

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of General Sessions

R. Lawton McIntosh, Judge

Appellate Case No. 2022-001505
Unpublished Opinion No. 2021-UP-278
(Rehearing Denied November 22, 2021)
Ct. of Appeals Appellate Case No. 2017-002011

State of South Carolina,

Respondent,

v.

Jason Franklin Carver,

Petitioner.

AMENDED BRIEF OF THE PETITIONER

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S.C. SUPREME COURT

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QUESTIONS PRESENTED

1. Did the Court of Appeals err by not finding the State's failure to disclose the details of the plea bargaining with Curry violated Petitioner's right to due process?
2. Did the Court of Appeals err by not finding the trial court abused its discretion in denying Petitioner's motion for new trial?

STATEMENT OF THE CASE

Procedural History

Petitioner was indicted by the Anderson County (Grand Jury) for the offense of murder. This murder charge arose from the shooting of Stephen Cameron on March 28, 2016. Woodrow Curry, the self-confessed shooter, implicated Milton Gambrell and herein Petitioner.

Petitioner's case was called to trial on August 21, 2017, before Judge R. Lawton McIntosh and a jury. Donald L. Smith represented Petitioner. Chelsey Moore and Scott McElhannon were the assistant solicitors.

On August 25, 2017, the jury found Petitioner guilty, and he was sentenced to thirty (30) years in prison. A timely notice of appeal was served on September 25, 2017, and the appeal was perfected.

Petitioner was finalizing the record on appeal when he learned Gambrell's trial was taking place. It appears after Petitioner was tried and convicted, Gambrell was charged with "Accessory before the fact to a Felony" and "Solicitation to Commit Murder". Two witnesses from his trial, Detective Marzolf and Curry, were made State witness against Gambrell. These two witnesses offered statements that were either not introduced or were inconsistent with their previous testimonies in Petitioner's case. Petitioner believed these statements should be explored in depth as they go to the very core of the crime for which Petitioner was convicted and

sentenced to thirty (30) years of imprisonment.

On October 19, 2018, Petitioner moved to hold his appeal in abeyance based on newly discovered evidence which the Court of Appeals granted on December 10, 2018.

On December 20, 2018, Petitioner filed his Motion for New Trial in the trial court. He amended the same on December 27, 2018. The trial court summarily dismissed the motion on January 4, 2019. Petitioner moved to reconsider said Order and submitted an Addendum to it on January 17, 2019. The trial judge denied the motion on January 30, 2019.

On February 7, 2019, Petitioner filed his Notice of Appeal and moved to consolidate the two (2) appeals. The Court of Appeals granted the Motion to Consolidate on April 4, 2019.

On July 21, 2021, in an unpublished *per curiam* opinion, the Court of Appeals affirmed Petitioner's conviction. A timely petition for rehearing was filed on August 16, 2021. The Court of Appeals requested a Return and on September 7, 2021, the State filed a Return. On November 22, 2021, the Court of Appeals denied the petition for rehearing. This Court granted Appellant's Petition for Writ of Certiorari in part; and this Brief for Certiorari follows.

Relevant Facts

This incident happened on March 28, 2016. Petitioner had known Gambrell for years and they had worked on cars together for additional income. (R., p. 599, 6.13). On that fateful day, Petitioner went to Gambrell's home to complete work on a car, which he had nearly finished the previous weekend. Petitioner went directly to the vehicle and never entered the household to partake in the festivities which were taking place in the home. Curry, Gambrell and Cameron, were inside the home.

Earlier that day, Cameron had sold his dirt bike to Gambrell's nephew and had no means of getting home. (R., p. 600, 22.25; p. 601, 1.3). Gambrell, who had been drinking the

whole day, was unable to drive, came outside to ask Petitioner to do him the favor of taking Cameron home. Curry could not take him home because he did not have a driver's license. (R., p. 545, 2.15; 603, 4.14). Thereafter, Petitioner commenced to drive Cameron to his home on Sterling Bridge Road, a trip which took 30 minutes to complete and return to Gambrell's home. *Id.*

While Petitioner was away, Gambrell and Curry discovered an ounce of cocaine, was missing. Gambrell and Curry deduced Cameron had taken the cocaine. (R., p. 571, 1.15; 604, 15.18). They attempted to reach Petitioner and Cameron as they traveled to Cameron's home. (R., p. 568, 14.21; 604, 19.21). They were unable to reach them since neither had a phone. *Id.*

Upon Petitioner's return, Gambrell told him he forgot something. He told him he wished he had a phone because he would have told him to turn around and come back. As a result, Gambrell asked him to go back and get Cameron. (R., p. 604, 22.25; 605, 1.6; 646, 8.19). Neither Gambrell nor Curry shared the issue with Carver regarding the missing cocaine. (R., p. 647, 20.24; 650, 2.6). Based on the fact Petitioner was not advised of the missing cocaine, he understood he was bringing Cameron back because either he or Gambrell had forgotten something.

