THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. 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Unpublished Opinion No. 2021-UP-278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 APPENDIX FOR CERTIORARI

Respectfully submitted by:

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October 18, 2022.

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In The Court of Appeals

The State, Respondent,

v.

Jason Franklin Carver, Appellant.

Appellate Case No. 2017-002011

Appeal From Anderson County
R. Lawton McIntosh, Circuit Court Judge

Unpublished Opinion No. 2021-UP-278
Submitted June 1, 2021 – Filed July 21, 2021

AFFIRMED

Donald Loren Smith, of Attorney Office of Donald Smith, of Anderson, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General W. Jeffrey Young, Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General Melody J. Brown, all of Columbia, for Respondent.

PER CURIAM: In this criminal matter, Jason Franklin Carver appeals his conviction for murder. Carver argues the trial court violated his due process rights

and erred in (1) denying his motion for a new trial, (2) charging the jury on "the hand of one, hand of all" doctrine, and (3) failing to direct a verdict in his favor. We affirm.

1. We find the trial court did not abuse its discretion in denying Carver's motion for a new trial on the basis of after-discovered evidence. *See State v. Garrett*, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002) ("[T]he grant or refusal of a new trial is within the trial [court's] discretion and will not be disturbed on appeal without a clear abuse of that discretion."); *State v. Hughes*, 346 S.C. 339, 342, 552 S.E.2d 35, 36 (Ct. App. 2001) ("An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law.").

The evidence that Carver asserts warrants a new trial was not material and is merely cumulative to the evidence presented at trial; it would not have changed the result if a new trial was granted. *See State v. Spann*, 334 S.C. 618, 619–20, 513 S.E.2d 98, 99 (1999) ("In order to prevail in [a] new trial motion, [the] appellant must show the after-discovered evidence[] (1) is such that it would probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to the trial; (4) is material; and (5) is not merely cumulative or impeaching.").

2. We find the trial court did not abuse its discretion in denying Carver's motion for a new trial on the basis that he was deprived of a fair trial. *See Garrett*, 350 S.C. at 619, 567 S.E.2d at 526 ("[T]he grant or refusal of a new trial is within the trial [court's] discretion and will not be disturbed on appeal without a clear abuse of that discretion.").

The State filing different charges against Carver and his two codefendants did not deprive him of a fair trial. The State has prosecutorial discretion, and Carver failed to establish a claim for selective prosecution. *See Ex parte Littlefield*, 343 S.C. 212, 218, 540 S.E.2d 81, 84 (2000) ("The South Carolina Constitution and case law place the unfettered discretion to prosecute solely in the prosecutor's hands."); *State v. Geer*, 391 S.C. 179, 195, 705 S.E.2d 441, 449 (Ct. App. 2010) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." (alteration in original) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978))); *id.* at 194, 705 S.E.2d at 449 (finding that to establish a claim for selective prosecution, a defendant must demonstrate (1) he was singled out for prosecution while others who were similarly situated were not prosecuted for

similar conduct and (2) the discriminatory selection for prosecution was based on an impermissible ground).

The trial court also did not err in denying Carver a new trial based on his codefendant's deferred sentencing. *State v. Wright*, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977) ("An unsentenced codefendant is a competent witness for the State.").

Further, the State's failure to provide Carver with a recording of its meeting with his codefendant prior to trial or with information regarding his codefendant's plea bargain did not deprive Carver of a fair trial. The court adjourned for the day to allow Carver the opportunity to review the tape-recording that was withheld from him prior to trial. Therefore, Carver was aware of his codefendant's plea bargain and sentence deferment, and Carver was able to cross-examine him regarding any negotiations with the State. *See* Rule 5(a)(2), SCRCrimP ("[T]his rule does not authorize the discovery or inspection of . . . statements made by prosecution witnesses or prospective prosecution witnesses."). Thus, the trial court did not err in denying Carver a new trial. *See State v. Newell*, 303 S.C. 471, 476, 401 S.E.2d 420, 423 (Ct. App. 1991) ("Rule 5(d)(2), [SCRCrimP] . . . gives the court a broad discretion in deciding what should be done whe[n] material that should have been produced in response to an earlier request does not become known until during or just before the trial."); *id.* at 476, 401 S.E.2d at 423–24 (finding the trial court did not abuse its discretion in refusing to suppress statements because the court recessed trial to allow the defendant the opportunity to interview a witness); *State v. Kerr*, 330 S.C. 132, 150, 498 S.E.2d 212, 221 (Ct. App. 1998) ("Sanctions for noncompliance with disclosure rules are within the discretion of the trial [court] and will not be disturbed absent an abuse of discretion.").

3. We find the trial court did not err in refusing to direct a verdict in Carver's favor because the State produced evidence of Carver's presence at the scene of the shooting as a result of an arranged plan to undertake an illegal act. *See State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006) ("When reviewing a denial of a directed verdict, this [c]ourt views the evidence and all reasonable inferences in the light most favorable to the [S]tate."); *id.* ("A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged."); *State v. Bennett*, 415 S.C. 232, 235, 781 S.E.2d 352, 353 (2016) ("[An appellate c]ourt's review is limited to considering the existence or nonexistence of evidence, not its weight."); *Weston*, 367 S.C. at 292–93, 625 S.E.2d at 648 ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, [an appellate court] must find the case was properly

submitted to the jury."); *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002) ("Under the 'hand of one is the hand of all' theory [of accomplice liability], one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose."); *State v. Thompson*, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct. App. 2007) ("'[P]resence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a [principal].'" (second alteration in original) (quoting *State v. Hill*, 268 S.C. 390, 395–96, 234 S.E.2d 219, 221 (1977))).

4. We find the trial court did not violate Carver's due process rights when it refused Carver the opportunity to call his codefendant as a witness. Because Carver's codefendant made clear he would invoke his Fifth Amendment right against self-incrimination on the stand, it was desirable that the jury not have the ability to draw any inferences from the invocation. *See State v. Hughes*, 328 S.C. 146, 150, 493 S.E.2d 821, 823 (1997) ("It is desirable the jury not know that a witness has invoked the privilege against self-incrimination since neither party is entitled to draw any inference from such invocation."); *id. at* 152, 493 S.E.2d at 823 ("[N]either the [S]tate nor the defendant should be allowed to call witnesses who either side knows will invoke the Fifth Amendment in front of the jury and then be subject to inferences in a form not subject to cross-examination.").

