunfire aimed at C.D.'s house[1], on the night of August 26, 2004. The murders resulted from a vendetta by members of the "Folk Nation" against a rival gang, "the Bloods." **R. pp. 109-15; 121-58; 588-93.**[2] Each victim had a single gunshot wound to the head and died from injuries caused by the gunshot wound. **R. pp. 885-95.**

The events leading up to the murders unequivocally demonstrated a gang-related motive. Carl Duane "Pooh" Smith testified that he and several friends had driven over to T.S. Martin Dr. earlier that evening. They were looking for a person named Delshawn, who was a member of the Bloods and had been involved in a confrontation with Pooh's friends earlier that day. This group were wearing black, which is the color of Folk Nation. They were unable to locate Delshawn and they left after a girl called Pooh by name. Pooh (Carl Smith) later saw Appellant at Bayberry Apartments told him about what had occurred earlier. Appellant was accompanied by his friend and fellow gang member, Goo, as well as the other people. **R. pp. 174-193; 219.**

Appellant then told Pooh (Smith) that someone "from T.S. Martin had run him out from "there several days earlier." He also showed Pooh three or four bullets that he said he had just obtained, and he told Pooh that he had a .22 caliber gun. However, Pooh did not see a gun at that

---

[1] She lived on [redacted]

[2]Three projectiles were recovered from the home, and ten fired cartridge casings were found a short distance from C.D.'s home

point. Appellant said that he was going to T.S. Martin, and he said that he might "go on a lick." Pooh tried to stop Appellant from going to T.S. Martin because he was afraid the girl who recognized him would blame him for any trouble; but Appellant refused to listen to him. **R. pp. 191-99.**

Diego Thompson testified that he is Appellant's friend. He knew Appellant, or Baby Jesus, from school and from seeing Appellant at Bethel Bishop Apartments, where Appellant's grandmother lived. Thompson denied that he was in a gang. However, he knew a number of gang members. Thompson testified that Appellant was a member of the Folk Nation gang. Close to dark on the night of the murders, Thompson ran into Appellant at Bethel Bishop Apartments while Thompson was on his way home. Appellant told Thompson that he had to "handle something" on T.S. Martin. **R. pp. 233-40.**

Thompson, who was unaware that Appellant had a gun, agreed to go. As they were walking, Appellant and Thompson met up with three more people Ty, Goo and Little Chris.[3] These three also agreed to go to T.S. Martin. While still in Bethel Bishop Apartments, Pooh warned Appellant to be careful "because they had pulled some guns on some Bloods." Along the way to T.S. Martin, Thompson saw Appellant put a black bandanna, or "flag" around his neck. This indicated that he was "repping his set," or representing the gang, Insane Gangster Disciples.[4] **R. pp. 245-46.**

Once they reached T.S. Martin Dr., Little Chris asked a "little boy" who was sitting on a porch if he was Slob, which is a disrespectful term for Bloods. The boy replied that there was not any gangbanging there and he went to a telephone. Thompson told Appellant that they should go because the boy was either calling the police or "other boys to come over. Baby Jesus said that's

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[3]Goo, whose name is Reginald Joyner, **R. p. 469**,was a member of the Folk Nation gang.

[4] Again, the Insane Gangster Disciples are a part of the Folk Nation.

what he wanted [the boy] to do." At this point, Appellant pulled a .22 caliber rifle from his pants leg. Goo, who was standing next to Appellant, was armed with a shotgun. Thompson and the others were a slight distance away from them. **R. pp. 243-50**.

Thompson said, "it's time for us to go, " and he started to back away. Appellant pointed the gun at the house where the little boy had been. He then told Goo in sign language, to shoot at the house. As Thompson and the other two males began running away, Thompson "overheard six or seven gunshots." When Thompson briefly turned around, he saw Appellant throw the rifle down and pick up the shotgun. However, no other shots were fired. Thompson continued running from the scene, as did all of the people who had gone to T.S. Martin, with the exception of Appellant. Appellant eventually followed and he disposed of his weapon near the gate to the Colony Apartments. **R. pp. 250-56**.

Shante Bethel testified that she was a member of Folk Nation. On the night of August 26, 2004, she saw Appellant, whom she called Baby Jesus, and Pooh at Bethel Bishop Apartments. Appellant said that he was going to T.S. Martin "to go ride with some Slobs." She thereafter saw Appellant leave Bethel Bishop Apartments with three others: Goo (Joyner) Diego Thompson and "Mirage."**R. pp. 340-45**.

A little later, she saw Appellant come up to Bethel Bishop Apartments "full speed." She overheard him tell a man there that he and the others had just left a shooting at T.S. Martin, "that they were spraying" the gunfire and two little kids got shot. He also said that they had done it because "they had gotten in something with some Bloods" earlier in the evening. After this conversation, Appellant ran to Bayberry Apartments, taking a "cut" near the apartment complex. **R. pp. 345-49**.

Tyrone Smith testified that he had known Appellant, or Baby Jesus, for about seven years at the time of the shooting. Smith was living on T.S. Martin Dr., with his aunt and cousins at the time. He saw Appellant talking to his friend Delshawn at Bayberry Apartments, on the afternoon of August 26, 2004. Delshawn was a member of the Bloods. He and Delshawn eventually went to Smith's residence.[5] Delshawn left shortly after 9:00 p.m. and went home. **R. pp. 676-82.**

The trouble began after Delshawn left. Smith received a call from C.D. ., who told him that "some boys had come to her and asked where the Slobs stayed." Smith later saw two males get out of a white car. One went to a house two doors away from him. However, the other male, whose face was partially covered by a black bandanna, approached Smith on his aunt's porch. This man pointed a gun at him and said, "I'll kill you." When this person turned around after realizing that Smith was not Delshawn, Smith ran into the house and called the police. **R. pp. 682-84.**

The white car was gone by the time the police arrived and were informed of the incident. After the police left to speak with Delshawn, Smith went back out onto the porch of his home with his two female cousins and another girl. This is when he saw Appellant and four other males walking up the street. Appellant's face was not obscured by a bandanna, although the other males were wearing bandannas. Smith and the girls immediately ran into the house. Smith ran upstairs and looked out of "the left-hand window."[6] **R. pp. 684-86.**

Smith saw Appellant get a long, dark rifle from someone and hand someone a revolver. One gun was pointed at C.D. 's house. Appellant kneeled, aimed at the same house and opened

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[5] One of Delshawn's sisters lived next door to Smith, while another lived two houses away from him. **R. 681.**

[6] The lights were off inside of the house.

fire. He continued shooting after he stood up again. Smith testified that he heard multiple gunshots.[7] The other people who were with Appellant ran back the same direction from which they had come, as soon as Appellant began shooting. Appellant tried to re-cock his weapon but a bullet did not "come up." So he turned and ran away from the scene. In all, Smith looked out the window for four or five minutes. **R. pp. 686.91; 694-97; 696-98.**

The police arrived a "while later" and Smith gave a statement concerning the shooting to Inv. Joe Gray, of the City of Columbia Police Department, in Gray's car. Smith's statement identified Appellant as the shooter by nickname. Minutes later, Inv. Gray told him that the police had caught someone going through a "cut". Inv. Gray then drove him to this location. Smith remained in Gray's car, while Officer Whittle brought Appellant to the side of Inv. Gray's car. Although it was dark outside, both police vehicles at the show-up had their lights on, and Inv. Gray testified that his high beams were on. Also, Officer Whittle shined a light on Appellant's face. Smith immediately identified Appellant as the shooter. **R. pp. 399-404; 419-429; 433-34; 438-42; 448-49; 691-93; 731-35; 747-52.**

Appellant gave two statements to Inv. Gray following his arrest. The waiver of rights for his first statement began at 12:17 a.m. on August 27, 2004. Appellant initially denied being at T.S. Martin. When Inv. Gray told him that witness information put him there at the time of the shooting, however, he admitted that he had been there with "Ty and Chris from Belvedere" and two of their friends. Still, he claimed that one of the other persons in the groups had done the shooting. This person used a sawed-off gun that had a scope on it. A person named O.B. had a dispute with Delshawn. **R. pp. 444-46.**

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[7] His cousin dialed 911 during the incident. **R. pp. 689-90; 700.**

Roughly twelve hours later, following the victims' deaths, Inv. Gray again spoke to Appellant. After serving arrest warrants for murder on Appellant and obtaining a waiver of rights, Inv. Gray told Appellant that he had some qualifications about the shooting that needed to be clarified. Appellant again waived his rights and gave another statement. **R. pp. 470-74.**

In this statement, which was given at 1:25 p.m. on August 27, he admitted that he had been shooting a .32 caliber automatic when the incident occurred at T.S. Martin; but he claimed that he only had two bullets. He also said that he had shot at a "top window [of a house] with a round hole like an attic." The other person was shooting "down the street in the dark."[8] Further, Appellant said he had returned the .32 weapon to the person who handed it to him; and he denied that Goo, Diego Thompson or Pooh had been present. **R. pp. 472-78.**

Finally, the State presented two experts in gang recognition who gave expert opinion testimony about the significance of the two teardrop tattoos that Appellant put on his face after his arrest for the murders. *See also* **Argument II.** Inv. Edward O' Cain, an expert in gang activity and gang recognition, testified that he had viewed the two teardrop tattoos on Appellant's face, "right [below] the right eye." One of these is an open teardrop. O'Cain opined that this "can represent quite a few things depending on who you're talking to." Under gang rules, however, it is supposed to signify that a "family member" - whether a fellow gang member, a relative or an innocent person- has died. The other teardrop was filled in, and this means that the wearer has killed someone in retribution. It can, however, have some other meanings. **R. pp. 834-35.**

If someone falsely claimed status, such as with a tattoo that he had not earned, he could be

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[8] Officers returned to the scene but could not find damage to any house other than C.D. 's, including a house that resembled the house Appellant described.

beaten or other gang members may try to physically remove the tattoo. **R. p. 836-37.**

Officer Walter Mahoney, of the City of Columbia Police Department's gang task force testified about gangs in the Columbia area. In his expert opinion, "[t]he open teardrop could represent a lost soldier [a fellow gang member] or ... some innocent person that might have been killed by mistake. The closed teardrop is the body. He is a gang member that took somebody out." (Sic). **R. p. 870, l. 14-p. 871, l. 1.**

ARGUMENTS

I. Assuming that the issue is preserved for appellate review, despite Appellant's failure to renew his in camera objection when the witness testified before the jury, the trial judge did not abuse his discretion by ruling that the testimony of Tyrone Smith was not subject to the procedural safeguards in *Neil v. Biggers*, where his ruling was consistent with *State v. McLeod*; and he ultimately considered the admissibility of Smith's identification *in camera*, thereby providing Appellant a constitutionally adequate hearing on the issue of identification.

Appellant's first argument is that the trial judge erroneously refused to hold a hearing comporting with the United States Supreme Court's decision in *Neil v. Biggers,* 409 U.S. 188 (1972) before allowing the State to present the eyewitness identification testimony of Tyrone Smith. Respondent disagrees and submits that the trial judge did not abuse his discretion by ruling that Smith's testimony was not subject to the procedural safeguards in *Neil.* Assuming that the issue is not barred by Appellant's failure to renew his *in camera* objection when the witness testified before the jury, the trial judge's ruling was consistent with the South Carolina Supreme Court's decision in *State v. McLeod,* 260 S.C. 445, 196 SE 2d 645 (1973), because Smith knew Appellant prior to the night Appellant murdered C.D. and T.M.; and Smith had already identified Appellant to police as the shooter, by nickname, and he had described Appellant's clothing, before police took him to a one person show-up a short time after the murder and only blocks from the scene. Further, the trial judge ultimately considered the admissibility of Smith's identification *in camera* and thereby provided Appellant a constitutionally adequate hearing on the identification issue.

A. How issue was raised in the trial court

The trial judge addressed the identification of Appellant by an eyewitness before the original start of the trial on August 28, 2006. When the trial judge asked whether the State was ready for a *Neil v. Biggers* hearing, the State asserted that it was not necessary for him to review the totality of the circumstances of the identification because the eyewitness knew Appellant. In support of this position, the State relied upon the South Carolina Supreme Court's decision in *McLeod, supra.* The

State maintained that *McLeod* had held that the procedural safeguards set forth in *Neil* and the cases preceding it simply do not apply where the victim and the defendant know each other. Rather, those cases apply where the victim and accused are strangers. **R. pp. 14-15.**

Appellant maintained that the victim in *McLeod* was assaulted and had "an ample time to make an identification." The State's discovery in this case, however, merely reflected that the witness knew Appellant by a nickname. He asserted that the two did not attend school together and that they had not had any relationship before the night of the shooting. Also, the witness was "quite some distance away from the person who allegedly committed this act." He asserted that *McLeod* did not apply, in the absence of a pre-existing relationship. **R. pp. 16-17.**

The State presented eyewitness, Tyrone Smith. Smith testified that he was nineteen years old, and that he was present when the shootings occurred on T.S. Martin Dr., on August 26, 2004. He was looking out of an upstairs window of another house on T.S. Martin Dr. and he watched the shooting.[9] He saw the shooting and identified Appellant as the shooter. **R. pp. 17-19.**

Smith testified that he had known Appellant since roughly fifth grade. They did not go to school together. However, Appellant used to live in an apartment next door to Smith's aunt, in Saxon Homes. Smith described Appellant as a friend and explained that Appellant would communicate with a deaf friend, named Goo; for him.[10] Smith saw Appellant for "about four days in a row" during that period. Also, he had seen Appellant twice, in 2003, at a McDonald's where Appellant worked; and he saw Appellant at Bayberry Apartments speaking with someone named Delshawn. Smith knew

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[9]Smith described this as the "left hand room" upstairs.

[10] He last saw Goo two days before the murder. **R. p. 22.** Goo is Reginald Joyner, who was present when the murders occurred. **R. p. 469.**

Appellant by the nickname "Baby Jesus." **R. pp. 19-24; 27-28.**

On cross-examination, Smith testified that Appellant was wearing a white shirt and shorts when he saw Appellant on the morning of the murders. Also, Appellant's hair was "sprayed" and he had beads in the back. Two brothers, "Money" and "Cash" were also present. However, Smith was roughly two houses away from Appellant and did not speak to him at Bayberry Apartments. The sun was out, Smith does not wear glasses and he had not used either drugs or alcohol that day. **R. pp. 24-27.**

Appellant maintained that the State had not established a sufficient, reliable showing of a pre-existing relationship between Smith and him. He argued that his physical characteristics had changed over the course of seven years since Smith saw him on four occasions. Also, Smith did not describe the McDonald's incident; and Smith only allegedly saw him at a distance at Bayberry Apartments on the day of the shooting. **R. pp. 29-30.**

The trial judge found that the State's evidence was "awfully close" to *McLeod*. However, before he made a ruling under the totality of the circumstances, he stated that " I think I still have to hear exactly what was going on at the time of the identification." Therefore, he allowed the State to present additional testimony concerning the actual identification. **R. p. 30, ll. 13-21.**

Smith testified that Appellant was "right across the street" from him when he saw the shooting. "[P]retty soon after the shooting," he gave a statement to Inv. Joe Gray, in Gray's police car. In his statement, he identified the shooter, Appellant, by nickname, and he described the shooter's clothing. The shooter wore a white shirt, shorts, a camouflage bandanna on his head and something shiny or reflective on his shoes, which Smith described as "New Balances." Inv. Gray thereafter drove him to another location about four blocks away from the shooting. Along the way,

Inv. Gray told him that the police had someone and wanted to see whether Smith could identify the person as the shooter. **R. pp. 30-36.**

Smith remained in Inv. Gray's car when they reached the other location. Appellant was brought up to the side of the Inv. Gray's car and Smith identified him from a distance of between two and six feet. Appellant was wearing the same clothes that he had been wearing earlier. Smith told the police that they had the right man. **R. pp. 33; 36-38.**

Appellant also cross-examined Smith, again, about the circumstances surrounding his ability to see the shooter. Smith testified that the lights were not on inside of the upstairs room from which he watched the shooting. Also, there were street lights on T.S. Martin. One light was behind the group he saw, close to a stop sign. There was likewise a light on the side of the house. **R. pp. 38-39.**[11]

Appellant objected to the lack of a full hearing in accordance with *Neil v. Biggers; supra.* He again asserted that *McLeod* did not apply because there was not a sufficiently reliable relationship between him and Smith. He also noted that Smith's identification was made from some two homes away from the shooter and Smith never spoke to the shooter. On the other hand, the victim in *McLeod* had intimate, physical contact with the person she later identified. **R. pp. 41-42.**

The State argued that *McLeod* applied. Although Smith did not know Appellant's real name, he knew Appellant by the nickname Baby Jesus; and he had known Appellant since elementary school. He had gotten to know Appellant when he "hung out with" Appellant on several occasions in the four days or so at the residence of Smith's aunt. He had also seen Appellant at the McDonald's later in life and on the day of the shooting. Therefore, he knew Appellant. The State further argued

[11] The Court introduced a copy of Smith's statement as Court's Ex. 5.

that there was no requirement of a "meaningful relationship" as Appellant argued. **R. pp. 42-43.** Appellant, however, again argued that there was an insufficient opportunity for Smith to view the shooter. **R. pp. 43-44.**

The trial judge observed that *McLeod* holds that the "constitutional and procedural safeguards required under *Neil v. Biggers* were never intended to apply where the victim knew the accussed." However, *McLeod* did not define the word "knows." The trial judge found that *McLeod* does not require an intimate relationship. Also, based on the evidence presented *in camera,* he found that "the relationship or at least knowledge existed and I think whether it was sufficient knowledge . . . would . . . go more toward the weight of the testimony rather than the admissibility of it." **R. pp. 44, ll. 9-20.** Additionally, the trial judge found that:

> sufficient evidence has been shown by the State under the totality of the circumstances to make an identification. It is permissible and I know the argument would be that at a show-up identification where the defendant was the only one there might be overly suggestive but at the same time the witness who testified that he knew the defendant, he knew him from elementary school, from seeing him at McDonald's, from seeing him [at] Bayberry on the date of the shooting. He knew him by his nickname, he identified the shooter by nickname to the officer prior to him being taken to the second location. Based on that I will permit the identification testimony and you can still argue about its weight.

R. pp. 44, l. 20- p. 45, l. 9.

Before the subsequent trial, Appellant asked the trial judge to revisit his ruling with respect to this issue. He argued that certain evidence that had not been presented during the original *in camera* hearing was elicited at another (apparently un-transcribed) hearing on a motion to disqualify the Fifth Circuit Solicitor's Office in connection with an alleged *Brady v. Maryland,* 373 U.S. 83

(1963) violation.[12] Specifically, he referred to evidence that Smith (1) told law enforcement on the night of the shooting that he saw Appellant get into a car that night and that Appellant stuck a gun in Smith's face that night. (2) told law enforcement in two written statements; and (3) said that this was how he was able to recognize Baby Jesus (Appellant) as the shooter. Also, Smith never told police that he had recognized Appellant from Saxon Homes or from McDonald's. Appellant asserted that Smith could not have seen him get into the car that night and "could not have been the person who stuck the gun in Tyrone Smith's face." **R. pp. 32-36.**

He maintained it was improper to assert the identification was reliable as to the shooter but unreliable as to who put a gun in Smith's face. Appellant further argued that this information did not come out because the trial judge did not hold a full *Neil v. Biggers* hearing. Finally, he repeated his argument about *McLeod* being factually distinguishable based upon the close physical connection between the victim and defendant in that case. **R. pp. 32-36.**

In response the State argued that Appellant's arguments went to the weight of the identification testimony, as opposed to its admissibility; and that the Court in *McLeod* had held that *Neil* does not apply to cases such as the present one where the witness knew the subject, even though by nickname. **R. pp. 36-37.** Appellant then argued briefly in reply, again stressing that the trial judge had precluded a full showing of the relevant circumstances by relying upon *McLeod*. He also focused upon the fact that police used show-up identification, which is disfavored. **R. pp. 37-38.**

However, the trial judge reviewed the transcript of the August 28, 2006 hearing and found that a full *Neil v. Biggers* hearing was not required because the State hade made a sufficient

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[12] Appellant has not raised any issue on appeal in connection with the motion to disqualify.

presentation of a prior knowledge or relationship between the witness and Appellant. Therefore, he adhered to his earlier ruling. **R. p. 38, l. 20- p. 39, l. 4**. Appellant then asserted that this ruling violated his right to due process under the United States Constitution and the South Carolina Constitution. **R. p. 39, ll. 8-10**.

Smith later testified, without further objection or motion, as a State's witness. **R. pp. 676-754**. After the State rested its case, Appellant renewed his objection to the trial judge's decision not to hold a full *Neil* hearing. **R. p. 896**. The trial judge denied his motion for the reasons he originally denied it. **R. pp. 899-900.**

B. Discussion

1. Procedural bar

Initially, Respondent submits that the issue is not preserved for appellate review. It is well settled that a ruling on an *in limine* motion is usually not final and the losing party must renew his or her objection when the evidence is presented. *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993); *State v. Gagum*, 328 S.C. 560, 492 S.E.2d 822 (Ct.App.1997). An exception is recognized only where the motion is ruled on immediately prior to the introduction of the evidence in question. Under those circumstances, no further objection is necessary. *State v. Tufts*, 355 S.C. 493, 497, 585 S.E.2d 523, 525 (S.C.App.,2003); *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct.App.1998); *State v. Mueller*, 319 S.C. 266, 460 S.E.2d 409 (Ct.App.1995). Here, the *in camera* ruling was not immediately before Smith's testimony and the issue is not preserved for appellate review. *See Schumpert.*

2. The trial judge properly relied upon *McLeod*

Alternatively, Respondent submits that the trial judge properly found that *McLeod* applied

under the facts of this case. An identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification may deprive a criminal defendant of due process of law. *Neil, supra*; *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004); *State v. Caldwell*, Op. No. 4392, 2008 WL 2078139, 6 (Ct.App., May 18, 2008). However, an in-court identification of an accused is inadmissible only if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. *Id.*

Where the State offers eyewitness testimony identifying the defendant as the person who committed the crime and the defendant challenges the in-court identification as being tainted by a previous, improper identification or confrontation, the trial judge in most instances must engage in a two-prong inquiry. The trial judge must first determine whether the identification process was unduly suggestive. *Id.* Even assuming an identification procedure was suggestive, it should not be excluded as long as the identification was reliable under the totality of the circumstances, notwithstanding the suggestiveness. *See Neil*, 409 U.S. at 199; *State v. Traylor*, 360 S.C. 74, 600 S.E.2d 523 (2004). The trial judge must consider the totality of circumstances to determine whether an identification may be reliable even when the procedure has been suggestive. *See Neil*, 409 U.S. at 199. The relevant factors to be considered include: (1) the opportunity of the witness to view the accused; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Id. See also State v. Caldwell*, Op. No. 4392, 2008 WL 2078139, 6 (Ct.App., May 15, 2008).

However, "[w]here the reason for a rule disappears, the rule becomes somewhat irrelevant." *Powell v. State*, 566 So.2d 1228, 1236 (Miss. 1990). The United States Supreme Court has held that

"reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall*[13] confrontations." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (footnote added). *See also State v. Brown*, 356 S.C. 496, 504, 589 S.E.2d 781, 785 (Ct.App.2003) (citing *Manson*). Consistent with both *Neil* and *Manson*, both the South Carolina Supreme Court and this Court have held that the requirements of *Neil* and the cases preceding or following it do not apply where the eyewitness and the suspect know each other.

In *McLeod*, the victim of an assault with intent to ravish was attacked on a Friday night. "Her assailant struck her on the head with a hard object, choked her," and tore her undergarments while attempting to remove them. The assailant fled after her struggles and her "identifying exclamation, 'oh, you Hattie's boy.'" The victim testified at trial that she had recognized her assailant as "'Hattie's boy.'" Another prosecution witness testified that when the victim came to her house after being attacked: "'She say 'Hattie's boy'. That's all she say.'" On Saturday, police arrested the defendant pursuant to an arrest warrant and took him to the victim's home to see whether she could identify him as her assailant. 260 S.C. at 447, 196 S.E.2d at 645.

On appeal, the defendant attacked the fairness of the pre-trial identification procedure used by the police. The Court rejected his argument. After observing that the record demonstrated that the victim knew the defendant, *Id* at 448, 196 S.E.2d at 645-46,[14] the Court explained that:

> The defendant's argument that the lone confrontation was unfair and untrustworthy is based on the principles set forth in the cases of *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18

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[13] *See Stovall v. Denno*, 388 U.S. 293 (1967).

[14] "She had seen him many times at a neighborhood store near their home; she knew the defendant's mother and knew him to be her son." *Id.*

> L.Ed.2d 1178 (1967); *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). The rulings in these decisions attempt to avert the danger of mistaken identity by establishing mandatory constitutional and procedural safeguards. The rules are designed for application where the accused and the victim are strangers to each other; they were never intended to apply where the victim knew the accused. The constitutional and procedural safeguards, which the defendant claims were necessary, simply do not apply under the facts of this case.

McLeod, 260 S.C. at 448, 196 S.E.2d at 646.

This Court reached the same result in *In the Interest of Robert D.*, 340 S.C. 12, 18, 530 S.E.2d 137, 140-41 (Ct.App. 2000). After finding that there could no be a violation of Neil because there had not been any State action surrounding the show-up, the Court stated that "[e]ven if *Neil v. Biggers* does apply to identifications arranged by persons not connected with law enforcement, we also agree with the family court that a hearing was not necessary in this case because the victim knew the defendant. The record reflects the victim knew Robert D. by his first name, recognized him as a friend of two of her classmates, and remembered he watched a couple of films with her class."

Notwithstanding Appellant's contrary position, the trial judge properly relied upon *McLeod* when he ruled that *Neil v. Biggers* did not apply in this case because Tyrone Smith knew Appellant prior to the night Appellant murdered C.D. and T.M. **R. p. 44, ll. 9-20**. As discussed, the prosecution's evidence established that Appellant lived next to Smith's aunt, in Saxon Homes, approximately seven years before the murders. Smith had contact with Appellant on several occasions over the course of four days while he visited his aunt during that period of time. Appellant even helped him communicate with a deaf boy nicknamed Goo. Sometime between that time and the August 26, 2004 murders, Smith twice saw Appellant at the McDonald's where Appellant worked. He also saw Appellant at Bayberry Apartments on the day of the murders. Finally, he knew

Appellant by the nickname of Baby Jesus.

As the trial judge properly recognized, **R.p. 44, ll. 9-20**, the arguments advanced by Appellant at trial go to the weight that he believes the jury should assign to Smith's knowledge of Appellant, rather than whether he knew Appellant. Thus, the trial judge properly relied upon *McLeod. See also In the Interest of Robert D.*, 340 S.C. at 18, 530 S.E.2d at 140-41.

On appeal, Appellant argues, for the first time, that *McLeod* has been implicitly overruled by the adoption, in 1995, of Rule 104(c), SCRE, and the South Carolina Supreme Court's subsequent decision in *State v. Ramsey*, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) (""the general rule is that a trial court must hold an in camera hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation"). *See also State v. Simmons*, 308 S.C. 80, 82-83, 417 S.E.2d 92, 93 (1992) (noting that the Court had adopted a *per se* rule requiring the trial court to hold an in camera hearing in such situations); *State v. Cheatham*, 349 S.C. 101, 117-18, 561 S.E.2d 618, 627 (Ct.App.2002) (same). Alternatively, he asserts that if it is"still viable, *State v. McLeod* only applies where the prosecution unequivocally establishes that '[the] defendant and the witness who identified him as the perpetrator had a sufficient relationship prior to the incident so that suggestiveness was not a concern.'" **IBOA, at pp. 7-8** (citing *People v. Dones*, 279 A.D.2d 366 (N.Y. 2001).

However, his arguments are not properly before this Court on appeal because he never presented them, or the authority from other jurisdictions upon which he relies, to the trial judge. A party cannot argue one ground in support of an objection or motion at trial and a different ground on appeal. *State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989); *State v. Byram*, 326 S.C.

107, 113, 485 S.E.2d 360, 363 (1997) (same). *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).

Additionally, this Court is bound by decisions of the South Carolina Supreme Court, and it cannot overrule or abrogate the Supreme Court's holding in *McLeod*. *See* S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents"); *Langley v. Boyter*, 286 S.C. 85, 87, 332 S.E.2d 100, 101 (1985) (reversing this court's adoption of comparative negligence and holding, "That issue must await the permission of [the Supreme Court] before a change in this basic, well-established law is brought about, unless the Legislature acts on the matter beforehand."); *State v. Watts*, 320 S.C. 377, 465 S.E.2d 359 (Ct.App.1995) (declining to follow the most recent interpretation of the United States Constitution by the United States Supreme Court, the Supremacy Clause notwithstanding, where the interpretation was in conflict with the most recent South Carolina Supreme Court precedent).

Respondent submits that the rule in *McLeod* is "still viable" and remains an exception to the otherwise *per se* rule in *Ramsey* and *Simmons*. The present case simply does not involve the type of identification contemplated by Rule 104(c). *People v.Tas*, 51 N.Y.2d 915, 916, 415 N.E.2d 967, 967-68, 434 N.Y.S.2d 978, 979 (N.Y. Ct. App. 1980) ("Since the participants in the incident the victim and the perpetrators were known to each other, there was no "identification" within the meaning of CPL 710.30 ... and no prior notice need have been given by the People") (citation omitted). Further, the viability of McLeod cannot seriously be drawn into question, since *In the Interest of Robert D.* was decided long after adoption of the South Carolina Rules of Evidence.

3. The hearing held and the trial judge's alternative findings comport with *Neil v. Biggers*

Moreover, and apart from the admissibility of Smith's testimony under *McLeod*, Appellant cannot complain on appeal because he received the only relief requested. *See State v. Sinclair*, 275 S.C. 608, 274 S.E.2d 411 (1981) (where the appellant obtains the only relief he sought at trial, there is no issue for the appellate court to decide); *State v. Brown*, 274 S.C. 48, 260 S.E.2d 719 (1979) (same). Despite the trial judge's ruling that the identification was admissible under *McLeod* because the pre-existing relationship between Smith and Appellant established that Smith knew Appellant, he only made this finding after he had conducted an *in camera* hearing and considered *in camera* testimony as to the circumstances surrounding Smith's identification of Appellant.

As discussed, the trial judge found that the evidence initially presented by the State was "awfully close" to *McLeod*. However, he concluded that "before I can examine the totality of the circumstances, I think I still have to hear exactly what was going on at the time of the identification." **R. p. 72, ll. 13-21**. To this end, he permitted the State to offer additional testimony from Smith. **R. pp. 72-81**.

Further, after hearing this evidence and the arguments by the parties, the trial judge made the alternative findings, discussed above, that the identification was properly admissible "under the totality of the circumstances." He specifically rejected the notion that the one person show-up was overly suggestive based upon Smith's knowledge of Appellant from elementary school, from seeing him at McDonald's and from seeing him earlier on the day of the shooting. The trial judge further found that Smith knew Appellant, by nickname; and that he had identified the shooter to police, by nickname before police took him to the location for the show-up. **R. p. 44, l.20-p. 45, l. 9**. Therefore, the trial judge did conduct an *in camera* hearing as to Smith's identification that was

consistent with Rule 104(c), SCRE,[15] as well as *Ramsey* and its progeny; and he made findings that are consistent with *Neil* and *Manson*.

Further, the trial judge did not abuse his discretion in making this alternative ruling. Smith had ample opportunity to watch the shooting. Although he was some distance from the shooter and it was dark, there were lights on the side of the house and the shooter was illuminated by a streetlight. Further, Smith was identifying a person he had known for seven years. *See McLeod, supra*; *In the Interest of Robert D., supra*. *See also Deberry v. State*, 457 A.2d 744, 754 (Del. 1983) (recognizing that while "a detailed description [of the perpetrator] is always helpful, ... such a requirement was unnecessary here since it is clear that [the victim] knew [the defendant],"had spent a considerable part of the previous day with him, identified him initially by his first name and the bunkhouse in which he lived, and according to the police officer who was with her, unhesitatingly identified him at a show-up); *People v. Reynolds*, 373 N.E.2d 650, 654 (1978) ("the testimony of an identification witness is strengthened to the extent of his prior acquaintance with the accused").

Appellant's principle arguments are that this was a single person show-up; that Smith did not have a sufficient opportunity to see the shooter at the time of the offense; and that, although Smith was a crucial prosecution witness, there were supposedly deficiencies in Smith's eyewitness

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[15]Rule 104(c) provides as follows:

> **Hearing of Jury.** Hearings on the admissibility of confessions or statements by an accused, and pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

Rule 104(c), SCRE.

identification.

However, the one person show-up employed here was not so unduly suggestive that it tainted the reliability of Smith's identification. Although single person show-ups are disfavored because they are suggestive by their nature, *see State v. Blassingame*, 338 S.C. 240, 525 S.E.2d 535 (Ct.App.1999), an identification may be reliable under the totality of the circumstances even when a suggestive procedure has been used. *State v. Brown*, 356 S.C. 496, 504, 589 S.E.2d 781, 785 (Ct.App. 2003). As the Court explained in *Brown*:

> Identifications resulting from single person show-ups have been upheld by the United States Supreme Court and our Supreme Court. " 'While a showup in which a witness views a single suspect is generally suggestive, and hence suspect or disfavored, and less preferable than a lineup, even if requested by accused, a showup may be proper in some circumstances.' " *State v. Mansfield*, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (Ct.App.2000) (quoting 22A C.J.S. *Criminal Law* § 803 (1989)).
>
> " '[A] showup may be proper where it occurs shortly after the alleged crime, near the scene of the crime, as the witness' memory is still fresh, and the suspect has not had time to alter his looks or dispose of evidence, and the showup may expedite the release of innocent suspects, and enable the police to determine whether to continue searching.' " *Mansfield*, 343 S.C. at 78, 538 S.E.2d at 263. The closer in time and place to the scene of the crime, the less objectionable is a showup. Id. A show-up may be proper even though the police refer to the suspect as a suspect, and even though the suspect is handcuffed or is in the presence of the police. Id. Although show-ups have been upheld by the Court, these situations usually involve either extenuating circumstances or are very close in time to the crime. *See State v. Hoyte*, 306 S.C. 561, 413 S.E.2d 806 (1992).

Brown, 356 S.C. 496, 503-04, 589 S.E.2d at 785.

Here, the show-up occurred shortly after the murders and roughly four blocks from the crime scene. Also, Smith's memory was still fresh, and Appellant had not had time to alter his looks or

change clothes. *Id.* Again, Smith was identifying a person he had known for seven years and had seen on several occasions, including the day of the murders. He likewise had already identified Appellant to police by the nickname of Baby Jesus, and he had described Appellant's clothing to police. *See McLeod, supra*; *In the Interest of Robert D., supra*; *Deberry*, 457 A.2d at 754. *See also People v. Tas*, 51 N.Y.2d at 916, 415 N.E.2d at 967-68, 434 N.Y.S.2d at 979.

Likewise, the fact Smith only knew Appellant by the nickname Baby Jesus does not adversely impact the identification in any fashion. *Id.* To the contrary, many of the witnesses referred to him by the same nickname, identified others involved in the incident (as well as the incident earlier that night) by nickname only and a number of these witnesses had nicknames by which they were known. This is hardly surprising, since many of the witnesses were members of the Folk Nation.

Nor is there any merit to Appellant's contention that he was prevented from exploring "deficiencies" in Smith's identification of him because "[t]he trial judge refused to expand the scope of the hearing." **IBOA, at p. 4**. This argument conveniently ignores that - if one is to accept defense counsel's representations to the trial judge as factually correct - these "deficiencies" were not disclosed until a subsequent hearing on a *Brady* motion. **R. pp. 76-78**. Thus, they could not have been explored upon further cross-examination of Smith. Also, these matters go more to the weight of Smith's identification of Appellant, as opposed to its admissibility. More importantly, these "deficiencies" were later brought to the jury's attention, through defense counsel's cross-examination of both Smith and Inv. Gray. *See* **R. pp. 516; 677; 682-85; 691-93; IBOA at p. 5**.

Finally, Appellant repeatedly characterizes Smith as the State's star witness because Smith identified him as the shooter. However, Appellant cannot show any conceivable prejudice resulting from the introduction of Smith's testimony because it was cumulative to identification of him by

Diego Thompson, who had accompanied Appellant, Goo and two others to T.S. Martin from Bayberry Apartments. Thompson testified that he saw Appellant point a .22 caliber rifle at the house where his group had spoken to a "little boy." Appellant had also motioned in sign language for Goo to shoot a shotgun at the same house. Then, Thompson heard "over six or seven" gunshots as he ran. When he turned around, he saw Appellant drop the rifle and pick up the shotgun. Appellant was the only person who fired a weapon, and Thompson later saw him dispose of the weapon near the gate of Colony Apartments. **R. pp. 246-56.**

Additionally, the State presented overwhelming evidence of guilt, some of which is discussed in the **Statement of Facts**, *supra*.[16] Because Smith's identification was cumulative to Thompson's testimony identifying him as the shooter, he cannot show prejudice from the trial judge's ruling. *See State v. Rochester*, 301 S.C. 196, 391 S.E.2d 244 (1990) (admission of evidence is harmless where

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[16]For instance, Appellant's involvement in the shooting was also established by the testimony of Shante Bethel, a member of the Folk Nation. She testified that she was present at Bethel Bishop Apartments and overheard Appellant state his intention to go to T.S. Martin on the night of August 26, 2004, despite Pooh (Carl Smith)'s plea that he not go there. He then left with Goo (Joyner), Diego Thompson and "Mirage." When he ran back into Bethel Bishop a short time later at "full speed," she heard him admit his involvement in the shooting at T.S. Martin, where his group sprayed their gunfire and two children were hit. She also heard him state that the shooting occurred because "they had gotten in[to] something with some Bloods" earlier in the evening. **R. pp. 340-49.**

Further, Appellant's second statement to police, which was given at 1:25 p.m. on August 27, admitted that he had been shooting a .32 caliber automatic when the incident occurred at T.S. Martin, but claimed that he only had two bullets. He also said that he had shot at a "top window [of a house] with a round hole like an attic." The other person was shooting "down the street in the dark." Officers returned to the scene but could not find damage to any house other that C.D. 's, including a house that resembled the house Appellant described. **R. pp. 472-78.**

Appellant presented several witnesses who knew him and testified that they did not see him on the night of the murders. However, these witnesses were not able to identify anyone as the shooter. **R. pp. 901-35; 1041-58.**

it is cumulative to other evidence admitted without objection); *State v. Howard*, 295 S.C. 462, 369 S.E.2d 132 (1988) (when information contained in the improperly admitted affidavit is merely cumulative to other properly admitted evidence, there is no prejudice).

II. Assuming that his argument under Rule 404(b), SCRE, is not procedurally barred by his failure to raise the same argument in the trial court, the trial judge properly denied Appellant's motions for a mistrial based on the State's presentation of expert opinion testimony concerning the the meaning of two hash marks branded on Appellant's back because this testimony did not violate Rules 403 and 404(b), SCRE, since it was tied to the murders for which Appellant was on trial, and it was relevant to both identity of the shooter and motive. Also, Appellant was not prejudiced by the ruling.

Appellant next contends that the trial judge erroneously denied his requests for a mistrial based upon the State's presentation of expert testimony that each of two hash marks or slash marks branded on Appellant's back signify that he had done some act on behalf of the Folk Nation gang and that there could be bodies associated with that act. He asserts that the evidence violated Rules 403 and 404, SCRE. Assuming that his argument is not procedurally barred by his failure to raise the same argument in the trial court, the trial judge properly denied Appellant's motions for a mistrial because this testimony did not violate Rules 403 and 404, SCRE. Rather, the State's theory was that the hash marks represented the murders for which he was on trial, and the challenged testimony was relevant to proving both identity of the shooter and motive. Moreover, Appellant cannot show any conceivable prejudice from denial of his motion, particularly where he only challenged one expert's opinion at trial and did not challenge at trial or on appeal virtually identical testimony from another expert; he was able to impeach the State's experts through cross-examination and presentation of a defense expert; and there was overwhelming evidence of guilt.

A. How the matter was raised in the trial court

Following an *in camera* hearing on August 28, 2006, the trial judge ruled, over Appellant's objection that the evidence of his gang membership would inflame the jury, that the State could present evidence of Appellant's gang membership. The State argued that it's evidence was relevant to establish the motive for the two murders and as part of the *res gestae* of the murders. The State

argued that it would present expert testimony concerning the significance of the various tattoos on his body. Many of these tattoos indicated his membership in the Insane Gangster Disciples, which is a "set" of the Folk Nation gang. **R. pp. 1-9**.

The trial judge denied Appellant's renewed motion, made during the same hearing, to exclude this evidence, as confusing and inflammatory. The trial judge noted that Appellant had a continuing objection to such testimony, unless he had a different ground to support the objection. **R. pp. 11-13**. The State which originally relied upon *State v. Price,* 368 S.C. 494, 629 SE2d 363 (2006), later stated that it had some cases that it could provide to the trial judge concerning the admissibility of the tattoos. When Appellant asked whether there was going to be a hearing as to the admission of tattoo evidence, the trial judge indicated that he first wanted to read the cases. **R. pp. 88-89**.

Appellant evidently made an objection at the bench to the State's reference to the teardrop tattoos in opening statement. He argued that the evidence was inadmissible and unduly prejudicial. The trial judge overruled his objection. **R. pp. 117-18**. Appellant later objected *in camera* to any testimony that he received the teardrop tattoos on his face while incarcerated in the South Carolina Department of Corrections (SCDC). He argued that this would unfairly comment on his prior history and the testimony about his tattoos was irrelevant. **R. pp. 659-70**. He agreed to stipulate that the teardrop tattoos on his face were observed on February 6, 2006. However, he did not have them on March 11, 2005. **R. p. 670**.

Appellant then objected to testimony from the prosecution's gang expert concerning either "the indication or the purported meaning of any tattoos because this evidence was cumulative, unduly prejudicial and it deprived him of a fair trial. He then asked to have a continuing objection.

The trial noted that it was Appellant's intention not to waive any objection. **R.p. 673-75.** Immediately before the State called Inv. Edward O' Cain, an expert in gang activity and gang recognition, Appellant renewed his previous objections. The trial judge overruled his objection. **R. p. 808, ll. 1-7.**

Inv. O'Cain is the branch chief over special investigations for SCDC. And he is assigned to the F.B.I.'s terrorist task force. His duties at SCDC include investigating "security threat groups, which [are] gangs . . . (and) intelligence . . . ." He was " put over the security threat groups gangs in late 1998;" and he has received a great deal of training in gang recognition. He is also the co-founder and current President of the South Carolina Gang Investigator's Association. Subject to previous objections, Appellant consented to him testifying as an expert in gang activity and gang recognition. **R. pp. 807-11; 839.**

Inv. O'Cain first explained that the larger gangs in South Carolina are the Bloods, the Crips and the Folk Nation; and he testified that the Bloods and Folk Nation do not "get along." He also explained that a number of terms that had been used by prosecution witnesses. He added that Folk Nation's color is black; and he explained the hierarchy of the Folk Nation. Specifically, there are various subdivisions of the Folk Nation called "sets." He opined that " [a] set King strike or one strike, two strike" is a recent expression in this State and refers to "someone who is gaining rank to become a set King." **R. pp. 811-15.**

Inv. O'Cain further explained how tattoos and brandings play a significant role in how gang-members represent themselves. Then, he explained the significance of various tattoos he had seen and photographed on Appellant's body indicating Appellant's affiliation with the Insane Gangster Disciples, which is part of the Folk Nation. **R. pp. 815-23.**

Next, he gave the following testimony that is the subject of the current argument:

Q. Okay. And now we're going into the back area. It had a branding on it also?

A. Yes, Ma'am, on his left upper back it is.

Q. I show you State's Exhibit 68.

A. Yes, Ma'am.

Q. And have you had a chance to observe that?

A. Yes, Ma'am.

Q. And is that the tattoo you saw on his back?

A. Yes, Ma'am.

Q. That's the branding you saw on his back?

A. Right.

Q. What Does this depict in State's Exhibit 68?

A. It is a pitchfork. It is a branded pitchfork. There's a lot of scarring with this particular branding. It has what looks like tow has marks that come out to the right side of the pitchfork, which could be rank. It could be any number of reasons those hash marks are there.

Q. And specifically at the bottom of the pitchfork is this there a symbol?

A. There's a lot of scarring at the bottom of the branding. It looks like it could have been an upside down five.

Q. Why would that be significant to have an upside down five intentionally?

A. That is a disrespect to the Bloods in those

representing the number five.

Q. You mention that to the right of that there are now two slash marks?

A. Yes, Ma'am.

Q. Is that significant?

A. That very well could be rank or gaining rank. It could give some clue as to what rank he's holding right now.

Q. And in your expert opinion, what rank would he have on his back?

A. That would go along with what I'm being told about set king, strike one, strike two. He has put on his body that he's now a set – excuse me, a set king, strike two.

Q. And in that same vein, is that significant to you as far as is there a certain thing you have to do to get to set king, strike two?

A. What I'm being told from the streets and interviews to get the strike series of that rank, you have to have bodies attributed to you.

R. p. 823. l. 22-p. 825, l. 15.

Appellant objected to this testimony. **Rr. p. 825, ll. 16-17.** Outside of the jury's presence, he moved for a mistrial based upon Inv. O' Brien's opinion that the two hash marks next to the pitchfork meant that bodies were associated with them. He maintained that this was " a completely outrageous claim, absolutely no support for it;" and that it was " incredibly inflammatory." **R. p. 825, ll. 1-14.**

The State countered by noting that the witness' basis for his conclusion was fully explained,

and that his knowledge was gained through interviews. Also, he opined that it would have another meaning. "In addition to that, we're going into the testimony about how the teardrops could mean bodies;" and the State noted that " this is all subject to cross-examination." **R. p. 826, ll. 16-25.** ***See Also*** **R. p. 827, ll. 18-23.**

In response, Appellant asserted that O'Cain's reliance upon interviews meant that his opinion was based upon hearsay and violated his right to confront the witness who told this to O'Cain. Appellant further noted that the trial in *Price* resulted in a mistrial because the witness did not personally have knowledge but was relying upon hearsay. **R. pp. 827-29.**

The State maintained that expert opinion testimony can rely "on anything that his knowledge, skill, experience, training, education . . . to form an opinion." Also, Inv. O'Cain "testified that the basis of his knowledge is information he has accumulated through his experience in the system . . . . Even in a database, it's just hearsay all compiled into a database." **R. p. 828, ll. 6-98, ll. 16-20; p. 828, l. 25-p. 829, l. 2.**

The trial judge overruled Appellant's mistrial motion after reading *Price,* which he found was distinguishable. He noted that the expert could base his opinion on hearsay under Rule 703, SCRE. In *Price*, the expert testified that the defendant was a gang member based upon hearsay from an informant. However, Inv. O'Cain "has testified as to his opinion as to what different symbols or tattoos or other signification or symbols signify, and I would overrule based upon the fact that this is part of his opinion." **R. p. 829, l. 3-p. 830, l. 18.** Appellant then added that he also was raising an objection based on the confrontation clause. The trial judge overruled this objection. **R. p. 830, l. 19-p. 831, l. 3.**

After the jury returned to the courtroom, Inv. O'Cain testified that the hash marks were

visible in State's Ex. 68. "Based on the information I'm getting from interviews and inmates . . . and what I'm being told from fellow law enforcement on the street . . . [this] represents a rank structure, an that it could represent bodies attributed to that individual wearing the tattoos]." **R. p. 831, l. 11-p. 832, l. 14.**

Subsequently, Officer Walter Mahoney, of the City of Columbia Police Department's gang task force testified about gangs in the Columbia area.[17] He explained that sets and subsets of Folk Nation, as well as "set strike King one and two." Information provided to him over " the last couple of years" was that " strike King gangbanging" meant that the wearer of the tattoo had "done something or there's a possibility of being bodies." **R. pp. 860-65.**[18]

Officer Mahoney then testified about the tattoos and brands that he had seen on Appellant's body. Of particular relevance to the current issue, he testified about the meaning of the hash marks on Appellant's back. Without objection, he testified "that's the hash mark across a strike . . . set thing." He added that " it could mean a lot of things. It could mean bodies . . . . it could mean . . . him robbing somebody, . . . him breaking into or vehicles." Officer Mahoney, again, opined that it could mean many different things because the striker King was relatively new to South Carolina. However, Officer Mahoney emphasized that it represented something Appellant had done on behalf of the gang. **R. pp. 865-69.**

Finally, Officer Mahoney explained that a gang member gains rank within the gang by

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[17] Although Appellant's brief is unclear on this point, the State presented two experts on the issue of gang activity and recognition.

[18] Appellant objected to testimony about bodies on the same ground as he had with Inv. O'Cain. **R. p. 865, ll. 5-9.** However, he has not raised any challenge to Mahoney's testimony on appeal.

performing the duties assigned to him, and that "if you don't do it, you have a problem." **R. p. 872.** He also confirmed that a gang member engages in "false claiming," the gang will punish him. **R. p. 871.**

Appellant renewed all of his previous mistrial motion at the conclusion of the State's case. **R. p. 896, l. 4-p. 898, l 2.** The trial judge denied his motion. **R. p. 899, l. 20. p. 900, l. 2.**

A. Discussion

1. Appellant's argument under Rule 404(b), SCRE, is not preserved for appellate review because not raised in the trial court.

Initially, Respondent submits that Appellant's Rule 404(b), SCRE, argument is not properly before this Court on appeal because he did not assert at trial that the testimony of the State's experts violated Rule 404(b), SCRE, in support of his mistrial motions. Rather, he argued that O'Cain's opinion was " a completely outrageous claim, [that there was] absolutely no support for it;" and that it was " incredibly inflammatory." He also argued that the testimony, like that in *Price*, was hearsay. **R. pp. 825-29**. He asserted the same grounds in support of the portion of Mahoney's testimony that he did challenge. **R. p. 865, ll. 5-9**. As discussed, a party cannot argue one ground in support of an objection or motion at trial and a different ground on appeal. *Bailey*, 298 S.C. at 5-6, 377 S.E.2d at 584; *Byram*, *supra* (same); *Prioleau*, 345 S.C. at 411, 548 S.E.2d at 216 (an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error). Thus, Appellant's argument is procedurally barred. *Id.*

2. Appellant's mistrial motion was properly denied

Alternatively, Respondent submits that there was no error. Rule 702, SCRE, states that: "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the

evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." As the Court explained in *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006):

> The decision to admit or exclude testimony from an expert witness rests within the trial court's sound discretion. *Mizell v. Glover*, 351 S.C. 392, 570 S.E.2d 176 (2002); *State v. Caldwell*, 283 S.C. 350, 322 S.E.2d 662 (1984). The trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion. *State v. Myers*, 359 S.C. 40, 596 S.E.2d 488 (2004). An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion that is without evidentiary support. *State v. McDonald*, 343 S.C. 319, 540 S.E.2d 464 (2000); *Fields v. Regional Med. Ctr. Orangeburg*, 363 S.C. 19, 609 S.E.2d 506 (2005).

Several jurisdictions have found that activities associated with street gangs can be probative on the issues of identity, motive and other relevant maters. *See, e.g., State v. Romero*, 178 Ariz. 45, 870 P.2d 1141, 1147-48 (App.1993) (citing *United States v. Abel*, 469 U.S. 45, 49 (1984)); *State v. Vickers*, 159 Ariz. 532, 768 P.2d 1177, 1182 (1989) (evidence of membership in prison gang probative of bias); *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); *People v. Contreras*, 144 Cal.App.3d 749, 192 Cal.Rptr. 810 (1983) (gang membership relevant to motive for assault and attempted robbery and identity); *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); John E. Theuman, Annotation, *Admissibility of*

Evidence of Accused's Membership in Gang, 39 A.L.R.4th 775 (1985); *United States v. Rodriguez*, 925 F.2d 1049, 1053 (7th Cir.1991); *State v. Campbell*, 78 Wash.App. 813, 901 P.2d 1050, 1055 (1995); *United States v. Santiago*, 46 F.3d 885, 889 (9th Cir.1995).

Gangs, including the Folk Nation and the Bloods, tend to build an internal "culture," which influences the decision-making of their members. They normally use "gang color," which may include particular colors or symbols, to create a group identity, and also employ permanent markings such as tattoos to indicate the status of members according to a code that other members understand. *Rios v. Rocha*, 299 F.3d 796, 800 n. 5 (9th Cir.2002) (Crips wear blue "rags" or bandanas and Bloods wear red); *Adams by Adams v. Township of Redford*, No. 95-1279, 1996 WL 250578, at *1, 1996 U.S.App. LEXIS 14473, at *2-3 (6th Cir. May 10, 1996) ("[A] gang's 'colors' are an integral part of its identity."); *People v. Parrish*, 152 Cal.App.4th 263, 278, 60 Cal.Rptr.3d 868, 879 (Cal.App. 2 Dist. 2007) ("Anyone in the gang may have a gang-related tattoo; tattoos signify loyalty to the gang; it is unlikely that a non-gang member will have a gang tattoo"); *State v. Earl*, 702 N.W.2d 711, 716 (Minn.2005) (tear drop tattoo near the eye indicates that the possessor has killed one person). The prosecution's argument and the evidence presented in this case, including the testimony at issue, is consistent with that authority.

The State's opinion testimony in this case is likewise consistent with the Court's decision in *Price*. In *Price*, the State's expert was permitted to testify, over objection, that the defendant was a member of the Bloods gang, and that he was a supreme or officer in that gang. This testimony was based solely upon information provided by informants. 368 S.C. at 497, 629 S.E.2d at 365. The Court held that the witness had not testified as to an expert opinion. Rather, he was merely relaying hearsay from informants. *Id* at 365-66, 629 S.E.2d at 498-99.

However, both of the State's experts in this case rendered expert opinions concerning the meaning of the various tattoos and brands on Appellant's body. Each testified that the hash marks represented acts taken by Appellant on behalf of the gang and possibly referenced his status in the gang's hierarchy. This opinion testimony is admissible under Rule 703, SCRE,[19] although predicated upon hearsay.

In *United States v. Hankey*, 203 F.3d 1160 (9th Cir. 2000), the United States Court of Appeals for the Ninth Circuit rejected the contention that similar evidence was inadmissible under Federal Rule of Evidence 703 because it was hearsay. In *Hankey*, a police officer testified, as a gang expert, that the defendant was a member of the Bloods. The expert based his opinion in large part on "street intelligence." The Court held:

> Certainly the officer relied on "street intelligence" for his opinions about gang membership and tenets. How else can one obtain this encyclopedic knowledge of identifiable gangs? Gangs such as involved here do not have by-laws, organizational minutes, or any other normal means of identification-although as [the expert] testified, some wear colors, give signs, bear tattoos, etc. [The expert] was repeatedly asked the basis for his opinions and fully articulated the basis, demonstrating that the information upon which he relied is of the type normally obtained in his day-to-day police activity.