Since Curry insisted on coming with him and because Gambrell's statement was made with the implication that something was simply forgotten, Petitioner understood Cameron wanted to come back. Petitioner decided to use Gambrell's Buick since there would be no room for a third person in his car (with his pit bull and tires in the back seat of his Escort). (R., p. 646, 20.25; 647, 1.19). Petitioner needed an empty back seat for Cameron to sit. *Id.*

Upon nearing Cameron's residence, Petitioner learned Curry had a gun when it fell to the floorboard beneath him (a .38). (R., p. 650, 16.21). Petitioner was confused. He did not

understand the need for a gun. Petitioner immediately started to cajole Curry into leaving the gun in the car. (R., p. 650, 22.25; 651, 1.2). In an effort to ensure the gun did not leave the vehicle, Petitioner remarked there were two of them, as opposed to only Cameron. Clearly, that was simply a fact.

Petitioner's negotiating prompted Curry to leave the .38 in the car. Seeing Curry left the .38 in the car, Petitioner was confident he had averted any unnecessary trouble. At the very least, he had withdrawn from any criminal act for which he may have been implicated. Both men exited the vehicle, with Curry in the front.

The Shooting

Curry went to the door and knocked. There was no response. Thinking Cameron may not be home, Petitioner and Curry made their way back to the car. As they were doing so, Curry noticed Cameron peeking out the window; and he reversed his direction. By the time Cameron got to the front door, Curry was ascending the porch. Curry immediately broached the topic of the missing cocaine. (R., p. 549, 16.25). Cameron denied taking anything; and he pushed Curry, letting him know he was not welcome.

Upon Curry reiterating the accusation, Cameron nearly shoved him off the porch. (R., p. 653, 16.25). Curry rose with a .25, which he testified was in his waistband, and unknown to anyone but him. *Id.* He brought the gun to a stop, pointed directly at Cameron.

Petitioner frantically screamed at him to put the gun away. (R., p. 653, 20.25; 654, 7.10). When it became apparent that Curry would not heed his pleas, Petitioner started toward the car, intending to leave Curry behind. (R., p. 655, 13.15).

In the meantime, Cameron's "cocaine muscles" allowed him to mock Curry and his gun. "What are you going to do, shoot me?" As he finished the sentence, he swiped the gun from

right to left. When Curry regained his control of the gun, he brought it back to where it had been seconds before. He then shot Cameron twice at point blank range.

Leaving the Scene

Petitioner, who had reached the car, heard the gunshots. Frightened and anxious, Petitioner dropped the keys on the floorboard. (R., p. 655, 15.16). As he grasped for them, Curry got in the passenger seat, and demanded he drive. Curry threatened his life and instructed him to leave the lights off and leave the neighborhood. (R., p. 658, 5.7). Unarmed, Petitioner did not put up any resistance; and he did as he was told. Curry also offered that should he feel compelled to tell anyone, he would kill him and his mother. Since he had just seen him kill Cameron, he recognized that this was not a hollow threat.

Both men drove back to Gambrell's home in silence. Thoughts of how and why this occurred were racing through Petitioner's head. He wanted to get Gambrell's car back to him; grab his car and dog; and race to his mother's house. When Petitioner and Curry arrived back at Gambrell's house, Petitioner was emotional and still shaken by the events that night. Curry told Gambrell he shot Cameron, summing it up with, "We got in an argument." And, he said, "It got out of hand." He left Gambrell and Curry arguing about the shooting. (R., p. 661, 6.25; 662, 1.13).

Petitioner's apprehensions were not unfounded. Fifteen (15) minutes later, Curry drove past Petitioner's mother's house in his green Grand Am. (R., p. 664, 2.13).

The Investigation

On the day Cameron's body was found on the front porch of his residence, Officer Eric Russell was assigned the duty of canvassing the neighborhood to see if anyone had seen or heard anything. It was brought to his attention by a fellow officer that there were video surveillance

cameras on two of the homes near the crime scene. At Petitioner's trial, Russell testified the team obtained footage of the video and "skimmed" portions of the video that afternoon.

It appears several videos were collected from the neighbors by the law enforcement officers. Law enforcement officers and/or prosecution had copies of these video surveillance footages on the day following the shooting. Thus, as early as March 29, 2016, the officers and/or prosecution had video surveillance footages which they used to trace the vehicle back to Gambrell's house. A search warrant was executed on Gambrell's house. Curry was found at Gambrell's house, with the .38 and drugs which he promptly admitted were his. Gambrell was not present at the time of the search warrant execution.