5. We find the trial court neither abused its discretion nor denied Carver his right to due process when it denied his motion for a continuance to present his codefendant's nephew as a witness because the testimony of that witness would have been cumulative.[1] *See State v. Colden*, 372 S.C. 428, 437, 641 S.E.2d 912, 917 (Ct. App. 2007) ("The granting or denial of a motion for a continuance is within the sound discretion of the trial [court]."); *id.* at 435, 641 S.E.2d at 916 ("Reversals for the denial of a continuance 'are about as rare as the proverbial hens' teeth.'" (quoting *State v. McMillian*, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002))); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (finding the trial court did not abuse its discretion in denying the defendant's motion for a continuance for

[1] Carver argues two witnesses he wished to call were unavailable. However, his appeal does not contain any arguments related to the second witness and that witness was not mentioned by name. Therefore, we find any argument as to the second witness was abandoned. *See State v. Addison*, 338 S.C. 277, 285, 525 S.E.2d 901, 906 (Ct. App. 1999) ("Conclusory arguments constitute an abandonment of the issue on appeal.").

the purpose of locating two alibi witnesses because two separate alibi witnesses had already testified and any additional testimony would have been cumulative).

6. We find the trial court did not abuse its discretion or deny Carver his right to due process when it did not allow him to recall a detective as a witness because Carver was able to cross-examine the detective as to the relevant subject matter.[2] *See State v. Sullivan*, 277 S.C. 35, 46, 282 S.E.2d 838, 844–45 (1981) (applying an abuse of discretion standard of review when determining whether the trial court erred in permitting the State to recall a witness), *superseded in part on other grounds by* Rule 801(d)(2)(E), SCRE, *as recognized in State v. Gilchrist*, 342 S.C. 369, 372 n.1, 536 S.E.2d 868, 869 n.1 (2000); *State v. Gillian*, 360 S.C. 433, 449, 602 S.E.2d 62, 71 (Ct. App. 2004) ("The Confrontation Clause guarantees an accused the right 'to be confronted with the witnesses against him.'" (quoting U.S. Const. amend. VI)); *id.* at 449–50, 602 S.E.2d at 71 ("The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence."); *id.* at 450, 602 S.E.2d at 71 ("Specifically included in a defendant's Sixth Amendment right to confront the witness is the right to meaningful cross-examination of adverse witnesses.").

7. As to Carver's assertions that (1) he should have been granted a new trial and was denied due process because he was not informed of the charges against him; (2) the trial court erred in charging the jury on the "hand of one, hand of all doctrine"; (3) his due process rights were violated by the trial court's efforts to explain his codefendant's Fifth Amendment rights; and (4) his rights to due process and a fair trial were impaired because the trial court's actions suggested a lack of neutrality, we find these arguments are unpreserved for appellate review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal.").

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[2] Carver also argues the trial court erred by not allowing him to recall another witness. However, his appeal did not make any arguments or cite any authority related to this witness. Therefore, we find this argument was abandoned. *See Addison*, 338 S.C. at 285, 525 S.E.2d at 906 ("Conclusory arguments constitute an abandonment of the issue on appeal.").

AFFIRMED.[3]

WILLIAMS, KONDUROS, and HILL, JJ., concur.

[3] We decide this case without oral argument pursuant to Rule 215, SCACR.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of General Sessions

R. Lawton McIntosh, Judge

Appellate Case No. 2017-002011
Case Number: 2016A05324

State of South Carolina, Respondent,

v.

Jason Franklin Appellant, Appellant.

PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

Pursuant to SCACR Rule 22 (a) and SCACR Rule 240(i), Appellant Jason Appellant, respectfully petitions this Court for a Rehearing of Opinion 2021-UP-278, filed July 21, 2021. Appellant respectfully submits the Court overlooked or misapprehended his arguments and evidence. (Kennedy v. S.C. Retirement System, 349 S.C. 531, 564 S.E.2d 322 (2001), Rehearing is warranted when the Court has overlooked or misapprehended an argument.). In support of this Petition for Rehearing, the attention of this Honorable Court is directed to material points of fact and law that were seemingly overlooked in the Appeal.

SUMMARY OF ARGUMENTS

This Honorable Court affirmed the trial court's denial of Appellant's Motion for New Trial based on after-discovered evidence, finding it did not abuse its discretion. This Court concluded that statements offered by Woodrow Curry, Detective Marzolf and James Milton

Gambrell in the latter's trial, were not in the nature of newly discovered and/or after-discovered evidence that would warrant a new trial. This Honorable Court declared the statements were not material and merely cumulative. (Unpublished Opinion No. 2021-UP-278, July 21, 2021, p. 2).

Appellant avers this Honorable Court misappreciated the import of the offered testimonial statements by aforesaid witnesses and believed the same are not merely cumulative. Appellant believes he was able to demonstrate the testimonial evidence, not only contradicts Curry's statements in Appellant's trial that led to his conviction, but also seriously undermined Respondents' theory of accomplice liability. This evidence, if it had been presented, would have changed the jury's verdict. The additional proof calls into serious question whether Appellant's conviction was anything more that a creation of the prosecution, its star witness and the rulings of the Court which prevented the defense from presenting witnesses and evidence.

Contrary to this Court's opinion, Appellant believes the prosecution's acts and statements as well as the trial court's actions towards the case deprived Appellant of a fair trial. Appellant asserts the prosecution abused its discretion. Its plea-bargaining arrangement and deferral of sentencing for the shooter in the case made his testimony nothing more than lip service for whatever the State sought in two (2) separate trials. Actions of the prosecution and Judge, who prevented Appellant from defending himself in earnest, were an affront to the truth-seeking mission of criminal justice system. This Court failed to appreciate the trial judge's acts and statements demonstrated bias against herein Appellant. The trial judge's actions and pronouncements were prejudicial to Appellant, and violative of his due process rights. This Court's Opinion ignored a fundamental Constitutional aspect of the argument, thus, the need for this Petition.

Appellant also submits this Court erred in affirming the denial of directed verdict.