Id. at 1169-70; *see also Connecticut v. Henry*, 805 A.2d 823, 837 (Conn. App. Ct. 2002) (holding a gang expert's opinion, based on information received from gang members, admissible because "[p]olice officers must rely on communications with gang members to gather intelligence and form

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[19] Rule 703, SCRE, provides that: "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

opinions about gang activity because most gangs do not have bylaws, organizational minutes or any other normal means of identification."). *See also State v. Hart*, 306 S.C. 344, 345-46, 412 S.E.2d 380, 381 (1991) ("the State's exhibition of a defendant's physical characteristics does not implicate the defendant's privilege against self-incrimination because such an exhibition is not testimonial") (citing *Schmerber v. California*, 384 U.S. 757 (1966)); 2 McCormick, *Evidence* § 215 (5th ed. 1999) (noting that "[t]he physical characteristics of a person may ... constitute relevant evidence in a criminal prosecution") (emphasis added).[20]

Appellant, however, contends that the trial judge erroneously denied his mistrial motions based upon Inv. O'Cain's testimony concerning the possible meanings of the slash marks branded on his back, as well as testimony from Officer Mahoney concerning the meaning of "set king strike one and strike two," because this testimony violated Rule 404(b), SCRE, by suggesting that he might have committed "two possible homicides prior to the two which [he] was standing trial." **IBOA, at p. 10**. Respondent disagrees.

The decision to grant or deny a mistrial is within the sound discretion of the trial judge. *State v. Cooper*, 514 S.E.2d 584 (S.C. 1999); *State v. Thompson*, 352 S.C. 552, 575 S.E.2d 77 (Ct.App.2003). The court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law. *State v. Harris*, 340 S.C. 59, 530 S.E.2d 626 (2000); *State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998). *See also State v. Arnold*, 266 S.C. 153, 157, 221 S.E.2d 867, 868 (1976) (generally, "the ordering of, or refusal of a motion for mistrial is within the discretion of the trial judge and such discretion will not be overturned in the absence of abuse thereof amounting to

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[20] The Court in *Hart* that exhibition of physical characteristics is treated "like any other evidence." 306 S.C. at 346, 412 S.E.2d at 381.

an error of law"). "The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes" stated into the record by the trial judge. *State v. Kirby*, 269 S.C. 25, 236 S.E.2d 33, 34 (1977); *State v. Patterson*, 337 S.C. 215, 522 S.E.2d 845 (Ct.App.1999) (mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons). The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way. *State v. Beckham*, 334 S.C. 302, 513 S.E.2d 606 (1999).

Applying this standard, it is clear that the trial judge did not abuse his discretion in denying the mistrial motion. As discussed throughout the brief, the murders here were motivated by revenge on a rival gang, the Bloods. The testimony concerning the meanings of the marks branded on Appellant's back was relevant to establishing both identity and motive. In particular, this was merely one of several tattoos or brandings that reflected Appellant's affiliation in the Folk Nation gang. More specifically, the hash marks reflected that Appellant had committed at least two acts on behalf of his gang, which might have had "bodies attributed to" him.

Nor did the hash marks improperly inject evidence of other homicides. In making his speculative Rule 404(b) argument, Appellant cleverly but mistakenly parses this portion of the experts' testimony from their opinions about the meaning of the teardrop tattoos on his face. Both of the State's experts testified of the tremendous significance tattoos and brandings play in the Folk Nation culture. It is clear from their testimony that many of the various symbols on Appellant's body are admissions by him.

It is at least implicit that he is proud of the meanings represented by these symbols and wants

others in his gang to know of them. Also, both conceded that the hash marks might not mean that there were bodies associated with the gang-related activity that the represented. However, the presence of the two hash marks strengthened the experts' opinions concerning the meaning of the two teardrop tattoos on Appellant's face.[21]

Moreover, in opposing the mistrial motion and in arguing for introduction of its experts testimony pretrial, the State never suggested that it intended to offer evidence of any prior bad acts. Instead, the State argued that the testimony was admissible under Rule 703, SCRE, although hearsay, since it was opinion testimony from a qualified expert. There was not any evidence presented as to when Appellant had the brands put on his back. Likewise, the State did not present any extrinsic evidence of any prior bad act(s) by Appellant and it did not argue to the jury that the hash marks signified any other prior bad act by Appellant. Indeed, the State did not reference the hash marks in closing argument, whatsoever. *See* **R. pp. 1150-1172; 1219-45**.

Rather, the State's closing argument focused on the meaning of the teardrops on Appellant's face; and it argued that he sought promotion within the gang based upon the killings, one of which he represents as the killing of a rival gang member. **R. pp. 1242-43**. Appellant's very speculative argument ignores the obvious: there are two hash marks, two teardrops and two victim's.[22] Thus,

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[21] That Appellant would face reprisal from his gang for any false representation by a tattoo adds to the credibility and reliability of the experts' opinion as to the meanings of the tattoos and brands,.

[22] Moreover, public policy supports admission of this type of expert testimony. As the various cases cited in this argument, and the headlines of virtually ever media source make abundantly clear, gangs and gang-related crime 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, as noted, 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

the challenged expert testimony was properly admitted. *Cf. Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974) ("a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations").

Further and assuming this opinion testimony was improperly introduced, the mistrial motion was properly denied because Appellant cannot show any resulting prejudice for a variety of reasons. First, he did not object at trial move for a mistrial based on Officer Mahoney's testimony concerning the meaning of the hash marks on his back, and his brief does not even reference this testimony. *See* **IBO, at pp. 9-11.**[23] Because he does not challenge Officer Mahoney's opinion as to the meaning of the hash marks, he cannot show prejudice from the trial judge's ruling on the mistrial motions. *See Rochester*, *supra* (admission of evidence is harmless where it is cumulative to other evidence admitted without objection); *Howard*, *supra* (when information contained in the improperly admitted affidavit is merely cumulative to other properly admitted evidence, there is no prejudice).

Second, the trial judge gave a limiting instruction, as part of the jury charge, that limited the jury's consideration of evidence concerning "gang and gang membership" to "its capacity to establish motive, not to the defendant's propensity to [Appellant's] propensity to commit criminal

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criminal activity. Gang members will be able to boast (*i.e.*, make admissions) about their various criminal activities, through their chosen form of communication - the coded world of tattoo and brand symbolism - and law enforcement would be powerless to explain the meaning of their admissions.

[23]The only reference to Officer Mahoney's testimony is the page citation on page 10 of his brief: "Tr. p. 957 line 23-p. 958 line 2." However, the renewed mistrial motion was predicated on his testimony explaining "set strike King one and two." There is no citation on appeal nor a mistrial motion made at trial with respect to Officer Mahoney's testimony about the significance of the hash marks on Appellant's back. *See* **R. pp. 865-69**.

acts." **R. p. 1258, ll. 4-14**. Third, any prejudice resulting from the presentation of opinion testimony concerning the hash marks pales in comparison to the more damaging testimony that it sought to reinforce: the expert testimony about the meaning of the two teardrops that Appellant had tattooed on his face following his arrest for the murders of C.D. and T.M. As discussed, the State's closing argument focused on the meaning of these teardrops; and it argued that he sought promotion within the gang based upon the killings, one of which he represents as the killing of a rival gang member. **R. pp. 1242-92**.

Also, Appellant was able to establish any perceived flaw in the opinions rendered by the State's experts through his cross-examination of them and his presentation of his own expert in this area. His cross-examination of Inv. O'Cain established that Inv. O'Cain refers to federal databases or journals when reaching his opinions, and that he is currently imputing into the violent gang terrorist organization file, which is part of the N.C.I.C. database. However, he did not consult with the FBI before reaching his opinions in this case, and he had not read any case law as to what the tattoos in this case mean. Also, he had not spoken to Appellant about what these tattoos mean. [24] Further, Inv. O'Cain has a tattoo on his body. **R. pp. 839-41**.

After examining Inv. O'Cain about the fact other people in society who are not gang members have teardrop tattoos like Appellant's **(Tr. p. 994)**, Appellant established that Inv. O'Cain

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[24] As the defense had done with the opening comments to the effect that Appellant had been incarcerated for twenty-six months pending trial for the two murders (when in fact he was serving time for a probation revocation, counsel's cross-examination of Mr. O'Cain focused extensively upon Mr. O'Cain's failure to ask Appellant what the tattoos actually meant to him. **R. pp. 840; 845-46**. Appellant's expert in gang identification later testified that talking to gang members in his field of expertise. **R. pp. 1048-49**. However, counsel objected and moved for a mistrial when the State established on redirect of Mr. O'Cain that he was not permitted to speak with Appellant. **R. pp. 852-55**.

opined that the hash marks beside the pitchfork on his back could represent either rank or bodies; but he did not specifically know what it meant to Appellant because he had not spoken to Appellant. **R. pp. 843-44**. He admitted that his source of his information about the meaning of the hash marks came from interviews, as opposed to information provided by the Federal Bureau of Prisons or case law. Finally, he was aware of a "number of books about gang tattoos," but he did not bring any to court with him. **R. pp. 845-47**.

Appellant's cross-examination of Officer Mahoney was much more limited. However, he elicited that the two hash marks could mean different things. Also, he did not have any notes with him of the conversations with individuals concerning the meanings of the various tattoos; and he acknowledged that some of those individuals tend to be evasive. **R. pp. 872-78**.

As part of his defense, Appellant presented testimony from Robert Walker, who was formerly the security threat group coordinator at S.C.D.C. He testified, without objection, as an expert in gang identification.[25] He testified extensively and in contradiction of the State's experts about the structure of the Folk Nation and the meaning of the teardrop tattoos. **R. pp. 1028-37; 1040-42**. As to the meaning of the hash marks on Appellant's back, Appellant established the following:

> Q. Okay. And did you ... notice the two hash marks that were next to the pitchfork on [Appellant's] back?
>
> A. Yes, Ma'am, I did.
>
> Q. And what do you think that means or ... what could

[25] Despite Appellant's criticism of the State's experts for predicating their opinion upon hearsay information, Mr. Walker testified that he relied upon similar information: past interviews while he was employed at S.C.D.C.; manuals published by experts in the area, including one published by the Federal Bureau of Prisons; a network of experts with whom he consults; and the internet. **R. p. 1033**. For the Court's information, Mr. Walker's website is http://www.gangsorus.com/tattoos.html.

that mean?

A. Well, the slash marks to me are new, and I had no knowledge of the slash marks whatsoever. It's not something that's common. It's not something that's running rampant as far as identifiers out in the field. I've heard and I've been told that they signify rank.

Q. Okay. And so when the State's experts testified that it might have meant there were bodies attached to that, had you heard about that or read about that in any of the literature?

A. No, Ma'am. No, Ma'am. ...

R. p. 1039, l. 11-p. 1040, l. 1. Mr. Walker further testified that he had not heard this mentioned in any conference or in the manual from the Federal Bureau of Prisons. Instead, this was something new to him. **R. p. 1039, ll. 2-10**.[26] Thus, Appellant was able to impeach the State's experts, both through his cross-examination of them and the testimony of his own expert. *See Price*, 368 S.C. at 495-500, 629 S.E.2d at 366.

Further, the State presented overwhelming evidence of guilt, including the identity of the shooter, such that any error relating to the opinion evidence at issue was insubstantial and did not effect te trial. *State v. Gillian*, 373 S.C. 601, 613, 646 S.E.2d 872, 878 (2007) ("Given the overwhelming evidence of guilt ... the admission of the extraneous evidence regarding the burglaries was harmless error"); *State v. Pagan,* 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("[A]n

[26]Also, Mr. Walker had spoken to Appellant about the supposed meaning of the two tattoos on his cheek, and Appellant unsuccessfully attempted to introduce self-serving hearsay about the subjective meaning of these tattoos, without subjecting himself to the crucible of cross-examination. **R. pp. 1039-40**. *Contra State v. Terry*, 339 S.C. 352, 356-57, 529 S.E.2d 274, 277 (2000) (defendant who has procured his own unavailability by invoking his protection against self-incrimination is not "unavailable" as a witness for purposes of Rule 804(b)(1), SCRE).

insubstantial error not affecting the result of the trial is harmless where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached'") (quoting *Bailey*, 298 S.C. at 5, 377 S.E.2d at 584). *State v. Garner*, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991) (holding improperly admitted evidence was harmless error given the overwhelming evidence of guilt). *See* **Statement of Facts and Argument I**, *supra*.[27]

[27]Appellant presented several witnesses who knew him and testified that they did not see him on the night of the murders. Also, these witnesses were not able to identify anyone as the shooter. **R. pp. 901-35; 941-58.**

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and convictions of the lower court be affirmed.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

WARREN B. GIESE
Solicitor, Fifth Judicial Circuit
P.O. Box 192
Columbia, SC 29202
(803) 576-1801

By: _____
WILLIAM EDGAR SALTER, III
ATTORNEY FOR RESPONDENT

November 3, 2008.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
James W. Johnson, Jr., Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

Respondent,

V.

CHRIS ANTHONY LIVERMAN,

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 3rd day of November, 2008.



WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
James W. Johnson, Jr., Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

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V.

CHRIS ANTHONY LIVERMAN,

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 in the Interagency mail, to his attorney of record , Joseph L. Savitz, III, Esquire, Chief Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, South Carolina, 29201.

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

This 3rd day of November, 2008.



WILLIAM EDGAR SALTER, III

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

ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Chris Anthony Liverman, Appellant.

Appeal From Richland County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 4635
Heard October 7, 2009 – Filed December 4, 2009

AFFIRMED

Chief Appellate Defender Joseph L. Savitz, III, South Carolina Commission on Indigent Defense Division of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Sr., Assistant Attorney General William Edgar Salter, III, Office of the Attorney General, of Columbia, Warren Blair Giese, Fifth Circuit Solicitor's Office, of Columbia, for Respondent.

HUFF, J.: Chris Anthony Liverman was convicted of two counts of murder and was sentenced to two consecutive sentences of life imprisonment. Liverman appeals asserting (1) the trial court erred in failing to conduct an in camera hearing on the reliability of the identification of Liverman by one of the State's witnesses and (2) the trial court erred in allowing one of the State's experts in gang activity and recognition to testify concerning body markings on Liverman indicating Liverman had committed two prior murders. We affirm.

FACTUAL/PROCEDURAL HISTORY

On the night of August 26, 2004, Brian D. was on the porch outside his home with his friend, Christopher, when several boys came around the corner and asked them if there were any "Slobs" around there.[1] Brian and Christopher responded they had not seen any, and did not know. Brian saw the boys walk off behind the house, at which time he went inside his home and told his step-father, Teddy, that something "didn't look right." Brian stepped back outside and started talking to Christopher. As Brian began to re-enter his home, he heard shooting and ran inside the house. C.D., Brian's sister, and T.M. were in the front yard at that time. After the shots rang out, Brian heard Christopher say that C.D. and T.M. had been shot.

Teddy testified he and C.D. were inside the house when Brian went outside and started talking to his friend on the porch. C.D. told her father she needed to get something from a friend's house. Brian came inside and told Teddy that something did not look right. Brian stepped back outside, followed by C.D. a few seconds later. Just seconds after that, Brian "jumped in the door" and Teddy heard gunshots. Realizing his daughter had just walked out the door, Teddy went outside to find C.D. was not moving and had blood coming from her head. He glanced to his right and saw T.M. out there too. Twelve year-old C.D. and sixteen year-old T.M. subsequently died from their gunshot wounds.

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[1] "Slobs" was used as a disrespectful term for a gang called the Bloods.

On the same day, but prior to the shooting of C.D. and T.M. at least two other incidents occurred on T.S. Martin Drive where C.D. lived. The first situation involved Brady B., who drove his white Ford Escort down this street with Travis W., Travis B., Demetrius B., and Paris A. in the car. The boys in the white Escort had an unfriendly encounter with a male in the neighborhood, and words having gang-related undertones were exchanged.[2] Brady drove away from the situation, and subsequently went to a parking lot at Bethel Bishop Apartments with Paris.

While at Bethel Bishop, Brady and Paris spoke to some of the people outside. Brady testified he, Paris, and Carl Smith, also known as Pooh, were joined by Praylow. Pooh, who was a member of the same gang as Appellant, the Folk Nation Gang, testified he, Paris, and Brady were joined by someone named Sherod,[3] and that they drove back to T.S. Martin looking for a person named Delshawn. Pooh testified Brady and Paris had indicated to the others they had a problem and wanted to go fight.

According to Brady, they turned down T.S. Martin and saw a young girl, about twelve years-old. Brady asked her if she knew the boy they had encountered earlier and the girl cussed at them. They told the girl to go back in her house. They turned around and drove back down the street, parked the car and exited the vehicle. The group walked up the street, but everyone in the neighborhood began closing their doors. There was no one outside, so they walked back to the car and drove away. After leaving T.S. Martin this second time, Brady stated he did not return to the location again, and denied being there during the shooting. He further testified, to his knowledge, no one in his group had a gun during this encounter.

Pooh testified when they exited the car at T.S. Martin, he was wearing a black bandana around his head, signifying the Folk Nation Gang. As they were looking for Delshawn, a female called out Pooh's name as they crossed

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[2] Brady testified he later determined the person confronting them that day was "Tyrone."

[3] Sherod is apparently Sherod Praylow.

the street.[4] The others began walking around, but Pooh called them back, realizing that if they jumped someone at that time he would be the one caught since the female recognized him.[5] They got back in the car, and Brady dropped Pooh and Sherod off at Bethel Bishop.

According to Pooh, he first saw Appellant that night coming out of Bayberry Apartments, located right behind Bethel Bishop. Appellant was accompanied by Pooh's deaf friend, Goo, and two other individuals Pooh did not know. Pooh explained to appellant what had happened at T.S. Martin and appellant told Pooh someone from T.S. Martin "had run him out there a couple of days before." Appellant then showed Pooh three or four .22 caliber bullets and said he "might go on a lick." Appellant also told Pooh he had just obtained a .22 caliber gun. Appellant kept telling Pooh he was about to go back to T.S. Martin, but Pooh asked appellant not to, fearing that if anything occurred he would be the person suspected, as the female had called out his name earlier. Appellant then told Pooh he was going to walk Goo home and probably was not "going to go up there."

Diego T., who was seventeen years-old at the time of trial, testified regarding his role in the incidents that occurred that night. Diego testified he ran into appellant, who went by the name Baby Jesus, at Bethel Bishop Apartments as it started to get dark. Appellant told Diego he had to go handle something at T.S. Martin, and asked Diego to go with him. Diego agreed, and as they walked they met up with Ty, Goo, and Little Chris. After appellant had a conversation with these three, they also agreed to accompany him to T.S. Martin. As they walked through Bethel Bishop they saw Pooh, and appellant had a conversation with Pooh. Pooh told them to be careful "because they had pulled some guns on some Slobs."

It was nighttime and dark when the five of them, appellant, Diego, Ty, Goo, and Little Chris, walked over to T.S. Martin. Appellant put a black "flag," or bandana, around his neck, indicating he was representing his set,

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[4] Pooh later identified this female as Precious, a person with whom he had worked in the past.

[5] Pooh stated they did not have any guns with them, but someone in the car did have some brass knuckles.

the Folk Nation Gang. As they arrived there, Little Chris asked a boy sitting on a porch if he was a "Slob." The boy responded that there was "no gang banging" around there. The boy then got on the phone, at which time Diego told the rest of them it was time to go, as he believed the boy was calling the police or other boys to come over there. Appellant responded that he wanted him to call his boys. At that point, Diego saw appellant pull out a .22 rifle. When appellant pulled out the gun, he was across the street from the house where they saw the boy on the porch. Diego told them it was time to leave and he started to back away. He then saw Goo with a "shotgun at his hand" and appellant sign to Goo to shoot at the house. After appellant pointed the rifle at the house, Ty, Goo and Little Chris started running away and Diego heard gunshots. When he looked back, he saw appellant throw down the rifle and pick up the shotgun and point it. However, he did not hear any more shots. Appellant eventually caught up with them, and Diego saw appellant wrap the guns and place them under a log.[6] Some weeks thereafter, appellant called Diego and asked him to get the guns from under the log and move them. However, Diego did not do so because he knew someone else had already moved them. The only person Diego observed pointing the .22 rifle or shooting that night was appellant. Diego described appellant as wearing two shirts, one black and the other white, along with long, black Dickey shorts and a pair of black and white shoes on that night.

Shante B., who was also a member of the Folk Nation Gang, testified to her encounter that night with appellant and Pooh. Shante was standing in front of a building at Bethel Bishop when appellant told her he was going to T.S. Martin to "ride with some Slobs." Pooh told appellant not to go over there. Appellant left the area with Goo, Mirage and Diego. A little while later, Shante saw appellant running back to Bethel Bishop from the woods in the direction of T.S. Martin "at full speed." Shante overheard appellant telling one of his friends he had just left T.S. Martin, that he was "spraying" when he was shooting, and that two little kids were shot. Appellant stated he had done this because earlier in the evening "they had got in something with some Bloods." Appellant then ran away from Bethel Bishop.

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[6] In a statement to Investigator Gray, Diego informed him that after appellant caught up with them, he took off a shirt, wrapped the guns in it, and hid it under a log near the railroad tracks.

After the second incident, where the boys drove back to T.S. Martin in Brady's car looking to fight the individual they previously encountered, the police were called. Officer Reynolds was dispatched to T.S. Martin at 9:11 p.m. on August 26, 2004, in regard to a civil disturbance. After being informed that some irate black males in a small white vehicle had come to the area looking for someone named "Delshawn," Officer Reynolds, along with another policeman who responded to the call, left the neighborhood to find Delshawn and see if he could identify the people involved. The officers spoke with Delshawn for ten to fifteen minutes, and upon leaving received a call at 9:44 regarding another disturbance on T.S. Martin. The dispatch then immediately changed to a "shots fired" call at the location. Officer Reynolds testified he was able to get back to T.S. Martin in about three or four minutes, and when he arrived he observed two individuals on the ground and a lot of people in the yard. Those standing there began yelling to him that the suspects had run behind the house, in the direction of Beltline.

Sergeant Auld also responded to the 9:44 p.m. shots fired dispatch, and heard over the radio that the subjects were running toward the railroad track. Sergeant Auld and Officer Whittle proceeded to the bottom of a cut, went over some railroad tracks, and as they reached the top of a mound, they heard crashing noises in the woods. Using a flashlight, they spotted appellant running out of the woods and commanded him to stop. Other individuals who could be heard in the woods took off in another direction. The officers placed appellant in handcuffs and detained him in Officer Whittle's vehicle. Investigator Gray then brought a witness to the site, and Officer Whittle removed appellant from his car and used his flashlight to shine on appellant for the witness to observe him. Officer Whittle described appellant as wearing a pair of gray shorts over a pair of dark blue basketball shorts, a white t-shirt, and black and white tennis shoes that night.

After arriving at the scene of the incident, Investigator Gray interviewed witness Tyrone S., who informed Gray he had observed the shooting. Tyrone indicated there was only one shooter, and identified the person by his nickname. Upon hearing a possible suspect had been detained, Gray drove Tyrone to the location of the detention, pulled about twenty feet behind the car holding the suspect, and turned on his high beam lights.

Officer Whittle removed the suspect from his car and had the person face Investigator Gray's vehicle for a few minutes. Based upon the identification process, Gray requested Whittle transport appellant to police headquarters. Thereafter, Gray interviewed appellant. When told he had been identified as being involved in a shooting at T.S. Martin, appellant initially denied having been there. When told he had been placed at T.S. Martin at the time of the shooting, appellant then stated he had been at T.S. Martin "earlier" and "one of the dark skinned dudes" was shooting at a house. Appellant denied that he shot a gun that night. Approximately twelve hours later, and after a gunshot residue test had been performed on appellant,[7] appellant gave another statement. This time he stated he had been firing a gun on the night in question, but claimed it was a .32 caliber gun, he only had two bullets, and that he shot at a top window of a house with a round hole like an attic, situated on the corner. Authorities were unable to discover any bullet holes in the only home in the area with an attic vent, or any damage to any homes in the area other than C.D. s home.

Tyrone S. testified regarding his witness of the shooting and the events surrounding it. Tyrone saw appellant at an apartment complex around 3:00 in the afternoon on August 26, 2004. Tyrone was with Delshawn, a member of the Bloods Gang. Tyrone did not speak with appellant, but he observed a conversation take place between Delshawn and appellant that he did not hear. Tyrone and Delshawn then went back to T.S. Martin where Tyrone lived. A little after 9:00 that evening, Delshawn, who did not live on T.S. Martin, left Tyrone's home. After his departure, Tyrone received a call from C.D. wherein she relayed that some boys had asked her where the "Slobs" stayed. Tyrone went outside to talk to C.D. He observed some boys exit a car onto T.S. Martin. Someone from the car had yelled, "There goes Delshawn," referring to Tyrone. One of the boys, who had braids, was wearing a light t-shirt and a black bandana covering half of his face. This person, who was two houses up as Tyrone stood on his porch, pointed a gun at Tyrone and said he was going to kill him. He then stated, "That ain't Delshawn," and turned and walked away, at which point Tyrone ran into his house, and someone in

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[7] Appellant's gunshot residue test ultimately did not detect sufficient residue to conclusively determine whether appellant had fired a weapon that night, and thus the test "came back negative."

his house called the police. After telling the officers the boys were looking for Delshawn, the police left to find Delshawn themselves. At the time, Tyrone did not know who the person was with the bandana, but he later told the police he thought it was appellant. Tyrone testified this same white vehicle had come into their neighborhood earlier that day. At that time, they rode down the street and started saying, "Come down here," speaking to Delshawn. As they were riding past, Delshawn and Tyrone were throwing up gang signs to them.

After the police left to look for Delshawn, Tyrone was sitting on the porch with his two female cousins and one of their friends when they saw five males walking up from the front of the neighborhood. Appellant was walking in the front of the group, and he was the only one who was not wearing a bandana around his face. Tyrone and the others ran into the house and cut off the indoor house lights when they saw the boys. Tyrone ran upstairs to a window. A motion detector light on the house where the boys were standing, as well as a street light located a little bit down the street, provided light. From his position in the upstairs window, Tyrone saw appellant get a rifle and then provide a revolver to another person. Appellant then knelt down, aimed, started shooting, stood up, and then continued shooting. After the first shot was fired, all the other boys ran away. Tyrone heard multiple shots, and someone in his house called the police to return to T.S. Martin. Appellant was in the street when he was shooting. Appellant tried to shoot again, but was unsuccessful. He then turned around and ran away in the same direction as the other boys. Tyrone estimated he watched from the upstairs window for a period of four to five minutes.

Tyrone spoke with Investigator Gray at the scene and told him what he had observed and identified the shooter by his nickname. Gray then transported Tyrone to another location about four or five miles away, where Tyrone identified appellant as the shooter.

The State also presented testimony from two individuals qualified as experts in the field of gang activity and/or gang recognition. Both experts testified generally regarding several gangs with a presence in South Carolina, as well as to the meaning of certain tattoos and brands on the body of appellant, affiliating appellant with the Folk Nation Gang and possibly

indicating he had "bodies" attributed to him. Additionally, the experts testified the Bloods and the Folk Nation did not "get along," and are considered rival groups.

Precious D. also testified to her observation of a small white car on T.S. Martin approximately thirty minutes prior to the shooting incident. According to Precious, the car stopped in the middle of the road and she saw one individual exit the vehicle. This person started arguing with someone at one of the houses and lifted his shirt to show he had a gun tucked in his pants. When he started talking, Precious recognized the person as Pooh, whom she had worked with in the past. Precious called him "Pooh," and told him "you need to go somewhere with that mess." After calling out his name, the people from the car left within about two or three minutes. Although Pooh had a bandana on his face, she recognized him by his voice and the way he walked.

The defense argued to the jury that Pooh and Diego had fabricated appellant's involvement in order to make him the "fall guy" and cover for one another. Counsel also maintained Tyrone was mistaken about his identity of appellant as the person who pointed a gun at him in the second incident, just prior to the shooting, and because of this mistake, his identification of appellant as the shooter could not be trusted. The matter was submitted to the jury and appellant was found guilty of the murders of C.D. and T.M. This appeal follows.

ISSUES

1. Whether the trial judge committed reversible error by refusing to conduct an in camera hearing pursuant to Neil v. Biggers, 409 U.S. 188 (1972) and Rule 104(c), SCRE, on the reliability of Tyrone's identification of appellant as the shooter, especially in light of the fact Tyrone had incorrectly identified appellant as a participant in an earlier incident shortly before the shooting, and his identification of appellant as the triggerman was the product of an inherently suggestive show-up conducted by the police after appellant was arrested.

2. Whether the trial judge committed reversible error by allowing the State's purported gang expert to testify that one of appellant's body markings meant that he had committed two prior murders, as this evidence placed appellant's character at issue in violation of Rules 403 and 404, SCRE.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous. This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citations omitted). The admission or exclusion of evidence is left to the sound discretion of the trial court, and the court's decision will not be reversed absent an abuse of discretion. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). An abuse of discretion occurs when the decision of the trial court is based upon an error of law or upon factual findings that are without evidentiary support. Id. A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant. State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005).

LAW/ANALYSIS

I. Tyrone's Identification

In a pretrial motion two months before the trial, the trial judge indicated he was ready to proceed on the Neil v. Biggers hearing. Before calling any witnesses, the State noted the constitutional safeguards in place under Neil v. Biggers were designed to avert the dangers of mistaken identity and applied in situations involving strangers. The State argued, pursuant to State v. McLeod, 260 S.C. 445, 196 S.E.2d 645 (1973), the trial judge did not need to conduct a basic review of the totality of the circumstances and the suggestiveness of the show-up where the witness knows, independently from the incident, the person he or she is identifying. Accordingly, the State maintained that Neil v. Biggers did not apply in this situation. Defense counsel countered that this case was distinguishable from McLeod inasmuch

as here, the witness viewed the incident from some distance away and, further, there was not a sufficient existing relationship between the witness and the person identified.

The trial judge determined the State should put up evidence on Tyrone's prior relationship or knowledge and he would then decide whether there needed to be further showing other than the relationship between the two. Tyrone testified in an in camera hearing that he was in a house on T.S. Martin on August 26, 2004, when he observed the shooting from an upstairs window. Tyrone made an in-court identification of appellant as the shooter. Tyrone further testified he had known appellant since he was elementary school age,[8] had known him for a period of approximately seven years, that appellant used to visit Goo's home, an apartment next to where Tyrone's aunt lived, that appellant and Goo were friends of his at the time, appellant used to talk to Goo for him because Goo was deaf, and the three of them "hung out" together for about a four day period. Since elementary school, Tyrone had seen appellant twice in 2003 at McDonald's, where appellant worked, and he also saw appellant earlier on the day of the shooting, from about two houses away, at a housing complex where he observed appellant talking to Delshawn.

Defense counsel argued the State failed to make a sufficient showing there was any kind of preexisting relationship between Tyrone and appellant and therefore there was no reliable basis for Tyrone's identification of appellant. The trial judge found the facts to be close to McLeod, but before ruling determined the State should continue the examination to show exactly what occurred at the time the identification was made so he could look at the totality of the circumstances. Thereafter, Tyrone testified he observed appellant shooting from "right across the street." He gave Investigator Gray his statement shortly after the shooting identifying appellant as the shooter by his nickname. He was taken to another location about four blocks away and he sat in Investigator Gray's vehicle and observed appellant standing on the side of a police car wearing the same clothes he was wearing at the time of the shooting. It was dark outside at the time he saw appellant, and he remained inside the police car approximately three to six feet away from

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[8] Tyrone and appellant did not attend the same school.

appellant. At the time of the shooting, there were no lights on in the upstairs room where he stood, but there was a street light on behind the shooter and a light on the side of a house.

Following Tyrone's in camera testimony, defense counsel objected "to the lack of allowing a full Neil v. Biggers hearing." Counsel argued this matter did not fall within McLeod as there was an insufficient showing of "any real meaningful preexisting relationship between" Tyrone and appellant. Counsel therefore asked for "a full Neil v. Biggers hearing on this issue." The trial judge noted McLeod indicated constitutional and procedural safeguards under Neil v. Biggers were not intended to apply where a victim knows an accused, and McLeod does not talk about the degree of knowledge or indicate there must be an intimate relationship. He found, based on the evidence presented, that a relationship, or at least knowledge existed, and whether that knowledge was sufficient went to the weight of the testimony rather than the admissibility of it. The trial judge additionally determined there was sufficient showing by the State, under the totality of circumstances, to make an identification, even considering the suggestiveness of show-ups, as the witness testified he knew the defendant since elementary school, he had seen him at McDonald's, he had seen him at the apartment complex on the day of the shooting, he knew him by nickname, and he identified him by nickname prior to being taken to the location of the identification. The trial judge therefore determined the identification testimony was admissible, and the defense could argue about its weight to the jury.

At the commencement of the trial two months later, defense counsel asked the trial judge to revisit the Neil v. Biggers issue previously raised. Counsel noted that some information came out in an unrelated hearing on this case and, at the time of the judge's initial ruling on this matter, it had not been known that Tyrone had inaccurately identified appellant as the person who had pointed a gun at Tyrone in the incident prior to the shooting incident. Counsel therefore argued that the judge never had an opportunity to consider this fact and appellant was entitled to a full Neil v. Biggers hearing that would allow this other information to be considered. Counsel further asserted a full in camera hearing was required by Rule 104, SCRE. The State continued to maintain that it had established Tyrone had prior knowledge of the defendant and counsel's arguments went to the weight of the evidence and

not admissibility. The trial judge stated he was still of the opinion a sufficient showing had been made by the State to establish a prior knowledge or relationship between the witness and the defendant and found, under McLeod, that a full Neil v. Biggers hearing was not required. At the close of the State's case, counsel renewed the defense objection to the denial of a full Neil v. Biggers hearing. The trial judge overruled the objection.

On appeal, appellant contends the trial judge erred in refusing to conduct an in camera hearing regarding the reliability of Tyrone's identification of appellant as the shooter. He argues that the shooting occurred in a dark neighborhood with various people moving about, and Tyrone testified he observed the shooter from an upstairs window. Appellant asserts there were substantial problems with the reliability of Tyrone's identification too because, although Tyrone claimed to know appellant since elementary school, he was unaware of appellant's real name until after he identified appellant to police. Additionally, appellant notes Tyrone incorrectly identified appellant as the person who had threatened to kill him a short time before the shooting. Appellant contends the fact that a witness knew the defendant prior to the commission of the crime is only another factor to consider in a Neil v. Biggers analysis when, as here, the witness had incorrectly identified the defendant on a previous matter and subsequently participates in an inherently suggestive show-up. Appellant further maintains, given the importance of Tyrone's testimony identifying him as the shooter, the failure to hold a full Neil v. Biggers hearing could not have been harmless error. We disagree.[9]

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[9] We note the State contends, because defense counsel failed to object when Tyrone's identification testimony was presented during the trial and the pre-trial rulings on the matter were not made immediately prior to Tyrone's trial testimony, the issue is not preserved for review. However, trial counsel did not simply object to the admission of the identification evidence in the pre-trial motions, but specifically argued the defense was entitled to a "full Neil v. Biggers hearing" and objected to the trial judge's failure to grant appellant a more extensive hearing on the matter. It is from the denial of this extensive hearing that appellant appeals. The matter was repeatedly argued and ruled on by the trial court, and we find it adequately preserved for our review.

When identification of a defendant is at issue, the general rule is that a trial court must hold an in camera hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation. State v. Miller, 359 S.C. 589, 596, 598 S.E.2d 297, 301 (Ct. App. 2004), aff'd, 367 S.C. 329, 626 S.E.2d 328 (2006). Additionally, our courts have noted Rule 104(c), SCRE,[10] "unambiguously mandates hearings on the admissibility of out of court identifications of the accused shall in all cases be held outside the presence of the jury," and while the adoption of Rule 104 did not abrogate the viability of the rulings in the pre-Rules of Evidence cases, an in camera hearing required by Rule 104(c) allows a defendant to question a witness more stringently regarding possible misidentification or bias outside the presence of the jury. State v. Cheatham, 349 S.C. 101, 117, 561 S.E.2d 618, 627 (Ct. App. 2002).

In State v. McLeod, 260 S.C. 445, 196 S.E.2d 645 (1973), our supreme court addressed the issue of a whether a lone confrontation was unfair and untrustworthy where the facts showed the victim knew the accused. The facts in McLeod indicate the victim struggled with her assailant and exclaimed, "oh, you Hattie's boy," causing the assailant to flee. The victim went to another woman's house after the attack and said simply, "Hattie's boy." The morning after the incident, the defendant was arrested and taken to the victim's home. Though the victim did not know her assailant's name, she identified the person arrested as the one who assaulted her. The victim testified at trial she recognized her assailant as "Hattie's boy," and made an in-court identification of her assailant. Id. at 447, 196 S.E.2d at 645. It was "apparent from the record [victim] knew the defendant," "[s]he had seen him many times at a neighborhood store near their home; she knew the defendant's mother and knew him to be her son." Id. at 448, 196 S.E.2d at 645. On appeal, McLeod challenged the fairness of the pre-trial identification procedure used by the police. Id. at 448, 196 S.E.2d at 645-46. The court held the rulings in decisions which attempted to avert the danger of

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[10] Rule 104(c), SCRE provides, in part, that "[h]earings on the admissibility of . . . pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury."

mistaken identity by establishing mandatory constitutional and procedural safeguards were designed for application where the accused and victim are strangers to each other, and were "never intended to apply where the victim new the accused." Thus, the constitutional and procedural safeguards McLeod claimed were necessary simply did not apply to the facts of his case. Id. at 448, 196 S.E.2d at 646.

In the more recent case of In re Robert D., 340 S.C. 12, 530 S.E.2d 137 (Ct. App. 2000), this court held the family court did not err in failing to hold an identification hearing pursuant to Neil v. Biggers, as the hearing was not necessary because the victim knew the defendant. Id. at 17-18, 530 S.E.2d at 140-41. The record reflected the victim knew Robert D. by his first name, recognized him as a friend of two of her classmates, and remembered he watched a couple of films with her class. The court cited McLeod, noting the rules regarding out-of-court identifications were "designed for application where the accused and the victim are strangers to each other; they were never intended to apply where the victim knew the accused." Id. at 18, 530 S.E.2d at 141. Thus, the constitutional and procedural safeguards, which McLeod claimed were necessary, simply did not apply under the facts of the case. Id.

We find McLeod and In re Robert D. to be controlling, and that there was sufficient evidence presented of Tyrone's prior knowledge of appellant such that a Neil v. Biggers hearing was not required. Here, the witness knew appellant by his nickname, had known him for a number of years, and specifically testified to having seen appellant on several occasions over the years, including having seen him earlier in the day on the date of the shooting. Additionally, while the defense presented evidence Tyrone mistakenly identified appellant as the person who pointed a gun at him and threatened him in one of the prior incidents, we agree such argument goes to the weight of the evidence.[11]

II. Meaning of Body Markings

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[11] We note that Tyrone did not identify the appellant as the person who pointed a gun in his face in the earlier incident until after the shooting. It is more likely that any mistaken identity from the earlier incident was the result of his identification of appellant as the shooter in the latter event.

In the pretrial hearing two months prior to appellant's trial, the State indicated its intention to present evidence regarding tattoos on appellant's body. Defense counsel objected, asserting no specific meaning could be attributed to the tattoos, the State was attempting to admit the evidence so the jury would infer the tattoos represented the death of the two children, that the tattoo evidence was grossly and unduly prejudicial and that it was irrelevant. Counsel further argued the State intended to bring out testimony that he received the tattoos while in prison, which was improper character propensity evidence. Counsel asked the court for an in camera hearing on the matter. When the case resumed two months later, counsel sought to exclude the State's gang expert testimony on the meaning of two teardrop tattoos on appellant's body, arguing the State could not lay a proper foundation to the meaning, and testimony from a corrections officer regarding when appellant received the tattoos would allow the State to impermissibly remark on appellant's prior criminal record. The trial judge determined the evidence was admissible as long as the State laid a proper foundation.

Prior to the State calling its gang expert witnesses, the defense renewed its objection to any testimony regarding the purported meaning of "any tattoos," asserting such testimony would be cumulative and unduly prejudicial, and that the State would be unable to provide a foundation for the meaning of the tattoos. Thereafter, the State presented the testimony of Investigator O'Cain, who was qualified as an expert in gang activity and recognition, and Officer Mahoney, who was qualified as an expert in the field of gang activity.

O'Cain testified to various tattoos and brandings he observed on appellant's body, including some indicating appellant's affiliation with the Folk Nation Gang and a "set" of the Folk Nation Gang. O'Cain further testified that a branded pitchfork on appellant's back appeared to have two hash marks on the right side of the pitchfork which could signify appellant's rank. When asked what his expert opinion was as to appellant's rank as denoted by the hash marks, O'Cain stated, from what he had been told "from the streets and interviews," appellant is now "a set King, strike two," and "to get the strike series of that rank, you have to have bodies attributed to you." Counsel objected to this testimony and asked for a mistrial arguing the evidence was without support, it was inflammatory, and O'Cain was

improperly relying on hearsay evidence to support his opinion. The trial court overruled the objection, noting reliance on hearsay by the expert was proper under Rule 703, SCRE.[12] O'Cain continued this line of testimony, stating the hash marks represent a rank structure and that it could represent bodies attributed to appellant. When asked what he meant by "bodies," O'Cain responded, "That they have committed some sort of act or murder where bodies - - dead people." O'Cain also testified in regard to two teardrops above appellant's right eye, one of which was filled in and the other one which was open. O'Cain stated the open tear drop could mean a fellow gang member or relative died, or that an innocent person was killed by mistake, while the filled in teardrop is supposed to represent a retribution, where someone died and that person is responsible for that killing.

Mahoney likewise testified to his observation of various tattoos and brandings on appellant's body. In regard to the pitchfork brand on appellant's back, Mahoney testified the hash marks could mean a lot of things, including "it could mean bodies." He testified it could also mean robbing someone or other things, but "it would be something he did on behalf of the gang," and could include murder. As for the teardrops, Mahoney opined that the open teardrop could represent a lost soldier or someone who was innocent, while "the closed teardrop is a body." The open teardrop could be for a fellow gang member or an innocent person taken out by mistake, and the closed teardrop would represent "a body," indicating the person is a gang member who "took somebody out."

After the State rested, appellant renewed his objection "to any gang expert testimony, especially any references to the tattoos." He argued the State introduced inadmissible character propensity evidence that was irrelevant to the identity of the perpetrator of the crime and was unduly

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[12] Rule 703, SCRE provides as follows: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

prejudicial. Appellant further objected to the expert testimony as it was based on hearsay. The trial judge overruled the objection.

The defense presented its own expert in the field of gang identification, Robert Walker, who also observed appellant's tattoos and agreed appellant's tattoos reflected his affiliation with the Folk Nation Gang. As to the hash or "slash" marks, Walker testified he had heard they signify rank, but the marks were new to him and he really had no knowledge about the meaning. He had not heard it meant there were bodies attached to it. In regard to the teardrops, Walker explained there were many meanings that could be attributed to them, including having killed someone or having served time, but there was no way to say it had a specific meaning.

On appeal, appellant contends the trial judge erred in allowing Investigator O'Cain to testify the hash marks on 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.[13] He argues this testimony, in violation of Rule 404(b), "referred to possible homicides prior to the two for which [appellant] was standing trial," as the State had maintained the two teardrop tattoos symbolized the homicide of C.D. and T.M. He further summarily argues evidence appellant was involved in two prior murders is inadmissible under Rule 403, SCRE, as it is "unduly prejudicial and inflammatory."

Rule 403, SCRE provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Pursuant to Rule 404(b), SCRE provides, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The rule further provides, "It may, however, be admissible to show motive, identity, the

[13] Appellant argues generally about "[o]ne of these witnesses" and "[o]ne of these [tattoos]," and cites only to the testimony of Investigator O'Cain and O'Cain's reference to the hash marks on appellant's body.

existence of a common scheme or plan, the absence of mistake or accident, or intent." Id.

The 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. In his argument to the trial court, appellant asserted the State intended to bring out testimony that he received the teardrop tattoos while in prison, which was improper character propensity evidence. Appellant argued the State's gang expert testimony on the meaning of two teardrop tattoos should be excluded, asserting testimony from a corrections officer regarding when appellant received the tattoos would allow the State to impermissibly remark on appellant's prior criminal record.[14] On appeal, appellant challenges the admission of the hash mark evidence, not that of the teardrops. Appellant never argued to the trial judge as he does on appeal that the hash mark brand referred to possible homicides prior to the two for which appellant was standing trial, thereby amounting to improper character propensity evidence that was unduly prejudicial and inflammatory. Further, there is nothing in the record to indicate the State asserted the hash marks referenced prior bad acts. The State did not present evidence as to when appellant obtained the hash marks, nor argue the hash marks were placed on his body to signify murders or bad acts committed in incidents unrelated to that for which appellant stood trial. Because this argument was neither raised to nor ruled upon by the trial judge, it is not properly preserved for our review. See State v. McKnight,

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[14] The record shows the State sought to introduce evidence that appellant did not have the two teardrop tattoos on his face when he initially entered the Department of Corrections after the death of the two victims, but was subsequently found to have the tattoos during his time there, implying he received the tattoos while in the prison system, after the death of the victims. Appellant objected to this line of testimony, arguing it would unfairly remark on his prior criminal history, and proposed the State introduce the time line of the tattoos without referring to the Department of Corrections. As a result, appellant and the State thereafter entered into a stipulation that tattoos depicted in certain pictures of appellant's body were observed as of February 2, 2006, but were not present on appellant's body as of March 11, 2005.

352 S.C. 635, 646-47, 576 S.E.2d 168, 174 (2003) (issue must be raised to and ruled upon by trial court to be preserved for review).

Further, 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. As noted, the record shows Pooh testified that appellant stated an intent to go over to T.S. Martin just after Pooh's run-in over there. Diego testified he agreed to accompany appellant to T.S. Martin to "handle something" and identified appellant as the one in the group who pointed a rifle at a house while all the others ran after the first shot, and later observed appellant dispose of the weapon. Shante testified she observed appellant running from the direction of T.S. Martin at full speed, she overheard appellant saying he had just left T.S. Martin, that he was "spraying" when he was shooting, that two little kids where shot, and that he had done this because earlier in the evening they had gotten into something with some Bloods. Also, Tyrone witnessed the shooting and identified appellant as the shooter.

Further, appellant admitted in his last statement to police that he was present at the shooting and he had in fact fired a weapon. Thus, there is substantial other evidence suggesting appellant's guilt. Additionally, appellant only points to the testimony of O'Cain regarding the hash mark evidence. It is clear Mahoney likewise testified the hash marks on appellant "could mean bodies," and the testimony of O'Cain would therefore be largely cumulative to that of Mahoney. See State v. Page, 378 S.C. 476, 483-84, 663 S.E.2d 357, 360 (Ct. App. 2008) (holding error is harmless where it could not reasonably have affected the trial's outcome; no definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case; in considering whether error is harmless, a case's particular facts must be considered along with various factors including: the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of

cross-examination otherwise permitted, and the overall strength of the prosecution's case). Accordingly, any error in the admission of the hash mark evidence would be harmless.

For the foregoing reasons, appellant's convictions are

AFFIRMED.

THOMAS and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

CHRIS ANTHONY LIVERMAN,

APPELLANT

Appeal from Richland County

James W. Johnson, Jr., Circuit Court Judge

Opinion No. 4635

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCAR counsel for Chris Anthony Liverman petitions the Court for rehearing of the Court's disposition of the identification issue involving the relationship between Neil v. Biggers, 409 U.S. 188 (1972), State v. McLeod, 260 S.C. 445, 196 S.E.2d 645 (1973), and Rule 104 (c), SCAR, which provides in part that "[h]earings on the admissibility of ... pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury." The Court interprets McLeod and its own case of In Re Robert D, 340 S.C. 12, 530 S.E.2d 137 (Ct.App. 2000), to hold that an incamera hearing pursuant to Rule 104(c) and Neil v. Biggers is not required whenever an eyewitness testifies that he has prior knowledge of the defendant.

First, it is not at all certain that McLeod, a 1973 decision, survived the adoption of Rule 104 in 1995. Rule 1103(b), SCAR. In Robert D., the Court of Appeals suggested that McLeod survived the adoption of Rule 104, albeit in dicta and without reference to the rule itself. Subsequently, in State v. Ramsay, 345 S.C. 607, 550 S.E.2d 294, 297 (2001), the Supreme Court ruled:

> Where identification is concerned, the general rule is that a trial court must hold and incamera hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation.

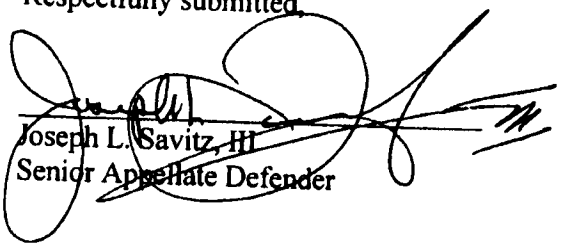
The Court of Appeals also ignores its own opinion in State v. Cheatham, 349 S.C. 101, 561 S.E. 2d 618, 627 (Ct.App. 2002):

> Rule 104(c) unambiguously mandates hearings on the admissibility of out of court identifications of the accused shall in all cases be held outside the presence of the jury. The adoption of Rule 104 did not abrogate the viability of the rulings in the pre-Rules of Evidence cases. The incamera hearing required by Rule 104(c) allows a defendant to question a witness more stringently regarding possible misidentification or bias outside the presence of the jury. If the defendant is required to question a victim/witness ... only in the juries presence, the defendant may be required to severely curtail the questioning so as not to inflame the jury.

The fact that they eyewitness knew Liverman prior to the commission of the crime is only another factor in the Neil v. Biggers analysis, since he has incorrectly identified another person as the defendant – a misidentification which the witness continued to make even at trial—and subsequently participated in an inherently suggestive show-up. Given the importance of the eyewitness' testimony in identifying Liverman as the shooter instead of other possible suspects, the failure to hold a full Neil v. Biggers hearing pursuant to Rule 104 could not have been harmless error.

For this reason, the Court should grant rehearing and either reverse or remand for a new trial or remand for a hearing which complies with that case and Rule 104(c). State v. Moore, 343 S.C. 282, 540 S.E.2d 445, 448 (2000); State v. Cheatham.

Respectfully submitted,



Joseph L. Savitz, III
Senior Appellate Defender

This 17th day of December, 2009.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

James W. Johnson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRIS ANTHONY LIVERMAN,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William Edgar Salter, III, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201,this 17th day of December, 2009.

Joseph L. Savitz, III
Senior Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 17th day
of December, 2009.

(L.S.)
Notary Public for South Carolina

My Commission Expires: July 1, 2019.

The South Carolina Court of Appeals

The State, Respondent,

v.

Chris Anthony Liverman, Appellant.

The Honorable James W. Johnson, Jr.
Richland County
Trial Court Case No. 2005-GS-40-06831
2005-GS-40-06832

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.

A.C. J. Huff

J. Thomas

J. Pieper

1/20/2010

Columbia, South Carolina

cc: Chief Attorney Joseph L. Savitz, III
Attorney General Henry Dargan McMaster
Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Donald J. Zelenka
Sr. Assistant Attorney General William Edgar Salter, III
Warren Blair Giese, Esquire

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

James W. Johnson, Jr., Circuit Court Judge

Opinion No. 4635 (S.C. Ct. App. filed 12/4/2009)

05-GS-40-6831, 6832

THE STATE,

RESPONDENT,

V.

CHRIS ANTHONY LIVERMAN,

PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

JOSEPH L. SAVITZ, III
Senior Appellate Defender

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

ATTORNEY FOR PETITIONER

I N D E X

INDEX 1

CERTIFICATE OF COUNSEL 2

ISSUE PRESENTED 3

STATEMENT OF THE CASE 4

ARGUMENT 6

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on January 20, 2010.

ISSUE PRESENTED

The trial judge committed reversible error by refusing to conduct an *in camera* hearing pursuant to *Neil v. Biggers*, 409 U.S. 188 (1972), and *Rule 104(c), SCRE*, on the reliability of Tyrone Smith's identification of Liverman as the shooter, particularly since Smith incorrectly identified Liverman as a participant in an earlier incident shortly before the shooting and his identification of Liverman as the triggerman was the product of an inherently suggestive show-up conducted by the police after Liverman was arrested.

STATEMENT OF THE CASE

On October 30 through November 9, 2006, Chris Liverman stood trial in Richland County, before Judge James W. Johnson, Jr., and a jury, on indictments charging him with two counts of murder. The State alleged that two innocent bystanders, 16 year-old [redacted] T.M. and 12 year-old [redacted] C.D., were each shot once in the head after Liverman opened fire in retaliation for an earlier gang-related dispute. The local media exploited the fears aroused by this case extensively.

The defense contended that an associate of Liverman, Diego Thompson, was the actual shooter. Thompson, who testified for the State, claimed that he had been shocked when Liverman produced a rifle from his shorts and opened fire. ROA p. 248, line 7 – p. 249, line 12; ROA p. 302, lines 7-18. But the central State's witness was Tyrone Smith, who testified that he had watched from an upstairs window directly across the street as someone handed Liverman a rifle and he "kneels downs, aims, starts shooting, stands up, keeps shooting." ROA p. 687, line 17 – p. 688, line 16. Liverman himself did not testify.

Before the jury found Liverman guilty of both murders, it sent out a note indicative of its apprehension: "Regardless of what the verdict is, the jurors were curious of whether any safety precautions have been taken." ROA p. 1269, line 24 – p. 1270, line 3. The judge sentenced Liverman to two consecutive life sentences.

Liverman raised two issues on direct appeal to the South Carolina Court of Appeals, including the following:

> The trial judge committed reversible error by refusing to conduct an *in camera* hearing pursuant to *Neil v. Biggers*, 409 U.S. 188 (1972), and *Rule 104(c), SCRE*, on the reliability of Tyrone Smith's identification of Liverman as the shooter, especially since Smith had incorrectly identified Liverman as a participant in an earlier incident

> shortly before the shooting and his identification of Liverman as the triggerman was the product of an inherently suggestive show-up conducted by the police after Liverman was arrested.

The Court of Appeals affirms Liverman's convictions. *State v. Liverman*, 286 S.C. 223, 687 S.E.2d 70 (Ct. App. 2009). The Court denied rehearing by order dated January 20, 2010. Counsel for Liverman now petitions the Supreme Court for writ of certiorari to the Court of Appeals pursuant to Rule 226, SCACR.

ARGUMENT

The trial judge committed reversible error by refusing to conduct an *in camera* hearing pursuant to *Neil v. Biggers*, 409 U.S. 188 (1972), and *Rule 104(c), SCRE*, on the reliability of Tyrone Smith's identification of Liverman as the shooter, especially since Smith incorrectly identified Liverman as a participant in an earlier incident shortly before the shooting and his identification of Liverman as the triggerman was the product of an inherently suggestive show-up conducted by the police after Liverman was arrested.

At a pretrial hearing, the defense moved to suppress as unreliable Tyrone Smith's identification of Liverman as the shooter and requested an *in camera* hearing on the matter pursuant to *Neil v. Biggers*, 409 U.S. 188 (1972). ROA p. 14, lines 14-16. The State responded that Smith "knew the defendant prior to this day" and so:

> [T]he court doesn't need to go under a basic review of the totality of the circumstances, meaning the opportunity to observe the person, the lighting conditions, the suggestiveness of even a show-up or a line-up.

ROA p. 15, lines 8-18. The State based its objection on *State v. McLeod*, 260 S.C. 445, 196 S.E.2d 645 (1973). ROA p. 14, line 17 – p. 15, line 8. "So basically," the Assistant Solicitor concluded, "*Neil v. Biggers* doesn't apply." ROA p. 16, lines 3-6. The judge ruled:

> Let the State establish whatever relationship or prior knowledge there may be, and then I will see where that falls within *Neil v. Biggers* and *State v. McLeod* and whether there is going to be additional showing or more showing than this relationship at that point in time.

ROA p. 17, lines 10-15. The State and the defense conducted a circumscribed examination of Smith limited to the extent and nature of his prior relationship with Liverman. Defense counsel then renewed her objection "to the lack of … a full *Neil v. Biggers* hearing in this matter." ROA p. 41,

lines 17-19. The judge refused to expand the scope of the hearing, noting that the defense "can still argue [to the jury] about its weight." ROA p. 44, line 9 – p. 45, line 9.