In his initial interaction with the investigating officers, Petitioner did not disclose Curry's deed for fear of retribution against him and his mother. It was only when Curry was arrested that Petitioner gathered his nerves and went to the police. He called Gambrell thinking he would also like to get it off his chest. Gambrell suggested they go to the police together. Petitioner intended to assist them with details of the shooting incident. Instead, he was arrested and charged with murder.

After jury selection for Petitioner's trial, Curry admitted to shooting Cameron. (R., p. 793, 12.17). He entered into a plea agreement with the State prosecutor. He pled to Voluntary Manslaughter, but his sentencing was deferred. (R., p. 791, 12.17). Petitioner was tried for Murder.

Due to Curry's testimony, the judge believed this was a drug transaction gone awry. There was no transaction. A transaction in another word for contract, which requires something being given in exchange for something else. The judge charged the jury with the "hand of one is hand of all" doctrine.

At Petitioner's Trial

At the trial, the State and the defense differed over the events which led to Cameron's killing. According to the State, Petitioner was connected to a drug trade, and Curry and Petitioner worked for Gambrell. The State's theory was that Gambrell, Curry and the Petitioner planned to collect on a drug debt, rob or kidnap Cameron. In support of its theory the State presented eleven (11) investigating officers, who did not seem to have been coordinated with one another; and Curry, the self-confessed shooter.

Detective Kreig Marzolf (hereinafter referred as "Marzolf"), the lead investigator in the case, testified to the following: 1) there were two (guns), a .25 and a .38 caliber revolver involved in this case (R., p. 521, 8.10); 2) the .25 was not recovered, but the .38 caliber revolver was found at Appaloosa (R., p. 528, 20.25; 529, 1); 3) the residence where the Buick was found was owned by Gambrell's friend (R., p. 495, 1.15); 4) Petitioner was not provided any gun (R., p. 526, 9.14);(5) Petitioner's fingerprints did not match the one found on the .38 caliber (R., p. 529, 2.9); 6) Petitioner came to the ACSO voluntarily; 7) there had been people who had come and gone from Cameron's house, (R., p. 500; 10.14; 509, 3.6); 8) Angie's friend came to the deceased's house and rolled his body (R., p. 500, 8.11); 9) Daniel White accompanied Detective Henry to the residence where the Buick was found. (R., p. 504, 6.8); 10) Daniel White gave a statement that Christopher's girlfriend, Angela, planned on robbing Cameron (R., p. 507, 23.25; 508, 1.3); 11) ACSO reviewed two videos but did not review all the videos taken during the night of the shooting (R., p. 509, 7.12); 12) he could not say that Petitioner was part of any drug enterprise (R., p. 520, 2.6); 13) Petitioner was not in Gambrell's residence when cocaine was taken (R., p. 525, 23.25; 526, 1); 14) Curry expressed to Petitioner and Mrs. Curry that if they told anyone about anything, he would kill them (R., p. 531, 18.25; 532, 1); and, 15) Petitioner

was a witness to Curry shooting Cameron (R., p. 532, 2.5).

The State also presented Curry as a state witness. The State provided Curry with the opportunity to plead to voluntary manslaughter as opposed to murder. Curry testified among other things, that: 1) he worked for Gambrell for three (3) years (R., p. 570, 5.7); 2) Petitioner took Cameron home and was gone for twenty or thirty minutes (R., p. 570, 14.16); 3) Gambrell discovered that cocaine was missing and told Curry about it (R., p. 570, 21.25) ; 4) Gambrell gave him a gun (R., p. 571, 13.22); 5) he had a .25 caliber gun in his waistband (R., p. 563, 22.25; 564, 1.7); 6) the minute Petitioner pulled in the driveway, Gambrell and Curry told him that he needed to go back and get Cameron (R., p. 572, 21.24); 7) Petitioner had a shiny gun that had a long barrel (R., p. 573, 1. 24.25); 8) there was no plan to kill anybody (R., p. 574, 20.22); 9) he left the .38 caliber in the car (R., p. 574, 1.5); 10) he talked to Cameron and relayed that Gambrel wanted his drugs back or pay for it (R., p. 575, 8.12); 11) Cameron started pushing him and, as a result, he pulled his unknown gun and shot Cameron (R., p. 575, 22.25; 576, 1.3); 12) he was charged with murder but pled guilty to voluntary manslaughter (R., p. 552, 19.25; 553, 1.5); and, 13) despite his many charges before, this was the first time his sentence was deferred (R., p. 553, 6.7; 557, 18.25). The State did not introduce into evidence the gun which Petitioner allegedly used.