Respondents failed to produce evidence tending to prove the elements of murder, the crime for which Appellant was charged. Key facts discussed in the summary of the case were omitted in the discussion of the charges hurled against Appellant.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Appellant herein appeals his conviction of murder, under the accomplice liability doctrine (otherwise known as "the hand of one is hand of all"). Appellant, together with Woodrow Curry (hereafter Curry) and Milton Gambrell (hereafter Gambrell) were charged with different offenses for the death of Stephen Cameron (hereafter Cameron): Appellant was charged with murder, Curry pleaded guilty to voluntary manslaughter, while Gambrell was charged with solicitation to commit armed robbery.

This incident happened on March 28, 2016. Appellant had known Gambrell for years and they had worked on cars together for additional income. (R., p. 599, 6.13). On that fateful day, Appellant went to Gambrell's home to complete work on a car, which he had nearly finished that weekend. Appellant 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, p. 1.3). Gambrell, who had been drinking the whole day, was unable to drive, came outside to ask Appellant 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. 603, 4.14; p. 545, 2.15). Thereafter, Appellant commenced to drive Cameron to his home on Sterling Bridge Road, some 15 to 20-minute drive away from Gambrell's home. *Id.*

While Appellant 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; p. 604, 15.18). They attempted to reach Appellant and Cameron as they traveled to Cameron's home. (R., p. 568, 14.21; p. 604, 19.21). They were unable to reach either one as Appellant had no mobile phone. *Id.*

Upon Appellant'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 & p. 605, 1.6; p. 646, 8.19). Neither Gambrell nor Curry shared the issue regarding the missing cocaine. (R., p. 647, 20.24; p. 650, 2.15). They did not want to take the chance that Appellant would refuse to make the return trip. Based on the fact Appellant was not incorporated into the cocaine issue, he understood he was merely 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 implication that something was simply forgotten, Appellant understood Cameron wanted to come back. Appellant 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; p. 647, 1.19). Appellant needed an empty back seat for Cameron to sit. *Id.*

Upon nearing Cameron's residence, Appellant discovered Curry had a gun on his person (a .38). (R., p. 650, 16.21). Appellant was confused. He did not understand the need for a gun. Appellant immediately started to cajole Curry into leaving the gun in the car. (R., p. 650 22.25 & p. 651, 1.2). In an effort to ensure that the gun did not leave the vehicle, Appellant remarked that there were two of them, and only Cameron. Clearly, that was simply a fact.

Appellant's negotiating prompted Curry to leave the .38 in the car. Seeing that Curry left the .38 in the car, Appellant was confident that 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 got out of the vehicle, with Curry in the front.

AT CAMERON'S PLACE: The Shooting

Curry went to the door and knocked. There was no response. Thinking Cameron may not be home, Appellant 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. He pushed Curry and let him know that he was not welcome.

Upon Curry reiterating the statement, Cameron nearly shoved him off the porch. (R., p. 550, 14.25; p. 653, p. 16.25). Curry rose with the .25, which he testified was in his waistband, and unknown to anyone but him. *Id.* He brought the gun to a stop and pointed it directly at Cameron.

Appellant frantically screamed at him to put the gun away. (R., p. 653, 20.25 & p. 654, 7.10). When it became apparent that Curry would not heed his pleas, Appellant started toward the car, intending to leave Curry behind. (R., p. 655, 6.23).

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.

AFTER THE SHOOTING

Appellant, who had reached the car, heard the gunshots. Frightened and anxious, Appellant 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, 17). Unarmed, Appellant 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 Appellant'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 Appellant and Curry arrived back at Gambrell's house, Appellant was emotional and still shaken by the events that night. Curry told Gambrell he shot Cameron, summing it up with a generic statement that stuff happens. He left Gambrell and Curry arguing about the shooting. (R., p. 661, 6.25, & p. 662, 1.10).

Appellant's apprehensions were not unfounded. Fifteen (15) minutes later, Curry drove past Appellant's mother's house in his green Grand Am. (R., p. 664, 2.19).

THE INVESTIGATION

The next 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 Appellant'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 amounting to over fifty (50) hours 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, Appellant did not disclose Curry's deed for fear of retribution against him and his mother. It was only when Curry was arrested that Appellant 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. Appellant intended to assist them with details of the shooting incident. Instead, he was arrested and charged with murder.

Prior to Appellant's trial, Curry admitted to shooting Cameron. 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). Appellant 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 is 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 APPELLANT'S TRIAL

At the trial, the State and the defense differed over the events that led to Cameron's killing. According to the State, Appellant was connected to a drug trade, and that Curry and Appellant worked for Gambrell. The State's theory was that Gambrell, Curry and the Appellant 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, 8.23); (2) the .25 was not recovered, but the .38 caliber revolver was found at Appaloosa (R. p. 528-529, 20.1); (3) the residence where Buick was found was owned by Gambrell's friend (R. p. 495,11.15); (4) Appellant was not provided any gun (R. p., 526, 3.14); (5) Appellant's fingerprints did not match the one found on the .38 caliber (R. p. 529, 2.9); (6) Appellant came to the ACSO voluntarily; (7) there had been people who had come and gone from Cameron's house, (R. p. 500; p. 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, lines 23-25& pp. 508, lines 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 Appellant was part of any drug enterprise (R., p. 520, 2.6); (13) Appellant was not in Gambrell's residence when cocaine was taken (R. p. 525-526, 23 .1); (14) Curry expressed to Appellant and Mrs. Curry that if they told anyone about anything, he would kill them (R. 531-532, 18.1); and, (15) Appellant 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) Appellant 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; p. 390, 4.12); (4) Gambrell gave him a gun (R. p. 5 71, 13 .15); (5) he had a .25 caliber gun in his waistband (R. p. 563-563); (6) the minute Appellant pulled in the driveway, Gambrell and Curry told him that he needed to go back and get Cameron (R. p. 572, 21.24); (7) Appellant had a shiny gun that had a long barrel (R. p. 573, 22.25); (8) there was no plan to kill anybody (R. p. 574, 20.25); (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, 22.4); (12) he was charged with murder but pled guilty to voluntary manslaughter (R. p. 553, 4.5); and, (13) despite his many charges before, this was the first time his sentence was deferred (R. p. 557). The State did not introduce into evidence the gun which Appellant 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 Appellant drove Cameron to his house. Sometime after, it showed the white Buick, that Appellant drove the second time he went to Cameron's house. The surveillance video had a two-hour time gap.