The defense again reiterated its motion for a complete *Neil v. Biggers* hearing at the start of trial. ROA p. 74, line 3 – p. 78, line 21. Counsel added that a full *in camera* hearing was also required by Rule 104(c), SCRE, which explicitly provides:

> Hearings on the admissibility of … pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury.

ROA p. 79, line 25 – p. 80, line 19. The judge insisted, "[U]nder *McLeod,* a full *Neil v. Biggers* is not required." ROA p. 80, line 20 – p. 81, line 2.

* * *

T.M. and C.D. were killed sometime after 9:00 the night of August 26, 2004. ROA p. 148, lines 1-5. The neighborhood where the incident occurred was dark and the various people moving about the area were indistinct. ROA p. 122, line 23 – p. 123, line 2. Nevertheless, as previously noted, Tyrone Smith testified that, from an upstairs window, he observed a person he identified as Liverman firing a rifle down the street. ROA p. 687, line 17 – p. 688, line 16.

Smith's identification of Liverman as the shooter was crucial to the State's case, but there were substantial problems with the reliability of his testimony in this regard, deficiencies the defense was prevented from exploring at the truncated pre-trial hearing on the issue.

Although Smith claimed to have known Liverman "[s]ince elementary school," he was unaware of his actual name until sometime after he had identified Liverman to the police as the person among several other suspects who had shot T.M. and C.D. ROA p. 677, lines 9-15; ROA p. 691, line 18 – p. 693, line 6. Smith also incorrectly identified Liverman to the police as the

leader of a gang who had threatened to kill him a short time before the shooting. ROA p. 516, lines 7-11; ROA p. 682, line 23 – p. 685, line 14. Smith definitively identified Liverman as the shooter following a show-up conducted by the police that same night, shortly after Liverman was arrested. ROA p. 425, lines 6-17; ROA p. 438, line 7 – p. 449, line 20; ROA p. 691, line 18 – p. 693, line 12.

* * *

Due process protects against the admission of evidence derived from suggestive identification procedures. *Stovall v. Denno*, 388 U.S. 293 (1967).

> It is the likelihood of misidentification which violates a defendants right to due process… . Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous. But as *Stovall* makes clear, the admission of evidence of a show-up without more does not violate due process.

Neil v. Biggers, 409 U.S. at 199. The "central question" is "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive," and the factors to be considered in evaluating the likelihood of misidentification include:

> The opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. at 199-200. Single person show-ups are "particularly disfavored in the law" because they are suggestive by their very nature. *State v. Moore*, 343 SC 282, 540 S.E.2d 445, 448 (2000) (citing *Stovall*); *State v. Blassingame*, 338 SC 240, 525 S.E.2d 535 (Ct. App. 1999).

> A recognized exception to the general rule that show-ups are inherently suggestive [citations omitted] exist where the witness

> recognized the perpetrator at the time of the commission of the crime and the basis for that recognition was the fact the witness knew the perpetrator prior to the commission of the offense. In such situations, the show-up is of the nature of a conformation, rather than an identification [citations omitted].

People v. Miller, 137 A.D. 2d 626, 628 (NY 1988). ;see *In Re. McKelvin*, 258 A. 2d 452 (D.C. App. 1969).

In *State v. McLeod,* the defendant was arrested and taken to the victim's home the morning after she was attacked to make sure he was her assailant.

> It is apparent that she did not know her assailant's first name, but she identified the person arrested as the one who had assaulted her… It is [also] apparent from the record that [the victim] knew the defendant. She had seen him many times at a neighborhood store near their home; she knew the defendant's mother and knew him to be her son.

196 S.E. 2d at 645. The defendant argued that the show-up was "unfair and untrustworthy," relying upon the *Stovall* line of cases. *Id* at 645. This Court held:

> The rulings in these decisions attempt to avert the danger of mistaken identity by establishing mandatory constitutional and procedural safeguards. The rules are designed for application where the accused and the victim are strangers to each other; they were never intended to apply where the victim knew the accused. The constitutional and procedural safeguards… simply do not apply under the facts of this case.

Id.

The Court of Appeals interprets *McLeod* and its own case of *In Re Robert D*, 340 S.C. 12, 530 S.E.2d 137 (Ct.App. 2000), to hold that an *in camera* hearing pursuant to Rule 104(c) and *Neil v. Biggers* is not required whenever an eyewitness testifies that he has prior knowledge of the defendant.

First, it is not at all certain that *McLeod*, a 1973 decision, survived the adoption of Rule 104 in 1995. Rule 1103(b), SCAR. In *Robert D._*, the Court of Appeals suggested that *McLeod* survived the adoption of Rule 104, albeit *in dicta* and without reference to the rule itself. Subsequently, in *State v. Ramsay*, 345 S.C. 607, 550 S.E.2d 294, 297 (2001), the Supreme Court ruled:

> Where identification is concerned, the general rule is that a trial court must hold and *in camera* hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation.

The Court of Appeals also ignores its own opinion in *State v. Cheatham*, 349 S.C. 101, 561 S.E. 2d 618, 627 (Ct.App. 2002):

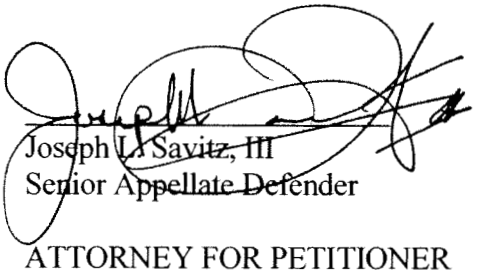
> Rule 104(c) unambiguously mandates hearings on the admissibility of out of court identifications of the accused shall in all cases be held outside the presence of the jury. The adoption of Rule 104 did not abrogate the viability of the rulings in the pre-Rules of Evidence cases. The *in camera* hearing required by Rule 104(c) allows a defendant to question a witness more stringently regarding possible misidentification or bias outside the presence of the jury. If the defendant is required to question a victim/witness ... only in the juries presence, the defendant may be required to severely curtail the questioning so as not to inflame the jury.

Neil v. Biggers itself stressed that "the testimony is undisputed that the victim made no previous identification of any of the show-ups, line-ups or photographic showings. Her record for reliability was thus a good one, as she had previously resisted whatever suggestiveness inheres in a show-up." *409 US* at *201*.

Given the importance of Tyrone Smith's testimony in identifying Liverman as the shooter - instead of, say, Diego Thompson – the failure to hold a full *Neil v. Biggers* could not have been harmless error. For this reason, the Court should grant rehearing and either reverse or remand for a

new trial or remand for a hearing which complies with that case and Rule 104(c). *State v. Moore*, 343 S.C. 282, 540 S.E.2d 445, 448 (2000); *State v. Cheatham*.

Respectfully submitted,



Joseph L. Savitz, III
Senior Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of March, 2010

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 4635 (S.C. Ct. App. filed 12/4/2009)
05-GS-40-6831, 6832

THE STATE,

RESPONDENT,

V.

CHRIS ANTHONY LIVERMAN,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William Edgar Salter, III, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and the S.C. Court of Appeals this 17th day of March, 2010.

Joseph L. Savitz, III
Senior Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day
of March, 2010.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 1, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
James W. Johnson, Jr., Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

Respondent,

V.

CHRIS ANTHONY LIVERMAN,

Appellant.

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

WARREN B. GIESE
Solicitor, Fifth Judicial Circuit

P.O. Box 192
Columbia, SC 29202
(803) 576-1801

ATTORNEYS FOR RESPONDENT.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

COUNTERSTATEMENT OF ISSUE ON APPEAL 1

ADDITIONAL SUSTAINING GROUND 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

ARGUMENT 3

Liverman's failure to renew his *in camera* objection when the witness testified before the jury waived his claim for appellate review. Alternatively, the trial judge did not abuse his discretion by ruling that the testimony of Tyrone Smith was not subject to the procedural safeguards in *Neil v. Biggers*, where his ruling was consistent with *State v. McLeod*; and he ultimately considered the admissibility of Smith's identification *in camera*, thereby providing Liverman a constitutionally adequate hearing on the issue of identification 4

A. How issue was raised in the trial court 4

B. The Court of Appeals' decision. 10

C. Discussion 13

1. Procedural bar 13

2. The trial judge properly relied upon *McLeod* 123

3. The hearing held and the trial judge's alternative findings comport with *Neil v. Biggers* 17

ADDITIONAL SUSTAINING GROUND. 24

This Court should deny certiorari because the Court of Appeals erroneously concluded that Liverman's failure to renew his *in camera* objection when the witness testified before the jury did not waive his claim for appellate review. 24

CONCLUSION 25

TABLE OF AUTHORITIES

FEDERAL CASES

Brady v. Maryland, 373 U.S. 83 (1963) 9, 10

Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967) 15

Manson v. Brathwaite, 432 U.S. 98, 114 (1977) 14

Neil v. Biggers, 409 U.S. 188 (1972) 1, 4, 13, 14

Schriro v. Landrigan, ___, U.S. ___, ___, 127 S.Ct. 1933, 1939-40 (2007) 12

State v. Caldwell, Op. No. 4392, 2008 WL 2078139, 6 (Ct.App., May 18, 2008) 13, 14

Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) 14, 15

United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) 15

STATE CASES

Deberry v. State, 457 A.2d 744, 754 (Del. 1983) 19, 20

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) 24

In re Robert D., 340 S.C. 12, 530 S.E.2d 137 (Ct.App.2000) 12, 15, 16

People v. Dones, 279 A.D.2d 366 (N.Y. 2001) 17

People v. Reynolds, 373 N.E.2d 650, 654 (1978) 19

People v. Tas, 51 N.Y.2d 915, 916, 415 N.E.2d 967, 967-68, 434 N.Y.S.2d 978, 979 (N.Y. Ct. App. 1980) 17, 20, 22

Powell v. State, 566 So.2d 1228, 1236 (Miss. 1990) 14

Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct.App.1998) 24

State v. Bailey, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) 16

State v. Blassingame, 338 S.C. 240, 525 S.E.2d 535 (Ct.App.1999) 19

State v. Brown, 274 S.C. 48, 260 S.E.2d 719 (1979) 17, 19

State v. Brown, 356 S.C. 496, 504, 589 S.E.2d 781, 785 (Ct.App.2003) 14, 20

State v. Byram, 326 S.C. 107, 113, 485 S.E.2d 360, 363 (1997) 17

State v. Cheatham, 349 S.C. 101, 117, 561 S.E.2d 618, 627 (Ct.App.2002) 11, 16

State v. Gagum, 328 S.C. 560, 492 S.E.2d 822 (Ct.App.1997) 24

State v. Howard, 295 S.C. 462, 369 S.E.2d 132 (1988) 23

State v. Hoyte, 306 S.C. 561, 413 S.E.2d 806 (1992) 20

State v. Liverman, 386 S.C. 223, 687 S.E.2d 70 (2009) 2

State v. Mansfield, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (Ct.App.2000) 20

State v. McLeod, 260 S.C. 445, 196 SE 2d 645 (1973) 4, 5, 11, 12, 14, 15, 19, 20

State v. Miller, 359 S.C. 589, 596, 598 S.E.2d 297, 301 (Ct.App.2004), aff'd, 367 S.C. 329, 626 S.E.2d 328 (2006) 11

State v. Mueller, 319 S.C. 266, 460 S.E.2d 409 (Ct.App.1995) 24

State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) 17

State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) 16

State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990) 23

State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) 24

State v. Simmons, 308 S.C. 80, 82-83, 417 S.E.2d 92, 93 (1992) 16

State v. Sinclair, 275 S.C. 608, 274 S.E.2d 411 (1981) 17

State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981) 17

State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) 13

State v. Tufts, 355 S.C. 493, 497, 585 S.E.2d 523, 525 (S.C.App. 2003) 24

STATE RULES

Rule 104 (c), SCRE 1, 11, 16, 17, 18, 19

Rule 208(b)(2), SCACR 24

Rule 220(c), SCACR 24

Rule 242(f), SCACR 24

PETITIONER'S STATEMENT OF ISSUE ON APPEAL

The trial judge committed reversible error by refusing to conduct an *in camera* hearing pursuant to *Neil v. Biggers,* 409 U.S. 188 (1972), and *Rule 104(c), SCRE,* on the reliability of Tyrone Smith's identification of Liverman as the shooter, especially since Smith had incorrectly identified Liverman as a participant in an earlier incident shortly before the shooting and his identification of Liverman as the triggerman was the product of an inherently suggestive show-up conducted by the police after Liverman was arrested.

COUNTER STATEMENT OF ISSUE ON APPEAL

Assuming that the issue is preserved for appellate review despite Liverman's failure to renew his *in camera* objection when the witness testified before the jury, whether the trial judge abused his discretion by ruling that the testimony of Tyrone Smith was not subject to the procedural safeguards in *Neil v. Biggers*, where his ruling was consistent with *State v. McLeod*; and he ultimately considered the admissibility of Smith's identification *in camera*, thereby providing Liverman a constitutionally adequate hearing on the issue of identification?

ADDITIONAL SUSTAINING GROUND

Whether this Court should deny certiorari because the Court of Appeals erroneously concluded that Liverman's failure to renew his *in camera* objection when the witness testified before the jury did not waive his claim for appellate review?

STATEMENT OF THE CASE

Petitioner, Chris Anthony Liverman (Liverman), is currently incarcerated in the McCormick Correctional Institution, of the South Carolina Department of Corrections, as the result of his two Richland County murder convictions and sentence. The Richland County Grand Jury indicted Liverman at the April 20, 2005 term of court for two counts of murder (05-GS-40–6831 and -06832). The charges stemmed from the shooting deaths of two innocent youngsters - sixteen year old T.M. and twelve year old C.D. - each of which had been shot once in the head. Assistant Richland County Public Defenders Elizabeth Franklin, Carolyn Gripp, and Maxwell Schardt represented Liverman on these charges. Fifth Circuit Solicitor Warren B. Giese and Assistant Solicitors Kathryn Luck Campell and Margaret Fent prosecuted the case.

On August 28, 2006 the Honorable James W. Johnson heard motions and selected a jury. Because of concerns expressed by both parties, however, he continued the matter for thirty days. Liverman thereafter received a jury trial before Judge Johnson on October 30-November 9, 2006. The jury convicted him of both murders; and Judge Johnson sentenced him to two consecutive sentences of life imprisonment.

Liverman timely served and filed a notice of appeal. After briefing by the parties, the South Carolina Court of Appeals filed a published Opinion on December 4, 2009, affirming his convictions and sentence. *State v. Chris Anthony Liverman*, Op. No. 4635 (S.C. Ct. App., Dec. 4, 2009). **App. 1-21.**[1] Liverman filed a timely Petition for Rehearing on December 17, 2009. **App. 22-25.** On January 20, 2010, the Court of Appeals filed an Order denying rehearing. **App. pp. 26-27.**

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[1] This Opinion is published as *State v. Liverman*, 386 S.C. 223, 687 S.E.2d 70 (2009), and Respondent hereafter refers to the published decision.

STATEMENT OF FACTS

The facts of this case are yet another example of the brutally senseless violence caused by gangs that is becoming increasingly prevalent in South Carolina and America as a whole. Two innocent people- twelve year old C.D. and sixteen year old T.M. were killed in a hail of gunfire aimed at C.D. s house, on the night of August 26, 2004. The murders resulted from a vendetta by members of the "Folk Nation" against a rival gang, "the Bloods." **R. pp. 109-15; 121-58; 588-93.**[2] Each victim had a single gunshot wound to the head and died from injuries caused by the gunshot wound. **R. pp. 885-95**. Respondent accepts the Court of Appeals' discussion of the facts in *Liverman*, 386 S.C. at 225-32, 687 S.E.2d at 71-75 as sufficient for purposes of this Return.

[2]Three projectiles were recovered from the home, and ten fired cartridge casings were found a short distance from C.D. 's home

ARGUMENT

Liverman's failure to renew his *in camera* objection when the witness testified before the jury waived his claim for appellate review. Alternatively, the trial judge did not abuse his discretion by ruling that the testimony of Tyrone Smith was not subject to the procedural safeguards in *Neil v. Biggers*, where his ruling was consistent with *State v. McLeod*; and he ultimately considered the admissibility of Smith's identification *in camera*, thereby providing Liverman a constitutionally adequate hearing on the issue of identification.

Liverman's first argument is that the trial judge erroneously refused to hold a hearing comporting with the United States Supreme Court's decision in *Neil v. Biggers,* 409 U.S. 188 (1972) before allowing the State to present the eyewitness identification testimony of Tyrone Smith. Respondent disagrees. Assuming that the issue is not barred by Liverman's failure to renew his *in camera* objection when the witness testified before the jury, see **Additional Sustaining Ground One**, *infra*, the Court of Appeals properly concluded that the trial judge did not abuse his discretion by ruling that Smith's testimony was not subject to the procedural safeguards in *Neil*. Rather, the trial judge's ruling was consistent with this Court's decision in *State v. McLeod,* 260 S.C. 445, 196 SE 2d 645 (1973), because Smith knew Liverman prior to the night Liverman murdered C.D. and T.M.; and Smith had already identified him to police as the shooter, by nickname; and Smith had described Liverman's clothing, before police took him to a one person show-up a short time after the murder and only blocks from the scene. *Liverman*, 386 S.C. at 234-39, 687 S.E.2d at 75-78. Further, the trial judge ultimately considered the admissibility of Smith's identification *in camera* and thereby provided Liverman a constitutionally adequate hearing on the identification issue.

A. How issue was raised in the trial court

The trial judge addressed the identification of Liverman by an eyewitness before the original

start of the trial on August 28, 2006. When the trial judge asked whether the State was ready for a *Neil v. Biggers* hearing, the State asserted that it was unnecessary for him to review the totality of the circumstances of the identification because the eyewitness knew Liverman. In support of this position, the State maintained that this Court's decision in *McLeod, supra*, had held that the procedural safeguards set forth in *Neil* and the cases preceding it simply do not apply where the victim and the defendant know each other. Rather, those cases apply where the victim and accused are strangers. **R. pp. 14-15.**

Liverman contended that the victim in *McLeod* was assaulted and had "an ample time to make an identification." The State's discovery in this case, however, merely reflected that the witness knew Liverman by a nickname. He asserted that the two did not attend school together and that they had not had any relationship before the night of the shooting. Also, the witness was "quite some distance away from the person who allegedly committed this act." He further asserted that *McLeod* did not apply, in the absence of a pre-existing relationship. **R. pp. 16-17.**

The State presented eyewitness, Tyrone Smith. Smith testified that he was nineteen years old, and that he was present when the shootings occurred on August 26, 2004. He was looking out of an upstairs window of another house on the street and he watched the shooting.[3] He actually saw the shooting and he identified Liverman as the shooter. **R. pp. 17-19.**

Smith testified that he had known Liverman since roughly fifth grade. They did not go to school together. However, Liverman used to live in an apartment next door to Smith's aunt, in Saxon Homes. Smith described Liverman as a friend and explained that Liverman would communicate with

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[3]Smith described this as the "left hand room" upstairs.

a deaf friend, named Goo; for him.[4] Smith saw Liverman for "about four days in a row" during that period. Also, he had seen Liverman twice, in 2003, at a McDonald's where Liverman worked; and at Bayberry Apartments, when Liverman was speaking with someone named Delshawn. Smith knew Liverman by the nickname "Baby Jesus." **R. pp. 19-24; 27-28.**

On cross-examination, Smith testified that Liverman was wearing a white shirt and shorts when Smith saw him on the morning of the murders. Also, Liverman's hair was "sprayed" and he had beads in the back. Two brothers, "Money" and "Cash" were also present. However, Smith was roughly two houses away from Liverman and did not speak to him at Bayberry Apartments. The sun was out, Smith does not wear glasses and he had not used either drugs or alcohol that day. **R. pp. 24-27.**

Liverman maintained that the State had not established a sufficient, reliable showing of a pre-existing relationship between Smith and him. He argued that his physical characteristics had changed over the course of seven years since Smith saw him on four occasions. Also, Smith did not describe the McDonald's incident; and Smith only allegedly saw him at a distance at Bayberry Apartments on the day of the shooting. **R. pp. 29-30.**

The trial judge found that the State's evidence was "awfully close" to *McLeod*. However, before he made a ruling under the totality of the circumstances, he stated that " I think I still have to hear exactly what was going on at the time of the identification." Therefore, he allowed the State to present additional testimony concerning the actual identification. **R. p. 30, ll. 13-21.**

Smith testified that Liverman was "right across the street" from him when he saw the

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[4] He last saw Goo two days before the murder. **R. p. 22.** Goo is Reginald Joyner, who was present when the murders occurred. **R. p. 469.**

shooting. "[P]retty soon after the shooting," he gave a statement to Inv. Joe Gray, in Gray's police car. In his statement, he identified the shooter, Liverman, by nickname, and he described the shooter's clothing. The shooter wore a white shirt, shorts, a camouflage bandanna on his head and something shiny or reflective on his shoes, which Smith described as "New Balances." Inv. Gray thereafter drove him to another location about four blocks away from the shooting. Along the way, Inv. Gray told him that the police had someone and wanted to see whether Smith could identify the person as the shooter. **R. pp. 30-36.**

Smith remained in Inv. Gray's car when they reached the other location. Liverman was brought up to the side of the Inv. Gray's car and Smith identified him from a distance of between two and six feet. Liverman was wearing the same clothes that he had been wearing earlier. Smith told the police that they had the right man. **R. pp. 33; 36-38.**

Liverman also cross-examined Smith, again, about the circumstances surrounding his ability to see the shooter. Smith testified that the lights were not on inside of the upstairs room from which he watched the shooting. Also, there were street lights on the street where the shooting occurred. One light was behind the group he saw, close to a stop sign. There was also a light on the side of the house. **R. pp. 38-39.**[5]

Liverman objected to the lack of a full hearing in accordance with *Neil v. Biggers; supra.* He again asserted that *McLeod* did not apply because there was not a sufficiently reliable relationship between him and Smith. He also noted that Smith's identification was made from some two homes away from the shooter and that Smith never spoke to the shooter. On the other hand, the victim in *McLeod* had intimate, physical contact with the person she later identified. **R. pp. 41-42.**

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[5] The Court introduced a copy of Smith's statement as Court's Ex. 5.

The State argued that *McLeod* applied. Although Smith did not know Liverman's real name, he knew Liverman by the nickname Baby Jesus; and he had known Liverman since elementary school. He had gotten to know Liverman when he "hung out with" Liverman on several occasions in the four days or so at the residence of Smith's aunt. He had also seen Liverman at the McDonald's later in life and on the day of the shooting. Therefore, he knew Liverman. The State further argued that there was no requirement of a "meaningful relationship" as Liverman argued. **R. pp. 42-43.** Liverman, again, argued that there was an insufficient opportunity for Smith to view the shooter. **R. pp. 43-44.**

The trial judge observed that *McLeod* holds that the "constitutional and procedural safeguards required under *Neil v. Biggers* were never intended to apply where the victim knew the accused." However, *McLeod* did not define the word "knows." The trial judge found that *McLeod* does not require an intimate relationship. Also, based on the evidence presented *in camera,* he found that "the relationship or at least knowledge existed and I think whether it was sufficient knowledge . . . would . . . go more toward the weight of the testimony rather than the admissibility of it." **R. pp. 44, ll. 9-20.** Additionally, the trial judge found that:

> sufficient evidence has been shown by the State under the totality of the circumstances to make an identification. It is permissible and I know the argument would be that at a show-up identification where the defendant was the only one there might be overly suggestive but at the same time the witness who testified that he knew the defendant, he knew him from elementary school, from seeing him at McDonald's, from seeing him [at] Bayberry on the date of the shooting. He knew him by his nickname, he identified the shooter by nickname to the officer prior to him being taken to the second location. Based on that I will permit the identification testimony and you can still argue about its weight.

R. pp. 44, l. 20- p. 45, l. 9.

Before the subsequent trial, Liverman asked the trial judge to revisit his ruling with respect to this issue. He argued that certain evidence that had not been presented during the original *in camera* hearing was elicited at another (apparently un-transcribed) hearing on a motion to disqualify the Fifth Circuit Solicitor's Office in connection with an alleged *Brady v. Maryland,* 373 U.S. 83 (1963) violation.[6] Specifically, he referred to evidence that Smith (1) told law enforcement on the night of the shooting that he saw Liverman get into a car that night and that Liverman stuck a gun in Smith's face that night. (2) told law enforcement in two written statements; and (3) said that this was how he was able to recognize Baby Jesus (Appellant) as the shooter. Also, Smith never told police that he had recognized Liverman from Saxon Homes or from McDonald's. Liverman asserted that Smith could not have seen him get into the car that night and that Smith "could not have been the person who stuck the gun in Tyrone Smith's face." **R. pp. 32-36.**

Liverman maintained that it was improper to assert that the identification was reliable as to the shooter but unreliable as to who put a gun in Smith's face. He further argued that this information did not come out because the trial judge did not hold a full *Neil v. Biggers* hearing, and he repeated his argument that *McLeod* was factually distinguishable based upon the close physical connection between the victim and defendant in that case. **R. pp. 32-36.**

In response, the State argued that Liverman's arguments went to the weight of the identification testimony, as opposed to its admissibility; and that the Court in *McLeod* had held that *Neil* does not apply to cases such as the present one where the witness knew the subject, even though by nickname. **R. pp. 36-37**. Liverman argued briefly in reply, again stressing that the trial judge had precluded a full showing of the relevant circumstances by relying upon *McLeod.* He also focused

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[6] Appellant has not raised any issue on appeal in connection with the motion to disqualify.

upon the fact that police used show-up identification, which is disfavored. **R. pp. 37-38.**

However, the trial judge reviewed the transcript of the August 28, 2006 hearing. He then found that a full *Neil v. Biggers* hearing was not required because the State hade made a sufficient presentation of a prior knowledge or relationship between the witness and Liverman. Therefore, he adhered to his earlier ruling. **R. p. 38, l. 20- p. 39, l. 4.** Liverman asserted that this ruling violated his right to due process under the United States Constitution and the South Carolina Constitution. **R. p. 39, ll. 8-10.**

Smith later testified, without further objection or motion, as a State's witness. **R. pp. 676-754.** After the State rested its case, Liverman renewed his objection to the trial judge's decision not to hold a full *Neil* hearing. **R. p. 896.** The trial judge denied his motion for the reasons he had denied the in camera motion. **R. pp. 899-900.**

B. The Court of Appeals' decision.

The current issue was the first issue raised on direct appeal. The Court first discussed the in camera proceedings discussed, *supra*. *See Liverman*, 386 S.C. at 234-36, 687 S.E.2d at 75-77. The Court then rejected Liverman's argument as follows:

> On appeal, appellant contends the trial judge erred in refusing to conduct an in camera hearing regarding the reliability of Tyrone's identification of appellant as the shooter. He argues that the shooting occurred in a dark neighborhood with various people moving about, and Tyrone testified he observed the shooter from an upstairs window. Appellant asserts there were substantial problems with the reliability of Tyrone's identification too because, although Tyrone claimed to know appellant since elementary school, he was unaware of appellant's real name until after he identified appellant to police. Additionally, appellant notes Tyrone incorrectly identified appellant as the person who had threatened to kill him a short time before the shooting. Appellant contends the fact that a witness knew the defendant prior to the commission of the crime is only another factor to consider in a *Neil v. Biggers* analysis when, as here, the witness had incorrectly identified the defendant on a previous matter and subsequently participates in an inherently suggestive show-up.

Appellant further maintains, given the importance of Tyrone's testimony identifying him as the shooter, the failure to hold a full Neil v. Biggers hearing could not have been harmless error. We disagree.FN9.

FN9. We note the State contends, because defense counsel failed to object when Tyrone's identification testimony was presented during the trial and the pretrial rulings on the matter were not made immediately prior to Tyrone's trial testimony, the issue is not preserved for review. However, trial counsel did not simply object to the admission of the identification evidence in the pretrial motions, but specifically argued the defense was entitled to a "full *Neil v. Biggers* hearing" and objected to the trial judge's failure to grant appellant a more extensive hearing on the matter. It is from the denial of this extensive hearing that appellant appeals. The matter was repeatedly argued and ruled on by the trial court, and we find it adequately preserved for our review.

When identification of a defendant is at issue, the general rule is that a trial court must hold an in camera hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation. *State v. Miller*, 359 S.C. 589, 596, 598 S.E.2d 297, 301 (Ct.App.2004), *aff'd*, 367 S.C. 329, 626 S.E.2d 328 (2006). Additionally, our courts have noted Rule 104(c), SCRE,FN10 "unambiguously mandates hearings on the admissibility of out of court identifications of the accused shall in all cases be held outside the presence of the jury," and while the adoption of Rule 104 did not abrogate the viability of the rulings in the pre-Rules of Evidence cases, an in camera hearing required by Rule 104(c) allows a defendant to question a witness more stringently regarding possible misidentification or bias outside the presence of the jury. *State v. Cheatham*, 349 S.C. 101, 117, 561 S.E.2d 618, 627 (Ct.App.2002).

FN10. Rule 104(c), SCRE provides, in part, that "[h]earings on the admissibility of ... pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury."

In *State v. McLeod*, 260 S.C. 445, 196 S.E.2d 645 (1973), our supreme court addressed the issue of a whether a lone confrontation was unfair and untrustworthy where the facts showed the victim knew the accused. The facts in *McLeod* indicate the victim struggled with her assailant and exclaimed, "oh, you Hattie's boy," causing the assailant to flee. The victim went to another woman's house after the attack and said simply, "Hattie's boy." The morning after the incident, the defendant was arrested and taken to the victim's home. Though the victim did not know her assailant's name, she identified the person arrested as the one who assaulted her. The victim testified at trial she recognized her assailant as "Hattie's boy," and made an in-court identification of her assailant. *Id.* at 447, 196 S.E.2d at 645. It was "apparent

from the record [victim] knew the defendant," "[s]he had seen him many times at a neighborhood store near their home; she knew the defendant's mother and knew him to be her son." Id. at 448, 196 S.E.2d at 645. On appeal, McLeod challenged the fairness of the pre-trial identification procedure used by the police. *Id.* at 448, 196 S.E.2d at 645-46. The court held the rulings in decisions which attempted to avert the danger of mistaken identity by establishing mandatory constitutional and procedural safeguards were designed for application where the accused and victim are strangers to each other, and were "never intended to apply where the victim new the accused." Thus, the constitutional and procedural safeguards McLeod claimed were necessary simply did not apply to the facts of his case. *Id.* at 448, 196 S.E.2d at 646.

In the more recent case of *In re Robert D.*, 340 S.C. 12, 530 S.E.2d 137 (Ct.App.2000), this court held the family court did not err in failing to hold an identification hearing pursuant to *Neil v. Biggers*, as the hearing was not necessary because the victim knew the defendant. *Id.* at 17-18, 530 S.E.2d at 140-41. The record reflected the victim knew Robert D. by his first name, recognized him as a friend of two of her classmates, and remembered he watched a couple of films with her class. The court cited *McLeod*, noting the rules regarding out-of-court identifications were "designed for application where the accused and the victim are strangers to each other; they were never intended to apply where the victim knew the accused." *Id.* at 18, 530 S.E.2d at 141. Thus, the constitutional and procedural safeguards, which [Robert D.] claimed were necessary, simply did not apply under the facts of the case. *Id.*

We find *McLeod* and *In re Robert D.* to be controlling, and that there was sufficient evidence presented of Tyrone's prior knowledge of appellant such that a *Neil v. Biggers* hearing was not required. Here, the witness knew appellant by his nickname, had known him for a number of years, and specifically testified to having seen appellant on several occasions over the years, including having seen him earlier in the day on the date of the shooting. Additionally, while the defense presented evidence Tyrone mistakenly identified appellant as the person who pointed a gun at him and threatened him in one of the prior incidents, we agree such argument goes to the weight of the evidence.FN11.

FN11. We note that Tyrone did not identify the appellant as the person who pointed a gun in his face in the earlier incident until after the shooting. It is more likely that any mistaken identity from the earlier incident was the result of his identification of appellant as the shooter in the latter event.

Liverman, 386 S.C. at 236-39, 687 S.E.2d at 77-78.

C. Discussion

1. Procedural bar

Initially, Respondent submits that the issue is not preserved for appellate review for the reasons set forth in **Additional Sustaining Ground I.**

2. The trial judge properly relied upon *McLeod*

Alternatively, Respondent submits that the Court of Appeals and the trial judge properly found that *McLeod* applied under the facts of this case. An identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification may deprive a criminal defendant of due process of law. *Neil, supra*; *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004); *State v. Caldwell*, Op. No. 4392, 2008 WL 2078139, 6 (Ct.App., May 18, 2008). However, an in-court identification of an accused is inadmissible only if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. *Id.* Where the State offers eyewitness testimony identifying the defendant as the person who committed the crime and the defendant challenges the in-court identification as being tainted by a previous, improper identification or confrontation, the trial judge in most instances must engage in a two-prong inquiry. The trial judge must first determine whether the identification process was unduly suggestive. *Id.*

Even assuming that an identification procedure was suggestive, it should not be excluded as long as the identification was reliable under the totality of the circumstances, notwithstanding the suggestiveness. *See Neil*, 409 U.S. at 199; *State v. Traylor*, 360 S.C. 74, 600 S.E.2d 523 (2004). The trial judge must consider the totality of circumstances to determine whether an identification may be reliable even when the procedure has been suggestive. *See Neil*, 409 U.S. at 199. The relevant factors to be considered include: (1) the opportunity of the witness to view the accused; (2)

the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Id.* *See also State v. Caldwell*, Op. No. 4392, 2008 WL 2078139, 6 (Ct.App., May 15, 2008).

However, "[w]here the reason for a rule disappears, the rule becomes somewhat irrelevant." *Powell v. State*, 566 So.2d 1228, 1236 (Miss. 1990). The United States Supreme Court has held that "reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall*[7] confrontations." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (footnote added). *See also State v. Brown*, 356 S.C. 496, 504, 589 S.E.2d 781, 785 (Ct.App.2003) (citing *Manson*). Consistent with both *Neil* and *Manson*, both this Court and the Court of Appeals have held that the requirements of *Neil* - and the cases preceding or following it - do not apply where the eyewitness and the suspect know each other.

In *McLeod*, the victim of an assault with intent to ravish was attacked on a Friday night. "Her assailant struck her on the head with a hard object, choked her," and tore her undergarments while attempting to remove them. The assailant fled after her struggles and her "identifying exclamation, 'oh, you Hattie's boy.'" The victim testified at trial that she had recognized her assailant as "'Hattie's boy.'" Another prosecution witness testified that when the victim came to her house after being attacked: "'She say 'Hattie's boy'. That's all she say.'" On Saturday, police arrested the defendant pursuant to an arrest warrant and took him to the victim's home to see whether she could identify him as her assailant. 260 S.C. at 447, 196 S.E.2d at 645.

On appeal, the defendant attacked the fairness of the pre-trial identification procedure used

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[7] *See Stovall v. Denno*, 388 U.S. 293 (1967).

by the police. The Court rejected his argument. After observing that the record demonstrated that the victim knew the defendant, *Id* at 448, 196 S.E.2d at 645-46,[8] the Court explained that:

> The defendant's argument that the lone confrontation was unfair and untrustworthy is based on the principles set forth in the cases of *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). The rulings in these decisions attempt to avert the danger of mistaken identity by establishing mandatory constitutional and procedural safeguards. The rules are designed for application where the accused and the victim are strangers to each other; they were never intended to apply where the victim knew the accused. The constitutional and procedural safeguards, which the defendant claims were necessary, simply do not apply under the facts of this case.

McLeod, 260 S.C. at 448, 196 S.E.2d at 646.

The Court of Appeals reached the same result in *In the Interest of Robert D.*, 340 S.C. 12, 18, 530 S.E.2d 137, 140-41 (Ct.App. 2000). After finding that there could not be a violation of *Neil* because there had not been any State action surrounding the show-up, the Court stated that "[e]ven if *Neil v. Biggers* does apply to identifications arranged by persons not connected with law enforcement, we also agree with the family court that a hearing was not necessary in this case because the victim knew the defendant. The record reflects the victim knew Robert D. by his first name, recognized him as a friend of two of her classmates, and remembered he watched a couple of films with her class." *Id.* at 17-18, 530 S.E.2d at 140-41.

Notwithstanding Liverman's contrary position, the Court of Appeals correctly found that the trial judge properly relied upon *McLeod* when he ruled that *Neil v. Biggers* did not apply in this case because Tyrone Smith knew Liverman prior to the night that Liverman murdered C.D. and T.M. **R. p. 44, ll. 9-20**. As discussed, the prosecution's evidence established that Liverman

[8]"She had seen him many times at a neighborhood store near their home; she knew the defendant's mother and knew him to be her son." *Id.*

lived next to Smith's aunt, in Saxon Homes, approximately seven years before the murders. Smith had contact with Liverman on several occasions over the course of four days while he visited his aunt during that period of time. Liverman even helped him communicate with a deaf boy nicknamed Goo. Sometime between that time and the August 26, 2004 murders, Smith twice saw Liverman at the McDonald's where Liverman worked. He also saw Liverman at Bayberry Apartments on the day of the murders. Finally, Smith knew Liverman by the nickname of Baby Jesus.

As the trial judge properly recognized, **R.p. 44, ll. 9-20**, the arguments advanced by Appellant at trial go to the weight that he believes the jury should assign to Smith's knowledge of Appellant, rather than whether he knew Appellant. Thus, the trial judge properly relied upon *McLeod*. *See also In the Interest of Robert D.*, 340 S.C. at 18, 530 S.E.2d at 140-41.

In his pleadings on appeal, Liverman has argued - for the first time - that *McLeod* has been implicitly overruled by the adoption of Rule 104(c), SCRE, in 1995, and this Court's subsequent decision in *State v. Ramsey*, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) (""the general rule is that a trial court must hold an *in camera* hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation"). *See also State v. Simmons*, 308 S.C. 80, 82-83, 417 S.E.2d 92, 93 (1992) (noting that the Court had adopted a *per se* rule requiring the trial court to hold an *in camera* hearing in such situations); *State v. Cheatham*, 349 S.C. 101, 117-18, 561 S.E.2d 618, 627 (Ct.App.2002) (same).

However, his argument is not properly before this Court on appeal because he never presented it to the trial judge. A party cannot argue one ground in support of an objection or motion at trial and a different ground on appeal. *State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989);

State v. Byram, 326 S.C. 107, 113, 485 S.E.2d 360, 363 (1997) (same). *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).[9]

Even if preserved, his argument lacks merit. The rule in *McLeod* is "still viable" and remains an exception to the otherwise *per se* rule in *Ramsey* and *Simmons*. The present case simply does not involve the type of identification contemplated by Rule 104(c). *See People v. Tas*, 51 N.Y.2d 915, 916, 415 N.E.2d 967, 967-68, 434 N.Y.S.2d 978, 979 (N.Y. Ct. App. 1980) ("Since the participants in the incident the victim and the perpetrators were known to each other, there was no "identification" within the meaning of CPL 710.30 ... and no prior notice need have been given by the People") (citation omitted). Further, the viability of *McLeod* cannot seriously be drawn into question, since *In the Interest of Robert D.* was decided long after adoption of the South Carolina Rules of Evidence.

3. The hearing held and the trial judge's alternative findings comport with *Neil v. Biggers*

Moreover, and apart from the admissibility of Smith's testimony under *McLeod*, Liverman cannot complain on appeal because he received the only relief requested. *See State v. Sinclair*, 275 S.C. 608, 274 S.E.2d 411 (1981) (where the appellant obtains the only relief he sought at trial, there is no issue for the appellate court to decide); *State v. Brown*, 274 S.C. 48, 260 S.E.2d 719 (1979)

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[9] In the Court of Appeals, he alternatively asserted that if it is "still viable, *State v. McLeod* only applies where the prosecution unequivocally establishes that '[the] defendant and the witness who identified him as the perpetrator had a sufficient relationship prior to the incident so that suggestiveness was not a concern.'" **IBOA an FBOA, at pp. 7-8** (citing *People v. Dones*, 279 A.D.2d 366 (N.Y. 2001). He has abandoned this argument. *State v. Sullivan*, 277 S.C. 35, 282 S.E.2d 838 (1981) (issue not raised in brief is deemed abandoned). Again, this argument was procedurally barred because he never presented it, or the authority from other jurisdictions upon which he relied, to the trial judge. *Bailey*.

(same). Despite the trial judge's ruling that the identification was admissible under *McLeod* because the pre-existing relationship between Smith and Liverman established that Smith knew Liverman, the trial judge only made this finding after he had conducted an *in camera* hearing and considered *in camera* testimony as to the circumstances surrounding Smith's identification of Liverman.

As discussed, the trial judge found that the evidence initially presented by the State was "awfully close" to *McLeod*. However, he concluded that "before I can examine the totality of the circumstances, I think I still have to hear exactly what was going on at the time of the identification." **R. p. 72, ll. 13-21**. To this end, he permitted the State to offer additional testimony from Smith. **R. pp. 72-81**.

Further, after hearing this evidence and the arguments by the parties, the trial judge made the alternative findings, discussed above, that the identification was properly admissible "under the totality of the circumstances." He specifically rejected the notion that the one person show-up was overly suggestive based upon Smith's knowledge of Liverman from elementary school, from seeing him at McDonald's and from seeing him earlier on the day of the shooting. The trial judge further found that Smith knew Liverman, by nickname; and that Smith had identified the shooter to police, by nickname before police took him to the location for the show-up. **R. p. 44, l.20-p. 45, l. 9**. Therefore, the trial judge did conduct an *in camera* hearing as to Smith's identification that was consistent with Rule 104(c), SCRE,[10] as well as *Ramsey* and its progeny; and he made findings that

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[10]Rule 104(c) provides as follows:

> **Hearing of Jury.** Hearings on the admissibility of confessions or statements by an accused, and pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and

are consistent with *Neil* and *Manson*.

Further, the trial judge did not abuse his discretion in making this alternative ruling. Smith had ample opportunity to watch the shooting. Although he was some distance from the shooter and it was dark, there were lights on the side of the house and the shooter was illuminated by a streetlight. Further, the killer that Smith was identifying was a person he had known for seven years. *See McLeod, supra*; *In the Interest of Robert D., supra*. *See also Deberry v. State*, 457 A.2d 744, 754 (Del. 1983) (recognizing that while "a detailed description [of the perpetrator] is always helpful, . . . such a requirement was unnecessary here since it is clear that [the victim] knew [the defendant],"had spent a considerable part of the previous day with him, identified him initially by his first name and the bunkhouse in which he lived, and according to the police officer who was with her, unhesitatingly identified him at a show-up); *People v. Reynolds*, 373 N.E.2d 650, 654 (1978) ("the testimony of an identification witness is strengthened to the extent of his prior acquaintance with the accused").

Liverman's principle arguments are that this was a single person show-up; that Smith did not have a sufficient opportunity to see the shooter at the time of the offense; and that, although Smith was a crucial prosecution witness, there were supposedly deficiencies in Smith's eyewitness identification. However, the one person show-up employed here was not so unduly suggestive that it tainted the reliability of Smith's identification. Although single person show-ups are disfavored because they are suggestive by their nature, *see State v. Blassingame*, 338 S.C. 240, 525 S.E.2d 535 (Ct.App.1999), an identification may be reliable under the totality of the circumstances even when

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so requests.

Rule 104(c), SCRE.

a suggestive procedure has been used. *State v. Brown*, 356 S.C. 496, 504, 589 S.E.2d 781, 785 (Ct.App. 2003).

As the Court explained in *Brown*:

> Identifications resulting from single person show-ups have been upheld by the United States Supreme Court and our Supreme Court. " 'While a showup in which a witness views a single suspect is generally suggestive, and hence suspect or disfavored, and less preferable than a lineup, even if requested by accused, a showup may be proper in some circumstances.' " *State v. Mansfield*, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (Ct.App.2000) (quoting 22A C.J.S. *Criminal Law* § 803 (1989)).
>
> " '[A] showup may be proper where it occurs shortly after the alleged crime, near the scene of the crime, as the witness' memory is still fresh, and the suspect has not had time to alter his looks or dispose of evidence, and the showup may expedite the release of innocent suspects, and enable the police to determine whether to continue searching.' " *Mansfield*, 343 S.C. at 78, 538 S.E.2d at 263. The closer in time and place to the scene of the crime, the less objectionable is a showup. Id. A show-up may be proper even though the police refer to the suspect as a suspect, and even though the suspect is handcuffed or is in the presence of the police. Id. Although show-ups have been upheld by the Court, these situations usually involve either extenuating circumstances or are very close in time to the crime. *See State v. Hoyte*, 306 S.C. 561, 413 S.E.2d 806 (1992).

Brown, 356 S.C. 496, 503-04, 589 S.E.2d at 785.

Here, the show-up occurred shortly after the murders and roughly four blocks from the crime scene. Also, Smith's memory was still fresh, and Liverman had not had time to alter his looks or change clothes. *Id.* Again, Smith was identifying a person he had known for seven years and had seen on several occasions, including the day of the murders. He likewise had already identified Liverman to police by the nickname of Baby Jesus, and he had described Liverman's clothing to police. *See McLeod, supra*; *In the Interest of Robert D., supra*; *Deberry*, 457 A.2d at 754. *See also People v. Tas*, 51 N.Y.2d at 916, 415 N.E.2d at 967-68, 434 N.Y.S.2d at 979.

Likewise, the fact Smith only knew Liverman by the nickname Baby Jesus does not adversely

impact the identification in any fashion. *Id.* To the contrary, many of the witnesses referred to him by the same nickname, identified others involved in the incident (as well as the incident earlier that night) by nickname only and a number of these witnesses had nicknames by which they were known. This is hardly surprising, since many of the witnesses were members of the Folk Nation.

Nor is there any merit to Liverman's contention that he was prevented from exploring "deficiencies" in Smith's identification "at the truncated pre-trial hearing." **Petition, at p. 7.** This argument conveniently ignores that - if one is to accept defense counsel's representations to the trial judge as factually correct - these "deficiencies" were not disclosed until a subsequent hearing on a *Brady* motion. **R. pp. 76-78.** Thus, they could not have been explored upon further cross-examination of Smith. Also, these matters go more to the weight of Smith's identification of Liverman, as opposed to its admissibility. More importantly, these "deficiencies" were later brought to the jury's attention, through defense counsel's cross-examination of both Smith and Inv. Gray. *See* **R. pp. 516; 677; 682-85; 691-93; IBOA at p. 5.**

Finally, Liverman repeatedly characterizes Smith as the State's star witness because Smith identified him as the shooter. However, Liverman cannot show any conceivable prejudice resulting from the introduction of Smith's testimony because it was cumulative to identification of him by Diego Thompson, who had accompanied Liverman, Goo and two others to T.S. Martin from Bayberry Apartments. Thompson testified that he saw Liverman point a .22 caliber rifle at the house where his group had spoken to a "little boy." Liverman had also motioned in sign language for Goo to shoot a shotgun at the same house. Then, Thompson heard "over six or seven" gunshots as he ran. When he turned around, he saw Liverman drop the rifle and pick up the shotgun. Liverman was the only person who fired a weapon, and Thompson later saw him dispose of the weapon near the gate

of Colony Apartments. **R. pp. 246-56.**

Additionally, the State presented overwhelming evidence of guilt, some of which is discussed in the Court of Appeals' statement of facts. For instance, Liverman's involvement in the shooting was also established by the testimony of Shante Bethel, a member of the Folk Nation, who testified that she was present at Bethel Bishop Apartments on the night of the killidgs. She overheard Liverman state his intention to go to T.S. Martin on the night of August 26, 2004, despite Pooh (Carl Smith)'s plea that he not go there. He then left with Goo (Joyner), Diego Thompson and "Mirage." When he ran back into Bethel Bishop a short time later at "full speed," she heard him admit his involvement in the shooting at T.S. Martin, where his group sprayed their gunfire and two children were hit. She also heard him state that the shooting occurred because "they had gotten in[to] something with some Bloods" earlier in the evening. **R. pp. 340-49.**[11]

Finally, Respondent notes that Liverman has abandoned his challenge to the damaging expert testimony about the meaning of the two teardrops that he had tattooed on his face following his arrest for the murders of C.D. and T.M. **R. pp. 834-37; R. p. 870, l. 14-p. 871, l. 1.** The State's closing argument was that these teardrops represented that he sought promotion within the gang based upon the killings, one of which he represents as the killing of a rival gang member. **R. pp. 1242-92.** Because Smith's identification was cumulative to Thompson's testimony identifying him

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[11] Further, in Liverman's second statement to police (which he gave at 1:25 p.m. on August 27th), he admitted that he had been shooting a .32 caliber automatic when the incident occurred at T.S. Martin, but he claimed that he only had two bullets. He also said that he had shot at a "top window [of a house] with a round hole like an attic." The other person was shooting "down the street in the dark." Officers returned to the scene but could not find damage to any house other that C.D. 's, including a house that resembled the house Liverman described. **R. pp. 472-78.** Although Liverman presented several witnesses who knew him and testified that they did not see him on the night of the murders, none of these witnesses were able to identify anyone as the shooter. **R. pp. 901-35; 1041-58.**

as the shooter, he cannot show prejudice from the trial judge's ruling. *See State v. Rochester*, 301 S.C. 196, 391 S.E.2d 244 (1990) (admission of evidence is harmless where it is cumulative to other evidence admitted without objection); *State v. Howard*, 295 S.C. 462, 369 S.E.2d 132 (1988) (when information contained in the improperly admitted affidavit is merely cumulative to other properly admitted evidence, there is no prejudice).

ADDITIONAL SUSTAINING GROUND

This Court should deny certiorari because the Court of Appeals erroneously concluded that Liverman's failure to renew his *in camera* objection when the witness testified before the jury did not waive his claim for appellate review.

As an additional sustaining ground,[12] Respondent submits that the Court of Appeals erred when it found that Liverman's argument was properly preserved for appellate review, since his failure to renew his *in camera* objection when the witness testified before the jury waived his claim for appellate review.

It is well settled that a ruling on an *in limine* motion is usually not final and the losing party must renew his or her objection when the evidence is presented. *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993); *State v. Gagum*, 328 S.C. 560, 492 S.E.2d 822 (Ct.App.1997). An exception is recognized only where the motion is ruled on immediately prior to the introduction of the evidence in question. Under those circumstances, no further objection is necessary. *State v. Tufts*, 355 S.C. 493, 497, 585 S.E.2d 523, 525 (S.C.App. 2003); *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct.App.1998); *State v. Mueller*, 319 S.C. 266, 460 S.E.2d 409 (Ct.App.1995). Here, the *in camera* ruling was not immediately before Smith's testimony and the issue is not preserved for appellate review. *See Schumpert.*

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[12] *See* Rule 208(b)(2), SCACR ("Respondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)"); Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal"); Rule 242(f), SCACR; *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("a respondent-the 'winner' in the lower court-may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court").

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and convictions of the lower court be affirmed.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

WARREN B. GIESE
Solicitor, Fifth Judicial Circuit
P.O. Box 192
Columbia, SC 29202
(803) 576-1801

By: _____
WILLIAM EDGAR SALTER, III
ATTORNEY FOR RESPONDENT

April 15, 2010.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
James W. Johnson, Jr., Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

Respondent,

V.

CHRIS ANTHONY LIVERMAN,

Appellant.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari on ~~Appellant~~ Petitioner by depositing two (2) copies of the same via US Mail, first class, postage prepaid, to his attorney of record , Joseph L. Savitz, III, Esquire, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, South Carolina, 29201.

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

This 15th day of April, 2010.

WILLIAM EDGAR SALTER, III

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

ATTORNEY FOR RESPONDENT

The Supreme Court of South Carolina

The State, Respondent,

v.

Chris Anthony Liverman, Petitioner.

ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' decision in *State v. Liverman*, 386 S.C. 223, 687 S.E.2d 70 (Ct. App. 2009). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

C.J.

J.

J.

J.

J.

Columbia, South Carolina

March 3, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

James W. Johnson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRIS ANTHONY LIVERMAN,

APPELLANT

BRIEF OF PETITIONER

Robert M. Dudek
Chief Appellate Defender

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

ATTORNEY FOR PETITIONER.

INDEX

INDEX 1

TABLE OF AUTHORITIES 2

ISSUE PRESENTED 3

STATEMENT OF THE CASE 4

ARGUMENT

The Court of Appeals erred by finding no reversible error in the trial judge's refusal to conduct an *in camera* hearing pursuant to Neil v. Biggers, 409 U.S. 188 (1972), and Rule 104(c), SCRE, on the reliability of Tyrone Smith's identification of petitioner as the shooter, particularly since Smith incorrectly identified petitioner as a participant in an earlier incident shortly before the shooting and his identification of petitioner as the triggerman was the product of an inherently suggestive show-up conducted by the police after petitioner was arrested. 5

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

In Re Robert D, 340 S.C. 12, 530 S.E.2d 137 (Ct.App. 2000) 14

In Re. McKelvin, 258 A. 2d 452 (D.C. App. 1969) 13

Neil v. Biggers, 409 U.S. 188 (1972) ..... passim

People v. Miller, 137 A.D. 2d 626 (NY 1988) 13

State v. Blassingame, 338 SC 240, 525 S.E.2d 535 (Ct. App. 1999) 13

State v. Cheatham, 349 S.C. 101, 561 S.E. 2d 618 (Ct.App. 2002) 14

State v. McLeod, 260 S.C. 445, 196 S.E.2d 645 (1973) ..... passim

State v. Moore, 343 SC 282, 540 S.E.2d 445 (2000) 13

State v. Ramsay, 345 S.C. 607, 550 S.E.2d 294 (2001) 14

Stovall v. Denno, 388 U.S. 293 (1967) 12, 13

Rules

Rule 104(c), SCRE 5, 9, 14, 15

Rule 1103(b), SCAR 14

ISSUE PRESENTED

Whether the Court of Appeals erred by finding no reversible error in the trial judge's refusal to conduct an *in camera* hearing pursuant to Neil v. Biggers, 409 U.S. 188 (1972), and Rule 104(c), SCRE, on the reliability of Tyrone Smith's identification of petitioner as the shooter, particularly since Smith had incorrectly identified petitioner as a participant in an earlier incident shortly before the shooting, and his identification of petitioner as the triggerman was the product of an inherently suggestive show-up conducted by the police after petitioner was arrested?

STATEMENT OF THE CASE

Petitioner Chris Liverman was indicted at the April 20, 2005 term of the Richland County Grand Jury for two counts of murder. R. 1272-1275. On October 30, 2006 through November 9, 2006, petitioner stood trial in Richland County before the Honorable James W. Johnson, Jr. and a jury. Elizabeth Franklin-Best represented petitioner. Barney Giese was the solicitor and Margaret Fent was the assistance solicitor. R. 1.

The jury found petitioner guilty of both counts of murder. R. 1271, ll. 9-18. The judge sentenced petitioner to two consecutive life sentences.

Petitioner was represented on appeal by Senior Appellate Defender Joseph L. Savitz, III. He raised two issues on direct appeal to the South Carolina Court of Appeals, including the following:

> The trial judge committed reversible error by refusing to conduct an *in camera* hearing pursuant to Neil v. Biggers, 409 U.S. 188 (1972), and Rule 104(c), SCRE, on the reliability of Tyrone Smith's identification of Liverman as the shooter, especially since Smith had incorrectly identified Liverman as a participant in an earlier incident shortly before the shooting and his identification of Liverman as the triggerman was the product of an inherently suggestive show-up conducted by the police after Liverman was arrested.