The prosecution also presented a surveillance video, taken from one of the deceased's neighbors, showing the traffic onto Cameron's property. It showed the first time Petitioner drove Cameron to his house. Sometime after, it showed the white Buick, that Petitioner drove the second time he went to Cameron's house, as instructed by Gambrell. The surveillance video had a two-hour time gap.

For his part, since Curry threatened Petitioner and his mother's life, Petitioner intended to

establish Curry's propensity for violent behavior. Petitioner called Sheila Curry, the wife of Curry, who admitted that her husband threatened to kill her and her son, if they were to discuss what had happened. (R., p. 583, 13.17).

Petitioner also presented his employer, Timothy Jacobs, who testified that he has known Petitioner since 1999. Petitioner worked at Greenville Transmission Clinic, which Jacobs owns. (R., p. 586, 18.23). He vouched for Petitioner's reliable, loving, hardworking and family-oriented personality. (R., p. 587, 16.25; 588, 13.25; 589, 1.2).

Gambrell was also called as defense witness. The Court refused to allow Gambrell to testify. The judge failed to provide any reason for same. He did allow Petitioner to examine him outside the presence of the jury. The Court indicated to Gambrell that he was strongly opposed to him testifying. Gambrell had his counsel present. Petitioner merely sought to establish he was not at Gambrell's home long enough to learn of the alleged theft.

However, the Court would not have any part of him testifying. The Court stopped Gambrell from testifying, despite the fact his learned counsel was there to offer him advice. The court mandated that Gambrell leave the courtroom with his attorney and exercise his right to remain silent. (R., p. 605, 13.25; 606, 1.25; 607, 1.25; 608, 1.23; and, 609, 1.17).

Petitioner believed that Gambrell would have testified as to what he relayed to Petitioner, he would have exonerated the latter from the murder charge. Since Gambrell could no longer stand in court, Petitioner attempted to introduce the audio recording of Gambrell's police interrogation. The court initially denied Petitioner's request, deciding that it did not meet the standards as set forth in State v. Doctor, 413 S.E.2nd 36, and would not exculpate Petitioner. (R., p. 620, 5.16).

Petitioner also subpoenaed Quay Gambrell to testify on the sale of the dirt bike. When

the witness failed to attend the hearing, the Court refused to extend or continue the trial, ruling that the witnesses' testimonies were immaterial to the guilt of Petitioner. (R., p. 708, 16.25; 709, 1.25; 710, 1-15).

At the close of evidence, the judge charged the jury. The jury's instructions included discussion of murder and the accomplice liability theory. Following the deliberations, Petitioner was convicted of murder on August 25, 2017.

ARGUMENTS

I.

THE COURT OF APPEALS ERRED IN NOT FINDING THE STATE'S FAILURE TO DISCLOSE THE PLEA DEAL WITH ITS WITNESS VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS.

Government disclosure of material, exculpatory and impeaching evidence is part of the constitutional right to a fair trial. Brady v. Maryland, 373 U.S. 83, 87 (1963). This duty to disclose must be fulfilled in a timely manner.¹ Because of the requirement of materiality standard and its emphasis on evidence, the Brady rule has historically been associated with full-blown trials. Ibid. at 86.

Petitioner posits that the Brady rule should be applied to the plea-bargaining process, in particular, to the resulting plea agreement. While there is a dearth of cases that categorically state that the Brady rule applies to plea agreements in South Carolina, some jurisdictions have extended this duty to disclose to "any understanding or agreement between the witness and the State". Ware v. States, 348 Md. 19, 41, 702 A.2d. at 710.

In the *United States v. Bagley*, the United States Supreme Court laid down the doctrine

¹ The Brady rule imposes an affirmative duty on the prosecution to produce at the appropriate time requested evidence that is materially favorable to the accused, either as direct or impeaching evidence. Cited from *Mixon v. Attorney General of State of S.C.*, 538 F. Supp. 190 (D.S.C. 1982).

that plea bargains made between the government and a witness must be fully disclosed to the defendant. United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed.2d 481 (1985). The Court in *Giglio v. United States*, made it mandatory for the prosecutors to disclose promises made to witnesses. Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 64 (1959).

Petitioner argues the prosecutor failed, not only in disclosing the terms of the deal with Curry, but also to do so in a timely manner. The State extended a plea offer to Curry without informing Petitioner nor his counsel. The prosecution provided no recording, or failed to make one, of the time they visited Curry to speak to him on his manslaughter deal. Petitioner's counsel received two (2) video interviews, but the Solicitor withheld (or conveniently did not make) the third. Petitioner was not shown the video, or any other evidence, of exactly what the prosecution offered Curry. (R., p. 278).