For his part, since Curry threatened Appellant and his mother's life, Appellant intended to establish Curry's propensity for violent behavior. Appellant 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).

Appellant also presented his employer, Timothy Jacobs, who testified that he has known Appellant since 1999. Appellant worked at Greenville Transmission Clinic, which Jacobs owns. (R. p. 586-587, 20.15). He vouched for Appellant's reliable, loving, hardworking and family-oriented personality. (R. p.587-589, 16.2).

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 Appellant 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. Appellant merely sought to establish he was not at Gambrell's home long enough to learn of the alleged theft and, therefore, could not have been part of any conspiracy to take it back.

However, the Court would have not 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. 605-609, 1.12). The Court released Gambrell from the Appellant's subpoena and sent him on his way.

Appellant believed that Gambrell would have testified as to what he relayed to Appellant. That testimony would have exonerated the latter from the murder charge. Since Gambrell could no longer stand in court, Appellant attempted to introduce the audio recording of Gambrell's police interrogation. The Court initially denied Appellant'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 Appellant. (R. p. 620, 5.16). Of course, the State was allowed to play it in Gambrell's trial.

Appellant 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 Appellant. (R. p. 709,7.25 & p. 710, 1-16). The Judge determined facts which is the task of the jury.

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, Appellant

was convicted of murder on August 25, 2017. He moved to vacate or arrest the verdict; or, in the alternative grant a new trial, but was denied in an Order, dated September 14, 2017.

POST-TRIAL: APPEAL AND MOTION FOR NEW TRIAL

Appellant perfected his appeal. (R. p. 22). He was finalizing the record on appeal when he learned of the trial for Gambrell. Gambrell was charged with "Accessory before the fact to a Felony" and "Solicitation to Commit Murder". Detective Marzolf and Curry were made State witness against him. These two witnesses offered statements that were either not introduced or ran inconsistent with their previous testimonies in Appellant's case. Appellant believed that these statements should be explored in depth as they go to the very core of the crime for which Appellant was convicted and sentenced to thirty (30) years of imprisonment.

Appellant moved to hold his appeal in abeyance based on newly discovered evidence on October 19, 2018, which this Court granted on December 10, 2018.

In the trial court, Appellant filed his Motion for New Trial on December 20, 2018. He amended the same on December 27, 2018, which was summarily denied on January 4, 2019. Appellant moved to reconsider the said Order on January 14, 2019 and submitted an Addendum to it on January 17, 2019. The trial judge denied the motion on January 30. 2019.

On February 7, 2019, Appellant filed his Notice of Appeal and moved to consolidate the two (2) appeals. This Court granted the Motion to Consolidate on April 4, 2019. On July 21, 2021, the Court of Appeals, through Justice Williams, Konduros and Hill, (hereafter referred as Panel) issued its Unpublished Opinion No. 2021-UP-278, affirming the trial court's denial of Motion for New Trial and denying Appellant's Appeal. Thus, this Petition.

ARGUMENTS

I.

THE PANEL DECISION OVERLOOKED FACTS AND LAWS IN DENYING THE MOTION FOR NEW TRIAL BASED ON AFTER- DISCOVERED EVIDENCE.

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 have been discovered before the trial; (3) material to the issue of guilt or innocence; (4) not merely cumulative or impeaching; (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 trial court denied Appellant's motion without ruling on the arguments raised in his Motion for New Trial. (R., p.5). 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 Appellant's new evidence as not material, merely cumulative and would not have changed the result, this Panel ruled the trial court did not abuse its discretion in denying Appellant's motion. This Panel failed to appreciate the new evidence submitted by herein Appellant.

Appellant was charged with murder under the theory of "hand of one is hand of all". Respondent's theory is all four men – Appellant, Gambrell, Curry and Cameron—were involved in a drug trade. Respondent built their case against Appellant on the testimonies of law enforcement officers who conducted the investigation, the surveillance video and Curry's testimonial statements.

Appellant's proffer of after-discovered evidence in support of his Motion for New Trial consisted of Gambrell's Sworn Affidavit, testimonies from Curry and Marzolf, and Curry's Affidavit (which would be discussed in a separate chapter on due process).

Gambrell's sworn declaration contained the following relevant facts: (1) Curry had no phone at the day of the shooting; (2) Curry did not call him about the Cameron shooting; (3) Appellant did not have a gun on the day of the shooting.

Appellant cited additional statements Curry offered in the Gambrell trial that were not mentioned during Appellant's trial. First, Curry, testified he called Gambrell to inform him of Cameron's shooting (R., p. 109, 9.15). This testimony served to emphasize the conspiracy theory being thrust by Respondent, strengthening the same by showing Gambrell induced Appellant and Curry to perform criminal acts.

Curry also testified for the first time he pulled a gun to intimidate Cameron in their confrontation. This information was not offered during Appellant's trial, where he declared, "I don't know, I like turned and he come at me, and I looked down, I didn't know I had the gun but obviously, I did." He shot at Cameron in self-defense. This statement was purposely added to Curry's testimony to eliminate Curry's self-defense alibi during Appellant's trial and emphasized intent and/or malice on the part of Curry to use force (or aggression) against Cameron.

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 word "dirt bike" was mentioned. (R. p. 804-805, 20.6). This neighbor was not mentioned in previous reports. Neither was it mentioned by any of the detectives who testified in the Appellant's trial.

Appellant contends this Court misappreciated all this new evidence and took them out of context. Contrary to this Panel's ruling, all this evidence satisfies the requirements for granting new trial. Since the Panel singled out materiality, non-cumulative and probability of changing the result or verdict, Appellant will focus his discussion on these three factors.

Evidence was material and would probably result in an Acquittal

These two factors are inter-related, since evidence is "material if there is a reasonable possibility that the new evidence would have changed the outcome be material". The 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). Evidence is material if it relates to the element of the crime.