The Court of Appeals affirmed petitioner's convictions. State v. Liverman, 286 S.C. 223, 687 S.E.2d 70 (Ct. App. 2009). App. 1-21. A petition for rehearing was filed on December 17, 2009. App. 22-25. The Court of Appeals denied rehearing by its order dated January 20, 2010. App. 26-27. This Court subsequently granted the petition for a writ of certiorari on this issue.

ARGUMENT

The Court of Appeals erred by finding no reversible error in the trial judge's refusal to conduct an *in camera* hearing pursuant to Neil v. Biggers, 409 U.S. 188 (1972), and Rule 104(c), SCRE, on the reliability of Tyrone Smith's identification of petitioner as the shooter, particularly since Smith incorrectly identified petitioner as a participant in an earlier incident shortly before the shooting and his identification of petitioner as the triggerman was the product of an inherently suggestive show-up conducted by the police after petitioner was arrested.

Introduction

The state's case was that two innocent bystanders, sixteen-year-old [redacted] and twelve-year-old [redacted] were each shot once in the head after a shooter, whom the state alleged was petitioner, opened fire in retaliation for an earlier gang-related dispute. R. 82, ll. 11-15; r. 1222, l. 18 – 1223, l. 17. The local media exploited the fears aroused by this case extensively, and several jurors expressed trepidation during the trial about gang activity. R. 7, l. 23 – 8, l. 7. Before the jury found petitioner guilty of both murders, it sent out a note indicative of its apprehension: "Regardless of what the verdict is, the jurors were curious of whether any safety precautions have been taken." R. 1269, l. 24 – 1270, l. 3.

As will be seen infra, the issue at the trial became whether there was a mistaken identification of petitioner as the shooter of the two bystanders.

Relevant Facts

At 9:11 p.m. on August 26, 2004, Officer Ernest Reynolds with the City of Columbia Police Department received a dispatch call for a civil disturbance in progress. R. 148, ll. 1-10. He responded to 104 T.S. Martin Drive and spoke with residents who informed him that "some people had just came there looking for a particular person, and they was pretty irate during the time of

looking for that person." R. 148, ll. 18-23. The residents explained that several black males entered the neighborhood in a white vehicle looking for an individual named Delshawn. R. 149, l. 1 – 150, l. 17. Officer Reynolds left the scene to contact Delshawn and investigate his involvement in the disturbance. R. 150, ll. 3-25.

Carl Smith testified that he was hanging out at nearby Bethel Bishop Apartments on the night of August 26, 2004 when he came into contact with Brady Brown. R. 181, ll. 1-6. Brady Brown explained to Carl that as he and other players in his vehicle were driving through T.S. Martin on their way home from football practice "a couple of guys ran up to their car and whatnot, and they wanted to fight." R. 13-15. Carl testified, "[t]hey were outnumbered, so they came and got me, so I went back up there." R. 181, ll. 15-16. The men traveled back to T.S. Martin in Brady Brown's white Ford Escort looking for a man named Delshawn. R. 181, 11. 17-21; r. 183, ll. 4-10. According to Carl, the only people in the vehicle were Brady Brown, Paris Alexander, a man named Sherod, and himself. R. 182. l. 11 – 183, l. 15. *Carl did not name petitioner as a one of the men in the vehicle.* When the men arrived at T.S. Martin they got out of the vehicle wearing black bandannas on their faces to represent their gang. R. 185, ll. 5-22. After walking down the street without incident the men got back into their vehicle and left T.S. Martin. R. 188, ll. 9-11.

Diego Thompson was the next to testify for the state about a subsequent incident that occurred shortly after the first. He stated that he ran into the petitioner at Bethel Bishop on the night of the shooting. R. 239, ll. 6-8.

Thompson claimed petitioner told him that "he needed to go handle something" over at T.S. Martin and asked Thompson to go with him. R. 240, ll. 11-21. According to Thompson, a group of about five men, including petitioner and Thompson, headed over to T.S. Martin on foot. R. 242, ll. 23-25. While at T.S. Martin the shooting occurred. In Thompson's first statement to police he

denied ever seeing the petitioner that night. R. 268, ll. 17-25. R. 248, l. 10-14; r. 251, ll. 7-9. Only after obtaining his own attorney did Thompson admit his presence at T.S. Martin the night of the murder and claim petitioner not only participated in the crime but that he was the shooter. R. 274, l. 6 – 275, l. 14; r. 278, l. 16 – 279, l. 15.

Neil v. Biggers Facts

The defense contended that Diego Thompson was the actual shooter. Thompson, as seen above, testified for the state, and he claimed that he was shocked when petitioner produced "a .22 rifle" from his "pants leg" and opened fire. R. 248, l. 7 - 249, l. 12; r. 302, ll. 7-18.

The state's central witness, Tyrone Smith, testified before the jury that he had watched from an upstairs window directly across the street as someone handed petitioner a rifle and he "kneels downs, aims, starts shooting, stands up, keeps shooting." R. 688, ll. 15-16. Smith said that everyone else with petitioner started running when the first shot was fired. R. 689, ll. 2-6. Smith said all of the lights in his house were off, but he maintained there was a house with a motion detector light on the neighbor's house, and a street light a little further down the street R. 687, l. 17 – 688, l. 16.

At a pretrial hearing, the defense moved to suppress as unreliable Tyrone Smith's identification of petitioner as the shooter and requested an *in camera* hearing on the matter pursuant to Neil v. Biggers, 409 U.S. 188 (1972). R. 14, l. 14-16. The state responded that Smith "knew the defendant prior to this day" and so:

> [T]he court doesn't need to go under a basic review of the totality of the circumstances, meaning the opportunity to observe the person, the lighting conditions, the suggestiveness of even a show-up or a line-up.

R. 15, l. 8-18.

The state based its objection on State v. McLeod, 260 S.C. 445, 196 S.E.2d 645 (1973). R. 14, l. 17 – 15, l. 8. "So basically," the assistant solicitor concluded, "Neil v. Biggers doesn't apply." R. 16, ll. 3-6. The judge ruled:

> Let the State establish whatever relationship or prior knowledge there may be, and then I will see where that falls within Neil v. Biggers and State v. McLeod and whether there is going to be additional showing or more showing than this relationship at that point in time.

R. 17, ll. 10-15.

The state and the defense conducted a circumscribed examination of Smith limited to the extent and nature of his prior relationship with petitioner. Through the defense's questioning of Smith the court learned that Smith's prior relationship with petitioner was very limited:

> Q: So, over the course of your life you saw him on a couple of occasions seven years ago, correct?
>
> A: I saw him about four days in a row seven years ago and then twice while he was working at McDonald's [in 2003].

R. 27, ll. 21-24.

Defense counsel argued that there was not a sufficient showing of any kind of preexisting relationship between Smith and the petitioner. She stated:

> [Smith] is testifying that he saw [Petitioner], maybe four days in a row seven years ago. That would have been the time when this witness was 12 years old. My client would have been 13. So, really young, I think that and their physical characteristics certainly have changed during the course of that time.

R. 29, ll. 18-23.

Smith then testified regarding the actual identification of petitioner in the one person show up. Smith stated that shortly after the shooting happened he came into contact with an investigator and described to the investigator what he saw during the shooting. R. 31, ll. 4-7. The investigator

told Smith that the police had caught a man who they believed to be the shooter. R. 34, ll. 15-17. The investigator drove Smith four blocks in a patrol vehicle to see if Smith agreed that the apprehended man was the shooter. R. 34, ll. 9-19.

Smith was sitting in the back seat of the patrol vehicle when he made the positive identification of petitioner. Smith never left the vehicle. R. 36, l. 19 – 37, l. 3. At the time the identification occurred it was dark outside and the petitioner was more than six feet away from Smith. R. 37, ll. 10-11; r. 38, l. 3.

The police never advised Smith that the man in the show up may not be the shooter, or that they planned on looking for other suspects. R. 38, ll. 6-9. Smith acknowledged that two or three days before the trial, the solicitor's office went over his statement with him and told him that he would be testifying during petitioner's trial. R. 39, l. 1 - 40, l. 24.

After Smith's testimony about the show up concluded, defense counsel renewed its objection "to the lack of ... a full Neil v. Biggers hearing in this matter." R. 41, l. 17-19. The judge refused to expand the scope of the hearing, noting that the defense "can still argue [to the jury] about its weight." R. 44, l. 9 – 45, l. 9. The defense again reiterated its motion for a complete Neil v. Biggers hearing at the start of trial. R. 74, l. 3 – 78, l. 21. Counsel added that a full *in camera* hearing was also required by Rule 104(c), SCRE, which explicitly provides:

> Hearings on the admissibility of ... pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury.

R. 79, l. 25 – 80, l. 19.

The judge insisted, "[U]nder McLeod, a full Neil v. Biggers is not required." R. 80, l. 20 – 81, l. 2.

* * *

T.M. and C.D. were killed sometime after 9:00 pm the night of August 26, 2004. R. 148, ll. 1-5. The neighborhood where the incident occurred was dark and the various people moving about the area were indistinct. R. 122, l. 23 – 123, l. 2. Nevertheless, as previously noted, Tyrone Smith testified that, from an upstairs window, he observed a person he identified as petitioner firing a rifle down the street. R. 687, l. 17 – 688, l. 16.

Smith's identification of petitioner as the shooter was crucial to the state's case, but there were substantial problems with the reliability of his testimony in this regard, deficiencies the defense was prevented from exploring at the truncated pre-trial hearing on the issue.

Although Smith claimed to have known petitioner "[s]ince elementary school," he was unaware of his actual name until sometime after he had identified petitioner to the police as the person among several other suspects who had shot T.M. and C.D. R. 677, ll. 9-15; R. 691, l. 18 – 693, l. 6. Smith also incorrectly identified petitioner to the police as the leader of a gang who had threatened to kill him a short time before the shooting. R. 516, ll. 7-11; r. 682, l. 23 – 685, l. 14. Smith definitively positively identified petitioner as the shooter following a show-up conducted by the police that same night, shortly after petitioner was arrested. R. 425, ll. 6-17; R. 438, l. 7 – 449, l. 20; R. 691, l. 18 – 693, l. 12.

Other evidence

Tyrone Smith lived at [redacted]. R. 680, ll. 9-15. He testified that he received a phone call "about some boys in the street." Smith stated that he went outside and saw the boys arrive in a white car and exit the vehicle with black bandannas covering their faces. R. 682, l. 15 – 683, 12. One of the young men approached Smith and pointed a gun at him threatening his life. R. 683, ll. 24-25. Once the young man realized that Smith was not Delshawn they turned around and left. R.

683, l. 24 – 684, l. 4. Smith testified that he only saw the top part of the man's face, including his eyes and his braids, as a result of the bandanna. R. 684, ll. 12-13. Smith stated that he did not immediately recognize the man with the gun, but *Smith later told police that he thought this man was the petitioner.* R. 685, ll. 6-14.

Smith and others who lived at his residence called the police to report the incident. After speaking to police who left the scene to look for Delshawn, Smith, who was sitting on the porch, saw "five guys coming from the front of the neighborhood walking." R. 685, l. 23 – 686, l. 1. Petitioner was leading the group, Smith maintained, but, according to Smith, petitioner no longer had a bandanna on his face. R. 686, ll. 3-7. Upon seeing the men approach the neighborhood, Smith went into the house and "ran upstairs to the left-hand window." From this window, Smith claimed he saw the petitioner "kneel down, aim, start shooting, stand up, keep shooting." R. 688, ll. 15-16.

Brady Brown later testified for the defense and explained the first incident that occurred that night in more detail. He explained that on the way home from football practice after stopping for dinner he, Travis Wooten, Travis Banner, Paris Alexander, and Demetrius Boucher passed through T.S. Martin on their way to Bethel Bishop Apartments. R. 1077, ll. 12-17. While going by T.S. Martin, Brown explained, "I identified a person. He waved us down, and we stopped the car. We was like – we were trying to figure out why he stopped us, you know. . . We was like, 'What's up?' He's like, 'Fuck you all.'" R. 1078, ll. 7-12.

According to Brown's testimony, the men then traveled to Bethel Bishop and after some conversation, Brady Brown, Carl Smith, Paris Alexander, and a man named Praylow got into the car and headed back to T.S. Martin to figure out the identity of the man who stopped their car earlier. R. 1084, ll. 2-23. *Brown testified that petitioner was not in the car. Petitioner did not travel to T.S.*

Martin with them. R. 1084, ll. 16-20. When the men arrived at T.S. Martin they parked, got out of the car, and walked down the street. R. 1088, ll. 4-5. They were there for five to ten minutes and then left the neighborhood. R. 1089, ll. 2. None of them had a gun. R. 1088, ll. 24-25.

Neither Carl Smith nor Brady Brown stated that petitioner was in the white Ford Escort that traveled to T.S. Martin around 9:00 p.m. that night. This testimony directly contradicted Tyrone Smith's identification of petitioner as the man from the white car that pointed a gun in his face within an hour before the shooting occurred.

Discussion

Due process protects against the admission of evidence derived from suggestive identification procedures. Stovall v. Denno, 388 U.S. 293 (1967).

> It is the likelihood of misidentification which violates a defendant's right to due process... . Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous. But as *Stovall* makes clear, the admission of evidence of a show-up without more does not violate due process.

Neil v. Biggers, 409 U.S. at 199.

The "central question" is "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive," and the factors to be considered in evaluating the likelihood of misidentification include:

> The opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. at 199-200.

Single person show-ups are "particularly disfavored in the law" because they are suggestive by their very nature. State v. Moore, 343 SC 282, 540 S.E.2d 445, 448 (2000) (citing Stovall); State v. Blassingame, 338 SC 240, 525 S.E.2d 535 (Ct. App. 1999).

> A recognized exception to the general rule that show-ups are inherently suggestive [citations omitted] exist where the witness recognized the perpetrator at the time of the commission of the crime and the basis for that recognition was the fact the witness knew the perpetrator prior to the commission of the offense. In such situations, the show-up is of the nature of a conformation, rather than an identification [citations omitted].

People v. Miller, 137 A.D. 2d 626, 628 (NY 1988); see In Re. McKelvin, 258 A. 2d 452 (D.C. App. 1969).

In State v. McLeod, the defendant was arrested and taken to the victim's home the morning after she was attacked to make sure he was her assailant.

> It is apparent that she did not know her assailant's first name, but she identified the person arrested as the one who had assaulted her... It is [also] apparent from the record that [the victim] knew the defendant. She had seen him many times at a neighborhood store near their home; she knew the defendant's mother and knew him to be her son.

196 S.E. 2d at 645.

The defendant argued that the show-up was "unfair and untrustworthy," relying upon the Stovall line of cases. Id. at 645. This Court held:

> The rulings in these decisions attempt to avert the danger of mistaken identity by establishing mandatory constitutional and procedural safeguards. The rules are designed for application where the accused and the victim are strangers to each other; they were never intended to apply where the victim knew the accused. The constitutional and procedural safeguards... simply do not apply under the facts of this case.

Id.

The Court of Appeals interpreted McLeod and its own case of In Re Robert D, 340 S.C. 12, 530 S.E.2d 137 (Ct.App. 2000), to hold that an *in camera* hearing pursuant to Rule 104(c), SCRE and Neil v. Biggers is not required whenever an eyewitness testifies that he has prior knowledge of the defendant.

First, it is not at all certain that McLeod, a 1973 decision, survived the adoption of Rule 104 in 1995. Rule 1103(b), SCAR. In Robert D, the Court of Appeals suggested that McLeod survived the adoption of Rule 104, albeit *in dicta* and without reference to the rule itself. Subsequently, in State v. Ramsay, 345 S.C. 607, 550 S.E.2d 294, 297 (2001), this Court ruled:

> Where identification is concerned, the general rule is that a trial court must hold and in camera hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation.

The Court of Appeals also ignored its own opinion in State v. Cheatham, 349 S.C. 101, 561 S.E. 2d 618, 627 (Ct.App. 2002):

> Rule 104(c) unambiguously mandates hearings on the admissibility of out of court identifications of the accused shall in all cases be held outside the presence of the jury. The adoption of Rule 104 did not abrogate the viability of the rulings in the pre-Rules of Evidence cases. The in camera hearing required by Rule 104(c) allows a defendant to question a witness more stringently regarding possible misidentification or bias outside the presence of the jury. If the defendant is required to question a victim/witness ... only in the jury's presence, the defendant may be required to severely curtail the questioning so as not to inflame the jury.

Neil v. Biggers itself stressed that "the testimony is undisputed that the victim made no previous identification of any of the show-ups, line-ups or photographic showings. Her record for reliability was thus a good one, as she had previously resisted whatever suggestiveness inheres in a show-up." 409 US at 201.

Here, the fact that the eyewitness claimed to know petitioner prior to the commission of the crime was only another factor in the Neil v. Biggers analysis, since he had already incorrectly identified another person as the defendant—a misidentification which the witness continued to make even at trial—and subsequently participated in an inherently suggestive show-up. Furthermore, the purported basis for acquaintance was more attenuated than the familiarity of the witness in McLeod, even assuming *arguendo* this is still the law. Given the importance of the eyewitness' testimony in identifying petitioner as the shooter instead of other possible suspects, the failure to hold a full Neil v. Biggers hearing pursuant to Rule 104, SCRE could not have been harmless error. Given the importance of Tyrone Smith's testimony in identifying petitioner as the shooter – instead of, say, Diego Thompson – the failure to hold a full Neil v. Biggers could not have been harmless error.

CONCLUSION

By reason of the foregoing argument, the opinion of the Court of Appeals should be reversed and this case remanded to the Richland County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 15th day of July, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

James W. Johnson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRIS ANTHONY LIVERMAN,

APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on William Edgar Salter, III, Esquire, this 15th day of July, 2011.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day of July, 2011.

(L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
James W. Johnson, Jr., Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

Respondent,

V.

CHRIS ANTHONY LIVERMAN,

Petitioner.

BRIEF OF RESPONDENT

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

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

P.O. Box 192
Columbia, SC 29202
(803) 576-1801

ATTORNEYS FOR RESPONDENT.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL v

COUNTERSTATEMENT OF ISSUE ON APPEAL v

ADDITIONAL SUSTAINING GROUND v

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 3

ARGUMENT 3

Liverman's failure to renew his *in camera* objection when the witness testified before the jury waived his claim for appellate review. Alternatively, the trial judge did not abuse his discretion by ruling that the testimony of Tyrone Smith was not subject to the procedural safeguards in *Neil v. Biggers*, where his ruling was consistent with *State v. McLeod*; and he ultimately considered the admissibility of Smith's identification *in camera*, thereby providing Liverman a constitutionally adequate hearing on the issue of identification 10

A. How issue was raised in the trial court 10

B. The Court of Appeals' decision 16

C. Discussion 18

1. Procedural bar 18

2. The trial judge properly relied upon *McLeod* 19

3. The hearing held and the trial judge's alternative findings comport with *Neil v. Biggers* 25

ADDITIONAL SUSTAINING GROUND 32

This Court should deny certiorari because the Court of Appeals erroneously concluded that Liverman's failure to renew his *in camera* objection when the witness testified before the jury did not waive his claim for appellate review 32

CONCLUSION 33

TABLE OF AUTHORITIES

FEDERAL CASES

Brady v. Maryland, 373 U.S. 83 (1963) 15

Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967) 22

In Re Winship, 397 U.S. 358 (1970) 24

Manson v. Brathwaite, 432 U.S. 98, 114 (1977) 20, 21, 27

Neil v. Biggers, 409 U.S. 188 (1972) 5, 10, 11, 13, 14, 15, 16, 17, 18, 19, 21, 22, 25, 27

Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) 20, 22

United States v. Wade, 388 U.S. 218, 228 (1967) 20, 22

STATE CASES

Deberry v. State, 457 A.2d 744, 754 (Del. 1983) 27, 28

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) 32

In re Robert D., 340 S.C. 12, 530 S.E.2d 137 (Ct.App.2000) 18

People v. Dones, 279 A.D.2d 366 (N.Y. 2001) 25

People v. Reynolds, 373 N.E.2d 650, 654 (1978) 27

People v.Tas, 51 N.Y.2d 915, 916, 415 N.E.2d 967, 967-68, 434 N.Y.S.2d 978, 979 (N.Y. Ct. App. 1980) 25, 28

Powell v. State, 566 So.2d 1228, 1236 (Miss. 1990) 20

Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct.App.1998) 32

State v. Bailey, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) 23, 24, 25

State v. Blassingame, 338 S.C. 240, 525 S.E.2d 535 (Ct.App.1999) 27

State v. Brown, 274 S.C. 48, 260 S.E.2d 719 (1979) 25

State v. Brown, 356 S.C. 496, 504, 589 S.E.2d 781, 785 (Ct.App.2003) 20, 27, 28

State v. Byram, 326 S.C. 107, 113, 485 S.E.2d 360, 363 (1997) 23, 25

State v. Caldwell, 378 S.C. 268, 280-81, 662 S.E.2d 474, 481 (Ct.App. 2008) 19, 20

State v. Cheatham, 349 S.C. 101, 117, 561 S.E.2d 618, 627 (Ct.App.2002) 17, 24

State v. Gagum, 328 S.C. 560, 492 S.E.2d 822 (Ct.App.1997) 32

State v. Howard, 295 S.C. 462, 369 S.E.2d 132 (1988) 31

State v. Hoyte, 306 S.C. 561, 413 S.E.2d 806 (1992) 28

State v. Liverman, 386 S.C. 223, 687 S.E.2d 70 (2009) 1, 10, 16, 18

State v. Mansfield, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (Ct.App.2000) 28

State v. McLeod, 260 S.C. 445, 196 SE 2d 645 (1973) 11, 12, 18, 19, 22, 23, 28, 29

State v. Miller, 359 S.C. 589, 596, 598 S.E.2d 297, 301 (Ct.App.2004), aff'd, 367 S.C. 329, 626 S.E.2d 328 (2006) 17

State v. Mueller, 319 S.C. 266, 460 S.E.2d 409 (Ct.App.1995) 32

State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) 23, 25

State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) 24

State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990) 30

State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) 32

State v. Simmons, 308 S.C. 80, 82-83, 417 S.E.2d 92, 93 (1992) 24

State v. Sinclair, 275 S.C. 608, 274 S.E.2d 411 (1981) 25

State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981) 25

State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) 19

State v. Tufts, 355 S.C. 493, 497, 585 S.E.2d 523, 525 32

Wilson v. Clary, 212 S.C. 250, 259, 47 S.E.2d 618, 622 (1948) 23

STATE RULES

Rule 104(c), SCRE 17, 24, 26, 27

Rule 208(b)(2), SCACR 32

Rule 220(c), SCACR 32

Rule 242(f), SCACR 32

OTHER AUTHORITIES

R. 1269, I. 24 24

PETITIONER'S STATEMENT OF ISSUE ON APPEAL

The trial judge committed reversible error by refusing to conduct an *in camera* hearing pursuant to *Neil v. Biggers,* 409 U.S. 188 (1972), and *Rule 104(c), SCRE,* on the reliability of Tyrone Smith's identification of Liverman as the shooter, especially since Smith had incorrectly identified Liverman as a participant in an earlier incident shortly before the shooting and his identification of Liverman as the triggerman was the product of an inherently suggestive show-up conducted by the police after Liverman was arrested.

COUNTER STATEMENT OF ISSUE ON APPEAL

Assuming that the issue is preserved for appellate review despite Liverman's failure to renew his *in camera* objection when the witness testified before the jury, whether the trial judge abused his discretion by ruling that the testimony of Tyrone Smith was not subject to the procedural safeguards in *Neil v. Biggers*, where his ruling was consistent with *State v. McLeod*; and he ultimately considered the admissibility of Smith's identification *in camera*, thereby providing Liverman a constitutionally adequate hearing on the issue of identification?

ADDITIONAL SUSTAINING GROUND

Whether this Court should deny certiorari because the Court of Appeals erroneously concluded that Liverman's failure to renew his *in camera* objection when the witness testified before the jury did not waive his claim for appellate review?

STATEMENT OF THE CASE

Petitioner, Chris Anthony Liverman (Liverman), is currently incarcerated in the McCormick Correctional Institution, of the South Carolina Department of Corrections, as the result of his two Richland County murder convictions and sentence. The Richland County Grand Jury indicted Liverman at the April 20, 2005 term of court for two counts of murder (05-GS-40–6831 and -06832). The charges stemmed from the shooting deaths of two innocent youngsters - sixteen year old T.M. and twelve year old C.D. - each of which had been shot once in the head. Assistant Richland County Public Defenders Elizabeth Franklin, Carolyn Gripp, and Maxwell Schardt represented Liverman on these charges. Fifth Circuit Solicitor Warren B. Giese and Assistant Solicitors Kathryn Luck Campell and Margaret Fent prosecuted the case.

On August 28, 2006 the Honorable James W. Johnson heard motions and selected a jury. Because of concerns expressed by both parties, however, he continued the matter for thirty days. Liverman thereafter received a jury trial before Judge Johnson on October 30-November 9, 2006. The jury convicted him of both murders; and Judge Johnson sentenced him to two consecutive sentences of life imprisonment.

Liverman timely served and filed a notice of appeal. After briefing by the parties, the South Carolina Court of Appeals filed a published Opinion on December 4, 2009, affirming his convictions and sentence. *State v. Chris Anthony Liverman*, Op. No. 4635 (S.C. Ct. App., Dec. 4, 2009). **App. 1-21**. This Opinion is published as *State v. Liverman*, 386 S.C. 223, 687 S.E.2d 70 (2009), and Respondent hereafter refers to the published decision. Liverman filed a timely Petition for Rehearing on December 17, 2009. **App. 22-25**. On January 20, 2010, the Court of Appeals filed an Order

denying rehearing. **App. pp. 26-27.**

Liverman filed the Petition for Writ of Certiorari on March 17, 2010. Respondent made its Return to Petition for Writ of Certiorari on April 15, 2010. This Court filed an Order granting certiorari on March 3, 2011. On July 15, 2011, Liverman filed his Brief of Petitioner.

STATEMENT OF FACTS

The facts of this case are yet another example of the brutally senseless violence caused by gangs that is becoming increasingly prevalent in South Carolina and America as a whole. Two innocent people- twelve year old C.D. and sixteen year old T.M. were killed in a hail of gunfire aimed at C.D. s house, on the night of August 26, 2004. The murders resulted from a vendetta by members of the "Folk Nation" against a rival gang, "the Bloods." **R. pp. 109-15; 121-58; 588-93.**[1] Each victim had a single gunshot wound to the head and died from injuries caused by the gunshot wound. **R. pp. 885-95**. The perpetrators of these murders has the temerity to use the nickname, "Baby Jesus."

The events leading up to the murders unequivocally demonstrated a gang-related motive. Carl Duane "Pooh" Smith testified that he and several friends had driven over to T.S. Martin Dr. earlier that evening. They were looking for a person named Delshawn, who was a member of the Bloods and had been involved in a confrontation with Pooh's friends earlier that day. This group were wearing black, which is the color of Folk Nation. They were unable to locate Delshawn and they left after a girl called Pooh by name. Pooh (Carl Smith) later saw Liverman at Bayberry Apartments told him about what had occurred earlier. Liverman was accompanied by his friend and fellow gang member, Goo, as well as the other people. **R. pp. 174-193; 219**.

Liverman then told Pooh (Smith) that someone "from T.S. Martin had run him out from "there several days earlier." Liverman also showed Pooh three or four bullets that he said he had just obtained, and he told Pooh that he had a .22 caliber gun. However, Pooh did not see a gun at that

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[1] Three projectiles were recovered from the home, and ten fired cartridge casings were found a short distance from C.D. 's home.

point. Liverman said that he was going to T.S. Martin, and he said that he might "go on a lick." Pooh tried to stop Liverman from going to T.S. Martin because he was afraid the girl who recognized him would blame him for any trouble; but Liverman refused to head his warning. **R. pp. 191-99**.

Diego Thompson testified that he is Liverman's friend. He knew Liverman, or Baby Jesus, from school and from seeing Liverman at Bethel Bishop Apartments, where Liverman's grandmother lived. Although Thompson denied that he was in a gang, he admitted that he knew a number of gang members. Thompson testified that Liverman was a member of the Folk Nation gang. Close to dark on the night of the murders, while Thompson was on his way home, he ran into Liverman at Bethel Bishop Apartments. Liverman told Thompson that he had to "handle something" on T.S. Martin. **R. pp. 233-40**.

Unaware that Liverman had a gun, Thompson agreed to go. Liverman and Thompson met up with Ty, Goo and Little Chris as they were walking.[2] These three also agreed to go to T.S. Martin. While still in Bethel Bishop Apartments, Pooh warned Liverman to be careful "because they had pulled some guns on some Bloods." Along the way to T.S. Martin, Thompson saw Liverman put a black bandanna, or "flag" around his neck. This indicated that he was "repping his set," or representing the gang, Insane Gangster Disciples.[3] **R. pp. 245-46**.

Once they reached T.S. Martin Dr., Little Chris asked a "little boy" who was sitting on a porch if he was Slob, which is a disrespectful term for Bloods. The boy replied that there was not any gangbanging there and he went to a telephone. Thompson told Liverman that they should go because the boy was either calling the police or "other boys to come over. Baby Jesus said that's

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[2] Goo, whose name is Reginald Joyner, **R. p. 469**,was a member of the Folk Nation gang.

[3] Again, the Insane Gangster Disciples are a part of the Folk Nation.

what he wanted [the boy] to do." At this point, Liverman pulled a .22 caliber rifle from his pants leg. Goo, who was standing next to Liverman, was armed with a shotgun. Thompson and the others were a slight distance away from them. **R. pp. 243-50**.

Thompson said, "it's time for us to go, " and he started to back away. Liverman pointed the gun at the house where the little boy had been. He then told Goo in sign language, to shoot at the house. As Thompson and the other two males began running away, Thompson "overheard six or seven gunshots." When Thompson briefly turned around, he saw Liverman throw the rifle down and pick up the shotgun. However, no other shots were fired. Thompson continued running from the scene, as did all of the people who had gone to T.S. Martin, with the exception of Liverman. Liverman eventually followed and he disposed of his weapon near the gate to the Colony Apartments. **R. pp. 250-56**.

Shante Bethel testified that she was a member of Folk Nation. On the night of August 26, 2004, she saw Baby Jesus (Liverman) and Pooh at Bethel Bishop Apartments. Liverman said that he was going to T.S. Martin "to go ride with some Slobs." She thereafter saw Liverman leave Bethel Bishop Apartments with three others: Goo (Joyner) Diego Thompson and "Mirage."**R. pp. 340-45**.

A little later, she saw Liverman come up to Bethel Bishop Apartments "full speed." She overheard him tell a man there that he and the others had just left a shooting at T.S. Martin, "that they were spraying" the gunfire and that two little kids got shot. He also said that they had done it because "they had gotten in something with some Bloods" earlier in the evening. After this conversation, Liverman ran to Bayberry Apartments, taking a "cut" near the apartment complex. **R. pp. 345-49**.

Tyrone Smith testified that he had known Liverman, or Baby Jesus, for about seven years at

the time of the shooting. Smith was living on T.S. Martin Dr., with his aunt and cousins at the time. Smith saw Liverman talking to his (Smith's) friend Delshawn at Bayberry Apartments, on the afternoon of August 26, 2004. Delshawn was a member of the Bloods. Smith and Delshawn eventually went to Smith's residence.[4] Delshawn left shortly after 9:00 p.m. and went home. **R. pp. 676-82.**

The trouble began after Delshawn left. Smith received a call from C.D., who told him that "some boys had come to her and asked where the Slobs stayed." Smith later saw two males get out of a white car. One went to a house two doors away from him. However, the other male, whose face was partially covered by a black bandanna, approached Smith on his aunt's porch. This man pointed a gun at him and said, "I'll kill you." When this person turned around after realizing that Smith was not Delshawn, Smith ran into the house and called the police. **R. pp. 682-84.**

The white car was gone by the time the police arrived. After the police were informed of the incident and left to speak with Delshawn, Smith went back out onto the porch of his home with his two female cousins and another girl. He then saw Liverman and four other males walking up the street. Liverman's face was not obscured by a bandanna, although the other males were wearing bandannas. Smith and the girls immediately ran into the house. Smith ran upstairs and looked out of "the left-hand window."[5] **R. pp. 684-86.**

Smith saw Liverman get a long, dark rifle from someone and hand someone a revolver. One gun was pointed at C.D.'s house. Liverman kneeled, aimed at the same house and opened

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[4] One of Delshawn's sisters lived next door to Smith, while another lived two houses away from him. **R. 681.**

[5] The lights were off inside of the house.

fire. He continued shooting after he stood up again. Smith testified that he heard multiple gunshots.[6] The other people who were with Liverman ran back the same direction from which they had come, as soon as Liverman began shooting. Liverman tried to re-cock his weapon but a bullet did not "come up." So he turned and ran away from the scene. In all, Smith looked out the window for four or five minutes. **R. pp. 686.91; 694-97; 696-98.**

The police arrived a "while later" and Smith gave a statement concerning the shooting to Inv. Joe Gray, of the City of Columbia Police Department, in Gray's car. Smith's statement identified Liverman as the shooter by the nickname Baby Jesus. Minutes later, Inv. Gray told him that the police had caught someone going through a "cut." Inv. Gray then drove him to this location. Smith remained in Gray's car, while Officer Whittle brought Liverman to the side of Inv. Gray's car. Although it was dark outside, both police vehicles at the show-up had their lights on, and Inv. Gray testified that his high beams were on. Also, Officer Whittle shined a light on Liverman's face. Smith immediately identified Liverman as the shooter. **R. pp. 399-404; 419-429; 433-34; 438-42; 448-49; 691-93; 731-35; 747-52.**

Liverman gave two statements to Inv. Gray following his arrest. The waiver of rights for his first statement began at 12:17 a.m. on August 27, 2004. Liverman initially denied being at T.S. Martin. When Inv. Gray told him that witness information put him there at the time of the shooting, however, he admitted that he had been there with "Ty and Chris from Belvedere" and two of their friends. Still, he claimed that one of the other persons in the groups had done the shooting. This person used a sawed-off gun that had a scope on it. A person named O.B. had a dispute with Delshawn. **R. pp. 444-46.**

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[6] His cousin dialed 911 during the incident. **R. pp. 689-90; 700.**

Roughly twelve hours later, following the victims' deaths, Inv. Gray again spoke to Liverman. After serving arrest warrants for murder on Liverman and obtaining a waiver of rights, Inv. Gray told Liverman that he had some questions about the shooting that needed to be clarified. Liverman again waived his rights and gave another statement. **R. pp. 470-74**.

In this statement, which was given at 1:25 p.m. on August 27, he admitted that he had been shooting a .32 caliber automatic when the incident occurred at T.S. Martin; but he claimed that he only had two bullets. He also said that he had shot at a "top window [of a house] with a round hole like an attic." The other person was shooting "down the street in the dark." Further, Liverman said he had returned the .32 weapon to the person who handed it to him, and he denied that Goo, Diego Thompson or Pooh had been present. Officers returned to the scene but could not find damage to any house other than C.D. 's, including a house that resembled the house Liverman described. **R. pp. 472-78**.

Finally, the State presented two experts in gang recognition who gave expert opinion testimony about the significance of the two teardrop tattoos that Liverman put on his face after his arrest for the murders. Inv. Edward O' Cain, an expert in gang activity and gang recognition, testified that he had viewed the two teardrop tattoos on Liverman's face, "right [below] the right eye." One of these is an open teardrop. O'Cain opined that this "can represent quite a few things depending on who you're talking to." Under gang rules, however, it is supposed to signify that a "family member" - whether a fellow gang member, a relative or an innocent person- has died. The other teardrop was filled in, and this means that the wearer has killed someone in retribution. It can, however, have some other meanings. **R. pp. 834-35**.

If someone falsely claimed status, such as with a tattoo that he had not earned, he could be

beaten or other gang members may try to physically remove the tattoo. **R. p. 836-37**.

Officer Walter Mahoney, of the City of Columbia Police Department's gang task force testified about gangs in the Columbia area. In his expert opinion, "[t]he open teardrop could represent a lost soldier [a fellow gang member] or ... some innocent person that might have been killed by mistake. The closed teardrop is the body. He is a gang member that took somebody out." (Sic). **R. p. 870, l. 14-p. 871, l. 1**.

ARGUMENT

Liverman's failure to renew his *in camera* objection when the witness testified before the jury waived his claim for appellate review. Alternatively, the trial judge did not abuse his discretion by ruling that the testimony of Tyrone Smith was not subject to the procedural safeguards in *Neil v. Biggers*, where his ruling was consistent with *State v. McLeod*; and he ultimately considered the admissibility of Smith's identification *in camera*, thereby providing Liverman a constitutionally adequate hearing on the issue of identification.

Liverman contends that the trial judge erroneously refused to hold a hearing comporting with the United States Supreme Court's decision in *Neil v. Biggers*, 409 U.S. 188 (1972) before allowing the State to present the eyewitness identification testimony of Tyrone Smith. Respondent disagrees. Assuming that the issue is not barred by Liverman's failure to renew his *in camera* objection when the witness testified before the jury, *see* **Additional Sustaining Ground One**, *infra*, the Court of Appeals properly concluded that the trial judge did not abuse his discretion by ruling that Smith's testimony was not subject to the procedural safeguards in *Neil*.

Rather, the trial judge's ruling was consistent with this Court's decision in *State v. McLeod*, 260 S.C. 445, 196 SE 2d 645 (1973) because Smith knew Liverman prior to the night Liverman murdered C.D. and T.M.; and Smith had already identified him to police as the shooter, by nickname, and he had described Liverman's clothing, before police took him to a one person show-up a short time after the murder and only blocks from the scene. *Liverman*, 386 S.C. at 234-39, 687 S.E.2d at 75-78. Further, the trial judge ultimately considered the admissibility of Smith's identification *in camera* and thereby provided Liverman a constitutionally adequate hearing on the identification issue.

A. How issue was raised in the trial court

The trial judge addressed the identification of Liverman by an eyewitness before the original start of the trial on August 28, 2006. When the trial judge asked whether the State was ready for a

Neil v. Biggers hearing, the State asserted that it was unnecessary for him to review the totality of the circumstances of the identification because the eyewitness knew Liverman. In support of this position, the State maintained that this Court had held in *McLeod* that the procedural safeguards set forth in *Neil* and the cases preceding it simply do not apply where the victim and the defendant know each other. Rather, those cases only apply where the victim and accused are strangers. **R. pp. 14-15.**

Liverman contended that the victim in *McLeod* was assaulted and had "an ample time to make an identification." The State's discovery in this case, however, merely reflected that the witness knew Liverman by a nickname. He asserted that the two did not attend school together and that they had not had any relationship before the night of the shooting. Also, the witness was "quite some distance away from the person who allegedly committed this act." He further asserted that *McLeod* did not apply, in the absence of a pre-existing relationship. **R. pp. 16-17.**

The State presented the eyewitness, Tyrone Smith. Smith testified that he was nineteen years old, and that he was present when the shootings occurred on August 26, 2004. He was looking out of an upstairs window of another house on the street and he watched the shooting.[7] He actually saw the shooting and he identified Liverman as the shooter. **R. pp. 17-19.**

Smith testified that he had known Liverman since roughly fifth grade.They did not go to school together; but Liverman used to live in an apartment next door to Smith's aunt, in Saxon Homes. Smith described Liverman as a friend and explained that Liverman would communicate with a deaf friend, named "Goo;" for him.[8] Smith saw Liverman for "about four days in a row" during that

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[7]Smith described this as the "left hand room" upstairs.

[8] He last saw Goo two days before the murder. **R. p. 22.** Goo is Reginald Joyner, who was present when the murders occurred. **R. p. 469.**

period. Also, he had seen Liverman twice in 2003, at a McDonald's where Liverman worked; and he had seen Liverman at Bayberry Apartments, when Liverman was speaking to someone named Delshawn. Smith knew Liverman by the nickname "Baby Jesus." **R. pp. 19-24; 27-28.**

On cross-examination, Smith testified that Liverman was wearing a white shirt and shorts when Smith saw him on the morning of the murders. Also, Liverman's hair was "sprayed" and he had beads in the back. Two brothers, "Money" and "Cash" were also present. However, Smith was roughly two houses away from Liverman and did not speak to him at Bayberry Apartments. The sun was out, Smith does not wear glasses and he had not used either drugs or alcohol that day. **R. pp. 24-27.**

Liverman maintained that the State had not established a sufficient, reliable showing of a pre-existing relationship between Smith and him. He argued that his physical characteristics had changed over the course of seven years since Smith saw him on four occasions. Also, Smith did not describe the McDonald's incident; and Smith only allegedly saw him at a distance at Bayberry Apartments on the day of the shooting. **R. pp. 29-30.**

The trial judge found that the State's evidence was "awfully close" to *McLeod.* However, before he made a ruling under the totality of the circumstances, he stated that " I think I still have to hear exactly what was going on at the time of the identification." So, he allowed the State to present additional testimony concerning the actual identification. **R. p. 30, ll. 13-21.**

Smith testified that Liverman was "right across the street" from him when he saw the shooting. "[P]retty soon after the shooting," he gave a statement to Inv. Joe Gray, in Gray's police car. In his statement, he identified the shooter, Liverman, by nickname, and he described the shooter's clothing: the shooter wore a white shirt, shorts, a camouflage bandanna on his head and

something shiny or reflective on his shoes, which Smith described as "New Balances." Inv. Gray thereafter drove him to another location about four blocks away from the shooting. Along the way, Inv. Gray told him that the police had someone and wanted to see whether Smith could identify the person as the shooter. **R. pp. 30-36**.

Smith remained in Gray's car when they reached the other location. Liverman was brought up to the side of the Inv. Gray's car and Smith identified him from a distance of between two and six feet. Liverman was wearing the same clothes that he had been wearing earlier. Smith told the police that they had the right man. **R. pp. 33; 36-38**.

Liverman also cross-examined Smith, again, about the circumstances surrounding his ability to see the shooter. Smith testified that the lights were not on inside of the upstairs room from which he watched the shooting. Also, there were street lights on the street where the shooting occurred. One light was behind the group he saw, close to a stop sign. There was also a light on the side of the house. **R. pp. 38-39**.[9]

Liverman objected to the lack of a full hearing in accordance with *Neil v. Biggers; supra.* He again asserted that *McLeod* did not apply because there was not a sufficiently reliable relationship between him and Smith. He also noted that Smith's identification was made from some two homes away from the shooter and that Smith never spoke to the shooter. On the other hand, the victim in *McLeod* had intimate, physical contact with the person she later identified. **R. pp. 41-42**.

The State argued that *McLeod* applied. Although Smith did not know Liverman's real name, he knew Liverman by the nickname Baby Jesus; and he had known Liverman since elementary school. He had gotten to know Liverman when he "hung out with" Liverman on several occasions

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[9] The Court introduced a copy of Smith's statement as Court's Ex. 5.

in the four days or so at the residence of Smith's aunt. He had also seen Liverman at the McDonald's later in life and on the day of the shooting. Therefore, he knew Liverman. The State further argued that there was no requirement of a "meaningful relationship" as Liverman argued. **R. pp. 42-43.** Liverman, again, argued that there was an insufficient opportunity for Smith to view the shooter. **R. pp. 43-44.**[10]

The trial judge observed that *McLeod* holds that the "constitutional and procedural safeguards required under *Neil v. Biggers* were never intended to apply where the victim knew the accused." However, *McLeod* did not define the word "knows." The trial judge found that *McLeod* does not require an intimate relationship. Also, based on the evidence presented *in camera,* he found that "the relationship or at least knowledge existed and I think whether it was sufficient knowledge . . . would . . . go more toward the weight of the testimony rather than the admissibility of it." **R. pp. 44, ll. 9-20.**

Additionally, the trial judge found that:

> sufficient evidence has been shown by the State under the totality of the circumstances to make an identification. It is permissible and I know the argument would be that at a show-up identification where the defendant was the only one there might be overly suggestive but at the same time the witness who testified that he knew the defendant, he knew him from elementary school, from seeing him at McDonald's, from seeing him [at] Bayberry on the date of the shooting. He knew him by his nickname, he identified the shooter by nickname to the officer prior to him being taken to the second location. Based on that I will permit the identification testimony and you can still argue about its weight.

R. pp. 44, l. 20- p. 45, l. 9.

Before the subsequent trial, Liverman asked the trial judge to revisit his ruling with respect

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[10] Contrary to Liverman's argument before this Court, **Brief of Petitioner, p. 8**, the parties' examinations of Smith were not "circumscribed."

to this issue. He argued that certain evidence that had not been presented during the original *in camera* hearing was elicited at another (apparently un-transcribed) hearing on a motion to disqualify the Fifth Circuit Solicitor's Office in connection with an alleged *Brady v. Maryland,* 373 U.S. 83 (1963) violation.[11] Specifically, he referred to evidence that Smith (1) told law enforcement on the night of the shooting that he saw Liverman get into a car that night and that Liverman stuck a gun in Smith's face that night. (2) told law enforcement in two written statements; and (3) said that this was how he was able to recognize Baby Jesus (Liverman) as the shooter. Also, Smith never told police that he had recognized Liverman from Saxon Homes or from McDonald's. Liverman asserted that Smith could not have seen him get into the car that night and that Smith "could not have been the person who stuck the gun in Tyrone Smith's face." **R. pp. 32-36.**

Liverman maintained that it was improper to assert that the identification was reliable as to the shooter but unreliable as to who put a gun in Smith's face. He further argued that this information did not come out because the trial judge did not hold a full *Neil v. Biggers* hearing, and he repeated his argument that *McLeod* was factually distinguishable based upon the close physical connection between the victim and defendant in that case. **R. pp. 32-36.**

In response, the State argued that Liverman's arguments went to the weight of the identification testimony, as opposed to its admissibility; and that the Court in *McLeod* had held that *Neil* does not apply to cases such as the present one where the witness knew the subject, even though by nickname. **R. pp. 36-37.** Liverman argued briefly in reply, again stressing that the trial judge had precluded a full showing of the relevant circumstances by relying upon *McLeod.* He also focused upon the fact that police used show-up identification, which is disfavored. **R. pp. 37-38.**

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[11] Liverman has not raised any issue on appeal in connection with the motion to disqualify.

However, the trial judge reviewed the transcript of the August 28, 2006 hearing. He then found that a full *Neil v. Biggers* hearing was not required because the State hade made a sufficient presentation of a prior knowledge or relationship between the witness and Liverman. Therefore, he adhered to his earlier ruling. **R. p. 38, l. 20- p. 39, l. 4.**

Liverman asserted that this ruling violated his right to due process under the United States Constitution and the South Carolina Constitution. **R. p. 39, ll. 8-10.**

Smith later testified, as a State's witness, without further objection or motion. **R. pp. 676-754.** After the State rested its case, Liverman renewed his objection to the trial judge's decision not to hold a full *Neil* hearing. **R. p. 896.** The trial judge denied his motion for the reasons he had denied the *in camera* motion. **R. pp. 899-900.**

B. The Court of Appeals' decision.

The current issue was the first issue raised on direct appeal. The Court of Appeals first discussed the *in camera* proceedings set forth above. *See Liverman*, 386 S.C. at 234-36, 687 S.E.2d at 75-77. The Court then rejected Liverman's argument as follows:

> On appeal, appellant contends the trial judge erred in refusing to conduct an in camera hearing regarding the reliability of Tyrone's identification of appellant as the shooter. He argues that the shooting occurred in a dark neighborhood with various people moving about, and Tyrone testified he observed the shooter from an upstairs window. Appellant asserts there were substantial problems with the reliability of Tyrone's identification too because, although Tyrone claimed to know appellant since elementary school, he was unaware of appellant's real name until after he identified appellant to police. Additionally, appellant notes Tyrone incorrectly identified appellant as the person who had threatened to kill him a short time before the shooting. Appellant contends the fact that a witness knew the defendant prior to the commission of the crime is only another factor to consider in a *Neil v. Biggers* analysis when, as here, the witness had incorrectly identified the defendant on a previous matter and subsequently participates in an inherently suggestive show-up. Appellant further maintains, given the importance of Tyrone's testimony identifying him as the shooter, the failure to hold a full *Neil v. Biggers* hearing could not have

been harmless error. We disagree.FN9.

FN9. We note the State contends, because defense counsel failed to object when Tyrone's identification testimony was presented during the trial and the pretrial rulings on the matter were not made immediately prior to Tyrone's trial testimony, the issue is not preserved for review. However, trial counsel did not simply object to the admission of the identification evidence in the pretrial motions, but specifically argued the defense was entitled to a "full *Neil v. Biggers* hearing" and objected to the trial judge's failure to grant appellant a more extensive hearing on the matter. It is from the denial of this extensive hearing that appellant appeals. The matter was repeatedly argued and ruled on by the trial court, and we find it adequately preserved for our review.

When identification of a defendant is at issue, the general rule is that a trial court must hold an in camera hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation. *State v. Miller*, 359 S.C. 589, 596, 598 S.E.2d 297, 301 (Ct.App.2004), *aff'd*, 367 S.C. 329, 626 S.E.2d 328 (2006). Additionally, our courts have noted Rule 104(c), SCRE,FN10 "unambiguously mandates hearings on the admissibility of out of court identifications of the accused shall in all cases be held outside the presence of the jury," and while the adoption of Rule 104 did not abrogate the viability of the rulings in the pre-Rules of Evidence cases, an in camera hearing required by Rule 104(c) allows a defendant to question a witness more stringently regarding possible misidentification or bias outside the presence of the jury. *State v. Cheatham*, 349 S.C. 101, 117, 561 S.E.2d 618, 627 (Ct.App.2002).

FN10. Rule 104(c), SCRE provides, in part, that "[h]earings on the admissibility of ... pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury."

In *State v. McLeod*, 260 S.C. 445, 196 S.E.2d 645 (1973), our supreme court addressed the issue of a whether a lone confrontation was unfair and untrustworthy where the facts showed the victim knew the accused. The facts in *McLeod* indicate the victim struggled with her assailant and exclaimed, "oh, you Hattie's boy," causing the assailant to flee. The victim went to another woman's house after the attack and said simply, "Hattie's boy." The morning after the incident, the defendant was arrested and taken to the victim's home. Though the victim did not know her assailant's name, she identified the person arrested as the one who assaulted her. The victim testified at trial she recognized her assailant as "Hattie's boy," and made an in-court identification of her assailant. *Id.* at 447, 196 S.E.2d at 645. It was "apparent from the record [victim] knew the defendant," "[s]he had seen him many times at a neighborhood store near their home; she knew the defendant's mother and knew him

to be her son." Id. at 448, 196 S.E.2d at 645. On appeal, McLeod challenged the fairness of the pre-trial identification procedure used by the police. *Id.* at 448, 196 S.E.2d at 645-46. The court held the rulings in decisions which attempted to avert the danger of mistaken identity by establishing mandatory constitutional and procedural safeguards were designed for application where the accused and victim are strangers to each other, and were "never intended to apply where the victim new the accused." Thus, the constitutional and procedural safeguards McLeod claimed were necessary simply did not apply to the facts of his case. *Id.* at 448, 196 S.E.2d at 646.

In the more recent case of *In re Robert D.*, 340 S.C. 12, 530 S.E.2d 137 (Ct.App.2000), this court held the family court did not err in failing to hold an identification hearing pursuant to *Neil v. Biggers*, as the hearing was not necessary because the victim knew the defendant. *Id.* at 17-18, 530 S.E.2d at 140-41. The record reflected the victim knew Robert D. by his first name, recognized him as a friend of two of her classmates, and remembered he watched a couple of films with her class. The court cited *McLeod*, noting the rules regarding out-of-court identifications were "designed for application where the accused and the victim are strangers to each other; they were never intended to apply where the victim knew the accused." *Id.* at 18, 530 S.E.2d at 141. Thus, the constitutional and procedural safeguards, which [Robert D.] claimed were necessary, simply did not apply under the facts of the case. *Id.*

We find *McLeod* and *In re Robert D.* to be controlling, and that there was sufficient evidence presented of Tyrone's prior knowledge of appellant such that a *Neil v. Biggers* hearing was not required. Here, the witness knew appellant by his nickname, had known him for a number of years, and specifically testified to having seen appellant on several occasions over the years, including having seen him earlier in the day on the date of the shooting. Additionally, while the defense presented evidence Tyrone mistakenly identified appellant as the person who pointed a gun at him and threatened him in one of the prior incidents, we agree such argument goes to the weight of the evidence.FN11.

FN11. We note that Tyrone did not identify the appellant as the person who pointed a gun in his face in the earlier incident until after the shooting. It is more likely that any mistaken identity from the earlier incident was the result of his identification of appellant as the shooter in the latter event.

Liverman, 386 S.C. at 236-39, 687 S.E.2d at 77-78.

C. Discussion

1. Procedural bar

Initially, Respondent submits that the issue is not preserved for appellate review for the reasons set forth in **Additional Sustaining Ground I.**

2. The trial judge properly relied upon *McLeod*

Alternatively, Respondent submits that the Court of Appeals and the trial judge properly found that *McLeod* applied under the facts of this case. An identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification may deprive a criminal defendant of due process of law. *Neil, supra*; *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004); *State v. Caldwell*, 378 S.C. 268, 280-81, 662 S.E.2d 474, 481 (Ct.App. 2008). However, an in-court identification of an accused is inadmissible only if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. *Id.*

Where the State offers eyewitness testimony identifying the defendant as the person who committed the crime and the defendant challenges the in-court identification as being tainted by a previous, improper identification or confrontation, the trial judge in most instances must engage in a two-prong inquiry. The trial judge must first determine whether the identification process was unduly suggestive. *Id.* Even assuming that an identification procedure was suggestive, it should not be excluded as long as the identification was reliable under the totality of the circumstances, notwithstanding the suggestiveness. *See Neil*, 409 U.S. at 199; *State v. Traylor*, 360 S.C. 74, 600 S.E.2d 523 (2004). The trial judge must consider the totality of circumstances to determine whether an identification may be reliable even when the procedure has been suggestive. *See Neil*, 409 U.S. at 199. The relevant factors to be considered include: (1) the opportunity of the witness to view the accused; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time

between the crime and the confrontation. *Id.* *See also Caldwell*, 378 S.C. at 280-81, 662 S.E.2d at 481.

However, "[w]here the reason for a rule disappears, the rule becomes somewhat irrelevant." *Powell v. State*, 566 So.2d 1228, 1236 (Miss. 1990). The United States Supreme Court has held that "reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall*[12] confrontations." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (footnote added). *See also State v. Brown*, 356 S.C. 496, 504, 589 S.E.2d 781, 785 (Ct.App.2003) (citing *Manson*). Further, it is clear that the Supreme Court's concern with the potential unreliability of eyewitness identification in criminal trials is eyewitness identification made of the defendant by a stranger, as opposed to identification made by someone who knows the defendant before the crime and subsequent identification.

In *United States v. Wade*, 388 U.S. 218, 228 (1967), the Court recognized the inherently suspicious nature of such eyewitness identification. Writing for the majority, Justice Brennan stated that:

> "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: 'What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent-not due to the brutalities of ancient criminal procedure.' The Case of Sacco and Vanzetti 30 (1927)."

Then, in *Manson*, the Court was again faced with the unreliability of eyewitness identification where an eyewitness is requested to testify about an encounter with a *total stranger* under circumstances of emergency or emotional stress.

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[12] *See Stovall v. Denno*, 388 U.S. 293 (1967).