In fact, it was during Petitioner's trial he learned of Curry's plea to a lesser offense (Curry's plea hearing took place on the second day of Petitioner's trial). (R., p. 788.798). The State withheld information on its intent to enter into a plea deal with Curry and the terms of the deal agreed upon.

The information about the plea bargaining was crucial in that Petitioner could have used the same as an impeaching material and to show Curry's bias. Curry avoided a potential death sentence for murder and a five (5) to thirty (30) years imprisonment for his drug charges (possession and drug trafficking). These would have been important fodder for cross examination. State v. Williams, 432 S.C. 515, 524, 854 S.E.2d 166, 170 (Ct. App. 2021) (finding trial court erred in refusing to allow Petitioner to cross-examine witness about potential sentencing exposure for pending charges (State v. Gracely, 399 S.C. 363, 731 S.E.2d 880

(2012)).

Had the terms of the plea agreements been disclosed to Petitioner and/or his counsel, there is a substantial probability the outcome of Petitioner's case would have been different. It would cast doubt unto the confidence and competence of the verdict. Because of the suppression of this important impeaching material, Curry's credibility could not really be put into question during his trial. Defense counsel was left to use innuendo and conjecture. As the United States Court of Appeals for the Fourth Circuit explained in Campbell v. Reed, 594 F.2d 4 (4th Cir.1979):

The fact that [the witness] was not aware of the exact terms of the plea agreement only increases the significance, for purposes of assessing credibility, of his expectation of favorable treatment. . . [A] tentative promise of leniency might be interpreted by a witness as contingent upon the nature of his testimony. Thus, there would be a greater incentive for the witness to try to make his testimony pleasing to the prosecutor. That a witness may curry favor with a prosecutor by his testimony was demonstrated when the prosecutor renegotiated a more favorable plea agreement with [the witness] after [the defendant] was convicted. *Id.* at 7-8 (internal citations omitted). See *Boone v. Paderick*, 541 F.2d 447, 451 (4th Cir.1976).
*351

As cited in Wilson v. State, 363 Md 333 (MD2001), 768 A.2d 675 (Mar. 9, 2001).

With no prior knowledge of this deal, and due to lack of time to review a set of materials which the prosecution belatedly submitted a few days before the trial, Petitioner could not have thoroughly cross-examined Curry on this matter. (R., p. 460, 17.25; 461, 1.25; 462, 1.25; and, 463, 1.25), Petitioner was effectively deprived of a reasonable opportunity to prepare his defense.

Not only did the State fail to disclose the plea deal with Curry, but it also changed the terms of the plea agreement without informing Petitioner. Originally, Curry's sentencing was deferred "until after the trial of Mr. Carver". (R., p. 793, 2-7). Petitioner was sentenced on

August 25, 2017. More than a year after Petitioner's conviction, Curry testified against Gambrell in the latter's trial on September 5, 2018. This information was again withheld from herein Petitioner, despite the long-held principle that the obligation to disclose under Rule 3.8(d) is continuing and *it survives a conviction*. Imbler v. Pachtman (1976) 424 U.S. 409, 427, fn.25.²

Petitioner reiterates its claim that this non-disclosure is tantamount to suppression of evidence within the meaning of Brady. The doctrine laid down in Brady v. Maryland provides, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution." Brady v. Maryland, 373 U.S. at 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed. 2d 215.

A reversal is required if the prosecution violates Brady and fails to disclose depriving the defendant of a fair trial, *i.e.* nondisclosed information puts the whole case in such a different light as to undermine confidence in the verdict. Youngblood v. West Virginia, 547 U.S. 867, 870 (2006); U.S. v. Bagley, *supra*; State v. Gathers, 295 S.C. 476, 481, 369 S.E.2d 140, 143 (1988).

Petitioner also challenges the validity of the plea agreement in this case. Curry himself admitted in his Sworn Affidavit as follows:

After Jason Carver's conviction, Greenville dropped drug charges, and I was moved to Anderson. Marzolf and Chelsea said they would suggest voluntary manslaughter if I pled guilty. They also said it would look better if I testified against Carver. For Gambrell, I was offered the fact that Chelsea would have no problem suggesting 15 years provided Gambrell was convicted. However, neither of them spoke up when sentenced to 28 years.

² Footnote 25 reads: "The possibility of personal liability also could dampen the prosecutor's exercise of his duty to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation. At trial, this duty is enforced by the requirements of due process, but after a conviction, the prosecutor also is bound by the ethics of his office to inform the appropriate authority or after-acquired or other information that casts doubt upon the correctness of the conviction. *Cf.* ABA Code of Professional Responsibility § EC 7-13 (1969); ABA, Standards, *supra* § 3.11. Indeed, the record in this case suggests that respondent's recognition of this duty led to the post-conviction hearing which in turn resulted ultimately in the District Court's granting of the writ of the habeas corpus."