Respondent's theory was that Appellant was guilty of murder for committing acts showing he acted in concert with Curry and Gambrell to cause the death of Cameron. To prove this, the State had to prove intent on the part of Appellant. Respondent had Curry testify Appellant (1) not only a gun at the day of the shooting, but that he brought the same with him at Cameron's house, (2) was informed by Gambrell of the stolen cocaine and (3) was instructed to get Cameron, the dope or the money.

Appellant did not deny he ferried Curry to and from Cameron's house. His entire defense was he lacked the intent, malice and prior knowledge to provide support to Curry's action in shooting Cameron.

Clearly, in declaring Appellant carried a gun with him, Curry was establishing an intent on the part of Appellant to participate in the use of force (or intimidation) upon Cameron. This would play right into the State's theory Gambrell instructed his "do-boys" to intimate or threaten Cameron into returning the stolen cocaine or pay for it.

Gambrell in unequivocally stating Appellant did not possess any gun on the day of the shooting undercut the element of intent in Respondent's case against Appellant.

In his Sworn Affidavit, Gambrell categorically denied Curry had a phone and called him to inform of the shooting of Cameron. This statement shuts down the Respondent's attempt to

establish a conspiracy (or any form of agreement) to commit a crime, by painting a picture of a consigliere calling the mob boss after he had done a dirty deed on his behalf.

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

The new evidence was not merely cumulative nor impeaching.

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).

Gambrell's Sworn Affidavit is not an evidence of the "same kind" as it is a documentary evidence and not a testimonial evidence. Therefore, this is not the "same evidence: contemplated by the law.

Furthermore, to be cumulative, it must be an 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). In this case, the sworn declaration is not cumulative because it does not merely add to a fact presented at Appellant's trial, it directly contradicts a fact presented therein. Gambrell had been an unavailable witness as a result of the Court's actions during Appellant's trial.

For an 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, an evidence explaining an apparent conflict in, or contradicting evidence is not cumulative. As previously stated, this evidence did not only put in issue Respondent's main witness but goes to the very element of the crime.

Inconsistent statements by Curry (and Marzolf) offered in separate trials of his co-accused may be considered as newly discovered evidence.

To establish the link between the defendants, Respondent offered Curry's testimonies implying Appellant's complicity (and intent and/or malice) to the "plan to rob or kidnap Cameron".

First, Curry testified Appellant took Cameron home upon Gambrell's order (R., p. 544-545, 1.7), only to change his tune during Gambrell's trial by testifying Appellant voluntarily took Cameron home. (R., p. 809, 16.23).

Second, Curry claimed Appellant brought his own gun to Cameron's, but in his testimony at Gambrell's trial, he testified upon returning from Cameron's house, he and Appellant went inside Gambrell's house to return the guns. (R., p. 810, 16.25). While trying to rope in Appellant in the conspiracy, Curry contradicting himself because there is no logical reason for Appellant to return "his own gun" to Gambrell. *Id.* There can be ***no explanation other than he was lying to reduce his sentence.***

Curry has offered too many conflicting and illogical statements for his testimonial evidence to considered reliable. How can this Court allow such a catastrophic injustice take place when it is beyond a reasonable doubt the offeror is utterly incredible?

Some out-of-state cases recognize there are special circumstances where 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). [1] 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 motion for new trial

[1] 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, Appellant introduced his Sworn Affidavit briefly explaining the terms of his plea bargain with the prosecution. [2]

In sum, the new evidence submitted by Appellant satisfies the requirements for the grant of new trial based on newly discovered or after-discovered evidence. All this evidence surfaced after Appellant's trial. Appellant could not have known of Curry's new testimonies because it was either a fabrication or was intentionally omitted, for which, Appellant, even with exercise of due diligence, could not have found or uncovered. Appellant is entitled to have his request for his case for new trial.

II.

THE PANEL ERRED IN AFFIRMING THE DENIAL OF MOTION FOR DIRECTED VERDICT.

The standard for review of a denial of a motion for directed verdict is for the Court to "view the evidence of record and all reasonable inferences in the light most favorable to the State." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641 (2006); State v. Bennett, 415 S.C. 232, 235, 781 S.E.2d 352, 353 (2016) quoting State v. Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014).

The Panel overlooked, misunderstood or misapplied facts or circumstances which can affect the result of the case, and which this Court is duty bound to correct because the right to

[2] More in-depth discussion on this matter in the section for due process.

liberty, which stands second only to life in the hierarchy of constitutional rights cannot be lightly taken.

Appellant maintains there was insufficient evidence from which the trial judge could find that the existence of conspiracy and/or pre-arranged plan to commit illegal acts among Appellant and his alleged co-conspirators, much less, that Appellant participated in furtherance of such illegal purposes.

> Under the hand of one is hand of all [accomplice liability], one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.

State v. Thompson, 374 S.C 257, 261-62, 647 S.E. 2d 702, 704-05 (Ct. App. 2007).

In other words, it applies when two or more persons come to an agreement concerning the commission of a felony and decide to commit it. Its essence is the unity of action and purpose. Its elements, like the physical acts constituting the crime itself, must be proved beyond reasonable doubt.

Based on the Solicitor's closing argument, the relevant evidence presented against Appellant was Curry's testimony on the following: (1) Cameron stole drugs from Gambrell; (2) Gambrell instructions to get Cameron, or the dope or the money; (3) Appellant drove Curry to and from Cameron's house; (4) Curry brought two guns with him at Cameron's house ; (5) Appellant had a gun which he brought with him to Cameron's house; (6) Curry's presence at the shooting.

During Appellant's trial, the Solicitor proposed all three defendants were involved in drug trade and this incident was a drug trade gone awry. R., p. 765, 11.22 & p. 766, 4.15. However, virtually no evidence linked Appellant to any drugs or drug transaction or

conversations about drugs. In fact, no evidence was introduced a drug sale occurred on that fateful day. Records show the only transaction that transpired that day was the sale of a bike between Cameron and Gambrell's nephew. Thus, no evidence was offered to prove Respondent/the Court's drug trade conspiracy theory. No illegal act was undertaken.

Next, to establish what the Solicitor called the "plan to collect a drug debt or kidnap Cameron", Respondent introduced Curry's testimony on the missing cocaine and Gambrell suspecting Cameron took the same. (R. p. 570, 21.25; p. 390, 4.12).