Respondent submits that those concerns do not apply where the eyewitness knows the defendant before the crime and subsequent identification because the identification is not limited to the identification procedures employed by law enforcement, which might lead to mistaken identification, and the eyewitness' viewing of a stranger at the time of the offense. Instead, the identification is made based upon the familiarity of the eyewitness with the suspect. In other words, there cannot be a very substantial likelihood of irreparable misidentification because the identification is not based upon a constitutionally impermissibly suggestive procedure. Consistent with both *Neil* and *Manson*, both this Court and the Court of Appeals have held that the requirements of *Neil* - and the cases preceding or following it - do not apply where the eyewitness and the suspect know each other.

In *McLeod*, the victim of an assault with intent to ravish was attacked on a Friday night. "Her assailant struck her on the head with a hard object, choked her," and tore her undergarments while attempting to remove them. The assailant fled after her struggles and her "identifying exclamation, 'oh, you Hattie's boy.'" The victim testified at trial that she had recognized her assailant as "'Hattie's boy.'" Another prosecution witness testified that when the victim came to her house after being attacked: "'She say 'Hattie's boy.' That's all she say.'" On Saturday, police arrested the defendant pursuant to an arrest warrant and took him to the victim's home to see whether she could identify him as her assailant. 260 S.C. at 447, 196 S.E.2d at 645.

On appeal, the defendant attacked the fairness of the pre-trial identification procedure used by the police. The Court rejected his argument. After observing that the record demonstrated that

the victim knew the defendant, *Id* at 448, 196 S.E.2d at 645-46,[13] the Court explained that:

> The defendant's argument that the lone confrontation was unfair and untrustworthy is based on the principles set forth in the cases of *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). The rulings in these decisions attempt to avert the danger of mistaken identity by establishing mandatory constitutional and procedural safeguards. The rules are designed for application where the accused and the victim are strangers to each other; they were never intended to apply where the victim knew the accused. The constitutional and procedural safeguards, which the defendant claims were necessary, simply do not apply under the facts of this case.

McLeod, 260 S.C. at 448, 196 S.E.2d at 646.

The Court of Appeals reached the same result in *In the Interest of Robert D.*, 340 S.C. 12, 18, 530 S.E.2d 137, 140-41 (Ct.App. 2000). After finding that there could not be a violation of *Neil* because there had not been any State action surrounding the show-up, the Court stated that "[e]ven if *Neil v. Biggers* does apply to identifications arranged by persons not connected with law enforcement, we also agree with the family court that a hearing was not necessary in this case because the victim knew the defendant. The record reflects the victim knew Robert D. by his first name, recognized him as a friend of two of her classmates, and remembered he watched a couple of films with her class." *Id.* at 17-18, 530 S.E.2d at 140-41.

Notwithstanding Liverman's contrary position, the Court of Appeals correctly found that the trial judge properly relied upon *McLeod* when he ruled that *Neil v. Biggers* did not apply in this case because Tyrone Smith knew Liverman prior to the night that Liverman murdered C.D. and T.M. **R. p. 44, ll. 9-20**. As discussed, the prosecution's evidence established that Liverman lived next to Smith's aunt, in Saxon Homes, approximately seven years before the murders. Smith

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[13] "She had seen him many times at a neighborhood store near their home; she knew the defendant's mother and knew him to be her son." *Id.*

had contact with Liverman on several occasions over the course of four days while he visited his aunt during that period of time. Liverman even helped him communicate with a deaf boy nicknamed Goo. Sometime between that time and the August 26, 2004 murders, Smith twice saw Liverman at the McDonald's where Liverman worked. He also saw Liverman at Bayberry Apartments on the day of the murders. Finally, Smith knew Liverman by the nickname of Baby Jesus.

As the trial judge properly recognized, **R.p. 44, ll. 9-20**, the arguments advanced by Liverman at trial go to the weight that he believes the jury should assign to Smith's knowledge of Liverman, rather than whether Smith knew him. Thus, the trial judge properly relied upon *McLeod*. *See also In the Interest of Robert D.*, 340 S.C. at 18, 530 S.E.2d at 140-41.

For the very first time in these proceedings, Liverman contends that the judge's ruling was error because "[n]either Carl Smith nor Brady Brown stated that petitioner was in the white Ford Escort that traveled to T.S. Martin around 9:00 p.m. that night. This testimony directly contradicted Tyrone Smith's identification of petitioner as the man from the white car that pointed a gun in his face within an hour before the shooting occurred." **Brief of Petitioner, p. 12**. *Compare* **Initial Brief of Appellant, pp. 1-8**. However, this argument is not properly before this Court on appeal because he never presented it to the trial judge. A party cannot argue one ground in support of an objection or motion at trial and a different ground on appeal. *State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989); *State v. Byram*, 326 S.C. 107, 113, 485 S.E.2d 360, 363 (1997) (same). *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); *Wilson v. Clary*,

212 S.C. 250, 259, 47 S.E.2d 618, 622 (1948).[14]

Further, his argument is not a meritorious one because neither this Court nor the Court of appeals has held that the State must present witnesses whose testimony is consistent as to each point therein. Rather, the State's only obligation is to prove the accused's guilt beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358 (1970). Also, Liverman's argument has nothing, whatsoever, to do with the admissibility of Smith's identification.

Liverman has argued throughout the appeal, for the first time, that *McLeod* has been implicitly overruled by the adoption of Rule 104(c), SCRE, in 1995, and this Court's subsequent decision in *State v. Ramsey*, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) (""the general rule is that a trial court must hold an *in camera* hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation"). *See also State v. Simmons*, 308 S.C. 80, 82-83, 417 S.E.2d 92, 93 (1992) (noting that the Court had adopted a *per se* rule requiring the trial court to hold an *in camera* hearing in such situations); *State v. Cheatham*, 349 S.C. 101, 117-18, 561 S.E.2d 618, 627 (Ct.App.2002) (same).

However, his argument in this regard is not preserved for this Court's review on appeal because he never presented it to the trial judge. Again, a party cannot argue one ground in support of an objection or motion at trial and a different ground on appeal. *Bailey*, 298 S.C. at 5-6, 377

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[14] Likewise, he has not heretofore suggested that the trial judge's ruling was in error for the reason stated in the introductory paragraph of the Argument section of his brief: *i.e.*, "The local media exploited me fears aroused by this ease extensively, and several jurors expressed trepidation during me trial about gang activity. R. 7, 1. 23 - 8, 1. 7. Before the jury found petitioner guilty of both murders, it sent out a note indicative of its apprehension: 'Regardless of what the verdict is, me jurors were curious of whether any safety precautions have been taken.' R. 1269, I. 24 - 1270,1. 3." **Brief of Petitioner, p. 5**. His argument is, therefore, not properly before this Court. *Id.*

S.E.2d at 584; *Byram*, 326 S.C. at 113, 485 S.E.2d at 363 (same). *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).[15]

Even if preserved, his argument lacks merit. The rule in *McLeod* is "still viable" and remains an exception to the otherwise *per se* rule in *Ramsey* and *Simmons*. The present case simply does not involve the type of identification contemplated by Rule 104(c). *See People v. Tas*, 51 N.Y.2d 915, 916, 415 N.E.2d 967, 967-68, 434 N.Y.S.2d 978, 979 (N.Y. Ct. App. 1980) ("Since the participants in the incident the victim and the perpetrators were known to each other, there was no "identification" within the meaning of CPL 710.30 ... and no prior notice need have been given by the People") (citation omitted). Further, the viability of *McLeod* cannot seriously be drawn into question, since *In the Interest of Robert D.* was decided long after adoption of the South Carolina Rules of Evidence.

3. The hearing held and the trial judge's alternative findings comport with *Neil v. Biggers*

Moreover, and apart from the admissibility of Smith's testimony under *McLeod*, Liverman cannot complain on appeal because he received the only relief requested. *See State v. Sinclair*, 275 S.C. 608, 274 S.E.2d 411 (1981) (where the appellant obtains the only relief he sought at trial, there is no issue for the appellate court to decide); *State v. Brown*, 274 S.C. 48, 260 S.E.2d 719 (1979) (same). Despite the trial judge's ruling that the identification was admissible under *McLeod* because

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[15] In the Court of Appeals, he alternatively asserted that if it is "still viable, *State v. McLeod* only applies where the prosecution unequivocally establishes that '[the] defendant and the witness who identified him as the perpetrator had a sufficient relationship prior to the incident so that suggestiveness was not a concern.'" **IBOA an FBOA, at pp. 7-8** (citing *People v. Dones*, 279 A.D.2d 366 (N.Y. 2001). He has abandoned this argument. *State v. Sullivan*, 277 S.C. 35, 282 S.E.2d 838 (1981) (issue not raised in brief is deemed abandoned). Again, this argument was procedurally barred because he never presented it, or the authority from other jurisdictions upon which he relied, to the trial judge. *Bailey*.

the pre-existing relationship between Smith and Liverman established that Smith knew Liverman, the trial judge only made this finding after he had conducted an *in camera* hearing and considered *in camera* testimony as to the circumstances surrounding Smith's identification of Liverman.

As discussed, the trial judge found that the evidence initially presented by the State was "awfully close" to *McLeod*. However, he concluded that "before I can examine the totality of the circumstances, I think I still have to hear exactly what was going on at the time of the identification." **R. p. 72, ll. 13-21**. To this end, he permitted the State to offer additional testimony from Smith. **R. pp. 72-81**.

Further, after hearing this evidence and the arguments by the parties, the trial judge made the alternative findings, discussed above, that the identification was properly admissible "under the totality of the circumstances." He specifically rejected the notion that the one person show-up was overly suggestive based upon Smith's knowledge of Liverman from elementary school, from seeing him at McDonald's and from seeing him earlier on the day of the shooting. The trial judge further found that Smith knew Liverman, by nickname; and that Smith had identified the shooter to police, by nickname before police took him to the location for the show-up. **R. p. 44, l.20-p. 45, l. 9**.

Therefore, the trial judge did conduct an *in camera* hearing as to Smith's identification that was consistent with Rule 104(c), SCRE,[16] as well as *Ramsey* and its progeny; and he made findings

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[16]Rule 104(c) provides as follows:

> **Hearing of Jury.** Hearings on the admissibility of confessions or statements by an accused, and pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

that are consistent with *Neil* and *Manson*.

Further, the trial judge did not abuse his discretion in making this alternative ruling. Smith had ample opportunity to watch the shooting. Although he was some distance from the shooter and it was dark, there were lights on the side of the house and the shooter was illuminated by a streetlight. Further, the killer that Smith was identifying was a person he had known for seven years. *See McLeod, supra*; *In the Interest of Robert D., supra*. *See also Deberry v. State*, 457 A.2d 744, 754 (Del. 1983) (recognizing that while "a detailed description [of the perpetrator] is always helpful, . . . such a requirement was unnecessary here since it is clear that [the victim] knew [the defendant],"had spent a considerable part of the previous day with him, identified him initially by his first name and the bunkhouse in which he lived, and according to the police officer who was with her, unhesitatingly identified him at a show-up); *People v. Reynolds*, 373 N.E.2d 650, 654 (1978) ("the testimony of an identification witness is strengthened to the extent of his prior acquaintance with the accused").

Liverman's principle arguments are that this was a single person show-up; that Smith did not have a sufficient opportunity to see the shooter at the time of the offense; and that, although Smith was a crucial prosecution witness, there were supposedly deficiencies in Smith's eyewitness identification. However, the one person show-up employed here was not so unduly suggestive that it tainted the reliability of Smith's identification. Although single person show-ups are disfavored because they are suggestive by their nature, *see State v. Blassingame*, 338 S.C. 240, 525 S.E.2d 535 (Ct.App.1999), an identification may be reliable under the totality of the circumstances even when a suggestive procedure has been used. *State v. Brown*, 356 S.C. 496, 504, 589 S.E.2d 781, 785

Rule 104(c), SCRE.

(Ct.App. 2003).

As the Court explained in *Brown*:

> Identifications resulting from single person show-ups have been upheld by the United States Supreme Court and our Supreme Court. " 'While a showup in which a witness views a single suspect is generally suggestive, and hence suspect or disfavored, and less preferable than a lineup, even if requested by accused, a showup may be proper in some circumstances.' " *State v. Mansfield*, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (Ct.App.2000) (quoting 22A C.J.S. *Criminal Law* § 803 (1989)).
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> " '[A] showup may be proper where it occurs shortly after the alleged crime, near the scene of the crime, as the witness' memory is still fresh, and the suspect has not had time to alter his looks or dispose of evidence, and the showup may expedite the release of innocent suspects, and enable the police to determine whether to continue searching.' " *Mansfield*, 343 S.C. at 78, 538 S.E.2d at 263. The closer in time and place to the scene of the crime, the less objectionable is a showup. Id. A show-up may be proper even though the police refer to the suspect as a suspect, and even though the suspect is handcuffed or is in the presence of the police. Id. Although show-ups have been upheld by the Court, these situations usually involve either extenuating circumstances or are very close in time to the crime. *See State v. Hoyte*, 306 S.C. 561, 413 S.E.2d 806 (1992).

Brown, 356 S.C. 496, 503-04, 589 S.E.2d at 785.

Here, the show-up occurred shortly after the murders and roughly four blocks from the crime scene. Also, Smith's memory was still fresh, and Liverman had not had time to alter his looks or change clothes. *Id.* Again, Smith was identifying a person he had known for seven years and had seen on several occasions, including the day of the murders. He likewise had already identified Liverman to police by the nickname of Baby Jesus, and he had described Liverman's clothing to police. *See McLeod, supra*; *In the Interest of Robert D., supra*; *Deberry*, 457 A.2d at 754. *See also People v. Tas*, 51 N.Y.2d at 916, 415 N.E.2d at 967-68, 434 N.Y.S.2d at 979.

Likewise, the fact Smith only knew Liverman by the nickname Baby Jesus does not adversely impact the identification in any fashion. *Id.* To the contrary, many of the witnesses referred to him

by the same nickname, identified others involved in the incident (as well as the incident earlier that night) by nickname only and a number of these witnesses had nicknames by which they were known. This is hardly surprising, since many of the witnesses were members of the Folk Nation.

Nor is there any merit to Liverman's contention that he was prevented from exploring "deficiencies" in Smith's identification "at the truncated pre-trial hearing." **Brief of Petitioner, at p. 10**. This argument conveniently ignores that - if one is to accept defense counsel's representations to the trial judge as factually correct - these "deficiencies" were not disclosed until a subsequent hearing on a *Brady* motion. **R. pp. 76-78**. Thus, they could not have been explored upon further cross-examination of Smith. Also, these matters go more to the weight of Smith's identification of Liverman, as opposed to its admissibility. More importantly, these "deficiencies" were later brought to the jury's attention, through defense counsel's cross-examination of both Smith and Inv. Gray. *See* **R. pp. 516; 677; 682-85; 691-93**.

Finally, Liverman characterizes Smith as the State's "central witness" because Smith identified him as the shooter. However, Liverman cannot show any conceivable prejudice resulting from the introduction of Smith's testimony because it was cumulative to identification of him by Diego Thompson, who had accompanied Liverman, Goo and two others to T.S. Martin from Bayberry Apartments. Thompson testified that he saw Liverman point a .22 caliber rifle at the house where his group had spoken to a "little boy." Liverman had also motioned in sign language for Goo to shoot a shotgun at the same house. Then, Thompson heard "over six or seven" gunshots as he ran. When he turned around, he saw Liverman drop the rifle and pick up the shotgun. Liverman was the only person who fired a weapon, and Thompson later saw him dispose of the weapon near the gate of Colony Apartments. **R. pp. 246-56**.

Additionally, the State presented overwhelming evidence of guilt, some of which is discussed in the Court of Appeals' statement of facts. For instance, Liverman's involvement in the shooting was also established by the testimony of Shante Bethel, a member of the Folk Nation, who was present at Bethel Bishop Apartments on the night of the killings. She overheard Liverman declare his intention to go to T.S. Martin on the night of August 26, 2004, despite Pooh (Carl Smith)'s plea that he not go there. He then left with Goo (Joyner), Diego Thompson and "Mirage." When he ran back into Bethel Bishop a short time later at "full speed," she heard him admit his involvement in the shooting at T.S. Martin, saying that his group sprayed their gunfire and that two children were hit. She also heard him state that the shooting occurred because "they had gotten in[to] something with some Bloods" earlier in the evening. **R. pp. 340-49.**[17]

Finally, Respondent notes that Liverman has abandoned his challenge to the damaging expert testimony about the meaning of the two teardrops that he had tattooed on his face following his arrest for the murders of C.D. and T.M. **R. pp. 834-37; R. p. 870, l. 14-p. 871, l. 1**. The State's closing argument was that these teardrops represented that he sought promotion within the gang based upon the killings, one of which he represents as the killing of a rival gang member. **R. pp. 1242-92.** Because Smith's identification was cumulative to Thompson's testimony identifying him as the shooter, he cannot show prejudice from the trial judge's ruling. *See State v. Rochester*, 301

[17] Further, in Liverman's second statement to police (which he gave at 1:25 p.m. on August 27th), he admitted that he had been shooting a .32 caliber automatic when the incident occurred at T.S. Martin, but he claimed that he only had two bullets. He also said that he had shot at a "top window [of a house] with a round hole like an attic." The other person was shooting "down the street in the dark." Officers returned to the scene but they could not find damage to any house other that C.D. 's, including a house resembling the house that Liverman had described. **R. pp. 472-78.** Although Liverman presented several witnesses who knew him and testified that they did not see him on the night of the murders, none of these witnesses were able to identify anyone as the shooter. **R. pp. 901-35; 1041-58.**

S.C. 196, 391 S.E.2d 244 (1990) (admission of evidence is harmless where it is cumulative to other evidence admitted without objection); *State v. Howard*, 295 S.C. 462, 369 S.E.2d 132 (1988) (when information contained in the improperly admitted affidavit is merely cumulative to other properly admitted evidence, there is no prejudice).

ADDITIONAL SUSTAINING GROUND

This Court should deny certiorari because the Court of Appeals erroneously concluded that Liverman's failure to renew his *in camera* objection when the witness testified before the jury did not waive his claim for appellate review.

As an additional sustaining ground,[18] Respondent submits that the Court of Appeals erred when it found that Liverman's argument was properly preserved for appellate review, since his failure to renew his *in camera* objection when the witness testified before the jury waived his claim for appellate review.

It is well settled that a ruling on an *in limine* motion is usually not final and the losing party must renew his or her objection when the evidence is presented. *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993); *State v. Gagum*, 328 S.C. 560, 492 S.E.2d 822 (Ct.App.1997). An exception is recognized only where the motion is ruled on immediately prior to the introduction of the evidence in question. Under those circumstances, no further objection is necessary. *State v. Tufts*, 355 S.C. 493, 497, 585 S.E.2d 523, 525 (S.C.App. 2003); *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct.App.1998); *State v. Mueller*, 319 S.C. 266, 460 S.E.2d 409 (Ct.App.1995). Here, the *in camera* ruling was not immediately before Smith's testimony and the issue is not preserved for appellate review. *See Schumpert.*

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[18] *See* Rule 208(b)(2), SCACR ("Respondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)"); Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal"); Rule 242(f), SCACR; *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("a respondent-the 'winner' in the lower court-may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court").

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and convictions of the lower court be affirmed.

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

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit
P.O. Box 192
Columbia, SC 29202
(803) 576-1801

By: _____
WILLIAM EDGAR SALTER, III
ATTORNEY FOR RESPONDENT

November 14, 2011.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
James W. Johnson, Jr., Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

Respondent,

V.

CHRIS ANTHONY LIVERMAN,

Appellant.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Brief of Respondent on Petitioner by depositing two (2) copies of the same via US Mail, first class, postage prepaid, to his attorney of record , Robert M. Dudek, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, South Carolina, 29201.

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

This 14th day of November, 2011.



WILLIAM EDGAR SALTER, III

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

ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Chris Anthony Liverman, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 27130
Heard February 23, 2012 – Filed June 6, 2012

AFFIRMED IN RESULT

A. Mattison Bogan, of Nelson Mullins Riley & Scarborough, of Columbia, Chief Appellate Defender Robert M. Dudek, of Columbia, for Petitioner.

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

JUSTICE KITTREDGE: We granted a writ of certiorari to review the court of appeals' decision in State v. Liverman, 386 S.C. 223, 687 S.E.2d 70 (Ct. App. 2009). We affirm in result.

Petitioner Chris Anthony Liverman was convicted of two counts of murder and sentenced to life imprisonment. The court of appeals affirmed. Petitioner sought certiorari with respect to the claim that the trial court refused to conduct a "full" *in camera* hearing pursuant to Neil v. Biggers, 409 U.S. 188 (1972).[1] Petitioner contended the eyewitness's identification of him as the shooter at a police-orchestrated show-up was unduly suggestive and therefore tainted the in-court identification. The trial court, relying on McLeod v. State, 260 S.C. 445, 196 S.E.2d 645 (1973), did conduct an *in camera* hearing and found the pretrial identification was reliable, based primarily on the witness's previous knowledge of Petitioner.

Following the court of appeals' decision, the United States Supreme Court issued its opinion in Perry v. New Hampshire, 565 U.S. ___ (2012), in which the Supreme Court made clear that due process requires a trial court to conduct a preliminary assessment of the reliability of an eyewitness identification made under suggestive circumstances arranged by law enforcement. The case before us involves the intersection of a suggestive police show-up identification procedure and an eyewitness who knows the accused. In McLeod, we held that the procedural safeguard of a pretrial hearing to determine the reliability and ultimate admissibility of eyewitness identification testimony was not necessary where the eyewitness knows the accused. McLeod cannot stand in light of Perry, and we overrule McLeod insofar as it creates a bright-line rule excusing a Neil v. Biggers hearing where the eyewitness knows the accused. We nevertheless affirm Petitioner's

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[1] At the court of appeals, Petitioner also challenged the admission of testimony regarding the meaning of certain tattoos on Petitioner's body. The court of appeals rejected Petitioner's argument that the testimony was unduly prejudicial. Petitioner did not seek certiorari concerning the court of appeals' ruling regarding the tattoos.

convictions and sentence because any error in failing to conduct a Neil v. Biggers hearing was harmless.

I.

BACKGROUND

A.

On the evening of August 26, 2004, two minor victims were shot and killed outside of one of the victim's homes on T.S. Martin Drive in Columbia, South Carolina. The shooting was gang-related.[2] Officers from the Columbia Police Department responded to the scene. A witness, Tyrone Smith, identified the shooter to Investigator Joe Gray. Tyrone recognized the shooter as "Baby Jesus," the nickname of Petitioner. He further described the type of gun Petitioner used, and described Petitioner as wearing a white shirt, shorts, reflective sneakers, and a camouflage bandana on his head.

Shortly after the shooting, Petitioner was apprehended by officers in the nearby woods. Upon hearing officers had seized a possible suspect, Investigator Gray drove Tyrone to the woods, parked his vehicle approximately twenty feet from the car in which Petitioner was detained, and turned on the high beam lights. Petitioner was removed from the police vehicle and stood in front of Investigator Gray's car. There, from the back seat of Investigator Gray's vehicle, Tyrone confirmed Petitioner was the person he saw fire the shots that killed the two victims.

B.

Defense counsel moved for a Neil v. Biggers hearing regarding Tyrone's identification. The State, however, opposed a Neil v. Biggers

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[2] The evidence indicates that Petitioner and several other witnesses were members of the Dead Folk Nation gang and that the incidents leading up to and through the shooting were related to an altercation with members of a rival gang, the Bloods. The facts surrounding the murders are set forth fully in the court of appeals' opinion.

hearing. Relying on McLeod, the State contended that the constitutional safeguards applicable to Neil v. Biggers are not necessary when the witness knows the accused. The able trial judge proceeded cautiously and required the State to proffer Tyrone's testimony. Tyrone, age 19, testified he knew Petitioner by the name "Baby Jesus" and that he had known Petitioner as an acquaintance since elementary school. Petitioner once lived at the Saxon Homes Apartment Complex, where Tyrone's aunt lived. When Tyrone was about 12 years of age, he and Petitioner "hung out" at the apartment complex with a mutual friend, "Goo." Tyrone had seen Petitioner at McDonald's (where Petitioner worked) on two occasions. On the day of the murders, Tyrone saw Petitioner at the nearby Bayberry Apartments. At this point in Tyrone's testimony, the State rested its presentation, but Petitioner objected. The trial court agreed with the State's position but required an additional showing concerning "what was going on at the time the identification was made."[3]

Tyrone then testified as to where he watched the shooting occur, as well as his ability to identify Petitioner. According to Tyrone, he observed the shooting while looking out of a second story window in his house across the street on T.S. Martin. Tyrone stated he could see a group of men, including Petitioner, standing a short distance from a street light on the corner. After the murders, Tyrone promptly identified Petitioner as the shooter and provided police with a description of Petitioner's clothing. Petitioner was apprehended nearby, and Tyrone described the show-up arranged by police through which Tyrone confirmed his prior identification of Petitioner.

Initially, the trial court ruled the identification testimony was admissible pursuant to McLeod: "Based on what has been presented here I think the relationship or at least a knowledge existed and I think whether it was sufficient knowledge it would be [sic], go more toward the weight of the

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[3] The trial court stated: "Before I can examine the totality of the circumstances I think I still have to hear exactly what was going on at the time the identification was made. For that reason I will let the State continue examination as to the actual identification."

testimony rather than the admissibility of it." The trial court provided a secondary basis for admitting the evidence:

> But in addition to that I find that sufficient evidence has been shown by the State under the totality of the circumstances to make it an identification. It is permissible. And I know the argument would be made that at a showup identification where the defendant was the only one there might be overly suggestive but at the same time the witness who testified that he knew the defendant, he knew him from elementary school, from seeing him at McDonald's, from seeing him on Bay Berry [sic] on the date of the shooting. He knew him by his nickname, he identified the shooter by nickname to the officer prior to him being taken to the second location. Based on that I will permit the identification testimony and you can still argue about its weight.

C.

At trial, Tyrone testified extensively regarding his previous knowledge of Petitioner and what he witnessed the night of the shooting. Both Tyrone and Investigator Gray testified as to Tyrone's out-of-court identification. In addition to Tyrone's testimony, the State offered the testimony of other witnesses who presented further incriminating evidence against Petitioner. Two witnesses testified Petitioner was armed with a gun the day of the shooting and indicated he planned to go to T.S. Martin that night. Diego Thompson placed himself at the scene of the murders with Petitioner and testified that Petitioner and another male began shooting, while the others in the group ran towards the woods. Finally, the State presented the testimony of Petitioner's fellow gang member, Shante, who testified that shortly after the shooting, she overheard Petitioner discussing the shooting where they were "spraying" gunfire and two children were shot.

The defense thoroughly challenged the State's case. Defense counsel argued to the jury that the State's witnesses, especially Thompson, fabricated Petitioner's involvement to deflect from their own guilt. Defense counsel

also attacked Tyrone's testimony. Specifically, counsel maintained that Tyrone was mistaken about his identification of Petitioner as the shooter because he did not know Petitioner with any familiarity and he misidentified Petitioner in an incident earlier in the day. Ultimately, the jury found Petitioner guilty of both murders.

D.

On appeal, Petitioner repeated his challenge to the trial court's failure to conduct a "full" Neil v. Biggers hearing. The trial court erred, Petitioner contended, in refusing to conduct a more extensive hearing when Petitioner alleged the out-of-court identification was procured by law enforcement through unduly suggestive procedures. Petitioner argued that the State failed to show Tyrone had sufficient prior knowledge of Petitioner to overcome the unduly suggestive nature of the out-of-court identification. The court of appeals rejected Petitioner's argument and affirmed his conviction.

II.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact. State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court. Id. Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion. Id.

III.

ANALYSIS

"A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." Id.

In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, 409 U.S. at 198. Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (citing Biggers, 409 U.S. at 199-200).

Our courts have held this determination should be made during an *in camera* hearing, outside of the presence of the jury. See State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) (holding that generally, a trial court must hold an *in camera* hearing when the State offers a witness whose testimony identifies the defendant as a person who committed the crime and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation); State v. Simmons, 308 S.C.

80, 417 S.E.2d 92 (1992) (same); see also Rule 104(c), SCRE (providing that "[h]earings on the admissibility of . . . pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury"). "The purpose of the *in camera* hearing is to determine whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding the prior, out-of-court identification." Ramsey, 345 S.C. at 613, 550 S.E.2d at 297.

A year after Neil v. Biggers, this Court decided McLeod, in which we held that a pretrial hearing is not necessary where a witness knows the accused. In McLeod, during a physical struggle with her attacker, the victim exclaimed "oh, you Hattie's boy," causing her attacker to flee. 260 S.C. at 447, 196 S.E.2d at 645. Following the attack, the victim went to a friend's house and stated only the phrase "Hattie's boy." Thereafter, the defendant was arrested and taken to the victim's home, where she identified him as her attacker, although she did not know his actual name. Id.

Regarding the fairness of the pretrial identification procedure used by law enforcement, this Court found it was "apparent from the record that [the victim] knew the defendant. She had seen him many times at a neighborhood store near their home; she knew the defendant's mother and knew him to be her son." Id. at 448, 196 S.E.2d at 645. The Court reasoned that previous United States Supreme Court cases[4] mandating pretrial procedural safeguards represented an "attempt to avert the danger of mistaken identity by establishing mandatory constitutional and procedural safeguards." Id. at 448, 196 S.E.2d at 646. However, the Court found those rules were never intended to apply where the victim knew the accused. Id.; see also In re Robert D, 340 S.C. 12, 530 S.E.2d 137 (Ct. App. 2000) (finding Neil v. Biggers was not applicable because the identification was arranged by school officials, not police officers, and finding, based upon McLeod, that a pretrial hearing was not necessary where the victim knew the defendant by his first

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[4] Notably, McLeod (1973) does not reference Neil v. Biggers (1972), but does cite to three of its predecessors, including United States v. Wade, 388 U.S. 218 (1967), Gilbert v. California, 388 U.S. 263 (1967), and Stovall v. Denno, 388 U.S. 293 (1967).

name, recognized him as a friend of her classmates, and remembered he watched movies with her class).

In Perry v. New Hampshire, the Supreme Court refused to extend the reach of identification due process protections into areas where an identification is not procured by state action.[5] 565 U.S. ___ at *18-19. While acknowledging that eyewitness evidence is inherently imperfect, the Court stated: "The fallibility of eyewitness evidence does not, *without the taint of improper state conduct*, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." Id. at *15 (emphasis added). However, in refusing to expand judicial screening to *all* eyewitness identifications, the Supreme Court reemphasized the necessity of pretrial judicial review when an identification is infected by improper police influence, as expounded by Neil v. Biggers and its progeny. Thus, Perry mandates that preliminary judicial inquiry is required once it is contended that an identification is obtained under unnecessarily suggestive circumstances arranged by state action, regardless of the witness's prior knowledge of the accused. Therefore, we overrule McLeod to the extent it permits circumvention of a Neil v. Biggers hearing.

Here, the trial court went beyond the scope of a McLeod hearing and required testimony related to Tyrone's ability to identify Petitioner as the shooter, as well as the circumstances surrounding the show-up procedure arranged by the police. Petitioner maintains that he was denied a "full" Neil v. Biggers hearing. The State, having adamantly objected to a Neil v. Biggers hearing at trial, now suggests we treat the trial court's handling of the matter as the functional equivalent of a Neil v. Biggers hearing. While the

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[5] The identification of the defendant in Perry was not procured by state action. When an officer responding to the police call asked the eyewitness to describe the man breaking into cars, the witness pointed to her kitchen window and said the man she saw breaking into the car was standing in the parking lot, next to a police officer. The trial court denied the defendant's motion to suppress the witness's identification. On appeal, the defendant argued that it was error to require an initial showing that police arranged a suggestive identification procedure. Perry, 565 U.S. ___ *3-4. However, the Supreme Court refused to extend pretrial protections for eyewitness identifications that are not the result of police-arranged tactics. Id. at *18.

trial court required the State to submit evidence that has many of the traditional features of a Neil v. Biggers hearing (and the trial court made concomitant Neil v. Biggers findings), we decline to hold that the pretrial hearing fully comported with due process requirements. Even assuming error, however, we are firmly persuaded that such error was harmless.

"A harmless error analysis is contextual and specific to the circumstances of the case." State v. Byers, 392 S.C. 438, 448-49, 710 S.E.2d 55, 60 (2011). No definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. State v. Reeves, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990). In considering whether error is harmless, a case's particular facts must be considered along with various factors including: "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." State v. Clark, 315 S.C. 478, 481, 445 S.E.2d 633, 635 (1994) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)).

Although McLeod cannot survive Perry as a standalone basis for circumventing a Neil v. Biggers hearing, the fact that an identification witness knows the accused remains a significant factor in determining reliability. The suggestive nature of a show-up is mitigated by the witness's prior knowledge of the accused. We concur with those jurisdictions that consider the show-up identification procedure, normally considered unduly suggestive, as merely confirmatory. See State v. Taylor, 594 N.W.2d 158 (Minn. 1999) (holding that the show-up procedure was not suggestive but merely confirmatory where witness previously singled out assailant by nickname and had seen him around her apartment building at least ten times before the show-up took place); People v. Rodriguez, 593 N.E.2d 268, 272 (N.Y. 1992) ("A court's invocation of the 'confirmatory identification' exception is thus tantamount to a conclusion that, as a matter of law, the

witness is so familiar with the defendant that there is 'little or no risk' that police suggestion could lead to a misidentification.").

After conducting a pretrial hearing, the trial court was satisfied that Tyrone knew Petitioner before the shooting and Tyrone's identification was sufficiently reliable because he identified Petitioner by his nickname to Investigator Gray prior to the suggestive police orchestrated show-up. Further, a review of Tyrone's trial testimony indicates that his in-court identification of Petitioner as the shooter originated not from any taint associated with the suggestive show-up but from Tyrone's prior association with Petitioner and his observation of Petitioner at the time of the shooting. Thus, despite the lack of a full Neil v. Biggers hearing, Tyrone's in-court identification was nonetheless properly admitted as it had an independent origin. See Ramsey, 345 S.C. at 613, 550 S.E.2d at 297 ("The purpose of the *in camera* hearing is to determine whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding the prior, out-of-court identification."); State v. Byrd, 252 S.E.2d 279 (N.C. App. 1979) (finding no prejudicial error in failing to hold a voir dire hearing where evidence indicated eyewitness had known defendant for five or six years, recognized him at the scene, and gave his description to an officer before a show-up, the eyewitness's in-court identification originated from his observation of defendant at the scene of the crime).

Our decision to uphold Petitioner's convictions is reinforced by the protections available to defense counsel at trial. We must "take account of other safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability." Perry, 565 U.S. ___ *15. In Perry, the Supreme Court articulated safeguards available to parties in light of its recognition that the jury, not the judge, traditionally determines the reliability of evidence:

> These protections include the defendant's Sixth Amendment right to confront the eyewitness. Another is defendant's right to the effective assistance of an attorney, who can expose the flaws in the eyewitness' testimony during cross-examination and focus the

> jury's attention on the fallibility of such testimony during opening and closing arguments. Eyewitness-specific jury instructions, which many federal and state courts have adopted, likewise warn the jury to take care in appraising identification evidence. The constitutional requirement that the government prove the defendant's guilt beyond a reasonable doubt also impedes convictions based on dubious identification evidence.

565 U.S. ___ *15-16 (internal citations omitted).

Many of the safeguards noted by the Supreme Court in Perry were at work in Petitioner's trial. The reliability of the Tyrone's testimony was vetted, albeit perhaps in limited form, at the pretrial hearing. Without question, however, the reliability of Tyrone's testimony was fully vetted at trial. During opening statements, Petitioner's counsel cautioned the jury about the fallibility of Tyrone's identification.[6] While cross-examining Tyrone, Petitioner's counsel repeatedly discussed the weaknesses of Tyrone's identification, including: his inability to remember details of his prior encounters with Petitioner; the distance between Tyrone's window and the shooting two houses away; his alleged mistaken identification of Petitioner as the man who earlier in the day pointed a gun at him; inconsistencies in Tyrone's statements concerning whether Petitioner was wearing a bandana on his face; the lateness of the hour and lack of sufficient lighting; Tyrone's inaccurate statement that the shooter was wearing New Balance sneakers; and Petitioner's position next to a police car at the moment Tyrone made an identification.

During her closing argument, Petitioner's counsel reminded the jury of such weaknesses. Moreover, the trial court instructed the jury thoroughly on identification testimony[7] and the factors that should be considered when

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[6] Defense counsel stated "I submit to you ladies and gentlemen that from the very beginning, from that first night, the police were put on notice that the basis of their arrest, that identification, was a bad one, that it was a mistake."

[7] Beyond the traditional charge concerning the jury's determination of the credibility of witnesses, the trial court gave the following instruction regarding identification testimony:

evaluating it. The trial court also instructed the jury that the defendant's guilt must be proved beyond a reasonable doubt and specifically advised that the State must prove "beyond a reasonable doubt the identity of the defendant as the perpetrator of the offenses with which he stands charged."

Having thoroughly reviewed the record, we can say with assurance that "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Lowry v. State, 376 S.C. 499, 507, 657 S.E.2d 760, 764 (2008) (quoting Arnold v. State, 309 S.C. 157, 165, 420 S.E.2d 834, 838 (1992).

V.

For the foregoing reasons, the decision of the court of appeals is affirmed in result.

AFFIRMED IN RESULT.

TOAL, C.J., PLEICONES, BEATTY and HEARN, JJ., concur.

I would further charge you, Mr. Foreman and ladies and gentlemen, that in appraising identification testimony of a witness, you should consider the following: are you convinced that the witness had the capacity and an adequate opportunity to observe the offender; whether the witness or a witness had an opportunity to observe an offender at the time of the offense will be affected by such matters as how long or short a time was available; the circumstances under which an accused is presented for identification, how far or how close the witness was; how good the lighting conditions were; whether the witness had [] occasion to see or know the person in the past.

Again, I will charge you that the burden of proof on the prosecution extends to every element of the offense charged, and this includes the burden of proof and beyond a reasonable doubt the identity of the defendant as the perpetrator of the offenses with which he stands charged.

If examining this testimony you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211

1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

June 26, 2012

Jeanette W. McBride
Clerk of Court
PO Box 2766
Columbia SC 29202-2766

REMITTITUR

Re: The State v. Liverman, Chris Anthony
Lower Court Case No. 2005GS4006832, 2005GS4006831
Appellate Case No. 2010-152447

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc: Robert Michael Dudek
Alan McCrory Wilson
John W. McIntosh
Donald J. Zelenka
W. Edgar Salter, III
Daniel Edward Johnson
Allen Mattison Bogan
James W. Johnson, Jr.

FORM 5

2012CP4004870

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)
)
Chris A. Liverman #308393)
Full name and prison number (if any) of Applicant.)
)
v.) **APPLICATION FOR**
) **POST-CONVICTION RELIEF**
State of South Carolina)
)

RICHLAND COUNTY FILED
2012 JUL 17 AM 11:30
JEANNETTE W. McBRIDE C.C.P. & G.S.

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 the fees and costs of the proceedings. When the application is completed the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Broad River Correctional Institution
4460 Broad River, Rd. Columbia, SC. 29210
2. Name and location of Court which imposed sentence Richland County General Sessions
3. Name(s) of co-defendant(s) (if any) none
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
   (a) 2005-GS-40-6831 (murder)
   (b) 2005-GS-40-6832 (murder)
   (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
   (a) September 9, 2006 (LWOP)
   (b) September 9, 2006 (LWOP)

Revised 3/2003

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty trial by 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. South Carolina Court of Appeals

ii. South Carolina Supreme Court

iii. _____

(b) the result in each such Court to which you appealed:

i. affirmed conviction and sentences

ii. affirmed conviction and sentences

iii. _____

(c) the date of each such result:

i. unknown

ii. June 6, 2012

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. St. v. Liverman, 386 S.C. 223, 687 S.E.2d 70(Ct.App.2009

ii. Opinion Number 27130

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) n/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 of counsel

(b) denial of Fifth, Sixth and Fourteenth Amendment U.S.

(c) denial of due process

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

(a) counsel's deficient performance in representation

(b) rights were not protected due to counsels errors

(c) applicant will amend the applicant once counsel is appointed

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 n

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. n/a

ii.

iii.

iv.

(b) the name and location of the Court in which each was filed:

i. n/a

ii.

iii.

iv.

(c) the disposition thereof:

i. n/a

ii.

iii.

iv. _____

(d) the date of each such disposition:

i. n/a

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. n/a

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?

first filing for PCR

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. n/a

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. n/a

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) first filing for post conviction relief

(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? yes

(c) your sentencing? yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? yes

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. _____

ii. Betsy Franklin; Carolyn Gripp; Maxwell Schardt, esq,s

iii. Richland County Public Defenders Office (c)(d)

(b) the proceedings at which each such attorney represented you:

i. _____

ii. trial and sentencing

iii. Robert Dudek, direct appeal
S.C. Office of Appellate Defense

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

vacate sentences and convictions and remand, new trial

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

no

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of Richland)

I, Chris Liverman, 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. "Without Prejudice"

Chris Anthony Liverman

SWORN to and subscribed before me this 2 day of July, 2012.

Eugene Kerth (L.S.)
Notary Public

My Commission Expires: My Commission Expires April 4, 2016

Revised 3/2003

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

I, Chris Liverman, 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. "Without Prejudice"

Chris Anthony Liverman
Applicant

SWORN or affirmed to and subscribed before me this 2 day of July, 2012.

Eugene Kelly
Notary Public

My Commission Expires: My Commission Expires April 4, 2016

RICHLAND COUNTY
FILED
2012 JUL 17 AM 11:30
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

Revised 3/2003

ALAN WILSON
ATTORNEY GENERAL

RICHLAND COUNTY
FILED
2012 OCT 18 AM 9:17
JEANETTE W. MCBRIDE
C.C.P. & G.S.

Friday, October 12, 2012

Clerk of Court - Richland County
Jeanette W. McBride
PO Box 2766
1701 Main Street, Room 205
Columbia, SC 29202

Re: PCR (2012CP4004870) - LIVERMAN Chris A, 00308393 v. State

Richland County Clerk of Court:

Enclosed for filing is the State's Return in the PCR matter for:
LIVERMAN Chris A, 00308393 v. State
(2012CP4004870).

Thank you for all of your assistance in this matter,

Robert D. Corney
Assistant Attorney General
rcorney@scag.gov

Enc.
cc. Joy E. Middleton, Post Office Box 7486 , Columbia, SC 29202

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
LIVERMAN Chris A - # 00308393,	)	**2012CP4004870**
Applicant,	)	
v.	)	**RETURN**
State of South Carolina,	)	
Respondent.	)	

RICHLAND COUNTY
FILED
2012 OCT 18 AM 9:17
JEANETTE W. McBRIDE
C.C.P. & G.S.

The Respondent, making its Return to the application for post conviction relief (PCR) filed July 17, 2012, would respectfully show this Court:[1]

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. The Applicant true bill was indicted at the April 2005 term of the Richland Grand Jury for Murder (2 counts) (2005-GS-40-6831;6832).[2] He was represented by Betsy Franklin Best, Esquire, Maxwell Schardt, Esquire, and Carolyn Gripp, Esquire, on the charge(s). On October 30, 2006, Applicant proceeded to jury trial before The Honorable James W. Johnson, Jr. On November 9, 2006, the Applicant was found guilty of both charges as indicted and sentenced to life imprisonment without parole on each, to run consecutively.

[1] http://www4.rcgov.us/publicindex/PICaseDetails.aspx?County=40+&Casenum=2012CP4004870&CourtType=G&CaseType=Civil&CourtAgency=40002

[2] https://sword.doc.state.sc.us/scdc-public/inmateDetails.do?id=+00308393

Direct Appeal

A timely notice of appeal was filed and an appeal was perfected on Applicant's behalf. He was represented by A. Mattison Bogan, Esquire, and Chief Appellate Defender Robert M. Dudek, Esquire, of the South Carolina Office of Appellate Defense on the appeal. The facts giving rise to the appeal were set forth as follows:

> **BACKGROUND**
>
> **A.**
>
> On the evening of August 26, 2004, two minor victims were shot and killed outside of one of the victim's homes on T.S. Martin Drive in Columbia, South Carolina. The shooting was gang-related.[2] Officers from the Columbia Police Department responded to the scene. A witness, Tyrone Smith, identified the shooter to Investigator Joe Gray. Tyrone recognized the shooter as "Baby Jesus," the nickname of Petitioner. He further described the type of gun Petitioner used, and described Petitioner as wearing a white shirt, shorts, reflective sneakers, and a camouflage bandana on his head.
>
> Shortly after the shooting, Petitioner was apprehended by officers in the nearby woods. Upon hearing officers had seized a possible suspect, Investigator Gray drove Tyrone to the woods, parked his vehicle approximately twenty feet from the car in which Petitioner was detained, and turned on the high beam lights. Petitioner was removed from the police vehicle and stood in front of Investigator Gray's car. There, from the back seat of Investigator Gray's vehicle, Tyrone confirmed Petitioner was the person he saw fire the shots that killed the two victims.

After briefing, the matter proceeded to oral argument before the South Carolina Supreme Court on February 23, 2012. On June 6, 2012, the Court issued an opinion

affirming the convictions in result. State v. Liverman, Op. No. 27130 (S.C. filed June 6, 2012). The Remittitur was issued June 26, 2012.

The application for post conviction relief (PCR) was filed July 17, 2012.

II.

Attached herewith and incorporated herein are the records of the Richland County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, and the trial transcript, and the Applicant's applicable direct appeal files. The Respondent reserves the right to amend this Return upon receipt of any relevant materials or submit an amended Return to reflect any amended allegations and/or to provide a more detailed procedural history.

III.

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following:

(a) ineffective assistance of counsel

(b) denial of Fifth, Sixth and Fourteenth Amendment U.S.

(c) denial of due process

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

(a) counsel's deficient performance in representation

(b) rights were not protected due to counsels errors

(c) applicant will amend the applicant once counsel is appointed

IV.

For the purposes of this Return, the Respondent interprets each of the Applicant's allegations to be claims that he received ineffective assistance of counsel. The Respondent contends that the 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, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 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. The 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, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that 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).

V.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied. The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the 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.

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held. The Respondent will coordinate with the Applicant's attorney who is, according to the Respondent's file, Joy E. Middleton, Esquire regarding when the hearing should be set.[3]

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

ROBERT D. CORNEY
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737
rcorney@scag.gov

October 12, 2012

[3] The current PCR Roster for the 5th Circuit is available at http://www.scag.gov/criminal-litigation/postconvictionrelief

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
LIVERMAN Chris A - # 00308393, Applicant, v. State of South Carolina, Respondent.	**2012CP4004870** **CERTIFICATE OF SERVICE**

RICHLAND COUNTY
FILED
2012 OCT 18 AM 9:18
JEANETTE W. McBRIDE
C.C.P. & G.S.

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 a letter in the above-captioned matter on the following person(s) by routing the same to the United States mail, postage prepaid:

Joy E. Middleton, Post Office Box 7486 , Columbia, SC 29202

DATED October 15, 2012.

Jean R. Indriago
Legal Assistant

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

C/A No.2012-CP-400-4870



Chris A. Liverman -- Petitioner,

-Vs-

State of South Carolina -- Respondent,

AMENDED APPLICATION FOR

POST CONVICTION RELIEF

PURSUANT TO RULE 15, SCRCP

Chris A. Liverman
SCDC# 308393
BRCI
4460 Broad River Rd.
Columbia, SC. 29210

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	C/A No.2012-CP-400-4870

FILED
2013 MAR -6 P 12:28
JEANETTE W. WALTERS
CLERK OF COURT
RICHLAND CO., S.C.

Chris A. Liverman	)	
Petitioner,	)	**AMENDED APPLICATION FOR POST**
-Vs-	)	**CONVICTION RELIEF PURSUANT TO**
State of South Carolina	)	**RULE 15, SCRCP**
Respondent,	)	
	)	

COMES NOW, above captioned Petitioner by and through attorney of record who respectfully asks this Honorable Court to amend the Original post conviction relief application in the above captioned case number.

Respectfully Submitted,

/s/ Chris Liverman
Chris A. Liverman

SWORN to and subscribed before me this 25
day of Feb, 2013.

Eugene Keith Jr (L.S.)
Notary Public

My Commission Expires: Apr. 14, 2016

ISSUE (A) WAS COUNSEL INEFFECTIVE FOR CONCEDING PETITIONER'S GUILT DURING CLOSING SUMMATION?

Facts

Petitioner asserts he was denied the effective assistance of counsel when counsel conceded his guilt during closing argument to the jury. During closing summation counsel made the following statement to the jury, as was recorded:

> I mean, we have to **concede**, as defense attorneys, that there are reasons why my client is the defendant in this case, but just because there are some factors that make it look like he was the guilty party on the night this happened, It doesn't mean that he is. [Tr.p.1349, L.23-25, p.1350, L.1-3].

Petitioner asserts he was denied the effective assistance of counsel when trial counsel conceded in his closing argument to the jury that there was no reasonable doubt regarding one of the factual issues that is to be determined by the jury. Counsel was not obliged to override Petitioner's plea of "not guilty" and tell the jury that there are some factors that make it look like Petitioner is the guilty party.

Discussion

The adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate,", Anders v. California, 87 S.Ct. 1396 (1967). But if the process losses it's character as a confrontation between

adversaries, the constitutional guarantee is violated, Cronic v. United States, 466 U.S. at 656-657.

Petitioner asserts that a criminal defendant is also protected from unfairness in the criminal process by the due process requirement that his guilt be proved beyond a reasonable doubt. The Supreme Court has explicitly held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged, In re Winship, 397 U.S. 358 (1970). Thus, when a defense attorney concedes that there is no reasonable doubt concerning factual issues in dispute, the government has not been held to it's burden of persuading the jury that the defendant is guilty.

The Cronic Court, supra, recognized that there are circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. The Court identified the complete denial of counsel or the deprivation of the effective representation at a critical stage of an accused's trial as justifying a presumption of prejudice.

The Strickland v. Washington, 466 U.S. 668 (1984), standard has been the bar for trial counsel's effective representation for twenty-five years, however, Petitioner suggests this Court apply the Cronic standard where trial counsel's concession of guilt caused a breakdown in the adversarial system of justice. Counsel's concession in his closing argument that there are "reasons why Petitioner is the defendant in this case, and that

some factors make it look like Petitioner is the guilty party", does not demonstrate mere negligence in representation or a strategy to gain a favorable result that misfired. Undeniably, counsel's statement lessened the State's burden of persuading the jury that Petitioner was guilty of the crimes of murder. The mere fact counsel said: "We concede as defense attorneys, that there are reasons why my client is the defendant in this case," [Tr.p.1349, L.23-25], and "there are some factors that make it look like he is the guilty party," [Tr.p.1350, L.1-2], assuredly tainted the integrity of the trial. The Cronic Court instructed that "if counsel utterly fails to subject the prosecution's case to a meaningful adversarial testing, then there has been a denial of the Sixth Amendment right that makes the adversary process itself presumptively unreliable."

Counsel's remarks were not merely a negligent misstep in an attempt to champion Petitioner's cause. The concession that there was no doubt, reasons why Petitioner was the defendant and looked guilty, was a complete abandonment of the defense of Petitioner at a critical stage of the proceeding. An attorney that informs the jury that it is his view of the evidence that there is no reasonable doubt regarding a factual issue that is to be determined by the jury has utterly failed to subject the prosecution's case to meaningful adversarial testing.

The prejudice incurred here is clearly in counsel's words. The jury here reasonably interpreted Petitioner was no doubt guilty and you (the jury) should find him guilty. This constitutes a structual error where the framework of the trial

was changed by Petitioner's own advocate conceding Petitioner's guilt.

Petitioner asserts he was denied the effective assistance of counsel as a result of counsel's omission and as a result was denied his right to a fair trial. Petitioner respectfully prays this Court grant the requested relief of a new trial.

ISSUE (B) WAS COUNSEL INEFFECTIVE FOR INVOKING THE "GOLDEN RULE" DURING CLOSING SUMMATION TO THE JURY THAT IMPERMISSIBLY INVITED THE JURY TO DEPART FROM NEUTRALITY AND DECIDE THE CASE ON PERSONAL BIASIS RATHER THAN THE EVIDENCE?

Facts

Petitioner asserts counsel engaged in improper closing summation that invited the jury to depart from neutrality and decide the case on personal biasis rather than the evidence submitted during trial.

During closing summation counsel made the following improper comments to the jury, as was recorded:

> It seems if you're guilty of something, you're trying to run away as far as possible, [Tr.p.1345, L.7-8].
>
> Think about it. If you're living up in Bethel Bishop or you're living up here in Bayberry and you need to get out, you have got to go through all this to make it to West Beltline, or you can take these tracks -- You can take these cuts, [Tr.p.1345, L.23-25, p.1346, L.1-2].
>
> How would your heart have been beating if that just happened to you?, [Tr.p.1346, L.25, p.1347, L.1].
>
> You have to imagine what Chris was going through at that time, [Tr.p.1348, L.20-21].
>
> Now, the guys who looked at Chris' tatoos. The purpose there introducing this testimony is to try to terrify you. They want you to hate him because he's in a gang, [Tr.p.1354, L.9-12].
>
> I remind you that my client used to sleep on his grandmother's couch, not what you would expect of a high ranking influential gang member, [Tr.p.1354, L.17-19].
>
> Look at your weapon and the magazine, the

> bullets. The magazine here and the bullets and how you load one of theses. It's not an easy thing to do. I would argue completely impossible to do while you're running, [Tr.p.1357, L.17-21].
>
> If You're washing your hands, then your levels are going to be zero across the board,[Tr.p.1358, L.11-12].

Petitioner asserts counsel injected highly prejudicial comments during closing summation.

Discussion

Petitioner asserts counsel improperly invoked the "Golden Rule" during closing summation that invited jurors to place themselves into the shoes of one of the parties and in doing so denied Petitioner his right to effective representation and the right to a fair trial.

The traditional notion of the Golden Rule, though not yet contained in any rule of evidence or procedure, but can be seen at 75 AM.Jur.2d §282 p.357, which holds "a lawyer shall not" urge the jury members to "imagine themselves" or their families or friends in the place of the victim or the defendant and to render their verdict from that prospective. The Golden Rule argument, suggesting to jurors as it does, that they put themselves in the shoes of one of the parties, is generally impermissible because it encourages the jurors to depart from the neutrality and to decide the case on the basis of personal; interest rather than on the evidence. Regardless of the nomenclature used, any argument that importunes the jurors to place themselves in the shoes of

one of the parties is "disallowed", See Johnson v. State, 587 S.E.2d at 781 (2003), also see Black's Law Dictionary 7th ed. at p.700.

In State v. McDaniels, 320 S.C. 33, 462 S.E.2d 882 (Ct.App.1995) it was the solicitor who invoked the "Golden Rule" by the Solicitor's use of the word "you" some 45 times during closing summation asking the jurors to put themselves in the place of the victim that constituted reversible error and warranted a new trial. See also Von Dohlen v. State, 360 S.C. 598, 611, 602 S.E.2d 738, 745 (2004)(noting "[o]ther courts, including our Court of Appeals, uniformly have condemned and prohibited golden rule arguments in criminal and civil settings).

Here it was counsel's comments asking the jury to "imagine themselves in Petitioner's shoes" that encouraged the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than the evidence, See State v. Reese, 359 S.C. 260, 271, 597 S.E.2d 169, 175 (Ct.App.2004)(recognizing that a "Golden Rule" argument which suggests to jurors to put themselves in the shoes of one of the parties is generally impermissible because it encourages the jurors to depart from neutrality and decide the case on the basis of personal interest and biasis rather than the evidence), aff'd in part and rev'd in part, 370 S.C. 31, 633 S.E.2d 898 (2006), affirming the Court of Appeals, finding that the defendant was entitled to a new trial on the solicitor's "Golden Rule" closing summation.