(R., p. 278).

It would appear the terms of agreement between the prosecutor and Curry were contingent upon his favorable testimony for the prosecution, as well as the resulting verdict. In availing this outcome-oriented plea bargaining, the prosecution did not only deprive Petitioner of fair trial, as he did not have the same authority and or leverage to elicit favorable testimony for himself, but also subverted the ends of justice. A prosecutor's obligation should be balanced by the overriding goal of seeking justice:

“The United States Attorney is the representative not of the ordinary party to a controversy, but of a sovereignty whose obligation to govern at all; and whose interest thereof, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”

Berger v. U.S., 295 U.S. 78, 88 (1935).³

In an out-of-state case, the California Court of Appeals held that a plea bargain was invalid if it required the witness to testify to a particular version of the facts, and that testimony given pursuant to that bargain was tainted. People v. Medina, 41 Cal. App. 3d 438,455, 116 Cal. Rptr. 133, 145 (1974) (“[A] defendant is denied a fair trial if the prosecution's case depends substantially upon accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion.”).⁴ In *Medina*, the effect of the plea agreement was to place an accomplice under a "strong compulsion" to testify against the defendant in a particular fashion that amounted to scripted testimony. *Ibid.*

Petitioner believes it is opportune to review the plea-bargaining process. This case has highlighted how prosecutorial discretion in plea bargaining caused discrepancies in sentencing

³ S.C. Commission on Prosecution Coordination (Ethics-January 2017).

⁴ Beerman, Y.A., (May 1987). *Accomplice Testimony Under Contingent Plea Agreement*, Cornell Law Review, Vol 72, Issue 4.

outcomes. Defendants with prior criminal records and culpable in the commission of a new offense, are more likely to accept a plea. As a result, their testimony has a greater likelihood of “modification”. In that light, the plea-bargaining process subverts justice.

II.

THE COURT OF APPEALS ERRED BY NOT FINDING THE TRIAL JUDGE ABUSED HIS DISCRETION IN DENYING PETITIONER’S MOTION FOR NEW TRIAL.

After his conviction and while serving his sentence, Petitioner learned of developments that would affect his case—the trial of Gambrell. Petitioner was able to gather evidence that even with his best efforts, would not have been available in his own trial. Armed with these discoveries, Petitioner moved for a new trial; offering as after-discovered evidence the following: 1) the testimonies of Marzolf and Curry, 2) Gambrell’s Sworn Affidavit; and 3) Curry’s Sworn Affidavit.

For courts to grant a new trial based on newly discovered (or after-discovered) evidence, a party must show the new evidence has 1) been discovered since the trial; 2) could not by exercise of due diligence been discovered before the trial; 3) material to the issue of guilt or innocence; 4) not merely cumulative or impeaching; and 5) is such as would probably change the result if a new trial was held. State v. Caskey, 256 S.E.2d 737 (S.C. 1979), cited in Hayden v. State, 299 S.E.2d 854 (S.C. 1983).

The materiality of an evidence is closely linked to its possible effect on the verdict. Evidence is “material if there is a reasonable possibility that the new evidence has the potential to alter the outcome of the lawsuit.” Wilkins v. Sec’y, Dep’t of Health & Human Servs., 953 F.2d 93, 95-96 (4th Cir. 1991) (*en banc*) (quoting Williams v. Sullivan, 905 F.2d 214, 216 (8th Cir. 1990)). Also, evidence is material if it relates to the element of the crime.

For evidence to be cumulative:

Cumulative evidence has been tersely defined as additional evidence of the same kind to the same point. It is apparent that there is a wide difference in meaning between the terms 'of the same kind' and 'to the same point', as used in the various definitions. Newly discovered evidence, to be cumulative, must not only tend to prove facts which were in evidence at the trial, but must be the same kind of evidence as that produced at the trial to prove those facts. If it is of a different kind, though upon the same issue, or of the same kind on a different issue, it is not cumulative. Nor is evidence cumulative in the legal sense which, while tending to establish the same general result, does it by proof of a new and distinct fact. To render evidence subject to the objection that it is cumulative, in the legal sense, it must be cumulative, not with respect to the main issue between the parties, but on some collateral or subordinate fact bearing on that issue. * * * Newly discovered evidence raising a new ground of claim or defense is, of course, not cumulative, nor is evidence explaining an apparent conflict in or contradicting, evidence offered at the trial. Newly discovered evidence of admissions has been held not to be cumulative to evidence of facts and circumstances."

McCabe v. Sloan, 184 S.C. 158, 191 S.E., 905, quoting 20 R.C.L., 297, Sec. 79, as cited in Johnston v. Belk-McKnight Co., Inc., 188 S.C. 149 (S.C. 1938).