The only evidence Respondent proffered to establish Appellant knew of the plan is the uncorroborated testimony of Curry that Gambrell instructed them "to go down there to get the dope or money". (R., p. 567). Aside from this being inconsistent with Appellant's recollection of Gambrell's suggestion to return to Cameron's and bring him back to Gambrell's, Curry contradicted his narrative in the same testimony. (R., p. 568, 1.5, where he testified Gambrell told Appellant "he needed to go back and get Mr. Cameron").

It was uncontroverted Appellant was not at Gambrell's house when the latter discovered of his missing cocaine. He had no way of knowing what transpired at Gambrell's house while he was transporting Cameron to his house. Appellant was consistent in testifying that upon arrival at Gambrell's house, he was instructed to return to Cameron's and bring him back to Gambrell's. (R., p. 646; p. 649; p. 673).

Before he was instructed by the Court to take the Fifth Amendment, Gambrell confirmed Appellant's lack of knowledge on the issue of missing cocaine when he testified (1) he had to wait for Appellant's return since the latter had no cellphone with him (R., p. 602, 9.12); (2) he asked Appellant to go back to Cameron's (R. p. 604, 22.25).

Assuming arguendo that a plan was hatched between Cameron and Curry regarding the missing cocaine, Appellant could not have consented to something he had no knowledge of. Furthermore, if we are to rely on Curry's testimony, there is nothing illegal in retrieving one's property.

Outside the unreliable statement of its main witness, Respondent had no other evidence to support its claim Appellant knew about missing cocaine and a plan for its retrieval.

Respondent's witness, Curry, testified Appellant had a gun and brought the same to Cameron's house. As previously stated, this was Respondent's attempt to show Appellant has "intent" or "malice" when he went back to Cameron's house. This testimony was unsubstantiated. In fact, Curry contradicted himself in the same testimony when he said he did not know the make or caliber of Appellant's gun. (R., p. 579, 2.5).

Respondent did not produce the gun Appellant allegedly owned and brought to the scene of the crime. Neither did it introduced fingerprint analysis or other evidence linking any of the two guns (i.e. 25 and .38) to herein Appellant.

Respondent argued Appellant could have anticipated the shooting as a natural and probable consequence of the pre-arranged plan to go to Cameron's home. The only evidence introduced by Respondent in this regard is Curry's testimony implying Appellant had seen him with a gun when they were approaching Cameron's house. Appellant testified that as soon as he saw Curry with the gun, he pleaded with Curry to leave the same in the car. (R., p. 649; p. 678). As far as Appellant knew, Curry only had one gun with him and the same was left in the floorboard. (R., p. 574, 6.13). In his testimony, Curry confirmed Appellant's statement by admitting he left the gun in the car. (R., p. 574, 1.5). This admission by Curry strikes at the heart of Respondent's closing argument, "What did they think was going to happen?". The

evidence simply does not support Appellant knew an illegal activity occurred (stolen cocaine), nor could he have anticipated a shooting will occur considering he saw Curry leaving the gun in the car.

This leaves us to Appellant driving Curry to Cameron's house. In fact, Appellant's conviction for murder was largely based on the argument he drove the shooter to Cameron's house and back to Gambrell's.

Following the State's logic, Appellant was guilty of killing Cameron, not by bullet but by a car. In the words of the Solicitor, "Jason didn't pull that trigger, but he delivered Woodrow Curry to Steven Cameron's doorstep". (R., p. 765). This logic fails to consider the "intent" and malice aforethought" element of murder.

The question therefore is whether Appellant's act of driving Curry is considered an act aiding, abetting or even assisting Curry in the commission of the murder. To determine this, the case of State v. Mattison declared:

> For a person who has not actually committed the homicidal act to be regarded as a participant in a homicide, he or she must have aided, abetted, assisted, encouraged or advised the killing. Also, the courts have required that the alleged accomplice must have acted with the intention of encouraging and abetting the commission of the homicide, or, at least the commission of the murder by the principal must have been a reasonably foreseeable consequence of the defendant's action.

State v. Mattison, 388 S.C. 469 (S.C. 2010).

Since Appellant was charged under the accomplice liability doctrine which is based on unity of design and unity of action, Respondent's evidence must show Appellant knowingly intended to assist in the commission of the actual offense. In other words, to be guilty as principal, Appellant must have acted with the state of mind required for guilt.

Respondent failed to establish in driving Curry to Cameron's house, Appellant intended to, or expected Cameron to be shot. No evidence was presented that Appellant had any hostility or grudge against Cameron. In absence of strong motives on his part to kill Cameron, it cannot be safely concluded he had intent or malice to kill Cameron (or conspired to have him killed).

The absence of intent is also shown from the unwavering and consistent statement by Appellant of his reason for driving back to Cameron's place. (R., pp. 646, 649, 673). Even Respondent's witness, Curry, confirmed this in his testimony. (R., pp. 568, 572).[3]

Additional evidence where Appellant's intent can be inferred is his choice to use Gambrell's car to allow space for Cameron at the back, instead of his own since his dog was in his car. (R., p. 693, 1.15).

Respondent contends Appellant could have anticipated Cameron's shooting as a "natural and probable consequence" of him driving " a man that he knew to be armed, who he knew had a short fuse to another man's house, who also had a short fuse, to collect on a drug debt or to kidnap him..." (R., p. 766, 10.15).

Record shows Appellant did not interact, much less know Curry and Cameron enough for him to know the two had a "short fuse". In fact, Appellant testified he had only met Cameron three times and barely talked with him while he drove him to his house. (R., p. 641-642).

To assist in determining whether Appellant's action aided, abetted or assisted in the commission of the crime, an inquiry should be made over Appellant's overt acts before, during and after the shooting.

Prior to arriving at Cameron's house, Curry testified Appellant asked him to leave the .38 in the car. (R. p. 574, 1.5). He also testified upon reaching Cameron's place, Appellant merely

[3] During his entire testimony, Curry has prevaricated on this issue.

stood behind him while he talked to Cameron.

Curry testified that after he shot Cameron, he found Appellant inside the car already. (R., p. 551, 8.12). This corroborated Appellant's testimony he ran away from Curry when the latter refused to heed his pleas to stop pointing a gun at Cameron. (R., p. 655, 11.16 & p. 657, 2.12).