In the instant case it was Petitioner's counsel who

improperly invoked the "Golden Rule" argument. Regardless of the nomenclature used, here it was just as prejudicial to Petitioner since it was his counsel rather than the solicitor.

Petitioner asserts he was denied the effective assistance of counsel and his right to a fair trial based on counsel's improper closing.

Here counsel's performance was not reasonable "under the prevailing professional norms", Strickland v. Washington, 466 U.S. at 687-88. Due to the unduly highly prejudicial publicity of Petitioner's case and the "gang stigma" invoked during this argument was highly improper and prejudicial to Petitioner's right to a fair trial.

For the aformentioned reasons, Petitioner respectfully requests this Court grant the requested relief of a new trial.

ISSUE ($_C$) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE SOLICITOR'S IMPROPER "VOUCHING" FOR (3) THREE STATE WITNESS' DURING CLOSING SUMMATION TO THE JURY IN AN ATTEMPT TO "BOLSTER" THE STATE'S CASE AGAINST PETITIONER?

Facts

Petitioner asserts he was denied the effective assistance of counsel when counsel failed to object to the Solicitor's closing summation that allowed the Solicitor to improperly "vouch" for the credibility of (3) three State witness' in an attempt to "bolster" the State's case.

During closing summation the following was recorded:

> The Defendant -- and this is what gives Shante so much credibility. The State submits. That defendant says he shot one in the head and one in the stomach.
> Shante knew when she gave this statement that both children were shot in the head, yet she is telling the police that he said "shot one in the head and one in the stomach."
> If Shante is going to make this up, isn't she going to say, "He said he shot both of them in the head?" Sure, But she is not making it up, and that's why her testimony is so believable, [Tr.p.1377, L.2-12].
>
> He knows it's Baby Jesus because he knew Baby Jesus before, and he saw him shoot.
> That, Ladies and Gentleman, Makes what Tyrone Smith says in his testimony so believable, [Tr.p.1380, L.24-25, p.1381, L.1-3].
>
> If you don't believe he reloaded, the State submits, he had 20 minutes to reload or 15 until he's caught. That's why. That's why Pooh is believable, [Tr.p.1383, L.5-7].

As is seen in the above underlined portions of the Solicitor's closing argument the Solicitor repeatedly "bolstered" the State case by "vouching" for the believability of (3) three state witness'.

This was all the more damaging since the evidence presented by the State was circumstantial and it was ultimately a swearing match between witnesses.

Discussion

In trying the "bolster" the credibility of a prosecution witness the solicitor [may not] overstep the bounds of fairness. It is a well established principle that the prosecutor has a special obligation to avoid "improper suggestions, insinuations and especially assertions of personal knowledge", Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629 (1935).

Improper vouching may occur in two ways: "the prosecutor may place the prestige of the government behind the witness', (or) may indicate that information not presented to the jury supports the witnesses testimony, Lawn v. United States, 355 U.S. 339, 359-60 n.15, 78 S.Ct. 311, 323 n.15 (1958), also see United States v. Lamerson, 457 F.2d 371 (5th Cir.).

The first type of vouching involves personal assurance of a witness' veracity. The second type of vouching involves prosecutorial remarks that "bolster" a witness' credibility by references to matters outside the record, See United States v. Garza, 608 F.2d 659.

The solicitor's argument must not be calculated to arouse the passions and prejudices of the jury, State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). In the instant matter Petitioner asserts that the record conclusively supports the solicitor undoubtedly vouched for (3) three of the State's witness' in an attempt to improperly bolster the State case against Petitioner.

Our Fourth Circuit in United States Loayzo, 107 F.3d 257, 267 (4th Cir.1997), held in accordance with the Court in, United States v. Moore, 11 F.3d 475, 481 (4th Cir.1993), cert. denied 114 S.Ct. 1864 (1994), that it is improper for a prosecutor to directly express his personal opinion as to the veracity of a witness.

More plainly, [any statement] of personal belief jeopardizes the integrity of the trial process, United States v. Harrison, 716 F.2d 1050, 1052 (4th Cir.1983), cert. denied 466 U.S. 972 (1984). It is an error for the government to bolster or vouch for it's witnesses, United States v. Somad, 754 F.2d 1091, 1100 (4th Cir.1984), vouching generally occurs when the prosecution's actions are such that a jury could reasonably believe that the prosecutor was indicating a personal belief in the credibility of a witness.

A solicitor cannot vouch for the credibility of a witness, either expressly, or by implying his personal opinion of a witness' veracity by indicating information not presented supports the testimony, State v. Schuler, 545 S.E.2d 805, 815 (S.C.2001).

Further our Courts have consistently held in accordance with the Fourth Circuit Court of Appeals, "that a prosecutor cannot

vouch for the veracity of a witness, because the jury must make it's own assessment on the credibility of witnesses and it is inappropriate for the State to assure the jury of a government witness' credibility, State v. Kelly, 540 S.E.2d 851, 861 (S.C.2001), rev'd on other grounds, 543 U.S. 246 (2002).

In Gilchrist v. State, 565 S.E.2d 281, 285 (S.C.2002), the Court held that the prosecution's improper vouching for the State's key witness, where the credibility was crucial, prejudiced Gilchrist's defense.

Petitioner asserts that counsel was ineffective for failing to object to the Solicitor's repeated vouching for the State's witness' and putting the prestige of the government behind the witness' testimony by reassuring the jury the witness' were "believable". The failure of counsel to object denied Petitioner his right to a fair trial. Credibility determinations are for the jury to make and here the credibility determination was crucial to the outcome of the verdict.

For the aforementioned reasons, Petitioner respectfully asks this Court to grant the requested relief of a new trial.

ISSUE (D) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S MALICE INSTRUCTIONS THAT SHIFTED THE BURDEN OF PROOF AND RESULTED IN A MANDATORY PRESUMPTION, WHEN THE TRIAL COURT FAILED TO INSTRUCT THE JURY, THE COULD "ACCEPT OR REJECT" THE INFERENCE OF MALICE, IN VIOLATION OF THE DUE PROCESS CLAUSE?

FACTS

During closing summation to the jury the Solicitor made the following statement, as was recorded:

> Malice may be inferred from the willful, deliberate intentional doing of an unlawful act without just cause or excuse and with the use of a deadly weapon, [Tr.p.1307, L.8-10].

Coming directly after the Trial Court gave the following instructions:

> Malice is the intentional doing of a wrongful act without just cause or excuse, [Tr.p.1412, L.18-19].

This instruction led the jury to conclude that if Petitioner committed an "unlawful act", that [they] did not have to look any further to infer malice. Counsel was bound to enter an objection where the record was replete with an over abundance of evidence that Petitioner was a "gang member" and the State successfully argued in closing that "What's a lick? You heard the Gang Experts testify that people on the street, Officer Mahoney. A lick now in gang terms means "a shooting", Tr.p.1373, and the State further

argued "Now, they want you to believe that a lick means a robbery", Tr.p.1374, regardless of the nomenclature, "gang stigma affiliation and robbery" are both "unlawful acts" within the community.

It is uncontested that Petitioner's counsel argued to the jury that "they told you that my client (Petitioner) had gone and committed "a lick", and that "committing a lick" is some sort of gang lingo for gang retaliation that involves killing, Tr.p.1355, L.24-25, p.1356, L.1-2. Counsel further argued, as "our experts testified, frankly as everyone in this line of business knows, "it means robbery", "It means get money by illegal means", Tr.p.1356, L.3-6.

However, the Trial Court further charged the jury:

> Malice aforethougth may be expressed or inferred. Now these terms "expressed" and "inferred" do not mean different minds of malice, but merely the manner in which malice may be show to exist, that is either by direct evidence from facts and circumstances that are proven.
> Expressed malice is shown when a person speaks words which express hatred or ill will for another or when the person prepared beforehand to do the act which was later accomplished.
> Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon.
> Again each of these essentially elements must be proved by the State beyond a reasons doubt before you can convict the defendant of murder, [Tr.p.1413, L.3-18].

This instruction informed the jury that if they could not conclude malice from Petitioner doing an "unlawful act", then if

a deadly weapon was involved, malice was mandatory since the trial court "failed" to instruct the jury that inferred malice from the use of a deadly weapon can be "accepted or rejected" based on the jury's consideration of the evidence and that they, the jury can give the inference of malice such weight as they so determine.

Petitioner further asserts that a reasonable juror would have given great weight to these facts argued by the Solicitor and trial counsel, and considering the fact the judge instructed the jury that malice can be inferred from an "unlawful act", coupled with the instructions that malice can be inferred from the use of a deadly weapon, created a mandatory presumption when the trial court failed to instruct the jury they could "accept or reject" the inference of malice.

Discussion

In a long line of cases culminating in Yates v. Evatts, 500 U.S. 391 (1991), the United States Supreme Court recognized that the prosecution must prove each and every element of the crime beyond a reasonable doubt, citing in re Winship, 397 U.S. 158 (1970). The burden of proof on any element cannot be shifted to the defense, because in so doing it decreases the State's burden of proving the crime beyond a reasonable doubt.

As early as 1975 the U.S. Supreme Court considered a Maine Rule which required the defendant charged with murder to prove that he acted in the heat of passion in order to reduce the homicide to manslaughter. The Court determined that a State could

not shift the burden on any element of the crime to the defendant, finding the risk described to be intolerable, reversing the conviction, Mullaney v. Wilbur, 421 U.S. 684, 701 (1975).

The Court overturned a conviction in Sandstrom v. Montana, 442 U.S. 510 (1979). Montana law provided that a person could be charged with deliberate homicide when that person "purposely or knowingly" caused the death of another and, at Sandstrom's trial, the judge instructed the jury that, "The law presumes that a person intends the ordinary consequences of his voluntary acts, id at 512. After considering Sandstrom's argument, the U.S. Supreme Court agreed that the effect of that was to shift the burden of proof to Sandstrom on a critical element of the offense. The Court reiterated that a State must prove each and every element beyond a reasonable doubt and that the defendant cannot be required to prove any element of his defense or disprove any element of the crime, holding a "reasonable juror might have interpreted the instructions either as a conclusive presumption or as a burden shifting presumption, but either interpretation, the Court rendered the instruction unconstitutional."

In Francis v. Franklin, 472 U.S. 307 (1985), the Court found that the use of a "rebuttable" presumption was also unconstitutional for the same reasons set forth in Sandstrom, supra.

Following Sandstrom v. Montana, Mullaney v. Wilbur and Francis v. Franklin, the case of Yates v. Evatts, 310 S.E.2d 805

(1982), 474 U.S. 896 (1985)(Yates v. Aiken); and 500 U.S. 391 (1991) wound it's way through the judicial system on identical issues. This matter is thus stare decisis in South Carolina.

During that period of time in State v. Elmore, 308 S.E.2d 781 (1983) was being decided. Elmore complained that the trial judge's instructions on the presumption of malice from the use of a deadly weapon constituted a mandatory presumption rather than a permissive inference. Our Supreme Court agreed and suggested the following charge:

> The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you, the jury along with other evidence in the case, and you may give it such weight as you determine it should receive.
>
> *We caution the bench, that hereafter only slight deviations from this charge will be tolerated, id at 784.

As is seen above, the instructions given during Petitioner's trial "failed" to adhere to the instructions advised by our Supreme Court in Elmore.

Coming after Elmore, in 1985 the Court in State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985), the Court said the trial judge should instruct the jury they can "accept or reject" the inference of malice based on their consideration of the evidence, id.

Petitioner asserts the court's malice instructions given during his trial could not be considered harmless, where such instruction in effect directed a verdict for the State and gave the State the benefit of reasonable doubt when the trial court "failed" to instruct the jury they could "accept or reject" the inference of malice from the intentional doing of an unlawful act, or from the use of a deadly weapon (emphasis supplied).

Counsel was ineffective for not lodging an objection and counsel's performance was not reasonable under the professional norms, Strickland v. Washington, 466 U.S. at 687-88 (1984). Petitioner further asserts counsel failure to object denied him his right to a fair trial.

For the aforementioned reasons, Petitioner respectfully asks this Honorable Court to grant the requested relief of a new trial.

Conclusion

WHEREFORE, based on the foregoing, Petitioner respectfully requests this Honorable Court will grant the requested relief of a new trial.

Respectfully Submitted,

/s/ Chris Liverman
Chris A. Liverman

SWORN to and subscribed before me this 25
day of Feb, 2013.

Eugene Kent Jr (L.S.)
Notary Public

My Commission Expires: April 4, 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
CHRIS A. LIVERMAN, SCDC # 308393)
Plaintiff,)
vs.)
)
STATE OF SOUTH CAROLINA)
Defendant.)

IN THE COURT OF COMMON PLEAS
5th JUDICIAL CIRCUIT

CASE NO.: 2012 -CP-40-04870

MOTION AND ORDER INFORMATION FORM AND COVERSHEET

Plaintiff's Attorney:	Defendant's Attorney:
Joy E. Middleton, Bar No. 100182	Megan E. Harrigan, Bar No. 100108
Address:	Address:
P.O. Box 7486, Columbia, SC 29202	P.O. Box 11549, Columbia, SC 29211
Phone: 803-200-2494Fax 888-893-4401	Phone: 803-734-3319 Fax_____
E-mail:_____Other:_____	E-mail:_____Other:_____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

2013 AUG 29 PM 1:35

SECTION I: Hearing Information

Nature of Motion: MOTION TO CONDUCT DISCOVERY
Estimated Time Needed: 30 MINUTES Court Reporter Needed: ☒ **YES** / ☐ **NO**

SECTION II: Motion/Order Type

☐ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ _____
Signature of Attorney for ☒ Plaintiff / ☐ Defendant Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT: $_____
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE CODE _____
☐ Other: _____	Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CASE NUMBER: 2012-CP-40-04870
	)	
CHRIS A. LIVERMAN, SCDC # 308393, Applicant,	)	MOTION TO CONDUCT DISCOVERY
vs.	)	
STATE OF SOUTH CAROLINA, Respondent.	)	

2013 AUG 29 PM 1:35

The applicant, Chris A. Liverman, moves the Court for an order allowing discovery. This motion is based on the following grounds.

Procedural and Factual History

The State indicted Mr. Liverman for two counts of murder occurring on August 26, 2004. (Indictment Numbers 2005-GS-40-06831&32). Mr. Liverman pleaded not guilty and exercised his right to a jury trial.

The Honorable James W. Johnson, Jr. convened a jury trial on August 28, 2006, which was continued due to concerns, expressed by both the Defense and the State, regarding the lack of impartiality of some members of the jury that had been picked but not yet sworn. Prior to the jury trial convened by Judge Johnson on October 30, 2006, Mr. Liverman sought to have the Fifth Circuit Solicitor's Office disqualified due to an alleged *Brady v. Maryland*, 373 U.S. 83 (1963) violation. Although the Fifth Circuit Solicitor's Office did prosecute the case, the Judge's determination of whether a *Brady* violation occurred is unclear from the record.

During the trial that lasted through November 9, 2006, the prosecution heavily relied on a single eyewitness to identify Mr. Liverman as the alleged shooter. The jurors found Mr.

Liverman guilty of two counts of murder. Judge Johnson sentenced Mr. Liverman to two consecutive terms of life imprisonment without the possibility of parole.

The Court of Appeals affirmed the convictions and sentences on December 4, 2009. *State v. Liverman*, 386 S.C. 223, 687 S.E.2d 70 (Ct. App. 2009). The Supreme Court affirmed in result on June 6, 2012, but also held that the trial court did not properly conduct the hearing to determine the admissibility of the eyewitness identification. *State v. Liverman*, 398 S.C. 130, 727 S.E.2d 422 (2012).

Mr. Liverman filed an application for post-conviction relief (PCR) on July 17, 2012. The Court appointed Steven W. Hamm to represent Mr. Liverman on August 17, 2012. By written order filed on September 14, 2012, Joy Middleton substituted as counsel. On March 6, 2013, Mr. Liverman filed, *pro se*, his First Amended Application for PCR.

Attorney Charles Grose has agreed to assist Ms. Middleton with the PCR case. Mr. Grose has been a licensed member of the South Carolina Bar since 1993. For many of these years, Mr. Grose was a public defender, including Circuit Defender for the Eighth Judicial Circuit. Mr. Grose's practice includes representation of clients in PCRs, including in capital cases. *See John Kennedy Hughey v. State*, Abbeville County Case Number 2000-CP-01-212; *William O. Dickerson, Jr. v. State*, Charleston County Cases Number: 2012-CP-10-3216; *Jerry Inman v. State*, Pickens County Case Number 2012-CP-39-00918; and *Donald Allen Jones* v. State, Lancaster County Case Number 2001-CP-29-1030. In addition to his capital post-conviction experience, Mr. Grose has represented other clients sentenced to life imprisonment in post-conviction proceedings. *See e.g. Stephen A. Beckham v. State*, Newberry County Case Number 2000-CP-36-00051; *Edmond Edward Miller v. State*, Berkley County Case Number 1993-CP-08-01260; *Jennifer L. McSharry v. State*, Anderson County Case Number 2011-CP-04-

1581; *Larry Brent Horton v. State,* Spartanburg County Case Number 2013-CP-42-00007.

Ms. Middleton and Mr. Grose have met with Mr. Liverman, reviewed the trial record, and have identified additional investigation that needs to be done before Mr. Liverman can proceed with his PCR evidentiary hearing. Mr. Liverman requests the Court's permission to conduct discovery in order to prepare for the evidentiary hearing on his PCR application. Mr. Liverman's conviction followed a lengthy and complex trial and resulted in two consecutive life sentences. Mr. Liverman requests that the Court grant him the ability to utilize discovery pursuant to the South Carolina Rules of Civil Procedure, as provided upon approval of the Court by S.C. Code §17-27-150(A). Without the benefit of discovery tools, Mr. Liverman will be unable to identify claims and obtain necessary evidence in support of his claims for relief. This deprivation likely will result in a less than full and fair hearing for Mr. Liverman.

Argument

Although the Supreme Court of the United States has not expressly recognized a right to effective assistance of counsel in first tier review of ineffective assistance of counsel claims, the High Court has carved out an exception to federal *habeas corpus* procedural bars in such cases. *Martinez v. Ryan*, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012). State court PCR counsel, therefore, are on notice of their obligations in PCR cases. State courts, likewise, are on notice of the potential consequences of not providing PCR counsel with adequate resources to investigate and present PCR claims.

In order to properly represent Mr. Liverman, counsel requires subpoena power in order to collect records. Necessary records include the files from the Columbia Police Department and the Fifth Circuit Solicitor's Office. Counsel also desires to investigate the background of the sole witness that identified Mr. Liverman as the alleged shooter. Counsel, therefore, respectfully

requests that this Court allow Mr. Liverman to conduct discovery pursuant to the South Carolina Rules of Civil Procedure, as provided upon approval of the Court by S.C. Code §17-27-150(A).

In addition to conducting discovery, counsel desires to employ an investigator to conduct witness interviews and to consult an expert on eyewitness identification to determine whether such testimony could have influenced the trial judge to suppress the eyewitness identification during a properly conducted in camera hearing or influenced the jurors during the trial.

The Court, therefore, should allow Mr. Liverman to conduct discovery pursuant to the South Carolina Rules of Civil Procedure, as provided upon approval of the Court by S.C. Code §17-27-150(A).

IT IS SO MOVED.

Respectfully submitted,

By 

Joy E. Middleton
Middleton Law Firm, LLC
P.O. Box 7486
Columbia, SC 29202
Phone: (803) 200-2494
Fax: (888) 893-4401
joy@jmiddletonlaw.com

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC
Phone: (864) 538-4466
Fax: (864) 538-4466
charles@groselawfirm.com

August 29, 2013

CERTIFICATE OF SERVICE

This is to certify that the undersigned has, on this date, served the attached ***Motion to Conduct Discovery*** on the opposing party in this matter by hand delivery at the following address:

Megan E. Harrigan, Esquire
Office of the Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, S.C. 29201

2013 AUG 29 PM 1:35
C.C.P. & G.S.

Joy E. Middleton
Middleton Law Firm, LLC
P.O. Box 7486
Columbia, SC 29202
Phone: (803) 200-2494
Fax: (888) 893-4401

August 29, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CASE NUMBER: 2012-CP-40-04870
	)	
CHRIS A. LIVERMAN, SCDC # 308393, Applicant,	)	
	)	Order
vs.	)	
	)	
STATE OF SOUTH CAROLINA, Respondent.	)	

RICHLAND COUNTY FILED
2014 FEB -5 AM 9:36
JEANETTE W. McBRIDE C.C.P. & G.S.

This matter came before the Court on October 3, 2013, on the motion of Joy Middleton and E. Charles Grose, Jr., attorneys for the Applicant, Chris A. Liverman, seeking an order authorizing Mr. Liverman to conduct discovery and for investigative services, expert services, and attorney's fees.

Procedural History

The State indicted Mr. Liverman on two counts of murder occurring on August 26, 2004. (Indictment Numbers 2005-GS-40-06831&32). Mr. Liverman pleaded not guilty and exercised his right to a jury trial.

The Honorable James W. Johnson, Jr. convened a jury trial on August 28, 2006, which was continued due to concerns, expressed by both the Defense and the State, regarding the lack of impartiality of some members of the jury that had been picked but not yet sworn. Judge Johnson later convened a jury trial from October 30, 2006 to November 6, 2006. The jury found Mr. Liverman guilty of two counts of murder and Judge Johnson sentenced Mr. Liverman to two consecutive terms of life imprisonment without the possibility of parole.

The Court of Appeals affirmed the convictions and sentences on December 4, 2009. *State v. Liverman*, 386 S.C. 223, 687 S.E.2d 70 (Ct. App. 2009). The Supreme Court affirmed in result on June 6, 2012, but also held that the trial court did not properly conduct the hearing to

determine the admissibility of the eyewitness identification. *State v. Liverman*, 398 S.C. 130, 727 S.E.2d 422 (2012).

Mr. Liverman filed an application for post-conviction relief (PCR) on July 17, 2012. The Court appointed Steven W. Hamm to represent Mr. Liverman on August 17, 2012. By written order filed on September 14, 2012, Joy Middleton substituted as counsel. On March 6, 2013, Mr. Liverman filed, *pro se*, his First Amended Application for PCR. Attorney Charles Grose has agreed to assist Ms. Middleton with the PCR case, *pro bono.*

Findings of Fact

I. Conducting Discovery and Obtaining Transcripts.

Mr. Liverman moved this Court allow him to conduct discovery pursuant to the South Carolina Rules of Civil Procedure, as provided upon approval of the Court by S.C. Code §17-27-150(A). Mr. Liverman wants to obtain copies of the files pertaining to this case from the Fifth Circuit Solicitor's Office and the Columbia Police Department. In addition, Mr. Liverman has information that his mother and possibly other family members were taken into protective custody during his jury trial by the Columbia Police Department. Mr. Liverman therefore wants to obtain copies of this file also. Additionally, Mr. Liverman moved for blanket subpoena power.

The Court declines to authorize discovery pursuant to §17-27-150(A). Specifically, this Court declines to authorize subpoena power in this non-capital post-conviction relief action. However, this Court finds that Mr. Liverman is entitled to review information in the possession of the Fifth Circuit Solicitor's Office and Columbia Police Department pertaining to this case. The Court finds that counsel for Mr. Liverman shall provide the Attorney General's Office with a letter describing the information requested. If the State has any objections to providing the

requested information, the Court will reconvene to consider those objections. The State shall contact the Fifth Circuit Solicitor's Office and the Columbia Police Department and attempt to gain access to these files for the joint review of both the State and Mr. Liverman.

Also, during the hearing, it became apparent that some of the transcripts in Mr. Liverman's case have not been transcribed. The transcript for the August 28, 2006 proceedings is labeled a "partial transcript." The Brief of Respondent in the Court of Appeals refers to a hearing on a motion to recuse the Fifth Circuit Solicitor's Office as "apparently un-transcribed," which appears to be from October 2006. The Court finds that Mr. Liverman is entitled to these transcripts and that his counsel should provide the Attorney General's Office with dates of the hearings. Once provided with specific dates, the Attorney General's office will attempt to order these transcripts from the court reporter.[1]

II. Investigative Services, Expert Services, and Attorney Fees.

Mr. Liverman's counsel wants to retain an expert in eyewitness identification, employ a fact investigator, and be authorized to exceed the cap for attorney's fees.

A. Eyewitness Identification Expert.

During the trial, the prosecution relied on a single eyewitness to identify Mr. Liverman as the alleged shooter. The defense did not call an eyewitness identification expert witness to testify during the pre-trial hearing or in front of the jurors.

Counsel for Mr. Liverman desires to consult Dr. Jennifer Dysart, who "is a tenured Associate Professor of Psychology at John Jay College of Criminal Justice. She holds a Ph.D. in Social Psychology from Queen's University and has been conducting research on eyewitness

[1] Each requested transcript is from a hearing date more than five years ago. As Court Administration's policy is that court reporters are only required to retain records for five years, it is uncertain if these hearings will be able to be transcribed.

identification for 15 years."[2] A copy of Dr. Dysart's *curriculum vitae* is attached. Dr. Dysart's professional fee is $250.00 per hour, and she anticipates it will require approximately ten (10) hours to review the materials and consult with counsel.

The Court finds that counsel shall be authorized to retain Dr. Dysart to review records and consult. The Court approves up to $2,500.00 for this purpose. Dr. Dysart's final invoice should be submitted to the Court for approval before submission to indigent defense.

During the hearing, the Attorney General requested that the Court require Mr. Liverman to produce a copy of any report generated by Dr. Dysart well in advance of the evidentiary hearing. This Court orders that any such report generated be turned over to the Attorney General's Office well in advance of the hearing date.

B. Fact Investigator.

Counsel desires to hire a fact investigator for two reasons.

First, Mr. Liverman's trial involved lengthy testimony about gangs. Both the prosecution and defense called gang experts. Witnesses testified about the purported gang meaning of Mr. Liverman's tattoos. Prior to closing arguments, one of the jurors informed the trial court judge that gang symbols had been placed in her neighborhood. A pitchfork was drawn on the street near her home. Further down the street in her neighborhood, someone drew "C.T.C." These symbols are similar to tattoos that Mr. Liverman has on his body, and witnesses testified about these tattoos during Mr. Liverman's trial. The trial court judge replaced this juror with an alternate juror but did not conduct a hearing to determine whether (a) the other jurors had similar experiences or (b) the replaced juror discussed her experience with the other jurors. Counsel wants an investigator to interview the jurors to determine whether an additional hearing is

[2] http://johnjay.jjay.cuny.edu/profiles/psychology.aspx?key=%5Bemail%5D='jdysart@jjay.cuny.edu' (last viewed September 30, 2013).

necessary to develop the record about outside contacts that could have influenced the jurors' verdict.

Second, Mr. Liverman has given information and the names of potential witnesses to counsel. Counsel wants an investigator to interview these witnesses. Counsel is informed and believes that as their investigation progresses, additional investigative services will be required.

Counsel desires to employ Mark Harris as an investigator. Mr. Harris is a retired criminal defense lawyer from the State of New York currently living in South Carolina. Mr. Harris is licensed by the South Carolina Law Enforcement Division as an investigator, and he is on the South Carolina Commission on Indigent Defense's list of Approved Licensed Investigators.[3] Because of Mr. Harris' experience as a criminal defense lawyer, counsel believes he is uniquely qualified to conduct the juror interviews and investigate the unique issues involved in this case.

The Court finds the request for an investigator is reasonable and necessary. The Court approves up to $2,500.00 for Mr. Harris at a rate of $50.00 per hour plus expenses. Mr. Harris' invoices should be submitted to the Court for approval before being submitted to the Office of Indigent Defense.

C. Attorney's Fees

As set forth above, the trial in the case lasted for over a week. The transcript is lengthy. Investigating Mr. Liverman's case will require substantial time and research. Based on the facts and circumstances of this case, the Court finds it appropriate for Ms. Middleton to exceed the statutory cap. Ms. Middleton's invoices should be submitted to the Court for approval before being submitted to the Office of Indigent Defense.

Mr. Grose is providing legal services *pro bono*. Mr. Grose is coordinating with the

[3] https://sccid.sc.gov/licensed-investigators.cfm (last viewed Sept. 30, 2013).

eyewitness identification expert and fact investigator. The Court finds that Mr. Grose should be added to this case as *pro bono* appointed counsel for purposes of submitting investigative and expert costs to the Office of Indigent Defense.

Conclusions of Law

I. Conducting Discovery and Obtaining Transcripts.

The Court denies Mr. Liverman's motion to authorize discovery pursuant to §17-27-150(A). Mr. Liverman, however, is entitled to inspect and copy information in the possession of the Fifth Circuit Solicitor's Office and Columbia Police Department. Mr. Liverman shall provide the Attorney General's Office with a letter describing the information requested. If the State has any objections to providing the requested information, the Court will reconvene to consider those objections.

Mr. Liverman is also entitled to copies of the transcripts of proceedings in his case. Counsel for Mr. Liverman shall provide the Attorney General with dates of the hearings that previously have not been transcribed.

II. Investigative Services, Expert Services, and Attorney's Fees.

Mr. Liverman's requests for funding are reasonable and necessary for the adequate and effective representation. Payment in excess of the statutory rates and limits is reasonable and necessary to ensure the effective assistance of counsel and a full and fair proceeding. Accordingly, good cause to exceed the limits and rates has been shown by the Applicant. *See* S.C. Code §17-3-50. This Court also finds Mr. Liverman's requests appropriate because the services and expenses sought are reasonable and necessary, considering the unique facts of this case. The Court, therefore, authorizes expert and investigative services outlined below.

A. Eyewitness Identification Expert.

"The jury, not the judge, traditionally determines the reliability of [eyewitness identification] evidence." *Perry v. New Hampshire*, 132 S. Ct. 716, 728 (2012). "[S]afeguards built into our adversary system ... caution juries against placing undue weight on eyewitness testimony of questionable reliability" including the "Sixth Amendment right to confront the eyewitness" and the "right to the effective assistance of an attorney, who can expose the flaws in the eyewitness' testimony during cross-examination and focus the jury's attention on the fallibility of such testimony during opening and closing arguments." *Id.* Prior to Mr. Liverman's jury trial, our Supreme Court had recognized the admissibility of expert eyewitness identification testimony. *State v. Whaley*, 305 S.C. 138, 143, 406 S.E.2d 369, 372 (1991) (held "that it was an abuse of discretion to exclude Dr. Cole's testimony concerning eyewitness reliability because the main issue in this case was the identity of the assailant, the only evidence establishing Whaley as the assailant was the testimony of the two eyewitnesses, and other factors existed which could have affected the identification").

The Court, therefore, approves up to $2,500.00 for ten hours of Dr. Dysart's professional time to review witness statements, prior trial testimony, and other relevant records and consult with counsel. Counsel can apply to the Court if additional services are required.

Mr. Liverman shall provide the Attorney General with a copy of any report generated by Dr. Dysart well in advance of the hearing date.

It is further ordered that all invoices for investigative, expert, and legal services shall be submitted to the Court for approval before being submitted to the Office of Indigent Defense.

B. Fact Investigator.

> The Sixth and Fourteenth Amendments to the United States Constitution guarantee a defendant a fair trial by a panel of

> impartial and indifferent jurors. [I]n order to fully safeguard this protection, it is required that the jury render its verdict free from outside influences of whatever kind and nature. In cases where a juror's partiality is questioned after trial, it is appropriate to conduct a hearing in which the defendant has the opportunity to prove actual juror bias.

State v. Bryant, 354 S.C. 390, 395, 581 S.E.2d 157, 160 (2003) (internal citations an quotations omitted). *See also* S.C. Const. Art. I, §14.

Prior to a hearing about improper contacts with jurors, counsel must investigate. *E.g. Bryant*, 354 S.C. at 392, 581 S.E.2d at 158 ("The following day [after sentencing], defense counsel learned improper contact may have been made with a member of the jury pool. After further investigation, appellant filed a motion for a new trial...."); *Ex parte Greenville News*, 326 S.C. 1, 3, 482 S.E.2d 556 (1997) (After allegations of juror misconduct in capital trial, court allowed "depositions of jurors.").

Additionally, our Supreme Court "has repeatedly held a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (emphasis original).

The Court, therefore, approves up to $2,500.00 for counsel to employ Mr. Harris as an investigator. Mr. Harris shall be compensated at a rate of $50.00 per hour, plus expenses. Counsel can apply to the Court if additional services are required.

It is further ordered that all invoices for investigative, expert, and legal services shall be submitted to the Court for approval before being submitted to the Office of Indigent Defense.

C. Attorney's Fees.

The Court authorizes Ms. Middleton's attorney's fees to exceed the statutory cap. Ms. Middleton received $500.00 to substitute as counsel. Pursuant to Office of Indigent Defense

guidelines, this amount must be offset before billing that office. Once Ms. Middleton reaches the statutory cap after taking the offset into account, she is authorized to invoice an additional $2,500.00 without additional approval from the Court.

Mr. Grose is providing legal services *pro bono*. Mr. Grose is coordinating with the eyewitness identification expert and fact investigator. The Court appoints Mr. Grose to this case as *pro bono* appointed counsel for purposes of submitting investigative and expert costs to the Office of Indigent Defense.

It is further ordered that all invoices for investigative, expert, and legal services shall be submitted to the Court for approval before being submitted to the Office of Indigent Defense.

IT IS SO ORDERED.

James R. Barber, III
Presiding Judge, Fifth Judicial Circuit

4/5, 2014
Columbia, South Carolina

EXHIBIT A

September 2013

JENNIFER E. DYSART

Curriculum Vitae

University Address:
Department of Psychology
John Jay College of Criminal Justice
524 West 59th St., 10th Floor
New York, NY 10019

E-mail: jdysart@jjay.cuny.edu
Phone: 212.484.1160

Academic Work Experience

2006 – present	Associate Professor of Psychology, John Jay College of Criminal Justice, CUNY, New York, NY
2013 – present	Deputy Chair, Department of Psychology, John Jay College of Criminal Justice, CUNY, New York, NY
2011 – 2012	Deputy Chair, Department of Psychology, John Jay College of Criminal Justice, CUNY, New York, NY
2008 – 2010	Associate Chair, Department of Psychology, John Jay College of Criminal Justice, CUNY, New York, NY
2006 – 2008	Deputy Chair of Undergraduate Education, Department of Psychology, John Jay College of Criminal Justice
2003 – 2006	Assistant Professor of Psychology, Southern Connecticut State University, New Haven, CT
2005	Adjunct Professor, Quinnipiac University, Hamden, CT

Education

PhD	2004, Queen's University, Kingston, Ontario (Social Psychology) Advisor: Dr. R. C. L. Lindsay *Dissertation Title:* Intoxicated Witnesses: Exploring the Effects of Alcohol on Identification Accuracy
MA	1999, Queen's University (Brain, Behavior and Cognitive Science) Advisor: Dr. R. C. L. Lindsay
BA	1998, St. Thomas University, Fredericton, New Brunswick (First Class Honors in Psychology)

Peer-Reviewed Journal Publications

Lawson, V. Z., & Dysart, J. E. (in press). The showup identification procedure: An exploration of systematic biases. *Legal and Criminological Psychology*.

Wells, G. L., Steblay, N. M., & Dysart, J. E. (2012). Eyewitness identification reforms: Are suggestiveness-induced hits and guesses true hits? *Perspectives on Psychological Science, 7,* 264-271.

Dysart, J. E., & Strange, D. (2012). Beliefs about alibis and alibi investigations: A survey of law enforcement [Special Issue]. *Psychology, Crime and Law, 18,* 11-25.

Dysart, J. E., Lawson, V. Z., & Rainey, A. (2012). Blind lineup administration as a prophylactic against the post-identification feedback effect. *Law and Human Behavior, 36,* 312-319.

Steblay, N. M., Dysart, J. E., & Wells, G. L. (2011). Seventy-two tests of the sequential superiority effect: A meta-analysis and policy discussion. *Psychology, Public Policy and Law, 17,* 99-139.

Dysart, J. E., Lindsay, R. C. L., & Dupuis, P. R. (2006). Show-ups: The critical issue of clothing bias. *Applied Cognitive Psychology, 20,* 1009-1023.

Pryke, S., Lindsay, R. C. L., Dysart, J. E., & Dupuis, P. R. (2004). Multiple independent identification decisions: A method of calibrating eyewitness identifications. *Journal of Applied Psychology, 89,* 73-84.

Steblay, N., Dysart, J. E., Fulero, S., & Lindsay, R. C. L. (2003).Eyewitness accuracy rates in police showup and lineup presentations: A meta-analytic comparison. *Law and Human Behavior, 27,* 523-540.

Dysart, J. E., Lindsay, R. C. L., MacDonald, T. K., & Wicke, C. (2002). The intoxicated witness: Effects of alcohol on identification accuracy. *Journal of Applied Psychology, 87,* 170-175.

Dysart, J. E. & Lindsay, R. C. L. (2001). A pre-identification questioning effect: Serendipitously increasing correct rejections. *Law and Human Behavior, 25,* 155-165.

Dysart, J. E., Lindsay, R. C. L., Hammond, R., & Dupuis, P. (2001). Mug shot exposure prior to lineup identification: Interference, transference, and commitment effects. *Journal of Applied Psychology, 86,* 1280-1284.

Smith, S. M., Lindsay, R. C. L., Pryke, S., & Dysart, J. E. (2001). Postdictors of eyewitness errors: Can false identifications be diagnosed in the cross-race situation? *Psychology, Public Policy, and Law, 7,* 153-169.

Steblay, N., Dysart, J. E., Fulero, S., & Lindsay, R. C. L. (2001). Eyewitness accuracy rates in sequential and simultaneous line-up presentations: A meta-analytic comparison. *Law and Human Behavior, 25,* 459-473.

Books

Loftus, E. F., Doyle, J. M., & Dysart, J. E. (2013). *Eyewitness testimony: Civil and criminal* (5th Ed.). Charlottesville, VA: LexisNexis.

Loftus, E. F., Doyle, J. M., & Dysart, J. E. (2007). *Eyewitness testimony: Civil and criminal* (4th Ed.). Charlottesville, VA: LexisNexis.

Book Chapters

Dysart, J. E., & Lindsay, R. C. L. (2007). The effects of delay on eyewitness identification accuracy: Should we be concerned? In R. C. L. Lindsay, D. R. Ross, J. D. Read, & M. P. Toglia (Eds.), *The handbook of eyewitness psychology, Vol II, Memory for People* (pp. 361-376). Mahwah, NJ: Lawrence Erlbaum.

Dysart, J. E., & Lindsay, R. C. L. (2007). Show-up identifications: Suggestive technique or reliable method? In R. C. L. Lindsay, D. R. Ross, J. D. Read, & M. P. Toglia (Eds.), *The handbook of eyewitness psychology, Vol II, Memory for People* (pp. 137-154). Mahwah, NJ: Lawrence Erlbaum.

Other Publications

Wells, G. L., Steblay, N. M., & Dysart, J. E. (2011). *A test of the simultaneous vs. sequential lineup methods: An initial report of the AJS national eyewitness identification field study.*

Doyle, J. M., & Dysart, J. E. (2011). *Eyewitness testimony: Civil and criminal: Cumulative supplement 2010.* Charlottesville, VA: LexisNexis.

Doyle, J. M., & Dysart, J. E. (2010). *Eyewitness testimony: Civil and criminal: Cumulative supplement 2009.* Charlottesville, VA: LexisNexis.

Doyle, J. M., & Dysart, J. E. (2009). *Eyewitness testimony: Civil and criminal: Cumulative supplement 2008.* Charlottesville, VA: LexisNexis.

Doyle, J. M., & Dysart, J. E. (2008). *Eyewitness testimony: Civil and criminal: Cumulative supplement 2007.* Charlottesville, VA: LexisNexis.

Dysart, J. E. (2007). *Mugshots.* Encyclopedia of Psychology and Law. Sage.

Dysart, J. E. (2007). *Alcohol intoxication and eyewitness identification*. Encyclopedia of Psychology and Law. Sage.

Conference Presentations (* indicates student author)

Dysart, J. E. (2012, March). *Eyewitness research in the courts: The Troy Davis story.* Paper presented at the American Psychology-Law Society annual conference, San Juan, PR.

Dysart, J. E., Wells, G. L., Steblay, N. K., & Mitchell, D. (2012, March). *A double-blind experiment of simultaneous versus sequential lineups using actual eyewitnesses: Lab – field differences.* Paper presented at the American Psychology-Law Society annual conference, San Juan, PR.

Steblay, N. K., Wells, G. L., Dysart, J. E., & Mitchell, D. R. (2012, March). *A double-blind experiment of simultaneous versus sequential lineups using actual eyewitnesses: Principal results.* Paper presented at the American Psychology-Law Society annual conference, San Juan, PR.

Dumas, R., Dysart, J. E., Py, J., & Penrod, S. D. (2011, March). *Eyewitness identification strategies: Contribution of implicit personality theories and emotional expression.* Poster presented at the American Psychology-Law Society annual conference, Miami, FL.

Dysart, J. E., *Lawson, V. Z., & *Yang, N. (2011, March). *Weapon focus effect: Theoretical insights from eye-tracking research.* Poster presented at the American Psychology-Law Society annual conference, Miami, FL.

*Lawson, V. Z., Dysart, J. E., & *Butera, L. (2011, March). *The clothing bias effect in lineups: What can eye-tracking research teach us?* Poster presented at the American Psychology-Law Society annual conference, Miami, FL.

*Wong, Y., & Dysart, J. E. (2010, May). *Witness descriptions: Is there a cross-race effect for hair?* Poster presented at the Association for Psychological Science convention in Boston, MA.

*DeCarlo, J., & Dysart, J. E. (2010, March). *Weapon-focus effect: Are police and civilians differentially affected?* Paper presented at the American Psychology-Law Society annual conference, Vancouver, British Columbia, Canada.

Dysart, J. E., & Strange, D. (2010, March). *A survey of police officers' beliefs about alibis and alibi investigations.* Paper presented at the American Psychology-Law Society annual conference, Vancouver, British Columbia, Canada.

*Lawson, V. Z., & Dysart, J. E. (2010, March). *The effects of race, misinformation, and feedback on eyewitness descriptions.* Poster presented at the American Psychology-Law Society annual conference, Vancouver, British Columbia, Canada.

Strange, D., Dysart, J. E., & Loftus, E. F. (2010, March). *Where were you? Alibi generation, accuracy and consistency.* Paper presented at the American Psychology-Law Society annual conference, Vancouver, British Columbia, Canada.

Dysart, J. E., *Rainey, A. M., & Penrod, S. D. (2009, May). *CSI effect: Real or not real?* Poster presented at the Association for Psychological Science convention in San Francisco, CA.

Dysart, J. E. (2009, May). *Naked truth: What to do after graduate school.* Invited panelist at the Association for Psychological Science convention in San Francisco, CA.

*Chong, K., & Dysart, J. E. (2009, March). *Stranger alibis and eyewitness identification: What is the difference?* Paper presented at the American Psychology-Law Society annual conference, San Antonio, TX.

*Lawson, V. Z., Dysart, J. E., & *Rainey, A. M. (2009, March). *Showups: A Cross-race investigation into the identification accuracy of eyewitnesses.* Poster presented at the American Psychology-Law Society annual conference, San Antonio, TX.

*Mandelbaum, J., Dysart, J. E., & *Vitriol, J. A. (2009, March). *Recall of specific facial features in cross-race eyewitness descriptions.* Poster presented at the American Psychology-Law Society annual conference, San Antonio, TX.

*Owens, J., *Rainey, A. M., & Dysart, J. E. (2009, March). *Is three really a crowd? The effects of multiple perpetrators on eyewitness identification accuracy and confidence.* Poster presented at the American Psychology-Law Society annual conference, San Antonio, TX.

*Wallace, D. B., & Dysart, J. E. (2009, March). *The effects of framing on eyewitness believability.* Paper presented at the American Psychology-Law Society annual conference, San Antonio, TX.

Dysart, J. E., & *Rainey, A. M. (2008, May). *Eyewitness identification: Testing a new method of presentation.* Poster presented at the Association for Psychological Science convention, Chicago, IL.

*Mandelbaum, J., & Dysart, J. E. (2008, May). *Mug shot interference in a cross-race eyewitness identification.* Poster presented at the Association for Psychological Science convention in Chicago, IL.

Dysart, J. E., *Rainey, A., *Owens, J., *Chong, K., & *Lawson, V. (2008, March). *Lineup issues: Double-blind administration and the post-identification feedback effect.* Paper presented at the American Psychology-Law Society annual conference, Jacksonville, FL.

*Rainey, A., Dysart, J. E., (2008, March). *The intoxicated witness: Alcohol intoxication and person description accuracy.* Paper presented at the American Psychology-Law Society annual conference, Jacksonville, FL.

*Kopelovich, S., & Dysart, J. E. (2008, March). *Voice identification as a unique contributor to eyewitness identification: Exploring the cross-accent effect.* Paper presented at the American Psychology-Law Society annual conference, Jacksonville, FL.

Dysart, J. E., & *Fugal, L. (2006, March). *Improving the sequential lineup? The effects of double-blind testing and the envelope technique on post-identification feedback.* Paper presented at the American Psychology-Law Society annual conference, St. Petersburg, FL.

*Rainey, A., & Dysart, J. E. (2006, March). *Now you see me: The relationship between social hierarchies, social contact, and the cross-race effect.* Paper presented at the American Psychology-Law Society annual conference, St. Petersburg, FL.

*Wallace, D. B., & Dysart, J. E. (2006, March). *The effects of show-up eyewitness testimony, alibi eyewitness testimony, and alibi language bias on alibi believability.* Paper presented at the American Psychology-Law Society annual conference, St. Petersburg, FL.

Dysart, J. E., & Lindsay, R. C. L. (2005, March). *Intoxicated witnesses: Exploring the effects of procedural bias and alcohol intoxication on identification accuracy.* Paper presented at the American Psychology-Law Society annual conference, La Jolla, CA.

Dysart, J. E. (2004, March). *The effects of verbal overshadowing on unconscious transference from mug-shots.* Paper presented at the American Psychology-Law Society annual conference, Scottsdale, AZ.

Dysart, J. E., Lindsay, R. C. L., & *Sinclair, M. (2003, July). *Unconscious transference from mug shot searches: Does is really exist?* Paper presented at the biennial meeting of the Society for Applied Research in Memory and Cognition, Aberdeen, Scotland.

Dysart, J. E., Lindsay, R. C. L., & MacDonald, T. K. (2002, March). *The effects of alcohol intoxication on identification accuracy from show-ups: A field study.* Paper presented at the biennial meeting for the American Psychology-Law Society annual conference, Austin, TX.

Dysart, J. E., Steblay, N., Fulero, S., & Lindsay, R. C. L. (2002, March). *Eyewitness accuracy in sequential versus simultaneous lineups: A meta-analytic review.* Paper presented at the biennial meeting for the American Psychology-Law Society, Austin, TX.

Steblay, N., Dysart, J. E., Fulero, S., & Lindsay, R. C. L. (2002, March). *A meta-analytic comparison of showup and lineup identification accuracy.* Paper presented at the biennial meeting for the American Psychology-Law Society, Austin, TX.

Dupuis, P. R., Lindsay, R. C. L., & Dysart, J. E. (2002, March). *Examining the use of rank combined lineups in cross-racial identification.* Paper presented at the biennial meeting for the American Psychology-Law Society, Austin, TX.

Dysart, J. E., Lindsay, R. C. L., & Dupuis, P. (2001, June). *Clothing bias and showup identifications: Does clothing type make a difference?* Paper presented at the biennial meeting for the Society for Applied Research in Memory and Cognition, Kingston, ON.

Dupuis, P., Dysart, J. E., & Lindsay, R. C. L. (2001, June). *Instruction bias effects in showup identification.* Paper presented at the biennial meeting for the Society for Applied Research in Memory and Cognition, Kingston, ON.

Dupuis, P., Lindsay, R. C. L., & Dysart, J. E. (2001, June). *Rank combined lineups: Calibrating the accuracy of individual eyewitness "identification" decisions.* Paper presented at the biennial meeting of the Society for Applied Research in Memory and Cognition, Kingston, ON.

Dysart, J. E., Lindsay, R. C. L., Bala, N., & Lee, K. (2001, June). *Qualifying child witnesses to testify: A survey of Canadian judges.* Paper presented at the annual meeting for the Canadian Psychological Association, Ste-Foy, QC.

Dysart, J. E., Lindsay, R. C. L. & Hammond, R. (2000, March). *Mug shot exposure prior to lineup identification: Interference, transference and commitment effects.* Paper presented at the biennial meeting of the American Psychology-Law Society, New Orleans, LA.

Lindsay, R. C. L., Aylen, M., Lee, K., Bala, N., & Dysart, J. E. (2000, March). *The relation between children's moral understanding of lying and their lie-telling behavior: Does the competence examination matter?* Paper presented at the biennial meeting of the American Psychology-Law Society, New Orleans, LA.

Lindsay, R. C. L., Smith, S., Pryke, S., & Dysart, J. E. (2000, March). *Are postdictors of eyewitness accuracy as useful for cross-race as same-race identification?* Paper resented at the biennial meeting of the American Psychology-Law Society, New Orleans, LA.

Dysart, J. E. & Lindsay, R. C. L. (1999, July). *The effects of delay on eyewitness identification accuracy.* Paper presented at the biennial meeting of the Society for Applied Research in Memory and Cognition, Boulder, CO.

Dysart, J. E. (1998, May). *The effect of verbal cues on face recognition: Implications for eyewitness testimony.* Poster presented at the annual meeting of the Atlantic Provinces Council on the Sciences, Antigonish, NS.

Invited Talks

Dysart, J. E. (September, 2013). *The science of eyewitness identification.* Invited speaker at the Eyewitness Identification Best Practices Seminar for law enforcement and prosecutors, Forsyth, GA.

Dysart, J. E. (August, 2013). *The science of eyewitness identification.* Invited speaker at the Social Justice Workshop Seminar, Santa Clara Law School, Santa Clara, CA.

Dysart, J. E. (June, 2013). *The Psychology of eyewitness identification.* Invited speaker at the Pennsylvania Chiefs of Police Association Annual Conference, Harrisburg, PA.

Dysart, J. E. (June 2013). *The science of eyewitness identification.* Invited speaker at the Baltimore City Police Department training seminar on Eyewitness Identification, Baltimore, MD.

Dysart, J. E. (June 2013). *The psychology of eyewitness identification.* Invited speaker at the Annual NYC Criminal Court Judges Association meeting, Montauk, NY.

Dysart, J. E. (May, 2013). *The psychology of eyewitness identification.* Invited speaker at the Innocence Project Staff Training seminar, New York, NY.

Dysart, J. E. (April, 2013). *The psychology of eyewitness identification.* Invited speaker at the Ohio Association of Criminal Defense Lawyers "Eyewitness Identification" Seminar, Columbus, OH.

Dysart, J. E. (April, 2013). *Eyewitness memory and the social science research.* Invited speaker at the Annual Virginia Journal of Criminal Law Symposium at the University of Virginia School of Law, Charlottesville, VA.

Dysart, J. E. (March, 2013). *The psychology of eyewitness identification.* Invited speaker at the NYPD training meeting on Wrongful Convictions, New York, NY.

Dysart, J. E. (March 2013). *The psychology of eyewitness identification.* Invited speaker at the "Enhancing Law Enforcement's Ability to Ensure Accurate Convictions – Techniques & Scientific Developments" Seminar for WV Law Enforcement, Charleston, WV.

Dysart, J. E. (February, 2013). *The psychology of (eyewitness) memory.* Invited speaker at the 2013 Louisiana Judicial College, Evidence and Procedure Conference, New Orleans, LA.

Dysart, J. E. (February, 2013). *Identification evidence and eyewitness testimony.* Invited speaker at the Kings County Bar Association meeting, Brooklyn, NY.

Dysart, J. E. (February, 2013). *Identification evidence and eyewitness memory.* Invited speaker at the Pennsylvania District Attorneys Annual Conference, Pittsburgh, PA.

Dysart, J. E. (December, 2012). The science of eyewitness identification. Invited speaker at the Delaware County Association of Criminal Defense Lawyers meeting, Media, PA.

Dysart, J. E. (2012, November). *Eyewitness identification: A psychological perspective.* Invited speaker at the seminar "How Idaho Law Enforcement Can Ensure More Accurate Identifications: Practice Techniques & Scientific Developments", Boise, ID.

Dysart, J. E. (2012, October). *The science of eyewitness identification.* Invited speaker at the New York County Lawyers Association Judicial Section CLE Symposium, New York, NY.

Dysart, J. E. (2012, October). *The science of eyewitness identification.* Invited speaker at the New York State Bar Association program on "Forensics and the Law", New York, NY.

Dysart, J. E. (2012, October). *Identification evidence and eyewitness memory.* Invited speaker at the National Conference of Metropolitan Courts, Pittsburgh, PA.

Dysart, J. E. (2012, August). *The science of eyewitness identification.* Invited speaker at the Texas Criminal Defense Lawyers Association conference, Austin, TX.

Dysart, J. E. (2012, June). *Eyewitness identification: A psychological perspective.* Invited speaker at the State Bar of Michigan Eyewitness Identification Task Force meeting, Lansing, MI.

Dysart, J. E. (2012, June). *Eyewitness identification: A psychological perspective.* Invited keynote speaker at the Public Defender Service Forensic Science conference, Washington, DC.

Dysart, J. E. (2012, June). *Psychology of misidentification.* Invited speaker at the 2012 Innocence Policy Network conference, New Orleans, LA.

Dysart, J. E. (2012, June). *Eyewitness identification: A psychological perspective.* Invited keynote speaker and panelist at the Pennsylvania Bar Institute's 20th Annual Criminal Law Symposium, Harrisburg, PA.

Dysart, J. E. (2012, May). *Best practices in eyewitness ID: Model policy and procedures*. Invited speaker and panelist at the Best Practices in Law Enforcement Investigations Program, Center for American and International Law, Plano, TX.

Dysart, J. E. (2012, April). *Eyewitness identification: Why innocent people are wrongly identified.* Invited speaker at the 2012 New York State Wrongful Convictions conference, Rochester Institute of Technology, Rochester, NY.

Dysart, J. E. (2012, April). *Eyewitness identification: A psychological perspective.* Invited speaker at the 2012 National Defender Investigator Association conference, Atlanta, GA.

Dysart, J. E. (2012, April). *The science of eyewitness identification.* Invited speaker at the "Eyewitness Identification Symposium" sponsored by Emory Law School, Atlanta, GA.

Dysart, J. E. (2012, February). Invited panelist at the 7th Annual H.F. Guggenheim Symposium on Crime in America session titled "*Did You See That Man? The Challenge to Eyewitness ID*", New York, NY.

Dysart, J. E. (2011, December). *Enhancing law enforcement's ability to ensure accurate convictions – Techniques & Scientific Developments: Evidence that the updates work.* Invited speaker at the Mississippi Chiefs of Police conference, Oxford, MS.

Dysart, J. E. (2011, November). *Eyewitness identification.* Invited speaker at the Louisiana State Bar Association conference, New York, NY.

Dysart, J. E. (2011, October). *Eyewitness identification*. Invited Shea Lecturer, sponsored by the Charter Oak State College Foundation, Hartford, CT.

Dysart, J. E. (2011, October). *Eyewitness identification*. Invited speaker at the Newfoundland Department of Justice conference, St. Johns, Newfoundland, Canada.