Marzolf's testimony

Detective Marzolf testified that during one of their neighbor canvasses, one of his detectives talked to a neighbor who heard about an argument between Cameron and unidentified person wherein the term "dirt bike" was mentioned. (R., p. 804, 20.25; 805, 1.6). This neighbor was not mentioned in previous reports. Neither was it mentioned, by any of the detectives, who testified in the Petitioner's trial.

This evidence is material in that it confirms Petitioner's claims that the State withheld evidence from him. This was the first time that any information about a neighbor overhearing a conversation during the shooting incident was brought to Petitioner's attention. Since this neighbor was not mentioned in any of the police reports nor by any of the deputies who testified during Petitioner's trial, Petitioner had no means to elicit information from the said individual. The neighbor could have testified about what s/he heard at the time of the incident.

Had Petitioner known of the neighbor's encounter with the deputy, Petitioner could have called him to stand as witness in his favor. Petitioner could have used the neighbor's testimony to confirm his claim of lack of criminal motive and intent. Petitioner has consistently asserted he had no knowledge of any transaction between Cameron and Gambrell apart from the sale of the dirt bike. Petitioner has claimed he did not actively participate in the shooting, nor voluntarily ferry Curry back to Gambrell's place. Petitioner could have cross-examined the neighbor about what he saw and heard during the shooting incident.

Marzolf's testimony is not merely cumulative. To be cumulative, it must be additional evidence to that "which was presented at trial as to a fact." U.S. v. Fenn, No. 1:12cr 510 (JCC), 2014 U.S. Dist. LEXIS 46939, at * 9 (E.D. Va. April 3, 2014). His testimony does not add to any fact in the trial because it was, in fact, willfully withheld from Petitioner.

The non-disclosure by the prosecution of the neighbor as a potential witness deprived Petitioner of a potential witness who could have provided exculpatory evidence in his favor; and altered the results of the trial.

Gambrell's Affidavit

In charging Petitioner with the crime of murder under the accomplice liability theory, the State emphasized that Petitioner was armed. The State presented Curry who testified he saw Petitioner with his own gun. This statement was denied by Gambrell in his Sworn Affidavit. (R., p. 280). Gambrell categorically stated Petitioner did not have a gun on the day of the shooting.

This evidence is material because Gambrell was not allowed to testify during Carver's trial. The State has heaped allegations of motive and intent against Petitioner, and the latter was unable to present evidence to support his claims.

Gambrell's Sworn Affidavit is not cumulative evidence. It is not evidence of the "same kind" as it is documentary evidence and not testimonial evidence. Therefore, this is not the "same evidence" contemplated by the law. In this case, the sworn declaration is not cumulative because it does not merely add to a fact presented at Petitioner's trial, it directly contradicts a fact presented therein.

For evidence to be merely impeaching, it involves...unrelated [matter] with issues that had no bearing on those at [the defendant's] trial. Black's Dictionary 830 (9th Ed. 2009) (defining "impeach" as to discredit the veracity of a (witness)), as cited in U.S. V. Robinson, 627 F.3d 941 (4th Cir. 2010). In this case, Gambrell's Affidavit is not evidence of an unrelated matter challenging the credibility of a witness. Gambrell's Affidavit was presented to explain contradicting statements offered by Curry. As defined, evidence explaining an apparent conflict in, or contradicting evidence, is not cumulative. As previously stated, this evidence did not only put in issue the State's main witness but goes to the very element of the crime.

Gambrell's sworn declaration would more likely convince a jury that Petitioner's intent was never to fight, intimidate, coerce, rob or kidnap Cameron. This new evidence debunks the State having established all the elements of the crime of murder, beyond a reasonable doubt. The new evidence also directly challenges Curry's credibility and puts in question the information he offered in Petitioner's trial, considering the plethora of inconsistent statements discovered after Petitioner's conviction. It is material because it weakens the State's theory, casting doubt if there was indeed concert of action and unity in purpose among the three defendants.

Curry's Testimonies

In his Motion for New Trial, Petitioner discussed how Curry had offered conflicting, and sometimes downright false, statements.

During Gambrell's trial. Curry testified that while on the way back to Gambrell's house, he called the latter to inform him about the shooting. (R., p. 109, 9.15). This testimony, which was not elicited by the prosecution during Petitioner's trial, was clearly an attempt by the State to establish its theory of criminal conspiracy and/or complicity among the defendants. This testimony was the State's way of painting a picture of a consigliere calling the mob boss after he had done the dirty deed on his behalf. Gambrell had denied Curry's claims. In his Sworn Affidavit, Gambrell belied Curry called him as he claimed Curry had no phone with him at that time. (R., p. 280).