That Appellant drove Curry back to Gambrell is not sufficient to establish he cooperated or assisted Curry, particularly considering his defense of duress and grave threat. Appellant had a gun and threatened him and his mother's life, (R., p. 657, 13.18). Curry was seen driving by Appellant's mother's house. (R., p. 664, 2.19). Curry admitted knowing Appellant's mother's address.

Furthermore, it is well-established a person can not be found guilty of aiding and abetting a crime that has already been fully committed. United States v. Love, 767 F.2d 1052 (4th Cir. 1985).

In the absence of evidence to show intent to assist or encourage Curry in shooting Cameron, and even without reading Appellant's defense, Appellant driving Curry to and from the scene of the crime is not sufficient circumstantial evidence that would reasonably tend to prove guilt of Appellant. At most, the evidence may raise suspicion of him being an accessory. The evidence was not sufficient to prove that he associated himself with, and engaged in, some affirmative conduct designed to aid the criminal venture.

III.

THE PANEL ERRED IN NOT FINDING APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED.

Appellant was deprived of fair trial due to prosecution's abuse of discretion.

It is well-established 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). Here the terms of the plea agreement between Respondent and Curry was not made available to defense counsel, prior to the trial. In fact, it was during Appellant's trial he learned of Curry's plea to a lesser offense.

Aside from the prosecution's failure to disclose its plea bargain with Curry, Appellant challenges the constitutionality of the plea bargain based on due process.

> A number of out-of-state courts have censured bargains conditioned upon a witness's agreement to testify in a particular manner and have overturned the resulting convictions on both due process and policy grounds. (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.").

In this case, Curry's sworn declaration stated:

> 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.

(R., p. 397).

The Doctrine of Due process guarantees defendants a right to fair procedure and has traditionally operated to exclude involuntary confessions and unreliable witness testimony. While majority of courts do not consider plea bargaining as violative of the due process rights of the defendant, an increasing number of them has recognized that the process encourages perjured testimony and wrongful convictions. (Washington v. Texas, 388 U.S. 14, 22-23 (1967).

In fact, some out-of-state courts have ruled due process rights to fair trial was violated when "the prosecutor influences the witness to testify for the prosecution instead of the defense

or interferes with the content of his testimony for the defense". (United States v. Fricke, 684 F.2d 1126, 1130 (5th Cir. 1982), cert. denied, 460 U.S. 1011 (1983); United States v. Goodwin, 625 F.2d 693, 703 (5th Cir. 1980). The 5th Circuit Court has reversed a conviction on this ground. United States v. Hammond, 598 F.2d 1008, 1013 (5th Cir. 1979).

In this case, it would appear the terms of agreement between the prosecutor and Curry was contingent upon his favorable testimony for the prosecution, as well as the resulting verdict. In availing of this outcome-oriented plea bargaining, the prosecution did not only deprive Appellant of fair trial as he did not have the same authority and or leverage to elicit favorable testimony for himself. This practice encourage fabrication and would explain Curry's ever-changing testimonies.

The same argument applies with the delay in sentencing of Curry. Since the prosecution failed to disclose the terms of the plea bargain agreement, Appellant was denied the opportunity to cross examine Curry regarding the same. The Court in the case of State v. Dean states,

> "[I]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with witnesses against him." U.S. Const. amend. VI. "The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias." State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991) (citing Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.E.2d 347 (1974)). "The fact that a cooperating witness avoided a mandatory minimum sentence is critical information that a defendant must be allowed to present to the jury." State v. Gracely, 399 S.C. 363, 374-75, 731 S.E.2d 880, 886 (2012).

State v. Dean, Op. No. 5648, (SC Ct. App. 2019).

Similar to Dean's case, Curry's sentence and whether he received any leniency in sentencing in exchange for his cooperation was discovered after Appellant's trial and sentencing. Appellant was unable to cross-examine Curry regarding the terms of the agreement and his cooperation with the prosecution, which goes to Curry's motive and bias in testifying the way he

did. That the trial court denied Appellant's motion for new trial based on violation of his due process rights due to prosecutor's (mis)conduct is an error of law that this Panel overlooked. The Panel's failure to appreciate this is an error of law for which Appellant seeks this Court's review.

Respondent also failed to disclose information and/or witness that may exculpate Appellant. As early as March 29, 2016, the law enforcement had video surveillance. The investigation on Appellant's case was completed April or May 2016. Respondent offered Appellant a copy of the discovery response, which should have included all the surveillance videos, only in December 2016. Despite receipt of the videos in December of 2016, Appellant was unable to access them. This fact was known and acknowledged by the State. Appellant was provided with accessible discovery the week before trial. Appellant was not given enough time to view all the video exhibits, aside from the fact that one video could not be viewed at all.

A prosecutor's primary duty is to seek justice. Under the law, a prosecutor shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense. (Rule 3.8(d) of the Rules of Professional Conduct). It failed to do the same. Failing to submit the video surveillance and required discovery materials within the reglementary period is tantamount to the State denying Appellant his right to due process.

Again, the trial court did not rule on this violation, and this Panel erred in not finding the same as error of law.

Appellant was deprived of his due process due to judicial bias.

The trial judge has exhibited bias throughout the proceedings on this case. For one, he allowed the prosecutor to proceed with charging Appellant under accomplice liability doctrine

when he was indicted for murder. It was only during the trial he discovered of the additional accusation against him Appellant believed he was deprived of sufficient information of all the violation he allegedly committed and as such, he was unable to prepare for his defense accordingly. The additional charge of accomplice liability and the underlying offenses of kidnapping and robbery was not presented during the preliminary hearing, which takes this away from the ruling in State v. Hicks, 257 S.C. 279, 185 S.E.2d 746 (1971).

The trial judge has also abused his discretion in refusing Appellant to recall two important witnesses because it run in counter with the Confrontation Clause. In particular, the trial judge refused to recall Marzol who swore Curry told him Gambrell gave him the gun. In Gambrell's audio interview presented during the trial, he denied Curry's allegations, and declared the latter took the gun without his permission. Appellant requested to recall Marzolf to inquire into Gambrell's statements, but the trial judge, in explaining its denial stated Appellant could have cross-examined Marzolf and that if he was mistaken, he can be corrected in appeal. (R., p. 623).