Dysart, J. E. (2011, September). *Eyewitness identification*. Invited speaker at the Montgomery County Bar Association Bench Bar conference, Hamburg, NJ.

Dysart, J. E. (2011, August). *Eyewitness identification*. Invited speaker at the Florida Defender Summer School 2011 conference, Orlando, FL.

Dysart, J. E. (2011, July). *Eyewitness identification*. Invited speaker at the "Eyewitness Identification and False Confession" conference, sponsored by the Center for American and International Law, Plano, TX.

Dysart, J. E. (2011, June). *Eyewitness identification*. Invited speaker at the Arizona State Judicial conference, Scottsdale, AZ.

Dysart, J. E. (2011, May). *Eyewitness identification*. Invited speaker at the Ontario Judges Annual conference, Niagara Falls, Ontario, Canada.

Dysart, J. E. (2011, May). *Eyewitness identification*. Invited speaker at the Committee for Public Counsel Services conference, Worcester, MA.

Dysart, J. E. (2011, April). *Eyewitness identification: A scientific review*. Invited speaker at the joint Innocence Project, The Palmetto Innocence Project & The South Carolina Law Enforcement Division conference, Columbia, SC.

Dysart, J. E. (2011, March). *Eyewitness identification*. Invited speaker at the "Actual Innocence: Establishing Innocence or Guilt August - Causes of and Solutions to Wrongful Convictions" conference, sponsored by the Center for American and International Law, Plano, TX.

Dysart, J. E. (2011, February). *Eyewitness identification: A scientific review*. Invited speaker at the Society of Professional Investigators monthly meeting, New York, NY.

Dysart, J. E. (2011, February). *Eyewitness identification: A scientific review*. Invited speaker at the Manhattan Legal Aid Society training seminar, New York, NY.

Dysart, J. E. (2011, February). *Eyewitness identification*. Invited speaker at the California Capital Case Defense Seminar, Monterey, CA.

Dysart, J. E. (2010, November). *Identification evidence: Eyewitness memory*. Invited speaker at the Philadelphia Municipal Court Judicial conference, Philadelphia, PA.

Dysart, J. E. (2010, October). *Eyewitness identification evidence.* Invited speaker at the National Judicial Institute "Preventing Wrongful Convictions" Seminar, St. John's, Newfoundland, Canada.

Dysart, J. E. (2010, October). *Eyewitness identification*. Invited speaker at the Pennsylvania District Attorneys Association meeting, College Park, PA.

Dysart, J. E. (2010, September). *Eyewitness identification procedures*. Invited speaker at the National Defender Investigator Association annual training conference, Savannah, GA.

Dysart, J. E. (2010, June). *Eyewitness identification*. Invited speaker at the Arizona Judicial conference/State Bar Association Convention, Glendale, AZ.

Dysart, J. E. (2010, May). *Eyewitness identification.* Invited speaker at the D.C. Superior Court Judicial Training Program, Washington, DC.

Dysart, J. E. (2010, April). *The science of eyewitness evidence*. Invited speaker at the Missouri Association of Criminal Defense Attorneys convention titled "Eyewitness Identification Litigation Training", Branson, MO.

Dysart, J. E. (2010, April). *The science of eyewitness identification.* Invited panelist speaker at the Brown University Eyewitness Identification Summit, The Taubman Center for Public Policy Brown University, Providence, RI.

Dysart, J. E. (2010, March). *Eyewitness identification – What is its value in criminal cases?* Invited speaker at the "Actual Innocence: Establishing Innocence or Guilt" conference, sponsored by the Center for American and International Law, Plano, TX.

Dysart, J. E. (2010, February). *An examination of eyewitness identification procedures: Perspectives on wrongful convictions.* Invited speaker at the Pennsylvania conference of State Trial Judges Mid-Annual Meeting, Philadelphia, PA.

Dysart, J. E. (2010, February). *False identifications: A scientific approach to limiting mistakes.* Invited speaker at the Texas District and County Attorneys Association Investigator School conference, Odessa, TX.

Dysart, J. E. (2009, November). *Eyewitness identification.* Invited speaker at the Rochester Institute of Technology Public Defender CLE program, Rochester, NY.

Dysart, J. E. (2009, October). *Identification evidence*. Invited speaker at the Ontario Court of Justice West Regional Seminar, Ontario, Canada.

Dysart, J. E. (2009, October). *Eyewitness identification*. Invited speaker for the Criminal Appeals Bureau CLE program, New York, NY.

Dysart, J. E. (2009, September). *The psychology, law, and ethics of eyewitness identification cases.* Invited speaker at the Innocence and Forensics CLE program, Widener Law School, Wilmington, DE.

Dysart, J. E. (2009, September). *The investigative process and eyewitness evidence*. Invited speaker at the Short Course in Crime Scene Analysis for Trial Lawyers in Criminal Cases, New York, NY.

Dysart, J. E. (2009, May). *Eyewitness identification*. Invited speaker at the Bronx Legal Aid Society CLE program on Eyewitness Identification, Bronx, NY.

Dysart, J. E (2009, May). *Eyewitness (mis)identification*. Invited speaker at the Nassau County Legal Aid Society CLE Program on Eyewitness Identification, Mineola, NY.

Dysart, J. E. (2009, March). *Eyewitness identification*. Invited speaker at the Brooklyn Legal Aid Society CLE Program on Eyewitness Identification, Brooklyn, NY.

Dysart, J. E., & Patenaude, K. (2009, March). *Eye-witness identification*. Invited speaker at the "Actual Innocence: Establishing Innocence or Guilt. Future of Forensic Science, Eye-Witness Identification and the Impact of the NAS report" conference, sponsored by the Center for American and International Law, Austin, TX.

Dysart, J. E. (2009, March). *Identification evidence*. Invited speaker at the National Judicial Institute "Preventing Wrongful Convictions" Seminar, Victoria, BC, Canada.

Dysart, J. E., & Edwards, E. (2009, January). *Eyewitness identification: New science and new litigation strategies.* Invited speaker at the Fifth National Seminar on Forensic Evidence and the Criminal Law, Philadelphia, PA.

Dysart, J. E. (2008, November). *Eyewitness identification*. Invited speaker at the Royal Canadian Mounted Police's Major Crime conference, Halifax, Nova Scotia, Canada.

Dysart, J. E., & Perrone, A. (2008, October). *Changing strategies to change the law of identification evidence.* Invited speaker at the New Jersey Office of the Public Defender Annual training conference, "Changing Times – Changing Strategies: Striking a New Balance, Kean University, Union, NJ.

Dysart, J. E., & Schecter, M. (2008, October). *Everything you always wanted to know but were afraid to ask about ID evidence.* Invited speaker at the New Jersey Office of the Public Defender Annual training conference, "Changing Times – Changing Strategies: Striking a New Balance, Kean University, Union, NJ.

Dysart, J. E. (2008, September). *The psychology of eyewitness identification*. Invited speaker at the Denver Fire Department's Annual Advanced Fire Investigation Seminar, Denver, CO.

Dysart, J. E. (2008, August). *Why eyewitnesses make mistakes.* Invited speaker at The Center for American and International Law conference, "Actual Innocence: Forensics, False Confessions, and Eyewitness Identification", Plano, TX.

Dysart, J. E. (2008, August). *Eyewitness identification*. Invited speaker at the Federal Defender Services of Idaho, Capital Habeas Unit's Annual Death Penalty conference, Boise, ID.

Dysart, J. E., Garcia, R., & Lieberman, S. (2008, June). *Cross-racial identification*. Invited panelist at the 2008 New York State Summer Judicial Seminar, Rye Brook, NY.

Dysart, J. E. (2008, March). *Eyewitness identification.* Invited speaker at the Nassau County Bar Association meeting, Mineola, NY.

Stetler, R., Friedman, J., Garcia, R., & Dysart, J. E. (2008, March). *Developing the right facts: Investigation and discovery.* Invited panelist at the National Association of Criminal Defense Lawyers CLE conference, "A new legal architecture: Litigating eyewitness identification cases in the 21st Century", New York University, New York, NY.

Dysart, J. E. (2007, November). *Eyewitness identification.* Invited speaker at the Suffolk County Bar Association CLE program titled "Police encounters of the first kind", Hauppauge, NY.

Dysart, J. E. (2007, November). *Eyewitness identification.* Invited speaker at the Atlantic Courts Education Seminar sponsored by the Canadian National Judicial Institute, St. John's, Newfoundland, Canada.

Dysart, J. E. (2007, July). *"He had a mug you couldn't forget": The psychological dynamics of mistaken eyewitness testimony.* Pennsylvania conference of State Trial Judges Annual Meeting, Hershey, PA.

Dysart, J. E. (2007, July). *Misidentification and eyewitness testimony.* Invited speaker at the Georgia Capital Public Defenders Association seminar, Atlanta, GA.

Dysart, J. E. (2007, May). *Eyewitness identification.* Invited speaker at "Wrongful Convictions: Causing Pain, Allowing Gain", sponsored by The Arlin M. Adams Center for Law and Society at Susquehanna University, Ceremonial Courtroom, Federal District Court, Philadelphia, PA.

Dysart, J. E. (2007, February). *Understanding eyewitness identification.* Invited speaker at Susquehanna University seminar "Wrongful Convictions", Selinsgrove, PA.

Dysart, J. E. (2006, November). *Understanding the science of memory: Distinguishing eyewitness confidence from accuracy.* Invited talk at Emory Law School, Atlanta, GA.

Dysart, J. E. (2006, September). *Eyewitness identification.* Invited talk at the International Association of Women in Policing conference, Saskatoon, Saskatchewan, Canada.

Dysart, J. E. (2006, July). *Eyewitness identification.* Invited speaker at Judicial Education Institute training conference for Magistrates, Port of Spain, Trinidad and Tobago.

Dysart, J. E. (2006, July). *Eyewitness identification.* Invited speaker at Judicial Education Institute training conference for the Bar Association, Port of Spain, Trinidad and Tobago.

Dysart, J. E. (2006, July). *Eyewitness identification.* Invited speaker at Judicial Education Institute training conference for Senior Police Officers, Trinidad and Tobago.

Dysart, J. E., & Carroll, P. (2006, May). *Eyewitness evidence.* Invited speaker at the Maryland Public Defender conference, Ocean City, MD.

Dysart, J. E. (2006, April). *Eyewitness errors*. Invited speaker at the Canadian National Judicial Institute Judges training workshop on eyewitness identification, Montreal, Quebec, Canada.

Dysart, J. E. (2006, March). *The effects of alcohol on eyewitness identification accuracy from show-ups.* Invited talk for the Department of Psychology at Lehman College, CUNY, Bronx, NY.

Dysart, J. E. (2005, November). *Eyewitness errors.* Invited speaker at the Canadian National Judicial Institute Judges training workshop on eyewitness identification, Regina, Saskatchewan, Canada.

Dysart, J. E. (2005, September). *Eyewitness errors*. Invited speaker at the Canadian National Judicial Institute Judges training workshop on eyewitness identification, Charlottetown, Prince Edward Island, Canada.

Dysart, J. E. (2005, June). *Eyewitness identification and testimony: A matter for the experts?* Invited speaker at the Connecticut Judges Institute conference, Quinnipiac University, Hamden, CT.

Supervision of Doctoral Students (John Jay College of Criminal Justice)

2010 John DeCarlo (Criminal Justice Doctoral Student)
Title: A Study Comparing the Eyewitness Accuracy of Police Officers and Citizens
Dissertation Defended: August 31, 2010

2009-2011 Victoria Lawson (Forensic Psychology Doctoral Student)
Topic: Eyewitness Identification

2006-2009 Anna Rainey (Forensic Psychology Doctoral Student)
Topics: Showups; Cross-race identification
Brian Wallace (Forensic Psychology Doctoral Student)
Topics: Alibi believability; Mug shot searching.

Supervision of Master's Theses (John Jay College of Criminal Justice)

2011 – 2012 Tamara Andrade
Topic: Composite creation in cross-race identifications

2010 – 2011 Jennifer Savion
Topic: Composite creation in cross-race identifications

2009 – 2010 Lindsey Butera
Topic: Eye-tracking and lineup accuracy with biased lineups
Yinglee Wong
Topic: Cross-race description accuracy of hair/hairstyles

Nancy Yang
Topic: Eye-tracking and weapon focus effect

2008 – 2009 Alexander Buijsrogge
Topic: Cross-race composite creation of famous faces
Kristin Chong
Topic: Stranger alibis and identification accuracy
Victoria Lawson
Topic: Cross-race showup and lineup accuracy
Jessica Owens
Topic: Multiple-perpetrator crimes and identification accuracy

2007 – 2008 Sarah Kopelovich
Topic: Cross-race and Accent effects on identification accuracy
Jason Mandelbaum
Topic: Cross-race effects in mug shot searching

Supervision of Master's Theses (Southern Connecticut State University)

2005 Lisbeth Fugal
Topic: Post-identification feedback
Anna Rainey
Topic: Cross-race identification and "contact" with other groups

2004 Sandra Soucie
Topic: CSI Effect

Supervision of Undergraduate Honor's Thesis (Southern Connecticut State University)

2005 Daniel Csuka
Topic: Multiple Independent Identification Accuracy

Awards and Scholarships

2008 John Jay College Research Assistance Program Grant ($1000)

2005 Connecticut State University Research Grant ($4400)

2005 Junior Faculty Research Fellowship, Southern Connecticut State University (9 credits teaching release time for Fall 2005)

2003 – 2005 Social Sciences and Humanities Research Council of Canada (SSHRC) Post-Doctoral Fellowship ($40, 000 and $35, 000 annually; **declined**)

2002	American Psychological Foundation/Council of Graduate Departments of Psychology (APF/COGDOP) Graduate research scholarship ($1500)
2002	American Psychology-Law Society Grants-in-Aid award ($650)
2001 – 2003	Social Sciences and Humanities Research Council of Canada (SSHRC) Doctoral Award ($17, 900 annually)
2000 – 2001	Ontario Graduate Scholarship ($15, 000)
1999 – 2000	Natural Sciences and Engineering Research Council of Canada (NSERC) PGS-B scholarship ($18, 900)
1998 – 1999	Natural Sciences and Engineering Research Council of Canada (NSERC) PGS-A scholarship ($17, 300)

Courses Taught

John Jay College of Criminal Justice
- Introduction to Psychology (undergraduate course)
- Forensic Social and Experimental Psychology (undergraduate course)
- Eyewitness Identification (Master's course)
- Prospectus Seminar (Master's course)
- Research Methods and Design (Forensic Psychology doctoral course)
- Survey of Psychology and Criminal Justice (Criminal Justice doctoral course)

Southern Connecticut State University, New Haven, CT:
- Experimental Methods (with Lab)
- Social Psychology
- Experimental Research Internship
- Issues in Psychology, Law, and Ethics (graduate)
- Psychology and Law (undergraduate)

Quinnipiac University, Hamden, CT:
- Introduction to Psychology

Committee/Administrative University Service

2013 – present	College Council Member, John Jay College of Criminal Justice
2013 – present	Faculty Senate Member, John Jay College of Criminal Justice
2010 - 2012	Middle States Commission on Higher Education Re-accreditation – Sub-committee member

2010 – 2012	College Council Executive Committee Member, John Jay College of Criminal Justice
2010 – 2012	College Council Member, John Jay College of Criminal Justice
2010 – 2012	Faculty Senate Executive Committee Member, John Jay College of Criminal Justice
2010 – 2012	Faculty Senate Member, John Jay College of Criminal Justice
2008 – 2012	College Scholarships and Awards Committee, John Jay College of Criminal Justice
2010 – 2011	Task Force on the Year-round College, John Jay College of Criminal Justice
2007 – 2010	Department Curriculum Committee, Department of Psychology, John Jay College of Criminal Justice
2007 – 2010	College Curriculum Committee Member, John Jay College of Criminal Justice
2006 – 2008	Coordinated Undergraduate Education (CUE) Committee Member, John Jay College of Criminal Justice
2006 – 2007	College Council Member, John Jay College of Criminal Justice
2006 – 2007	Faculty Senate Member, John Jay College of Criminal Justice
2006 – 2007	Major/Minor Fair Committee, John Jay College of Criminal Justice
2004 – 2005	Subject Pool Ad Hoc Committee, Department of Psychology, Southern Connecticut State University
2004 – 2005	Faculty Development Advisory Committee – Arts and Sciences Rep, Southern Connecticut State University
2004 – 2005	New Faculty Orientation Committee, Southern Connecticut State University
2004 – 2005	New Faculty Mentor, Southern Connecticut State University
2004	New Student Orientation Committee, Southern Connecticut State University
2003 – 2005	Department of Psychology Web-site Committee, Southern Connecticut State University

2003 – 2004	Connecticut State University Psychology Day Research Conference - Organizing Committee
1999 – 2003	Graduate Student Representative at Department of Psychology Meetings, Queen's University

Professional Activities

2012	Testified before the Maryland House and Senate Judiciary Committees, Anapolis, MD.
2011	Testified before Connecticut Eyewitness Identification Task Force, Hartford, CT.
2011	Reviewed model policy for Texas HB 215 on eyewitness identification.
2009 – present	Research Advisory Board Member, Innocence Project, New York, NY.
2007 – present	Member of a national field study team led by Dr. Gary Wells of Iowa State University investigating the use of simultaneous and sequential double-blind lineups in the field.
2010 – 2011	Site scientist in Austin, TX for National eyewitness field study (above).
2005 – present	Consultant, eyewitness identification expert. Provide consultation to lawyers with regards to police procedures and eyewitness identification errors.
2010 – 2011	Conference Co-Chair for the 9th biennial conference for the Society for Applied Research in Memory and Cognition, New York City, June 2011.
2007	Conference Chair and Organizer: "Off the Witness Stand: Using Psychology in the Practice of Justice", New York, NY.
2001	Organizing Committee for the 4th biennial conference for SARMAC

Reviewing (past and current)

Law and Human Behavior
Psychology, Public Policy and Law
Applied Cognitive Psychology
Journal of Experimental Psychology: Applied
Psychology, Crime & Law
National Science Foundation
American Psychology-Law Society annual meetings
Society for Applied Research in Memory and Cognition meetings

Professional Affiliations

American Psychology–Law Society
Society for Applied Research in Memory and Cognition

1894

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012CP4004870

Chris A #308393 Liverman
PLAINTIFF(S)

State of South Carolina
DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

RICHLAND COUNTY FILED
2014 FEB 10 AM 9:44
CLERK OF COURT

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ **day of** _____, **20** _____ and a copy mailed first class or placed in the appropriate attorney's box on this 10 February 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Chris A #308393 Liverman Joy Eileen Middleton Robert Daniel Corney

Chris A #308393 Liverman
ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF **RICHLAND**)	**FIFTH** JUDICIAL CIRCUIT
)	
CHRIS A. LIVERMAN, (#308393))	Case No. **2012-CP-40-04870**
Applicant,)	
)	
v.)	**AMENDED APPLICATION FOR POST-CONVICTION RELIEF**
)	
State of South Carolina)	
)	

RICHLAND COUNTY FILED
2018 AUG -7 PM 1:20
JEANNETTE W. McBRIDE C.C.P. & G.S.

[Note: As required by Rule 71.1(b), SCRCP, this application follows Form 5 of the SCRCP Appendix of Forms.]

1. Place of Detention: Lee Correctional Institution, 990 Wisacky Hwy, Bishopville, SC 29010.

2. Name and location of Court which imposed sentence: Richland County Court of General Sessions, 1701 Main Street, Columbia, SC 29201.

3. Name(s) of co-defendant(s) (if any): There are no co-defendants.

4. The indictment number(s) upon which and the offenses for which sentence was imposed:

   (a) 2005-GS-40-06831 (Murder).

   (b) 2005-GS-40-06832 (Murder).

5. The date upon which the sentence was imposed and the terms of the sentence:

   (a) November 9, 2006.

   (b) Life imprisonment for indictment number 2005-GS-40-06831.

   (c) Life imprisonment for indictment number 2005-GS-40-06832 (consecutive).

6. A finding of guilty was made:

   (a) After a trial by jury before the Honorable James W. Johnson, Jr.

7. Did you appeal from the judgment of conviction and/or the imposition of the sentence?

   (a) Yes.

8. If you answered "yes" to number (7), list:

(a) The name of each Court to which you appealed:

i. South Carolina Court of Appeals.

ii. South Carolina Supreme Court.

(b) The result in each Court to which you appealed:

i. SC Court of Appeals affirmed the convictions and sentence.

ii. SC Supreme Court affirmed the convictions and sentence.

(c) The date of each result:

i. SC Court of Appeals opinion (rehearing) filed on January 20, 2010.

ii. SC Supreme Court opinion filed on June 6, 2012.

(d) If known, citations of any written opinions or ordered entered pursuant to such result:

i. *State v. Liverman*, 386 S.C. 223 687 S.E.2d 70 (Ct. App. 2009).

ii. *State v. Liverman*, 398 S.C. 130, 727 S.E.2d 422 (2012).

9. If you answered "no" to number (7), state your reasons for not appealing:

(a) Not applicable. Applicant filed a direct appeal of his convictions and sentence.

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Trial Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. *See* S.C. Code § 17-27-20(A)(1), (4), and (6).

(b) Appellate Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution.

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

(a) Trial Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, Trial Counsel's acts or omissions included, but not are not limited to the following allegations:

(i) Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible mitigating evidence in preparation for trial. *See Wiggins v. Smith*, 539 U.S. 510 (2003). Specifically, Trial Counsel failed to consult with an expert witness for an independent review of the eye-witness identification evidence implicating Applicant as the murderer when it was reasonable and necessary. *See Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).

(ii) Trial Counsel improperly argued irrelevant and highly prejudicial character evidence during the Applicant's opening statement by telling the jurors that Applicant had been incarcerated for twenty-six months prior to his jury trial.

(iii) Trial Counsel failed to move for suppression of objectively false evidence that Applicant stole the gun that was used in the murders, resulting in Trial Counsel having to introduce otherwise inadmissible, irrelevant, and highly prejudicial character evidence that Applicant was incarcerated when the gun was used during the homicide was stolen.

(iv) Trial Counsel failed to object to improper and highly prejudicial testimony by witness, Tyrone Smith, that he was scared to testify but was testifying for the

victims and their family.

(v) Trial Counsel failed to object to the admissibility of any testimony, by either lay or expert witnesses, that Applicant was a member of a gang, when such evidence was not relevant to the State's case and was inadmissible, unduly prejudicial character evidence.

(vi) Trial Counsel failed to object to the admissibility of the State's gang expert witness testimony. *See State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979); *State v Council*, 335 S.C.1, 515 S.E.2d 508 (1999); *State v. White*, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009) and Rules 702 and 703, SCRE.

(vii) Trial Counsel failed to preserve for appellate review objections to highly prejudicial testimony of the State's gang expert witnesses, including but not limited to testimony about possible meanings of the teardrop tattoos and hash mark tattoos.

(viii) Trial Counsel improperly called an expert witness to testify about gangs, including the possible meaning of tattoos, when it only served to bolster the credibility of the State's gang expert witnesses and enhance the State's improper and highly prejudicial evidence.

(ix) Trial Counsel failed to object to the Solicitor's improper comments during closing argument and failed to move for a curative instruction and/or mistrial based on the undue prejudice created by those comments. Specifically, Trial Counsel failed to object when the prosecutor argued in closing, "There is not a single witness, or any evidence in this case, that points to anyone other than [Applicant] as being the

shooter, the murderer." This unduly prejudicial argument was both burden shifting and an impermissible comment on Applicant's right not to testify.

(x) Trial Counsel failed to present all reasonable and necessary evidence to the judge during the sentencing phase in mitigation of Applicant's potential sentence.

(b) Appellate Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Appellate Counsel's errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, Appellate Counsel's acts or omissions included, but not are not limited to the following allegations:

(i) Appellate Counsel failed to argue on appeal before the S.C. Court of Appeals that the testimony of the State's gang expert witnesses was entirely inadmissible.

(ii) Appellate Counsel failed to argue on appeal before the S.C. Court of Appeals that the State's gang experts' opinion about the possible meaning of teardrop tattoos was inadmissible.

(iii) Appellate Counsel failed to argue on appeal before the S.C. Court of Appeals that the State's gang experts' opinions about the possible meaning of hash marks tattoos was preserved for appellate review.

(iv) Appellate Counsel failed to appeal the portion of the S.C. Court of Appeals' Opinion regarding the admissibility of the State's gang expert witnesses' testimony to the S.C. Supreme Court.

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

(a) Any petition in a State Court under South Carolina Law? Applicant filed a direct appeal before the S.C. Court of Appeals and a Petition for Writ of Certiorari in the S.C. Supreme Court.

(b) Any petition in State or Federal Courts for Federal Habeas Corpus or Post-Conviction Relief? No. Applicant has not previously filed an application for Post-Conviction Relief or a Petition for Writ of Habeas Corpus in either state or federal court.

(c) Any petition in the Supreme Court of the United States for certiorari other than petitions, if any, already specified in number (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 number (12), list with respect to each petition, motion, or application:

(a) The specific nature thereof:

i. Not applicable.

(b) The name and location of the Court in which each was filed:

i. Not applicable.

(c) The disposition thereof:

i. Not applicable.

(d) The date of each such disposition:

i. Not applicable.

14. Has any ground set forth in number (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? No.

15. If you answered "yes" to number (14), identify:

(a) The grounds which have been presented:

i. Not applicable.

(b) The proceedings in which each ground was raised:

i. Not applicable.

16. If any ground set forth in number (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) Post-Conviction Relief is the proper forum and remedy for these allegations because the grounds for relief presented in this application are evidence of ineffective assistance of counsel, not preserved for appellate review, or were not appropriate to raise or were not properly raised on Direct Appeal.

17. Were you represented by an attorney at any time during the course of:

(a) Your plea hearing? Not applicable.

(b) Your trial? Yes.

(c) Your sentencing? Yes.

(d) Your appeal, if any, from the judgment of conviction and/or imposition of the sentence? Yes.

(e) Preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? Yes.

18. If you answered "yes" to one or more parts of number (17), list:

(a) The name and address of each attorney who represented you:

(i) Elizabeth A. Franklin-Best, Blume Norris & Franklin-Best, LLC, 900 Elmwood Ave., Suite 200, Columbia, SC 29201.

(ii) Joseph L. Savitz, III, S.C. Commission on Indigent Defense (Retired), 1330 Lady Street, Suite 401, Columbia, SC 29201.

(iii) Robert M. Dudek, S.C. Commission on Indigent Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201.

(b) The proceedings at which each attorney represented you:

(i) Elizabeth A. Franklin-Best represented Applicant at trial.

(ii) Joseph L. Savitz, III, represented Applicant on direct appeal before the S.C. Court of Appeals.

(iii) Robert M. Dudek represented Applicant on direct appeal to the S.C. Supreme Court.

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

Applicant seeks Post-Conviction Relief by vacating his convictions and sentences and remanding the indictments for a new trial based on ineffective assistance of counsel.

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

No. Applicant is not under sentence from any other court.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the within and foregoing Amended Application for Post-Conviction Relief via hand-delivery, upon all parties as follows:

Lindsey Anne McCallister, Assistant Attorney General
South Carolina Attorney General's Office
1000 Assembly Street, Room 519
Columbia, SC 29201

The Honorable Jeanette McBride
Richland County Clerk of Court
P. O. Box 2766
Columbia, SC 29202-2766

RICHLAND COUNTY
FILED
2018 AUG -7 PM 1:20
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

By: _____
Toby Whitmire
Law Clerk for Dayne C. Phillips, Esq.

1614 Taylor Street, Suite D.
Columbia, SC 29201
C: (803) 386-1596
F: (803) 380-8035
lawclerk.whitmire@gmail.com

***Attorney,* Price Benowitz LLP**

August 7, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF **RICHLAND**	)	**FIFTH** JUDICIAL CIRCUIT
	)	
CHRIS A. LIVERMAN, (#308393) Applicant,	)	Case No. **2012-CP-40-04870**
	)	
v.	)	**SECOND AMENDED APPLICATION FOR POST-CONVICTION RELIEF**
	)	
State of South Carolina	)	
	)	

RICHLAND COUNTY FILED DEC 11 P 1:42 CLERK OF COURT

As required by Rule 71.1(b), SCRCP, this application follows Form 5 of the SCRCP Appendix of Forms.

1. Place of Detention: Lee Correctional Institution, 990 Wisacky Hwy, Bishopville, SC 29010.

2. Name and location of Court which imposed sentence: Richland County Court of General Sessions, 1701 Main Street, Columbia, SC 29201.

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   (b) 2005-GS-40-06832 (Murder).

5. The date upon which the sentence was imposed and the terms of the sentence:

   (a) November 9, 2006.

   (b) Life imprisonment for indictment number 2005-GS-40-06831.

   (c) Life imprisonment for indictment number 2005-GS-40-06832 (consecutive).

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   (a) After a trial by jury before the Honorable James W. Johnson, Jr.

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ii. South Carolina Supreme Court.

(b) The result in each Court to which you appealed:

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ii. SC Supreme Court opinion filed on June 6, 2012.

(d) If known, citations of any written opinions or ordered entered pursuant to such result:

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ii. *State v. Liverman*, 398 S.C. 130, 727 S.E.2d 422 (2012).

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10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Trial Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. *See* S.C. Code § 17-27-20(A)(1), (4), and (6).

(b) Appellate Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution.

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

(a) Trial Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, Trial Counsel's acts or omissions included, but not are not limited to the following allegations:

(i) Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible mitigating evidence in preparation for trial. *See Wiggins v. Smith*, 539 U.S. 510 (2003). Specifically, Trial Counsel failed to consult with an expert witness for an independent review of the eye-witness identification evidence implicating Applicant as the murderer when it was reasonable and necessary. *See Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).

(ii) Trial Counsel improperly argued irrelevant and highly prejudicial character evidence during the Applicant's opening statement by telling the jurors that Applicant had been incarcerated for twenty-six months prior to his jury trial.

(iii) Trial Counsel failed to move for suppression of objectively false evidence that Applicant stole the gun that was used in the murders, resulting in Trial Counsel having to introduce otherwise inadmissible, irrelevant, and highly prejudicial character evidence that Applicant was incarcerated when the gun was used during the homicide was stolen.

(iv) Trial Counsel failed to object to improper and highly prejudicial testimony by witness, Tyrone Smith, that he was scared to testify but was testifying for the

victims and their family.

(v) Trial Counsel failed to object to the admissibility of any testimony, by either lay or expert witnesses, that Applicant was a member of a gang, when such evidence was not relevant to the State's case and was inadmissible, unduly prejudicial character evidence.

(vi) Trial Counsel failed to object to the admissibility of the State's gang expert witness testimony. *See State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979); *State v Council*, 335 S.C.1, 515 S.E.2d 508 (1999); *State v. White*, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009) and Rules 702 and 703, SCRE.

(vii) Trial Counsel failed to preserve for appellate review objections to highly prejudicial testimony of the State's gang expert witnesses, including but not limited to testimony about possible meanings of the teardrop tattoos and hash mark tattoos.

(viii) Trial Counsel improperly called an expert witness to testify about gangs, including the possible meaning of tattoos, when it only served to bolster the credibility of the State's gang expert witnesses and enhance the State's improper and highly prejudicial evidence.

(ix) Trial Counsel failed to object to the Solicitor's improper comments during closing argument and failed to move for a curative instruction and/or mistrial based on the undue prejudice created by those comments. Specifically, Trial Counsel failed to object when the prosecutor argued in closing, "There is not a single witness, or any evidence in this case, that points to anyone other than [Applicant] as being the

shooter, the murderer." This unduly prejudicial argument was both burden shifting and an impermissible comment on Applicant's right not to testify.

(x) Trial Counsel failed to present all reasonable and necessary evidence to the judge during the sentencing phase in mitigation of Applicant's potential sentence.

(xi) **Trial Counsel failed to call an expert witness to testify in rebuttal of the eye-witness identification evidence presented by the State at trial when it was reasonable and necessary to present this critical evidence.**

(xii) **Trial Counsel failed to properly object to and preserve for appellate review lay opinion and expert testimony regarding unduly prejudicial gang affiliation evidence and stigma in the minds of the jurors. *See* Rules 403 and 702, SCRE; *see also United States v. Santiago*, 643 F.3d 1007, 1011 (7th Cir. 2011) (juries are "likely to associate gangs with criminal activity and deviant behavior, such that the admission of gang evidence raises the specter of guilt by association or a verdict influenced by emotion." (internal quotation marks omitted)); *Cf. United States v. Archuleta*, 737 F.3d 1287, 1295 (10th Cir. 2013), cert. denied, 134 S. Ct. 2859 (2014) ("Any unfairness from gang-affiliation testimony stems from the implicit connection [drawn] between the crimes committed by gangs and the defendant gang member. In most cases, concern about such innuendo would be proper, because ordinarily the jury should not assume that the defendant gang member committed the [gang's] crimes.").**

(xiii) **Trial Counsel failed to object to improper and highly prejudicial testimony by a State's witness that he was scared to testify but was testifying for the victims and their family.**

(b) Appellate Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Appellate Counsel's errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668

(1984). Specifically, Appellate Counsel's acts or omissions included, but not are not limited to the following allegations:

(i) Appellate Counsel failed to argue on appeal before the S.C. Court of Appeals that the testimony of the State's gang expert witnesses was entirely inadmissible.

(ii) Appellate Counsel failed to argue on appeal before the S.C. Court of Appeals that the State's gang experts' opinion about the possible meaning of teardrop tattoos was inadmissible.

(iii) Appellate Counsel failed to argue on appeal before the S.C. Court of Appeals that the State's gang experts' opinions about the possible meaning of hash marks tattoos was preserved for appellate review.

(iv) Appellate Counsel failed to appeal the portion of the S.C. Court of Appeals' Opinion regarding the admissibility of the State's gang expert witnesses' testimony to the S.C. Supreme Court.

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

(a) Any petition in a State Court under South Carolina Law? Applicant filed a direct appeal before the S.C. Court of Appeals and a Petition for Writ of Certiorari in the S.C. Supreme Court.

(b) Any petition in State or Federal Courts for Federal Habeas Corpus or Post-Conviction Relief? No. Applicant has not previously filed an application for Post-Conviction Relief or a Petition for Writ of Habeas Corpus in either state or federal court.

(c) Any petition in the Supreme Court of the United States for certiorari other than

petitions, if any, already specified in number (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 number (12), list with respect to each petition, motion, or application:

(a) The specific nature thereof:

i. Not applicable.

(b) The name and location of the Court in which each was filed:

i. Not applicable.

(c) The disposition thereof:

i. Not applicable.

(d) The date of each such disposition:

i. Not applicable.

14. Has any ground set forth in number (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? No.

15. If you answered "yes" to number (14), identify:

(a) The grounds which have been presented:

i. Not applicable.

(b) The proceedings in which each ground was raised:

i. Not applicable.

16. If any ground set forth in number (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) Post-Conviction Relief is the proper forum and remedy for these allegations because the grounds for relief presented in this application are evidence of

ineffective assistance of counsel, not preserved for appellate review, or were not appropriate to raise or were not properly raised on Direct Appeal.

17. Were you represented by an attorney at any time during the course of:

(a) Your plea hearing? Not applicable.

(b) Your trial? Yes.

(c) Your sentencing? Yes.

(d) Your appeal, if any, from the judgment of conviction and/or imposition of the sentence? Yes.

(e) Preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? Yes.

18. If you answered "yes" to one or more parts of number (17), list:

(a) The name and address of each attorney who represented you:

(i) Elizabeth A. Franklin-Best, Blume Norris & Franklin-Best, LLC, 900 Elmwood Ave., Suite 200, Columbia, SC 29201.

(ii) Joseph L. Savitz, III, S.C. Commission on Indigent Defense (Retired), 1330 Lady Street, Suite 401, Columbia, SC 29201.

(iii) Robert M. Dudek, S.C. Commission on Indigent Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201.

(b) The proceedings at which each attorney represented you:

(i) Elizabeth A. Franklin-Best represented Applicant at trial.

(ii) Joseph L. Savitz, III, represented Applicant on direct appeal before the S.C. Court of Appeals.

(iii) Robert M. Dudek represented Applicant on direct appeal to the S.C. Supreme Court.

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

Applicant seeks Post-Conviction Relief by vacating his convictions and sentences and

remanding the indictments for a new trial based on ineffective assistance of counsel.

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

No. Applicant is not under sentence from any other court.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the within and foregoing Second Amended Application for Post-Conviction Relief by depositing a true and correct copy of the same via first-class mail, postage prepaid, upon all parties as follows:

Lindsey Anne McCallister, Assistant Attorney General
South Carolina Attorney General's Office
1000 Assembly Street, Room 519
Columbia, SC 29201

The Honorable Jeanette McBride
Richland County Clerk of Court
P. O. Box 2766
Columbia, SC 29202-2766

FILED
2018 DEC 11 PM 1:42
JEANETTE W. MCBRIDE
C.C.P. & G.S.

By: _____
Toby Whitmire
Law Clerk for Dayne C. Phillips, Esq.

1614 Taylor Street, Suite D.
Columbia, SC 29201
C: (803) 386-1596
F: (803) 380-8035
lawclerk.whitmire@gmail.com

December 6, 2018

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF RICHLAND

2012-CP-40-04870

Chris A. Liverman

Vs.

State of South Carolina

Columbia, South Carolina

December 17, 2018

Before the Honorable Scott Sprouse

APPEARANCES

For the Applicant: Dane Phillips, Charles Gross

For the Defendant: Ed Salter, Lindsey McCallister

Reported by: Michael C. Watkins

Official Court Reporter

INDEX

Dawn McQuiston 11
Elizabeth Franklin-Best 66
Certificate: 162

EXHIBITS

Applicant's 1 McQuiston CV 14
Applicant's 2-5 Articles 20

THE COURT: Madam Clerk, call our first case.

THE CLERK: The first case is 2012-CP-40-04870, Chris A. Liverman v. State of South Carolina.

THE COURT: Yes, ma'am?

MS. MCCALLISTER: May it please the Court, Your Honor? I'll just put the procedural history on the record briefly. Your Honor, Mr. Liverman was indicted at the April 2005 term of the Richland County Grand Jury for two counts of murder. He was represented on those charges by Elizabeth Franklin-Best, Maxwell Schardt and Carolyn Gripp. On October 30th, 2006 he proceeded to a jury trial before the Honorable James W. Johnson. And on November 9th, 2006, he was found guilty as indicted of both charges and sentenced to life imprisonment without parole to run consecutively. Your Honor, a timely notice of appealed was filed on his behalf and an appeal was perfected. He was represented by Joseph Savitz, Robert Dudek and Matt Bogan on appeal. Your Honor, two issues were appealed, the first being an issue within Neil v. Biggers and an identification that was made at trial. And the second, and issue with the State's expert witnesses, and some testimony about tattoos on applicant's body that came in at trial. Your Honor, after briefing, the matter proceeded to oral argument before the South Carolina Supreme Court -- I'm sorry, South Carolina Court of Appeals on February 23rd, 2012. On June 6th of 2012 the Court

issued an opinion affirming the convictions and the remitter was issued in June of 2000 -- June 26th of 2012. I'm sorry, I apologize Your Honor. There was an appeal in the South Carolina Court of Appeals, the conviction was affirmed in the court of appeals. Then they petitioned for a cert on Mr. Liverman's behalf on one issue, just on the Neil v. Biggers and identification issue, and that went up to the South Carolina Supreme Court, just the one. That conviction was -- the conviction was affirmed, the result was affirmed again in the supreme court, and remitter was issued. Mr. Liverman filed this application for post conviction relief on July 17th, 2012. He is present in the courtroom today and he's represented Dane Phillips and Charles Gross. Mr. Liverman has filed several amendments to his original application. My understanding from Mr. Phillips is that they are proceeding only on the second amended complaint, that those allegations supercede the other filings, and I would ask Mr. Phillips to put the allegations on the record at this time.

THE COURT: Thank you, Ms. McCallister. Mr. Phillips?

MR. PHILLIPS: Yes, Your Honor. Give me one moment. We would like to add three additional allegations regarding closing argument before we start just to make the record clear. Two are kind of under the umbrella of vouching and bolstering as far as the closing argument is concerned, and

the other one is the golden rule burden shifting argument that essentially was made during closing. The second amended application for post conviction relief was filed with the Richland County Court of Common Pleas on December 11th of 2018. And the allegations are as follows: That trial counsel denied applicant's right to effective assistance of counsel as guaranteed by the 6th and 14th Amendments to the United States Constitution, and article one, sections three and 14 of the South Carolina Constitution also citing South Carolina Code Section 17-27-20, subsection A1, four and six. Also that appellate counsel denied applicant's right to effective assistance of counsel as guaranteed by the 6th and 14th Amendments to the United States Constitution, and article one and Sections three and 14 of the South Carolina Constitution, specifically going to ineffective assistance of trial counsel in that trial counsel's unreasonable deficient performance prejudiced the applicant. Because there is a reasonable probability that but for trial counsel's errors, the result of the proceeding would have been different, citing Strickland v. Washington. Specifically that trial counsel's acts or omissions included but were not limited to the following allegations: That trial counsel failed to conduct a reasonable investigation and to develop all relevant, available and admissible mitigating evidence in

preparation of trial, citing Wiggins v. Smith. Specifically trial counsel failed to consult with an expert witness for an independent review of the eye witness identification evidence implicating applicant as the murderer when it was reasonable and necessary to do so. In the application I cite Reeves v. State but it really also should be citing the defense of indigence act. He was represented by a public defender and at the time was declared indigent. One of the allegations that was included with the second amended application was that trial counsel failed to call in the expert witness to testify in rebuttal of the eye witness identification evidence and testimony presented by the State at trial when it was reasonable and necessary to present this critical evidence. The next allegation is that trial counsel improperly argued irrelevant and highly prejudicial character evidence during applicant's opening statement by telling the jurors that the applicant had been incarcerated for 26 months prior to his jury trial. The next allegation is that trial counsel failed to move for suppression of objectively false evidence that applicant stole a gun that was used in the murders resulting in trial counsel having to introduce otherwise inadmissible, irrelevant and highly prejudicial character evidence that applicant was incarcerated when the gun was used during the homicide -- that the gun that was used during the homicide was stolen.

Trial counsel -- this is the new allegation, another allegation, excuse me -- trial counsel failed to object to improper and highly prejudicial testimony by witness Tyrone Smith, that he was scared to testify but was testifying for the victims and their family. There's another catch-all, because I believe it comes up with other witnesses as well, that trial counsel failed to properly object to the highly prejudicial testimony by State's witnesses that they were scared to testify but were testifying for the victims and their family -- families. Another allegation is trial counsel failed to object to the admissibility of any testimony by either lay or expert witnesses, that the applicant was a member of a gang when such evidence was not relevant to the State's case and was inadmissible as unduly prejudicial character evidence. The next allegation, trial counsel failed to object to the admissibility of the State's gang expert witness testimony citing Jones -- State v. Jones, State v. Council, State v. White, and Rule 702 and 703 of the South Carolina Rules of Evidence. The next allegation, trial counsel failed to preserve for appellate review objections to highly prejudicial testimony of the State's gang expert witness, including but not limited to testimony about possible meanings of teardrop tattoos and hashmark tattoos. Next allegation, trial counsel improperly called an expert witness to testify about gangs, including

the possible meaning of tattoos when it only served to bolster the credibility of the State's gang expert witness and enhanced the State's improper and highly prejudicial evidence on gangs -- essentially gang evidence and testimony. The next allegation, trial counsel failed to object to the solicitor's improper comments during closing argument and failed to move for a curative instruction and/or a mistrial for error or preservation purposes based on the undue prejudice created by those comments. Specifically trial counsel failed to object when the prosecutor argued in closing there's not a single witness or any evidence in this case that points to anyone other than that it was Liverman, the applicant, as being the shooter or murderer. The unduly prejudicial argument was both burden shifting and impermissible comment on applicant's right not to testify. Again, we would like to include today or add allegations regarding vouching and bolstering regarding two witnesses, Shaunte Bethel (phonetically) and Diego Thompson. During closing prosecutor references the believability and credibility trying to bolster and vouch for the credibility of those two critical witnesses, because in this case there really is three critical witnesses. You have Tyrone Smith, the eye witnesses identification, Shaunte Bethel, and we'll get into that more, and Diego Thompson. And so with that we would also include a golden rule argument and burden

shifting argument where the State during closing essentially gave the argument essentially about taking back the community, that the gang land is not obviously the community, it's the people and giving the jury -- trying to empower the jury to take back the land, essentially making it an improper basis of their opinion, their verdict, not based on the evidence but on an improper basis. The next allegation, trial counsel failed to present all reasonable and necessary evidence to the judge during the sentencing phase in mitigation of applicant's potential sentence. One of the additional allegations that was included in the second amended application is trial counsel failed to properly object and preserve for appellate review lay opinion and expert testimony regarding unduly prejudicial gang affiliation evidence and stigma in the minds of the jurors citing rules 402 and 702 of the South Carolina Rules of Evidence. Citing also United States vs. Santiago, that's a 7th Circuit case, 643, F.3d 1007, and that's a 2011 case. And then also as a comparison not in support of also citing United States versus Archuleta, that's a 737 F.3d 1287, 10th Circuit case in 2013. And then as for appellate counsel allegations, the first one is appellate counsel's unreasonably deficient performance prejudiced the applicant because there's a reasonable probability that but for appellate counsel's errors the result of the proceeding

would have been different, again citing Strickland. And specifically that appellate counsel failed to argue on appeal that the South Carolina Court of Appeals -- to the South Carolina Court of Appeals that the testimony of the State's gangs expert witness was entirely inadmissible. The next allegation, that appellate counsel failed to argue on appeal before the South Carolina Court of Appeals that the State's gang expert's opinion about possible meaning of teardrop tattoos was inadmissible hearsay evidence as well as prejudicial evidence under Rule 403. The next allegation, that appellate counsel failed to argue on appeal before the South Carolina Court of Appeals that the State's gang expert's opinion about the possible meaning of hashmark tattoos was preserved for appellate review. And finally, Your Honor, appellate counsel failed to appeal the portion of the South Carolina Court of Appeals' opinion regarding the admissibility of the State's expert gang expert witnesses to the South Carolina Supreme Court. And he did have two different appellate lawyers in this case. And that is the allegations, Your Honor.

THE COURT: Thank you, Mr. Phillips. All right. I have a copy of the second amended application. Mr. Phillips, call your first witness.

MR. PHILLIPS: Thank you, Your Honor. The applicant calls Dawn McQuiston as its first witness.

The witness, DAWN MCQUISTON, was first duly sworn and Testified as follows:

DIRECT EXAMINATION

BY MR. PHILLIPS:

Q Ms. McQuiston, what is your current occupation?

A I'm a Psychology Professor at Wofford College in Spartanburg.

Q And how many years have you been doing this profession?

A For a total of about 16 years.

Q What type of degrees and full education have you had?

A I have a Bachelors Degree in Psychology, a Masters Degree in Psychology from the University of Texas at El Paso, and a Ph.D in Psychology from the same institution.

Q And what does your faculty position consist of at Wofford?

A I teach and I do research.

Q And your general area of expertise?

A My general area is psychology and law, more specifically I do research in the reliability of eye witness testimony.

Q And do you teach on that?

A I do.

Q And have you ever been qualified as an expert in South Carolina state court?

A Yes.

Q And what specifically have you been qualified as a witness for in South Carolina state court?
A Memory and eye witness identification.
Q Do you belong to any psychological organizations?
A I do, yes.
Q And what are those?
A The Association for Psychological Science, the American Psychology Law Society, and the Society for Applied Research and Memory and Cognition.
Q Have you ever published any research?
A Yes.
Q Have they been peer reviewed?
A Yes.
Q And could you explain what peer review is?
A Sure. Peer review is the process by which scholars attempt to get their research published, and so that research is sent to other experts in the field who review it for its quality and make a recommendation on whether it should be published or not.
Q And do you have any -- based on your expertise do you have any -- have you conducted peer review of other scholars' work?
A I have, yes.
Q And could you go into them in further detail?
A Sure. I review -- over the years I've reviewed for a

couple of different academic journals, and so those editors send you various articles that have been submitted to review. Usually there's two or three reviewers that make a recommendation to the editor.

Q Have you presented any research at professional psychology conferences?

A Yes.

Q And how many times do you believe you've presented at these professional psychology conferences?

A Over my career, 100 probably.

Q And how many times do you believe you've been qualified as an expert in eye witness -- or memory or eye witness identification?

A Around 35 or 40.

Q Have they all been in South Carolina?

A No.

Q If you could, could you try to do an approximate breakdown of which jurisdictions those were that those occurred in?

A Prior to living in South Carolina I was a professor in Arizona, and so I would say about two-thirds or three-quarters of my testimony was in Arizona in Maricopa County and Pima County prior to moving to South Carolina.

Q And how many times do you believe you've been qualified as an expert in South Carolina?

A I would say probably seven or eight.
Q If you could look at the Applicant's Exhibit Number 1 that's in front of you. If you would take a moment to review it.
A I know this document.
Q Is it your updated curriculum vitae?
A It is, yes.
MR. PHILLIPS: Your Honor, at this time I would like to move that into evidence.
THE COURT: Any objection.
Mr. SALTER: No, Your Honor. And for the record, my name is Ed Salter. I'm also assisting in the handling of the case for the State of South Carolina.
THE COURT: Thank you, sir. All right, Applicant's Exhibit Number 1 will be admitted without objection.
(The CV was received as Applicant's 1.)
MR. PHILLIPS: Thank you, Your Honor. And to clear up any confusion, I have provided paper copies of all of the premarked exhibits to opposing counsel, to the attorney general's office as well as to Your Honor's law clerk.
Q Ms. McQuiston, could you look at Applicant's Exhibits Number -- premarked Exhibits Number 2, 3, 4, and 5. Take a moment to review those.
A (Witness complies.)
Q And have you had a chance to review these articles

prior to today's hearing?
A I have, yes.
Q And in reviewing these articles, would these be considered valid publications?
A Two of them I would consider scientific publications, and the other two I would consider reports.
Q And so the two that you would consider publications, could you identify those two?
A Exhibits 3 and 4.
Q And so that is the -- Applicant's Exhibit Number 3 titled The Relationship Between Eye Witness Confidence and Identification Accuracy, A New Synthesis?
A Yes.
Q And those authors, John T. Wixed and Gary Wells, are they known in the scientific community?
A They are.
Q And are they known as top researchers in the field of eye witness identification and memory?
A Yes.
Q And as Applicant's Exhibit Number 4, The Suggestive Eye Witness Identification Procedures and the Supreme Court's Reliability Test In Light Of Eye Witness Science 30 years later, have you had a chance to look at that?
A Yes.
Q And this also you would say is a scholarly publication?

A Yes.
Q And the author is Gary Wells, which we have in the previous one, and Deah Quinlivan, is she also known as a top researcher in this community?
A Yes.
Q And would these publications be considered in the scientific community as reliable publications with accurate research data?
A Yes.
Q And the data that's contained in these exhibits would be consider peer reviewed, would be based on peer review?
A Yes.
Q Would follow the scientific method?
A Yes.
MR. PHILLIPS: Your Honor, at this time I would like to move in Applicant's Exhibits 3 and 4 into evidence.
THE COURT: Any objection?
Mr. SALTER: Objection, Your Honor, yes, sir. It's hearsay. I don't have the ability to confront either of the witnesses, or either of the three witnesses who wrote the publications. I can't ask them a single question. She has a right to rely upon this obviously in formulating any opinions that she may have, however in the absence of my ability to confront the authors and ask them questions and test the validity of their findings, I object.

THE COURT: Well, at this stage -- she hasn't been admitted as an expert at this stage, so I'm going to sustain the objection at this point without prejudice to your ability to bring them in later.

MR. PHILLIPS: We'll start there, Your Honor.

Q And so one more matter before we go to that portion. In Applicant's Exhibits Number 2 and 5, you said those were more reports. Could you explain the difference between the publication and report as far as what the differences are between the two?

A Sure. So those previous two were articles written by those authors submitted for publication in a peer reviewed scientific journal, so I would consider those to be scientific papers, and that's me using my own academic language in explaining that. The other two are certainly publications that are based on scientific data. These two were not submitted for publication per se using the same avenues as the other two.

Q And for the record, Applicant's Exhibit Number 2 is titled the Innocence Project's Report to the Committee on Scientific Approaches to Understanding and Maximizing the Validity and Reliability of Eye Witness Identification in Law Enforcement in the Courts?

A Yes.

Q And Applicant's Exhibit Number 5 is titled Identifying

the Culprit Accessing the Eye Witness Identification, and this was done by the Division of Behavioral and Social Sciences and Education of the National Research Council of the National Academies?

A Yes.

MR. PHILLIPS: Your Honor, at this time we would like to present Ms. McQuiston as an expert in eye witness identification and memory.

THE COURT: Any objection?

Mr. SALTER: No objection to her qualifications, Your Honor.

THE COURT: The witness will be so admitted as an expert in eye witness identification and memory.

MR. PHILLIPS: Thank you, Your Honor.

Q In reviewing Applicant's 2 through 5, or Applicant's Exhibits 2 through 5, the two publications and the two reports, would these publications and reports in your field of study as an expert based on your training and experience, are these accurate and reliable research that's contained in those publications and reports?

A Yes.

Q Would you say that the research contained in there is biased?

A No.

Q In other words, to be more specific, were the authors

trying to be more of an advocate in presenting the information versus laying out the science, the data that had been done in studies?

A Right. I believe these are good summaries of the science, the scientific findings.

Q And this is based on empirical data that that was collected by these researchers?

A These and others, yes.

Q Because of the reports. There's multiple reports cited.

A Right.

MR. PHILLIPS: And with that, Your Honor, we would like to move Applicant's Exhibits 2 through 5 into evidence.

Mr. SALTER: Again, Your Honor, I would renew my objection based on hearsay. I would point to Rule 703 which indicates that the basis for an expert's opinion may be evidence that's not otherwise admissible, but that evidence itself is not admissible. In other words, she can formulate an opinion based on this but not entered as these various documents themselves. Additionally, I would note that a lot of the information in these documents is irrelevant to anything before this Court.

THE COURT: Mr. Phillips?

MR. PHILLIPS: The argument regarding, first taking the latter, relevance, wouldn't pull random pages out and try to

submit them and, of course, there would be a completeness argument and wouldn't give the full pictures of the scholarly publications and reports. So submitting these reports into evidence is obviously to highlight certain portions and to certainly educate the Court on further matters as we deal with the science that's before the Court. And so some of the testimony that will come out through the expert witness, these reports are critical and necessary in making sure that the science is adequately provided to the Court for its review and determination of this case.

THE COURT: All right. I will overrule the objection and allow the exhibits.

MR. PHILLIPS: Thank you, Your Honor.

(The articles were received as Applicant's 2-5.)

Q Now, in breaking down eye witness identification evidence and memory -- or excuse me, and memory as an expert, you break that down into several different subcategories, is that fair to say?

A In terms of how memory in general operates?

Q Yes.

A Yes.

Q Would one of those categories be memory, attention and perception, or is that separate?