Curry also testified for the first time he pulled a gun to intimidate Cameron during their confrontation. This information was not offered during Petitioner's trial, where Curry declared he shot at Cameron in self-defense. Petitioner believed this statement was purposely added to Curry's testimony to emphasize intent and/or malice on the part of Gambrell to use force (or aggression) in their interaction with the deceased.

It is important to note that these additional testimonies by Curry were purposely drawn by the prosecutor in Gambrell's trial but were never propounded during Petitioner's trial. These instances strengthen Petitioner's arguments of prosecutorial abuse of discretion.

Curry's Sworn Affidavit

Petitioner has also argued Curry has offered too many conflicting and illogical statements for his testimonial evidence to be considered reliable. These inconsistent and sometimes illogical statements can only be attributed to the plea deal which Curry accepted. Curry has confirmed this in his Sworn Affidavit.

Marzolf's testimony, Gambrell's Sworn Affidavit, Curry's inconsistent statements, additional declarations, extension of deferred sentence were all discovered after Petitioner's trial.

They could not have been discovered prior to or during his trial by exercise of due diligence because they were deliberately withheld by the prosecution.

Curry was the only witness linking both Petitioner and Gambrell to the shooting. The prosecutor built its case against Petitioner and Gambrell around Curry's testimony. As such, his testimony was material to the determination of the guilt of his co-defendants. Curry's credibility as a witness was an important issue in this case. Any evidence of any understanding or agreement regarding his sentencing would be relevant to his credibility. *Giglio*, *supra*. Petitioner had the right to cross-examine the circumstances surrounding the extension of Curry's deferred sentence as this goes to the latter's motive and credibility.

Courts have long held that "(W)hen the reliability of a given witness may well be determinative of guilt or innocence, non-disclosure of evidence affecting credibility falls within the general rule." *Giglio*, *supra*.

Some out-of-state cases recognize there are special circumstances where a motion for new trial based on impeaching evidence discovered after trial may be granted. The case of *U.S. v. Custis* cited cases where new trial was granted on the basis of newly discovered impeachment evidence. *U.S. v. Taglia*, 992 F.2d 413, 415-416 (7th Cir. 1994) as cited in *United States v. Custis*, 988 F.2d 1355, 1360 (4th Cir. 1993).⁵ In *Taglia*, the 7th Circuit court held that "(I)f the government rested entirely on the uncorroborated testimony of a single witness who was discovered after trial to be utterly unworthy of being believed because he had lied consistently in a string of previous cases, the district judge would have the power to grant a new trial in order to prevent an innocent person from being convicted." *Id. at 415*.

The 2nd Circuit in the case of *United States v. Sanchez* emphasized a motion for new trial

⁵ This case noted possible exception, but the Court did not find the requirements for exception satisfied in this particular case.

should be granted “only with great caution” such as when there is “real concern that an innocent person may have been convicted”. United States v. Sanchez, 969 F.2d 1409, 1419 (2nd Cir. 1992) as cited in Custis, supra.

In this case, Curry exhibited a propensity to lie and/or change his story as it suits him. To put Curry’s statements in perspective, Petitioner introduced his Sworn Affidavit briefly explaining the terms of his plea bargain with the prosecution.

In sum, the new evidence submitted by Petitioner satisfied the requirements for the granting of a new trial based on newly discovered or after-discovered evidence. Unfortunately, the trial court denied Petitioner’s motion without ruling on the arguments raised in his Motion for New Trial. The trial court Order merely stated it found “competent evidence (was) submitted to sustain the jury’s verdict. (R., p. 4). Without explaining how it deemed Petitioner’s new evidence as not material, merely cumulative and would not have changed the result, the Court of Appeals erred in affirming the trial court’s decision and in turn not finding abuse of discretion on the part of the trial court.

Finally, the South Carolina Court of Appeals affirmed the granting of a new trial because the prosecution did not disclose its deal with a testifying co-defendant in State v. Dean, 427 S.C. 92 (S.C. Ct. App. 2019). The failure to disclose resulted in a denial of due process and the right to confront the witness. Ibid.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to issue Writ of Certiorari on this issue, reverse the decision of the Court of Appeals, and set aside the trial court’s ruling for violation of Petitioner’s due process.

In the alternative, remand the case to the Circuit Court for the purpose of retrying the case,

allowing Appellant to introduce the evidence associated with the State offering leniency to Curry in exchange for the successful prosecutions of his co-defendants. It would also provide the opportunity to show a jury of his peers how the State knowingly offered contradictory testimony from the same individual in two (2) different trials for the mere purpose of *winning*. Most importantly, it would allow Appellant to prove his innocence once and for all.

Respectfully submitted by:

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