A That would be separate. Those aren't all parts of memory, but those are certainly all different things that go

into how we in general process and retain information.
Q And so the general accepted theory of how memory works, is there --
Mr. SALTER: Your Honor, I will object to leading.
THE COURT: Yeah, rephrase your question.
Q In the scientific field of eye witness identification and memory, could you go into kind of the accepted theories?
A Sure. In terms of memory in general there is an accepted theory that was put forth back in the 1960's by scientists Atkinson and Chifferon (phonetically). And what that theory argues is that memory does not work like a videotape, but instead information that we process passes through a series of stages before it makes it into long term memory, and so there are three stages.
Q What are those three stages?
A So the first stage is called sensory memory. And sensory memory is all of the things that are happening right in a moment, that we're scanning the environment and picking out what things are the most important that we might need later and filtering out the information that we don't need. We only hang on to information in that stage for a couple of seconds.
Q And what would the next stage be?
A And so the next stage then is short term memory or temporary memory. So things that make it then in to short

term memory are the things that we need to be rehearsing over an over again. We can only hang on to information for about 30 seconds. So think of that like when -- back when someone had to tell you their phone number and you had to memorize it before you could write it down, you would rehearse it over and over again or it was lost very quickly. Or when someone tells you their name if you don't rehearse it over and over it's lost very quickly. So that's short term memory, things they are trying to hold on to for a short period of time before it might make into long term memory, so it's the last stage. Any information we rehearse over and over again in that moment then has the chance to make it into long term memory. And then long term memory is information stored that we should be able to access at any time later.

Q And just to clarify, so the final stage is long term memory?

A That's right.

Q And so people don't remember things as necessarily a mental photograph or a video they saw, is that fair to say?

A That's right.

Q And so, how do they remember? If it's not like a photographic can memory or a video played, how does that work as far as how someone's memory is concerned? How do they remember certain events?

A Well, we tend to think of memory as being more reconstructive rather than just replaying in your mind what you think that you've seen. What we remember has gaps in it, and I'm talking for any sort of memory. We tend to have gaps in the things that we remember and process, and then we fill in those gaps later with information from various sources. That information can be filled in by things that other people have told us, things that we've rehearsed in our own minds over and over again, things we saw in TV, things that we expected to have happened. And so that's where the reconstructive nature of memory comes into play.

Q Would it be fair to call that contamination when you get information from a third party that you haven't perceived --

A It could be.

Q As far as a scientific term?

A Yes.

Q And so as far as memories are concerned, you know, kind of a primacy in recency, as far as information that would not be the same over time, what happens? So how do you explain that process, somebody's memory at the moment they perceive it versus say five years later?

A Sure. Memory tends to decay over time, memories for anything really tends to decay over time. So we tend to have a worse memory for things as time goes on than we might

have right after an event.
Q And in your scientific training and research, attention comes in to play, the word -- the buzz word attention, could you explain how that is important in the scientific research of memory?
A Sure. So attention is a mechanism that we use to filter out information that we don't need so that we can focus on information that we do need.
Q And what circumstances would somebody fail to have that attention tend to fail to get some important details from an event?
A Sure. Attention is limited. Our capacity to attend to everything that's happening all at once, it's actually limited, we can't possibly attend to everything. And so we may not attend to certain things because we think they may not be important for later on, so that might be a circumstance under which you would not attend to something. But because attention is limited there are a lot of things that are happening that we may -- that may not get incorporated into our memory.
Q And so in your area of expertise, the buzz word perception, what does that mean to scientists and professors who study this?
A Sure. Perception is another mechanism that is used -- it refers to how we interact with things in the world when

it comes to our senses. So we think about information that we see, hear, touch, taste, smell, all of the senses, so that's perception, how we perceive and process information having to do with the senses.

Q And what affects perception? Essentially do people make errors in their perception?

A All the time, yes.

Q And what would an example of that be?

A So an example that applies to this kind of situation or a crime type situation is people tend to make errors -- or can make reports depending on how dark it might be outside, or the distance between you and something -- an event that you're seeing, those kinds of errors and perception happen all of the time.

Q And so these would be factors that would influence information that's perceived in the person's memory?

A Yes.

Q And so generally, does the quality of say the view kind of -- really, if you could, go into those factors that could affect someone's perception and attention in their memories.

A Sure. So there are several things that could happen and those that I just mentioned. For example, if the lighting isn't optimal outside when viewing an event the less information a person will get, therefore memory is likely to suffer, so that would be one example, sort of

environmental conditions. The distance between the person and the event that's being viewed. The further the distance the less information the person will get. Again, that will affect the details that the person later remembers.

Q And would the contamination that we discussed earlier, would that also affect the details of someone's memory as recalled at a later event?

A It could, yes.

Q Now, as far as familiarity, you brought that term up, are people more accurate in their identification if they've had previous interactions with them?

A Sometimes they are and sometimes they're not.

Q So based on the research, based on your training and experience, do you have an expert opinion about whether a person, if they've had prior experiences with an individual, whether they could make say an eye witness misidentification?

A That certainly could happen.

Q And based on your training and research as an expert opinion, has that happened? Is there empirical data to show that eye witness misidentification has occurred?

A Yes.

Q And what would some of that research be? Like, what would some of the data be on eye witness identification?

A Can you be more specific with that question?

Q So when we're trying to get a specific quantitative, if you have eye witness misidentification through your training and your experience in the research where there's data done in cases, say criminal cases regarding eye witness identification --

A Sure. There are data from The Innocence Project, that would be data that I would rely on in terms of quantifying the problem of misidentification.

Q And so The Innocence Project and other various wrongful conviction organizations have done research data, Applicant's Exhibits 2 through 5 contain a lot of that data on procedures for show-ups as well as the data on wrongful convictions. What would be some of the highlighted data on wrongful convictions that result from eye witness misidentification?

A Sure. In investigating those particular cases in which a person is exonerated, in looking at how --

Mr. SALTER: Your Honor, I will object right now, this is clearly irrelevant. There are other cases and examples of situations where someone may have been exonerated, it has nothing to do with whether or not eye witness identification in this case was accurate or whether or not counsel was ineffective in failing to present the expert.

THE COURT: Tie this into our present case, Mr. Phillips.

MR. PHILLIPS: Yes, Your Honor. And if I could be heard to make sure I can possibly get some more leeway. This would be testimony that an expert witness, had they been called at trial, could have testified about based on empirical data that the jury would be able to weigh the credibility. Once you have that expert opinion the jury could assess the credibility as its given the instruction by the judge, and that could be one of the factors that the jury would determine about whether Tyrone Smith's -- we'll tie it up, we'll tie it up, but whether his identification was accurate or not.

Mr. SALTER: Your Honor, just so I can maybe state for the record. There's a case that I argued before the state supreme court called State vs. Wesley Max Myers. And the issue in that case was whether or not an expert in wrongful confessions was improperly prevented from testifying to various examples of people who were wrongfully convicted based on confessions they had given that weren't truthful. The supreme court affirmed the trial judge's ruling excluding that information.

THE COURT: I'm going to give you a little leeway but tie it in to what -- the objection is correct, we're not trying -- or not we're not trying, we're not having a PCR on other convictions on other cases and that's not -- I understand that she's been qualified as an expert and

there's great leeway as to what she relies on to form her opinion, but tie it together.

MR. PHILLIPS: Of course, Your Honor. Just trying to make sure we can push that prejudice prong.

Q With that, going to -- we'll go into specific examples. So in familiarity, what happens if a perpetrator looks similar to the person -- we're talking about eye witness identification, looks similar to a familiar person? How does the research go as far as that's concerned?

A Sure. That can increase -- that could be problematic if a person is familiar with someone, but then identify -- but then the perpetrator is, in fact, a different person but looks similar to that familiar person. Is that the --

Q So does that affect the person who is making that identification's confidence? Because one of the buzz words if your research they use is confidence level of the eye witness, is that -- could you explain? That way we can flesh out the record. In the research, could you explain what the confidence level is for eye witness identification?

A Sure. Confidence as it relates to an eye witness identification is something that's been studied for decades. Researchers have looked at whether there is a relationship between a person's level of confidence in their identification and the accuracy of that identification in order to find out whether you can use confidence level to

predict accuracy, meaning does high confidence correlate with high accuracy. So that's been the point of the research, to look at the relationship between those two things. So over the decades -- over the last couple of decades a lot of research has looked into this relationship, and the result is that there is not a perfect relationship there. You can't use confidence as a perfect predictor of accuracy, so high confidence does not necessarily mean a person is accurate.

Q And so when someone is familiar with an individual and they see someone who they believe is that person, does that affect their confidence level?

A Yes. If someone is familiar with another person they're likely to be even more confident in that identification. They're likely to feel more confident that they are correct than if they are making an identification of a stranger.

Q And based on your training, experience and the research relied upon in your scientific community, does that guarantee an accurate identification?

A It does not.

Q And are these mistakes in a perception common?

A I wouldn't be able to say whether they are common. I can certainly say that people do make these mistakes.

Q And that has been relied upon in the field of memory

and eye witness identification?

A Yes.

Q Now, eye witness researchers, they've studied the confidence in witnesses when they make an expressed identification.

A Yes.

Q And you've reviewed that type of research?

A I have, yes.

Q You've written on that type of research?

A I have not myself written on that research.

Q Have you done any peer review on that type of research?

A I probably have.

Q So it would basically be based on your essentially training and your own personal research.

A It would be based on my analysis of the scientific literature.

Q And so what do scientists look at when they're looking at the confidence level? I know you went into it a minute ago, when they're doing a confidence level of a witness' identification.

A Sure. They're looking at how confident a witness is. And, of course, in these studies researchers are able to know whether an identification is accurate or not because it is simulated study, those kinds of studies that are simulated, the researcher knows whether the witness is

accurate or not. And then looking at how confident that witness is, they are able to determine whether confidence predicts accuracy, and the result is that confidence is not a perfect predictor of accuracy.

Q So going specifically in this case we have a one on one ID, or as it's referred to in the courts a one person show-up. What is a one on one ID as opposed to say a lineup procedure?

A Sure. One on one is a procedure in which one person or one photograph is presented to a witness, and the witness is asked whether or not that person is the perpetrator of the crime, whereas a lineup contains some number of fillers along side the photograph of the suspect.

Q So based on your training, experience and the research in your scientific community, which one is more reliable, a one person show-up or a lineup?

A A lineup.

Q And between the two, what's the major difference that makes one more reliable than the other?

A The major difference is the inclusion of those fillers. The inclusion of fillers is meant to provide some protection against a witness whose memory may be imperfect or even unreliable. You can think of a lineup as being similar to a multiple choice test, and if the witness has a great memory that person should have no problem picking out the person

that they remember, but if they don't then those fillers provide -- are meant to provide protection against the false identification. And so a one on one identification does not -- or procedure does not provide that protection.

Q And so there's one on one, this one person show-up. Is it inherently suggestive in nature?

A Yes, it is.

Q And that's based on your training and experience as an expert opinion?

A Yes. And many things that have been written about it.

Q And going to that, why would that be inherently suggestive?

A Presenting one person to a witness suggests exactly who law enforcement think committed the crime.

Q Has there been empirical research done on one person show-ups that compares -- versus comparison of a lineup procedure?

A Yes.

Q Is some of that research contained in Applicant's Exhibits 2 through 5?

A Yes.

Q And that research is consistent that it is inherently suggestive to have a one person show-up?

A Yes.

Q And so generally the research when it finds -- as far

as the one on one show-up versus lineup procedure, what does it generally find? What is the conclusion of that?
A The conclusion is that there is a greater risk of a false identification when a show-up procedure is used versus when a lineup procedure is used.
Q And so this would be why eye witness identification is the leading cause of wrongful convictions and DNA cases?
A This is one reason, the procedures used, yes.
Q And so do eye witness experts generally support the conclusion that you just made, the opinions that is inherently suggestive overall in the scientific community?
A Yes.
Q So are there guidelines that is discussed in administering a show-up?
A There are guidelines that review the administration of all lineup procedures and show-ups, yes.
Q Where is that published?
A A couple of different places. The Department of Justice published guidelines in 1999 and distributed that to law enforcement around the country that discussed the use of lineups and show-ups and argued against the use of show-ups. And then more recently in one of the exhibits The National Academy of Science Eye Witness Report that was published in 2015 or '16 argued vigorously against the use of show-ups based on all of the scientific data.

Q And so these guidelines they provide of best practices, as far as a one person show-up, is it anywhere mentioned in the best practices or the recommendations of those publications as a reliable method of identification?

A No.

Q And so these guidelines and recommendations, what do they suggest doing? I think you just briefly went over it but if we could just kind of go in, what would the recommendations be? What would be guidelines be to do a show-up with -- to have an accurate reliable result?

A To use a show-up or use a lineup?

Q A show-up, because it's specifically for this case.

A Sure. I'm not sure I'm aware of guidelines that indicate best practices.

Q Specifically based on your training, experience and research that's in your scientific community, would it be recommended based on your opinion to have a one person show-up versions a lineup that fits within those guidelines and best practices? I'm sorry, that was a confusing way to ask the question.

A Sure. It's recommended that a lineup be used.

Q And, of course, there are inherent problems with the way lineups are done, is that fair say?

A There can be.

Q And that's why there's guidelines and best practice

about how to set up a non-suggesting or non-suggestive lineup?

A That's right. There are very specific recommendations on how a lineup should be conducted so that it is not also suggestive.

Q As far as in-court identifications, are there difficulties in assessing the reliability of in-court identifications?

A There are. Because every identification that's made after the first one will always be contaminated by the first one. An in-court identification is not an independent identification, it's always based upon previous identifications that are made. And so in terms of reliability and memory only the first identification counts as completely reliable.

Q And so now start going into the application of the facts of what occurred in Mr. Liverman's trial. The eye witness that made the identification is named Tyrone Smith. Have you had a chance to review his pretrial testimony as well as his trial testimony, including Investigator Joe Gray's testimony in this case?

A Yes.

Q And after reviewing that, specifically we'll kind of walk through some of the factors that come up. So as far as the perceptional characteristics of the incident, is the eye

witness' -- so as far as the factors that you listed earlier, is aging a factor?

A I'm sorry, say that again.

Q Is age a factor? As far as an eye witness identification, can that be a factor?

A Not to my knowledge.

Q And so the person's intellectual ability, is that a factor?

A Not to my knowledge.

Q You said distance of observation, that is a known factor?

A Yes, it is.

Q Luminants, street lights --

A Yes.

Q -- that's a known factor?

A Yes.

Q Weapons presence?

A It can be, yes.

Q And multiple perpetrators, those are all known factors that's in the research data?

A Yes.

Q And in this case out of those factors we have essentially Tyrone Smith making an eye witness identification from a second floor window up to four houses away under either a street light nearby or a -- I guess you

would call it a motion sensored light. Could you go into kind of those factors as far as confidence and the issues that would come with making an identification of someone who has those factors?

A Sure. Those factors make it harder to make an accurate identification. And it really boils down to being able to process information adequately under suboptimal conditions, the distance and the lighting, anything that interferes with a person's ability to perceive all of the information. You don't get all of the information, therefore there's not as much information later to recall.

Q One of the factors that was not just mentioned was that. So to kind of clear the record, in this case you had two identifications. Mr. Smith says he sees Mr. Liverman earlier that day, and there's some inconsistency of the timing, and then during the time of the shooting he ID's him as the person who is the shooter.

A Right.

Q So in looking over just those factors, also during the initial identification during the day, out of the factors we just list regarding the lighting, the distance of observation, the weapons presence, multiple perpetrators, there's also a facial obstruction testified as by Mr. Smith?

A Right.

Q And there was testimony that there was a bandanna over

the person's face?
A Right.
Q And through that testimony that you reviewed there was multiple inconsistencies on those factors?
A Right.
Q In other words, Mr. Smith had provided to --
Mr. SALTER: Your Honor, again, I'm going to have to object to leading. I've let a lot of it go by --
THE COURT: Don't lead the witness.
Mr. SALTER: I don't think counsel is doing it deliberately, but I think that he's mischaracterized some of the testimony of the witness, the eye witness in question.
THE COURT: Rephrase your question so that you're not leading the witness.
MR. PHILLIPS: Thank you, Your Honor.
Q In this case, do you know how many statements Mr. Smith provided police before he testified?
A I don't know exactly.
Q And during his testimony -- but you have reviewed his testimony.
A I have.
Q What about his testimony did you notice regarding those factors?
A That there were some inconsistencies, yes.
Q And part of that went into cross examination regarding

prior statements?
A Right.
Q Now, as far as contact police, when we're directly discussing the one person show-up, what are the problematic or the inherently suggestive things that occurred during this one person show-up?
A Sure. It really has to do with the nature of a show-up in general. The presentation of one person is suggestive on its face to a witness. I also read that on the drive to the show-up the witness likely overheard on a police radio that someone had been caught. That can also be a problem in terms of influencing -- potentially influencing a witness before they've ever arrived on the scene, that the police have who they think committed the crime, that is inherently suggestive.
Q And so I assume you're referring to Investigator Gray's testimony that they had a radio call come in?
A Right.
Q And based on that there was testimony that that's how they knew to come do the one person show-up?
A Right.
Q And that the eye witness that made the identification, Tyrone Smith, was in the vehicle at that time?
A Yes.
Q And when they arrived to that location to do the one

person show-up, where was Mr. Liverman?
A I believe the witness was -- the witness was in the car and Mr. Liverman was outside of the car.
Q And so if you could, I don't know if you need to -- we can certainly give you the transcript to refresh your memory. But again, as far as if Mr. Liverman was in the car when they arrived, would that be a factor that would be inherently suggestive?
A I'm not sure I understand what you're asking.
Q If the police are transporting Tyrone Smith to make an identification of a suspect and when they pull up the suspect is inside the police car, would that also enhance -- be a factor that would be considered?
A It could be, sure.
Q And when Liverman gets out of the car, was he handcuffed?
A I believe so.
Q Would that be a factor that could be inherently suggestive?
A It could be biasing, yes.
Q Now, proximity is also something that's looked at in these one person show-ups, and there certainly was inconsistencies as far as distance testified to by Mr. Smith and Investigator Gray. At the furthest distance, do you remember what Investigator Gray testified to as to how far

they were?
A At the furthest distance I believe around 20 feet.
Q And Tyrone Smith, his testimony, what was the closest distance he said?
A I believe it was around five feet.
Q Would clothing be a bias if there were numerous people during when an identification was made at an earlier perceived event and there were multiple people wearing similar outfits, is that also considered a factor of bias?
A It certainly could be, yes. Because you can never know whether a person is identified based on the clothes or based on that person being the actual perpetrator.
Q And going back to the confident level and familiarity that you testified to as far as the science, regarding that there was testimony at trial that Tyrone Smith knew Mr. Liverman.
A Yes.
Q And, if you could, could you review some of that as far as the way he said he was able to identify Mr. Liverman from prior events?
A Well, I believe that there were several inconsistencies in the things that I read. But the claim was that Mr. Liverman was seen by the witness several times over the years and then even earlier that day, a few times at McDonald's several years prior. That was what I got out of

the testimony.

Q And so to be specific, that the first time the witness had seen Mr. Liverman, he testified to, was say two to three days roughly when they were in elementary school?

A Right.

Q Possibly back when he was in the fifth grade?

A Right.

Q Approximately 12 years old?

A Right.

Q And then at some point saw Mr. Liverman at McDonald's twice?

A Right.

Q At an approximate distance of 15 feet away?

A I don't remember that detail, but --

Q And as far as the inconsistencies that you referenced, one of those would be the fact that not in the statements, not in any previous trial testimony, Mr. Smith does later provide the fact that he said he saw Mr. Liverman at a basketball court within a few days of the murder.

A Right.

Q And then, of course, saw Mr. Liverman, another inconsistency, in the morning versus the afternoon of the murders?

A Right.

Q And so then there's the final identification, which

would be when the shooting actually occurred.
A Right.
Q Now, as far as this familiarity and confidence level, when someone has limited contact with someone over a big period of time, how does that affect the familiarity and the confidence?
A Sure. It's certainly possible to make a misidentification, even if a person feels that they're familiar with another person and that they've interacted a few times over the years. People -- when a person feels like they're familiar with another person they are often able to draw upon that information very quickly and feel more confident based on their sense of familiarity, they express greater confidence. Also, when someone is familiar with another person they often think that they can describe what that person looks like, that they remember what that person looks like much better than they actually do.
Q If you were hired by trial counsel in this case now that you had a chance to review pretrial arguments, testimony as well as testimony presented at trial, would you have been able to assist trial counsel in preparing for their motion to suppress?
A Yes.
Q And what type of arguments could you have helped them craft in preparation for their motion to suppress the

identification?
A Sure. I would have gone extensively through the lineup and show-up identification literature with trial attorney, and gone through the different Biggers criteria for making a reliable identification, and gone through all of the scientific evidence that really undermines several of the Biggers factors. Now that we have 30 years of evidence since that ruling was made we know a lot more about whether or not those criteria are, in fact, reliable indicators of a reliable identification. So I would have gone through all of that with the trial attorneys.
Q And based on your training and experience and the research in the scientific community, would it be your opinion that that would have been helpful for trial counsel to present to the judge at that time?
A Definitely.
Q Now, during that suppression hearing and Biggers, you would have been able to testify to all the matters that you just discussed, tried to go into the data and research that's contained in Applicant's Exhibits 2 through 5?
A Yes.
Q And you would have been able to review and go over the specific correlation that we've made, or corresponding research and data versus the inherently suggestive procedure and factors that essentially contaminate and address an

identification that we just -- that you just testified to today?

A Yes.

Q And as far as the trial testimony is concerned, would it be your expert opinion that you would have been able to assist the trier of fact, the jury, by testifying to essentially the scientific norms, research on eye witness identification and memory?

A Yes.

Q And would that science be related to the reliability of an eye witness identification?

A Yes.

Q And in this case, would you be able to take that expert opinion one step further regarding the reliability of the opinion in this case?

A No.

Q And why would that be?

A I don't testify as to the specific reliability of a particular identification. My role in the courtroom is to provide information about the science in general and what we know about the different factors that can influence the reliability of an identification in general.

Q So essentially to educate the jury --

A Right.

Q -- on what the science is.

A Right.
Q And on what the data is about eye witness misidentification.
A Right.
Q To essentially aide the jury in making the determination regarding the credibility of an eye witness identification?
A That's right.
Q But not to go the next step and say whether it actually was improper.
A That's right.
Q Would you have been able to, just to make sure we tie it up, testify at the pretrial hearing and, of course, provide testimony during trial that in your opinion that it was inherently suggestive as far as a one person show-up?
A Yes.
Q So you would be able to make an expert opinion based on your training and experience and in the course of research in the scientific community that you would have been able to tell the judge in pretrial through your testimony as well as the jury during trial that the one person show-up was inherently suggestive?
A Yes.
Q And you would have walked through those factors that we just went through --

A Yes.
Q -- as to whether that identification was contaminated?
A Right.
Q Based on your training and experience, is it -- essentially in your scientific community, is it believed that expert opinion testimony is needed in eye witness identification cases?
A Yes.
Q And why is that?
A In order for the jury to have all of the information when they are making a decision when they're weighing the evidence. We in the scientific community believe that this kind of evidence may not be common knowledge, probably is not common knowledge to the average lay person, and so we are here to hopefully educate the jury about these different factors that have been shown scientifically to potentially negatively affect the reliability of an identification.
Q So it would help the jury make a determination on the credibility and reliability of an eye witness identification.
A Yes.
Q And as far as the admissibility part of going to the pretrial that we said, of course, you would have been able to have comments regarding -- obviously you don't make that determination as for a judge, but you would have comments

regarding the inherent reliability or unreliability and suggestiveness of the identification done in this case?

A Yes.

MR. PHILLIPS: Just a moment, Your Honor.

(Break in proceedings.)

MR. PHILLIPS: No further questions.

THE COURT: Yes, sir?

Mr. SALTER: Thank you, Your Honor.

CROSS EXAMINATION

BY Mr. SALTER:

Q Dr. McQuiston, you testified earlier, I believe, that you have previously testified in a number of criminal cases?

A I have, yes.

Q How many would that have been?

A Somewhere between 35 and 40.

Q This has always been for the defense, correct?

A It has always been for the defense, yes.

Q And I believe you've testified in one other post conviction relief proceeding?

A In just one, yes.

Q And that would have been Norman Mitchell?

A Yes.

Q Again, on behalf of the inmate, correct?

A Yes.

Q You've never testified for the prosecution; is that

correct?
A Right.
Q What, if any, factual information were you provided about the facts of the case? Were you given a copy of the entire record?
A I don't believe the entire record. I was given excerpts of the original trial testimony, the witness and an investigator, and some of the appellate documents.
Q This has been provided to you by Mr. Liverman's counsel.
A That's right.
Q All right. So they only provided you, as I understand it, with the pretrial testimony of Mr. Smith and the trial testimony of Mr. Smith and Investigator Gray; is that correct?
A Right.
Q And you did not have the testimony of any other witness who testified at trial.
A I don't believe so.
Q But since you did review the in-camera testimony of Mr. Smith, you're aware that trial counsel pointed out many of the factors that you've testified to previously on direct examination, did she not?
A Some of them, yes.
Q For instance, she argued that the one person show-up

was inherently suggestive, did she not?
A Right.
Q And she examined the witness about the various times he had previously seen Mr. Liverman --
A Right.
Q -- correct? And his inability to recall certain details surrounding those times when he had previously seen Mr. Liverman, correct?
A Yes.
Q She examined him about the distance that he had been when he first saw him earlier that day, did she not?
A Yes.
Q As well as the distance between where he perceived -- according to his testimony, where he saw the shooting and where the shooting -- where the shooters were, or shooter, singular.
A Right.
Q She examined about the fact he did not know Mr. Liverman's real name, just knew him as Baby Jesus, right?
A Right.
Q And she examined about the fact Investigator Gray asked him to go with him to see if Mr. Liverman was the person that he had seen as the shooter, correct?
A That's right.
Q Now, prior to going there Mr. Smith had given a

description of -- a physical description of the shooter.
A Yes.
Q And coincidentally he'd given the nickname, had he not?
A Yes.
Q Baby Jesus, correct?
A Yes.
Q So it just so happens that the person they go take him to see is Baby Jesus, correct?
A Right.
Q That's kind of a coincidence? No?
A I can't say.
Q And again, I ask -- you testified earlier, you don't make a conclusion as to the accuracy of a particular identification.
A That's right.
Q Because you're in no better position to do so than say a juror.
A That's right.
MR. PHILLIPS: Objection, Your Honor.
THE COURT: Overruled.
Q Since you were asked about the bandanna across the face, didn't Mr. Smith testify on page 91 of the record that the camouflage bandanna wasn't tied around his face, it was just on his head.
A I would have to review it.

Q But if the record reflects that then you would not dispute that.
A I would not dispute that, no.
Q Now, counsel pointed out that it was dark outside when the identification was made, correct?
A Yes.
Q And that Mr. Liverman was in a police car when Mr. Smith first arrived. And since you were not provided with the entire record, you're unaware of whether or not the record reflects other individuals identifying Mr. Liverman as having been the shooter, correct?
A That's right.
Q Okay. Well, hypothetically if a witness had accompanied Mr. Liverman to the shooting and testified that Mr. Liverman pointed the gun in the direction of the house where the victims were shot and then took off running as Mr. Liverman started shooting, wouldn't that tend to corroborate the eye witness identification?
A It may, but I would have to review that information.
Q Okay. What about if the defendant himself gave a statement to police in which he admitted that he was present at the time of the shooting and had actually fired a weapon, but he did not fire the weapon that was used to murder the children?
A What's the question?

MR. PHILLIPS: Objection, Your Honor. Same kind of argument that we had by opposing counsel about misrepresentation of testimony that was presented and evidence that was presented at trial.

Mr. SALTER: Your Honor, if I might just briefly. The witness --

THE COURT: Lay some foundation. If you can identify a specific part of the transcript you can ask her if she reviewed that.

Mr. SALTER: All right.

THE COURT: But I believe her testimony was she has only reviewed the testimony of Mr. Smith and Investigator Gray.

MR. PHILLIPS: We would just say that's outside the scope of direct as well.

Mr. SALTER: This --

THE COURT: Well, it's cross examination.

Mr. SALTER: Well, this came up -- I'm sorry, during the examination of Investigator Gray.

Q All right. So you had reviewed Investigator Gray's testimony, correct?

A Correct.

Q Are you aware on page 560 of the record, line six through 22 the applicant, Mr. Liverman, gave a statement to Investigator Gray in which he admitted that he had been

present and shot a weapon, I believe it was a .38, but that he did not shoot the rifle, which was the .22.

THE COURT: Let the witness see the transcript if you are asking her to --

Mr. SALTER: Certainly.

THE COURT: -- to comment on what she reviewed. Let her see it.

Mr. SALTER: I apologize, Your Honor.

Q I'm sorry, this is on page 550 of the record.

Mr. SALTER: If I may approach the witness, Your Honor?

THE COURT: Yes, sir.

A Okay.

Q He did testify to that, correct?

A Right.

Q Okay. And you would agree with me that no two people are the same, correct?

A Most likely.

Q Other than perhaps identical twins?

A Right.

Q And that one person's ability to perceive and to remember may be greater than that of another individual, correct?

A Yes.

Q Some people basically have total recall.

A Yes.

Q Okay. And you've never spoken to Mr. Smith, have you?
A No, I have not.
Q Have you ever spoken to Investigator Gray?
A No.
Q Have you spoken to the applicant?
A No.
Q Now, I believe you testified earlier that Applicant's Exhibit 2, which is entitled The Innocence Project's Report To The Committee on Scientific Approaches To Understanding and Maximizing The Validity And Reliability Of Eye Witness Identification And Law Enforcement In Courts. You testified that that was not a biased report, correct?
A That's right.
Q But The Innocence Project itself is biased, is it not?
A No.
Q It's not? What is their purpose? To undermine convictions, correct?
A To undermine convictions? I wouldn't describe it in that way.
Q You wouldn't describe it like that?
A No.
Q So what is your understanding of The Innocence Project?
A To provide post conviction DNA testing, and also to look into various aspects of various cases to assist attorneys in bringing forward potentially new information,

new evidence, et cetera.

Q Would you agree that the shorter the time period between the start of an event, if you will, and an identification would tend to increase the accuracy of identification?

A I do, yes.

Q In this case, wasn't the identification made something like 45 minutes after the shooting occurred?

A It was very short, yes.

Q Now, you testified earlier that there's no direct correlation between confidence in an identification and it's reliability, correct?

A That's not what I testified to.

Q I'm sorry, then I misunderstood, I apologize. Would you please clarify?

A Sure. There is not as strong of a relationship as people would think. You cannot use a person's level of confidence as a perfect predictor of accuracy, in statistical terms we would call it a moderate correlation. So it certainly is not a zero correlation, but it's also not a perfect correlation.

Q Okay. And the familiarity of an individual with another person may increase the confidence of that person's identification.

A It can, yes.

Q And you're not saying that someone who witnessed an event may not have recognized an individual from some time in the past, correct?
A Right.
Q In other words, we see people all of the time, do we not, who we may have gone to elementary school with say or just been casual friends with at some point in our lives and we later see them and we recognize each other, correct?
A Correct.
Q It's not that unusual of an event, is it?
A Right.
Q It happens all the time. All right. I apologize, my note taking is a little bit slow. You testified that there were two sets of guidelines that were published as to -- this is where I got a little confused, was it the -- for conducting a lineup or for the identification procedures generally or --
A Identification procedures generally speaking, yes.
Q One was in 1999 and that was by the federal government?
A Yes.
Q And the other one was a National Associations of Science?
A National Academy of Sciences.
Q National Academy of Sciences, I apologize. And that was in 2015 or 2016?

A Right.
Q Okay. Now, you testified earlier that the Biggers guidelines are inaccurate, the Biggers standards are inaccurate, correct?
A I don't think that's how I framed it, no.
Q The criteria is not accurate.
A There are some problems with some of the criteria, that's --
Q Which criteria?
A The use of confidence to predict accuracy, that's one of them. I believe the framing of the attention criteria is problematic and very misunderstood.
Q Why so?
A I think there is a misunderstanding when it comes to the idea of attention as a cognitive mechanism. It doesn't have to do with whether someone was "paying attention" at the time, it has to do with a person's ability to attend to information that's happening during the time of a crime when there's so many things happening at once, so that can be problematic as well.
Q Okay. Well -- I don't mean to cut you off, but this is not a victim whose identification we're talking about, correct? This is not someone who was a victim of a crime, correct?
A Correct.

Q I know that you've testified before about the effective gun focus, correct?
A Right.
Q But that wouldn't play a role in the identification in this case, would it?
A That's right.
Q He was -- for all we can tell he was safe and in a safe environment.
A That's right.
Q He was by a window in his own home.
A Yes.
Q And making an identification of someone he said he recognized.
A That's right.
Mr. SALTER: One second, Your Honor.
(Break in proceedings.)
Q You were asked about mistakes in perception earlier on direct examination.
A Right.
Q And I believe you said you could not say that was common, correct?
A I know that it happens. I'm not sure that I would use the word common, I don't have exactly the right word used, but it certainly happens to everybody.
Q On occasion.

A Sure.

Mr. SALTER: I don't believe I have anything further, Your Honor.

THE COURT: Anything further of this witness?

MR. PHILLIPS: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. PHILLIPS:

Q If you were able to have provided your expert opinion to the judge and the jury, would both of those individuals have been in a better position after being educated by your expert testimony as a trier of fact and, of course, a judge of the law?

A I would like to think so.

Q And why would you like to think so? What are the specific reasons why the judge and the jury would be in a better position?

A I think it is important to understand the science and the data and look at several decades of scientific research that we base these conclusions on. I think it's important to have that information, because some of the information is counterintuitive. So I think that the idea of confidence and accuracy, I think it is certainly understandable that someone would think that there's a strong relationship between those two things. So some of the scientific conclusions are counterintuitive, but I believe that that's

an important factor here for a judge and jurors to understand the science.

Q And in your scientific community, I asked you this question before, it is preferable that there be expert opinion testimony in eye witness identification cases --

A Yes.

Q -- for that very reason, to educate the judge on the law based on science and the jury based on science.

A Yes.

Q Because that could have an effect on credibility and reliability of an identification.

A Right.

Q Now, in this case there was a discussion by opposing counsel about the camouflage bandanna testimony from Tyrone Smith about a camouflage bandanna being on the head. What wasn't mentioned by the attorney general's office is that there is also testimony in the record on page 91 and 758 and 759 about the black bandanna being over the face.

A Right.

Q Did you read testimony where Tyrone Smith discussed that there was a black bandanna over the face?

A Yes.

Q And there was inconsistencies regarding the different locations necessarily of the bandannas?

A Yes.

Q It was questioned about you being testified -- or that you testifying 30 or 40 times for the defense. I'll be straight, you're sworn and under oath, is everything that you have testified here today your unbiased expert opinion?
A Yes.
Q Are you a "hired gun?"
A No.
Q Because you are being paid by the defense, does that affect your testimony in any way?
A No.
Q Has that ever affected your testimony in anyway?
A No.
Q Based on the questions that you received regarding The Innocence Project, The Innocence Project has exonerated people who have been found guilty; is that correct?
A Yes.
Q And they've exonerated them through DNA evidence.
A Right.
Q And exonerate means that they were found guilty by a jury and later proved to be innocent.
A Yes.
Q So it wasn't necessarily undermining the conviction, it was vindicating the innocent.
A Right.
Q And with that, that's cases where the government had

strongly argued for a conviction in a case.
A Yes.
Q To affirm a conviction. And so with that, is that why you would say that The Innocence Project is an unbiased organization?
A Yes.
Q And the leading cause of wrongful convictions and DNA exonerations, according to The Innocence Project, is what?
A Eye witness identification.
Q And in this case we have eye witness identification.
A Yes.
Q The last thing I would like to touch is the limited familiarity, you said that could be a factor in whether someone's identification was accurate?
A Right.
Q There was testimony in the record that you reviewed that Tyrone Smith didn't actually go to the same elementary school with Mr. Liverman.
A Right.
Q Just that he was in elementary school when he saw him two or three times.
A Right.
MR. PHILLIPS: No further questions, Your Honor.
THE COURT: Anything further from this witness?
Mr. SALTER: Just if I could ask three quick questions,

Your Honor.

THE COURT: Yes.

RECROSS EXAMINATION

BY Mr. SALTER:

Q On redirect you were asked about the black bandanna across the face. You reviewed the record and you're familiar that there were two incidents on the night in question, correct?

A I believe so, yes.

Q Wasn't the testimony concerning the black bandanna across the face related to the first of those two incidents and not the shooting?

A I don't remember.

Q But if the record so reflects then you wouldn't dispute that, would you?

A Right.

Mr. SALTER: Thank you. Nothing further, Your Honor.

THE COURT: Thank you, Professor, you may step down.

MR. GROSS: Your Honor, our next witness is going to be lengthy, could I have a restroom break?

THE COURT: Yes, sir, let's take a short break.

(A recess was taken.)

THE COURT: Mr. Gross, call your next witness.

MR. GROSS: If it pleases the Court, we call Elizabeth Franklin Best.

The witness, ELIZABETH FRANKLIN BEST, was first duly Sworn and testified as follows:

DIRECT EXAMINATION

BY MR. GROSS:

Q Were you one of Chris Liverman's trial lawyers?

A Yes, I was.

Q And before we talk about his case I would like to summarize your background. Could you tell us about your education beginning with college?

A Sure. I went to undergraduate here at USC. Went out to Wyoming, did a masters there, did my law degree in Wyoming. Moved to Washington D.C., got licensed in New York, came home, got licensed in South Carolina. I'm now licensed in New York, South Carolina the 2nd, the 4th, the 5th and the 11th Circuit Courts Of Appeal.

Q Okay. And after you got your law degree I think you said you went to New York for awhile?

A Yes.

Q And how long were you in New York?

A About a year, a little over a year.

Q And what was your practice there?

A Working as a public defender in upstate.

Q And then you moved back to South Carolina?

A Yes. And worked with the Richland County Public Defender's Office from 2000 --

Q And how long were you with them?
A From 2004 to 2006.
Q Okay. And in 2006 where did you work after that?
A I went to go work with Jack Swerling for about a year, and then after that I went to the Office of Appellate Defense. Then in 2012 I went to go work with John Bloom.
Q And that's what you continue to do now.
A Yes, correct.
Q Is it fair to say that all of your legal experience, if not -- has had a heavy focus or emphasis on criminal defense?
A Yes, absolutely.
Q Now, you said you were with the Richland County Public Defender's Office through some time in 2006.
A Yes.
Q And Chris Liverman's trial was in 2006; is that correct?
A Yes.
Q And did you have cocounsel in this case?
A I did. Maxwell Shard and Carolyn Gripp.
Q And were you on Mr. Liverman's case from the beginning or did you take over at some point during the process?
A I believe I had it from the beginning, I'm not 100 percent sure of that.
Q But you were certainly involved with it significantly

before it went to trial.
A Yes.
Q Can you -- I realize it's probably not a very fair question, but can you -- because we have 1,400 or 1,500 pages of transcript here, but can you summarize for the Court sort of in an introductory manner what the State's theory of the case was?
A Yes. So the State's theory of the case was that Chris Liverman was the head of this particular gang, the folks, and that earlier on this particular night there had been some young men who had kind of gone into this neighborhood around like the T.S. Martin area and thrown up some gang signs. And then that later on that evening -- again, this was just the State's theory, but they thought that Chris had gone back into that community trying to shoot some bloods and then sort of unintentionally -- intentionally fired the weapon but hit the victims in this case.
Q And did the defense have a different theory?
A I mean, you know, we knew obviously that somebody had kind of gone into this community and committed murder, but we were very convinced that, in fact, it was not Chris Liverman who had done the shooting.
Q Okay. And did you have a theory as to who did?
A We thought it was more likely that Diego Thompson had been the shooter.

Q And he was one of the witnesses who testified.
A Yes.
Q You used the word convinced a minute ago, was this a case of overwhelming evidence for the State?
A No, not at all. And I think one of the difficulties they had, in particular, was that Chris Liverman had been taken into custody very shortly after the shooting but he had a negative GSR.
Q Okay. And what was the significance -- when you say GSR, you mean gunshot residue.
A Yes.
Q And this is probably obvious, but what was the significance of that fact to the defense?
A Well, it suggested that he, in fact, was not the shooter.
Q Or had not even fired a gun at all.
A Correct.
Q Okay. Now, was there a lot of publicity about this case?
A There was an enormous amount of publicity. In fact, around the time that we were trying to select a jury WIS TV had been running a series on gangs in the Midlands, so every night on television there was like a different kind of, you know, perspective story on the gang problem in this community.

Q Okay. And there were how many victims in this case?
A Two children.
Q And so you had innocent victims. Did that contribute to the publicity, too?
A Yes.
Q Now, you said when you're trying to pick a jury there was sort of a false start in this case, wasn't there?
A Yes.
Q Okay. I'm going to hand you a notebook. If you could turn to tab two in that notebook. And there's a transcript from -- is that August 28th?
A Yes.
Q Of 2006?
A Yes.
Q Was that the first time the case was scheduled to go to trial?
A Yes.
Q And if you could look at pages 12 to 15 of that transcript, please.
A Okay.
Q Do you recall that or do you need a second to review that?
A It appears that this is referring to an article that had been run in the state newspaper on the first day of trial. I believe this is the article that also included Mr.

Liverman's rap sheet and perhaps a mug shot.
Q And if you look at page 12, line 21 it does, in fact, reference a mug shot there, doesn't it?
A Yes.
Q Okay. And if you look at page 14 at line 17 it references the rap sheet, doesn't it?
A Yes.
Q Does it also -- does the article also try to associate Chris' membership in a gang with other criminal activity?
A Yes.
Q And at this point on August 26th -- I mean, August 28th when the case was first called for trial, were you asking for a continuance?
A I believe that's correct, Your Honor -- Your Honor, sorry. I believe that's correct.
Q And what was your concerns about this specific publicity about Mr. Liverman, his mug shot, his rap sheet and allegations of other criminal activity?
A I mean, I was concerned that our jury would be tainted by all of this information, that it would scare them. In fact, it would in fairness.
Q And I'm looking at line 22 on page 12. Were you concerned about whether or not this information that was in the paper that might taint the jury, whether it would be admissible or not admissible for trial?

A Yeah, clearly the mug shot --

MS. MCCALLISTER: Your Honor, I'm sorry, I have an objection. I don't -- maybe I'm missing the connection, but there's no allegations involving pretrial publicity or jury selection or anything pretrial even, so I am just --

MR. GROSS: I can answer that, Your Honor. One of our claims is that her cocounsel, not her, revealed in opening statement the length of pretrial incarceration that Mr. Liverman had. And secondly, that they did not suppress information that was objectively false that was presented by the prosecution that led them to have to call witnesses to show that Mr. Liverman was incarcerated on something entirely unrelated. And they typically argue strategic decisions, strategic decisions, so I'm using this record to establish that Ms. Franklin-Best had a strategy of trying to keep the jurors from knowing about Mr. Liverman's other allegations of criminal conduct, including convictions. And additionally, she also makes an argument -- there's a lot of allegations about the extraordinary amount of gang testimony and character evidence that they presented later on in the case, and some of this is also relevant to that, Your Honor.

THE COURT: All right. I overrule the objection.

MR. GROSS: Thank you.

A Okay. So back to your question. The mug shot would clearly have been inadmissible.

Q And did Mr. Liverman testify at trial?
A No.
Q Okay. And so would his criminal history have been something that would have come into evidence?
A No.
Q Okay. And, of course, there was also case law at the time regarding mug shots and evidence that suggested that somebody had a record for something other than what they were on trial for.
A Yes.
Q Now, are you familiar with Estelle versus Williams?
A Yes.
Q What do you understand that case to be?
A It has been awhile. If you have a copy of the case I'll be glad to look at it, but as I recall it's a U.S. Supreme Court case to process. Okay. So this is a case where the United States Supreme Court established that the State cannot compel an accused to stand before the trial dressed in identifiable prison clothes.
Q And if I could just have you look at this first, I guess, full paragraph on that page.
A Okay. I can quote this, it's 425US501 at 505-506. It says, "Similarly troubling is the fact that compelling the accused to stand trial in prison garb operates usually against only those who cannot post bail prior to trial.

Persons who can secure release are not subjected to this condition. To impose the condition on one category of defendants over objection would be repugnant to the concept of equal justice embodied in the 14th Amendment.

Q And, of course, when you were representing Mr. Liverman you were in the public defender's office, correct?

A Correct.

Q And so he was indigent.

A Yes.

Q And, I mean, even in murder cases sometimes bail is granted and people are able to be released.

A Yes.

Q Now, if you could go to the next tab in that notebook, which it gets into the opening statements -- I mean, gets into the trial of the case. And the trial was actually in November of that year, correct?

A Yes.

Q All right. And so if you could go to page 117 of that transcript and look at lines 18 to 22.

A Yes.

Q And at that point, who was making the opening statement for the defense?

A Maxwell Schardt.

Q And did he relate to the jurors how long Mr. Liverman had been in incarceration prior to trial?

A Yes. He indicates that Mr. Liverman had been incarcerated for 26 months prior to trial.

Q Okay. Now, as part of the State's evidence in this case, did they recover a gun?

A They did.

Q And do you know, was it recovered contemporaneously with the crime, or was it recovered some time later?

A I believe it was recovered some time -- well, I'm not sure.

Q Okay. Well, if I could have you go to page -- does that notebook go as far as page 633?

A Yes.

Q And this is the cross examination of Investigator Gray. If you look at lines 13 and 14, does that indicate when the gun was recovered?

A Yes. It indicates the gun was recovered on October 1st of 2004, which would have been some period after these events occurred.

Q Because these events were in August of 2004.

A Yes.

Q Okay. You were doing cross examination, correct?

A Yes.

Q And what were you questioning the investigator about?

A I was questioning the investigator about the gun trace that had been run on the recovered gun.

Q And how did that come about with the gun trace?
A I don't understand the question.
Q Did law enforcement request a gun trace or did you request it?
A I believe I requested the gun trace.
Q And as a result of this doing the gun trace, did they come back with any results?
A Yes. And they recovered when the gun had been stolen and it was during a period of time when Chris Liverman was incarcerated.
Q Okay. And if you could go over to page 651, and look at page 651 from line three to 652 at line five.
A Okay.
Q Who is asking the questions at this point?
A Margaret Fent of the solicitor's office.
Q She's one of the prosecutors obviously.
A Yes.
Q And this is still Investigator Gray, correct?
A Yes.
Q And if you look at line 24 on page 651, Ms. Fent asked, "Did Diego give a statement about where the defendant got this weapon," do you see that?
A Yes, I do.
Q Who is Diego?
A So Diego was somebody else who lived in the community

who was kind of peripherally involved in this.
Q Is he the one that you thought that was --
A We thought he was likely the shooter.
Q And if you flip the page to 652, what was Investigator Gray's answer?
A Well, that Diego had told law enforcement that Chris Liverman had stolen that weapon a few months prior to the shooting.
Q Okay. And if you go to page -- well, there was a Sergeant Dutton that testified, do you remember him?
A Vaguely.
Q If I told you that he was the one -- an officer that recovered the gun, would that make sense?
A Sure.
Q And then if we go over to page 1096. You probably don't have that, do you?
A I do not.
Q And actually you probably start at 1095 when the witness was called. Would you agree that that is an officer Edmonds from the Columbia Police Department?
A Yes.
Q And who is calling him as a witness?
A Solicitor Barney Giese.
Q Actually --
A Actually Maxwell Schardt, my cocounsel.

Q And at line 17, what incident was he being called to testify about?
A The theft of the gun.
Q And that is, in fact, what he testifies about for the next several pages; is that right?
A That is correct.
Q And then if you go to page 1101 --
A Yes.
Q -- is that an officer Glenn Ross that's being called?
A Yes. Maxwell Schardt is calling Officer Glenn Ross.
Q Is that also about that June 14th, 2004 automobile break-in where the gun was stolen?
A Yes, it is.
Q And is he the evidence technician, for lack of a better description, that processed the car and the weapon?
A That appears to be, yes.
Q And if you could go to page 1135. It looks like you're doing this examination beginning around line 17?
A Yes.
Q Who is that?
A Captain Bowman, the operations -- he's over the operations division at Alvin S. Glenn Detention Center.
Q And if you would, look at page 1135 to 1136, that's his entire examination, isn't it?
A Yes.

Q And what was the purpose of calling him as a witness?
A He established that Chris Liverman was incarcerated from June 2nd of 2004 until June 28th, 2004.
Q And June of 2004 was more than a month, two months prior to -- at least a month prior to the homicides that Mr. Liverman was on trial for?
A That's correct. And during the time that the gun was stolen.
Q Right. And so would you agree that it was objectively false that Chris stole that gun?
A Yes.
Q And having to call a witness to establish that Mr. Liverman was in jail, was that consistent or inconsistent with the strategy of keeping his record from coming in front of the jury?
A It was inconsistent. We would like to have kept that from the jury.
Q And they wouldn't have heard about it if he -- unless he had testified.
A That's right, we introduced that evidence.
Q And are you familiar with the case called Riddle versus Ozment?
A Yes.
Q And do you understand what that stands for?
A That's a prosecutorial misconduct case is how I think

of it.
Q Just looking at what they summarized, the holdings, what are those?
A Sure. That the South Carolina Supreme Court held that the solicitor's failure to disclose impeachment evidence constituted a Brady violation, and that the State was obligated to correct co-defendant's false testimony at trial.
Q Okay. And what was the date that that was decided?
MS. MCCALLISTER: Your Honor, I'm sorry, again this -- this apparently is going to some kind of allegation of a Brady violation or prosecutorial misconduct, which has not been pled.
MR. GROSS: Oh, it has absolutely been pled, Your Honor, that the prosecution presented objectively false evidence that Chris Liverman stole the gun that was used in these crimes. This case that was decided on May 22nd, 2006, which was prior to Mr. Liverman's trial, was available to Ms. Franklin-Best, and I'm getting ready to ask her about were there other ways to have kept the jury from --
THE COURT: Lay some more foundation for your question to tie that into this case.
MR. GROSS: Okay. All right.
Q When the solicitor's office presented the false evidence about Chris stealing the gun, did you believe that

that was something that should have been corrected?
A Yes.
Q Would it have been preferable if the jurors had never heard the false evidence?
A Yes.
Q And would one way to have done that have been to move to suppress that evidence?
A Yes.
Q And if you had moved to suppress that evidence and the judge had granted that motion, would that have kept you from having to call a detention center officer to bring in Chris Liverman's unrelated criminal record?
A Yes.
Q All right. Under Riddle versus Ozment the solicitor had an affirmative duty to correct the false testimony.
A That's correct.
Q And if you had moved for the solicitor to correct the false testimony and that had been granted, would that have avoided the need to call the detention center officer?
A Yes.
Q And could that have been done in a manner that would not have introduced or otherwise called attention to Chris Liverman's record?
A Yes.
Q And was, you know, Riddle versus Ozment, was that

available to you at the time to have done that?
A It was.
Q Okay. Now, Tyrone Smith, do you recall who he was and what his role in this case was?
A As best I recall he is somebody who claims to have been a witness, claimed that he saw the shooting and identified Chris Liverman as the person who did that shooting.
Q Okay. Now, you were here when Dr. McQuiston testified this morning.
A Yes, I was.
Q And during her cross examination there was some questions that the State asked about a witness who said that they were with Chris Liverman when he did the -- allegedly did the shooting, and that was Diego Thompson, right?
A Okay. Yes.
Q All right. Did you consider Diego to be a credible witness?
A No.
Q What was his motive?
A I mean, I think his motive was to --
MS. MCCALLISTER: Well, I would object, Your Honor, that's speculation. She doesn't know what his motive was.
MR. GROSS: Well, she argued to the jury in closing --
THE COURT: If you have something -- ask her if she's familiar with the transcript.

Q You have an independent recollection of this trial; is that correct?
A I do, most of it.
Q And do you recall what you argued in your closing in this case?
A I haven't reviewed my closing, but, you know, I'm pretty sure that we argued that he was a good candidate for being the person who actually did this.
Q And do you know whether or not the -- do you recall whether or not the solicitor tried to argue against that?
A I mean, I'm sure they did.
Q Okay. All right. And really whatever the transcript reflects is what the transcript reflects.
A That's right.
Q Okay. I really want to focus more on Tyrone Smith. He was somebody who had given an identification; is that correct?
A Yes.
Q And did you ask for a hearing on that identification?
A We did.
Q And did the trial judge give you that hearing?
A We were allowed a truncated hearing.
Q Were you allowed to call witnesses?
A Yes, I believe so.
Q Was there a problem that you had at that time?

A I don't understand.
Q A case at that time, the McCloud case?
A Yeah. So there was a case, State v. McCloud, that the State argued did not entitle us to a full Neil v. Biggers hearing, and that's based on the fact that Tyrone Smith claimed to have a preexisting relationship with Chris Liverman.
Q And I'm just going to show you a copy of the supreme court's opinion in Mr. Liverman's case. And would you agree with me that they actually overruled McCloud in Mr. Liverman's case?
A According to the supreme court's opinion it says, "Therefore we overrule McCloud, to the extent the pertinent circumvention of a Neil v. Biggers hearing." Yes.
Q Now, did you or your office hire a witness, an eye witness identification expert?
A We did not.
Q All right. Would that be something that would have been useful to you either in preparing for trial or actually doing the trial?
A Yes, it would have.
Q Okay. And can you explain why that is?
A I mean, I think there were a number of pieces of evidence in this case, but one of the most probative pieces of evidence was the identification. So to have somebody who

would have been able to explain to the jury some of the reliability issues with the identification process I think would have been helpful in assessing the reliability of Tyrone Smith's testimony.

Q And you may have just answered this, but do you think it would have been something that would have been helpful for the jurors to have heard?

A Yes.

Q And if the jurors had heard that, would that have been something that you could have used in your closing argument in this case?

A Yes.

Q And do you think that that could have had an affect on the outcome in this case?

A I do.

Q Was Tyrone Smith as a witness somebody that the solicitor's office relied on heavily?

A I believe so.

Q Okay. All right. I want to switch gears and talk about the expert testimony that was presented about Chris Liverman being involved in a gang.

A Okay.

Q And was this also something that was involved in pretrial?

A I believe so. The record will reflect.

Q Okay. If you could look at that August 28th hearing at page five.
A Okay.
Q Actually if you could go back to page four.
A Okay.
Q Was the State making a motion to try to bring in Chris' involvement in the gang through expert testimony?
A Well, they clearly wanted it, they clearly argued to bring it in. They argued that it was relevant to motive.
Q Okay. And did they have a case that they relied on?
A It appears that they were relying on State vs. Means.
Q And at line 21, another case?
A State v. Price.
Q And if you look at page five going on to page six, they're explaining that they want to present both lay and eye witness testimony; is that correct?
A That appears so.
Q All right. And if you look at page six beginning at line three, what were they wanting to introduce?
A Evidence of the tattoos on his body that they said were indicative from a gang expert who will explain the pitch fork, IGD, which is tattooed on his hand, and that he is a member of a particular group of folk gang members.
Q Okay. And were there other tattoos that they wanted to introduce?

A The teardrop tattoos on his face.
Q Okay. Do you recall what they were wanting to say about the teardrop tattoos?
A Yeah. They wanted to argue that the teardrops were representative of the murderers of the victims in this case.
Q Okay. And was there also a brand that they wanted to introduce?
A That sounds familiar.
Q If I said something about a pitch fork with -- on his back with slash marks, does that refresh your memory?
A Yes.
Q And regarding the teardrops and the pitch fork with a slash mark brands, what was the State wanting to prove with that?
A Well, okay. So they wanted to prove his identification with a gang, but then they also wanted to sort of use it so that the jury would infer sort of like a confession on his face, that the teardrops were symbolic of the victims, and that him putting them on his face means that he actually killed the victims.
Q And with regard to the back, were they also wanting to link that to killing the victim?
MS. MCCALLISTER: Your Honor, I object to the leading.
THE COURT: Rephrase your question.
Q We'll get to that. Can you go to page 112 of that