While the law provides that it is upon the discretion of the Court to allow a witness to be recalled, Appellant avers that the interest of justice will be served if these witnesses have been allowed to testify considering that Gambrell's testimony was stricken out by the Court. The Court has ruled defendant is entitled to cross examine witnesses when there is lack of sufficient evidence to build his defense. State v. Pradubsri, 403 S.C. 270 (S.C. Ct. App. 2013).

Furthermore, this Panel affirmed trial judge's refusal to recall the witness was "because Carver was able to cross-examine the detective as to the relevant subject matter". However, based on the procedure of the trial, Appellant could not have cross-examined Marzolf with

regards to the issue of the guns until the testimonies of Curry and Gambrell have been concluded.

Appellant believes this is a callous disregard of Appellant's rights, where the trial judge fails to exert efforts in obtaining all the facts in this case considering this involve the life of Appellant. This kind of behavior reflects the slow departure from the truth-seeking mission of the criminal justice system to ensuring a conviction.

The judge's bias can also be gleaned from his sentencing statement:

> THE COURT: So I—I am convinced that it was not necessarily Mr. Carver's intention to kill anybody when they went down there. But I'm equally convinced that you went down there to get the man, the money or the drugs back. As such you, engaged in a criminal conspiracy that ultimately spiraled out of control. It was notable to me that you drove away with the lights off, 911 wasn't called, that you didn't involve yourself with law enforcement until Mr. Curry was involved with the law enforcement himself. You can interpret that several ways.
>
> I think it's clear that when you start messing around with drugs, especially the type of drugs that y'all were using, a natural and probable consequence such as what ultimately happened in this case is what you will see.
>
> Also, the fact that this car of Mr. Gambrell's was used instead of yours is an indication that you did go with the intent to bring this guy back. And then you hid it after the fact, too; which is a sign that y'all knew that you had a problem.
>
> That being said and done, I think it is only fair that you be treated equally, so I am going to sentence you to thirty (30) years. You have ten days to appeal this decision. If he is entitled to any credit, give him credit for any time served. Okay?"

(R. p. 785-786, 5.10).

Appellant believed that it was improper for a judge to comment on evidence, especially when the same was not established in the trial (i.e. no evidence presented that Appellant hid Gambrell's car) or to suggest an outcome (i.e. "criminal conspiracy"). The trial judge did both.

Lastly, the judge impermissibly intruded upon defendant's rights by repeatedly admonishing Gambrell of his right not to testify and that it may be used against him in his upcoming trial against himself. It is all the more suspect when, instead of Gambrell's own lawyer, it was the prosecution who raised an objection just when Gambrell was discussing his "instructions" to herein Appellant. (R., p. 596-598; p. p. 605-608, 2.12).

This level of overzealousness by the trial judge can be likened to what is termed as judicial intimidation. The court in Webb v. Texas, found the judge's actions --in singling out defendant's witness for a lengthy admonition on his right to not testify, implying the latter will lie in court, and the dangers of perjury—have exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify. Webb v. Texas, 409 U.S. 95, 98 (1972).

One striking similarity between Webb and the instant case is the fact that the defendant's witness was initially willing to testify, only refusing to do so after the judge's admonition (in this case, repeated warning about taking the Fifth Amendment).

In both instances, the judges effectively drove the witness off the stand, resulting to the defendants being deprived of their due process of law under the Fourteenth Amendment.

The record is replete with instances biases from the trial judge. For instance, in response to Appellant's motion for directed verdict based on failure of the State to establish intent on his part, the trial judge outright denied his motion, stating "This isn't necessarily an accomplice but it's hand of one, hand of all." This statement is clearly misleading, or at the very least vague, since the aiding and abetting acts of an accomplice is considered similar as to the hand of one hand of all doctrine. (R., p. 718, 22.25; p. 719, 1.7).

It should be noted the trial judge was quick to berate and/or chastise Appellant's counsel

for bringing up Gambrell's audio tape (police interview) when the judge himself prevented him from doing so. (R., p. 612, 15.21). But the judge glossed over the prosecution's violation of the discovery rule, allowing the 36-hour long video and other materials submitted only two weeks prior to trial. The delay in the discovery is made much egregious considering the State withheld the materials for more than one year past its own review. (R. p. 463, 19.24).

In sum, this Panel erred in not considering the factual evidence of bias and misconduct on the part of the judge and the prosecution. Appellant believes there are times when the exercise of the Fifth Amendment rights infringes on defendant's due process right. One such case is when the "only person capable of furnishing useful testimony will be implicated in some way in the crime." Kastigar v. United States, 406 US441, 446. In this case, Appellant was entitled to a new trial since he was deprived of his due process to a fair trial.

IV.

THE PANEL ERRED IN FINDING ISSUES RAISED BY APPELLANT WERE NOT PROPERLY PRESERVED FOR APPELLATE REVIEW.

In the case of State v. Dean, the Court of Appeals laid down the precepts on preservation

> Our appellate courts have consistently found issues preserved for review when the issue was raised to and ruled upon by the trial court." State v. Cain, 419 S.C. 24, 33-34, 795 S.E.2d 846, 851 (2017). See, e.g., State v. Williams, 417 S.C. 209, 228 n.10, 789 S.E.2d 582, 592 n.10 (Ct. App. 2016) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge." (quoting State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). " While a party may not argue one ground at trial and another ground on appeal, State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989), we do not require a party to use the same language on appeal as it did at trial, Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011)." Id. at 33-34, 795 S.E.2d at 851. "

State v. Dean, supra.

This Panel erred in finding that Appellant's assertions as to (1) the failure to be informed

of the charges against him, (2) the charge for the "hand of one is hand of all" doctrine, (3) lack of neutrality of the trial judge, and (4) violation of his due process rights by trial court's efforts to explain Fifth Amendment rights to his co-defendants, were not preserved for appellate review. This Panel failed to appreciate Counsel for Appellant's efforts to challenge the charges of murder and accomplice liability during the trial, which were shut down by the trial judge. (R., pp. 156.160, 351, 718 & 766).

In his Motion for New Trial, Appellant raised the issue of the trial judge's lack of neutrality by questioning his (1) apparent zealousness in convincing Gambrell to invoke the Fifth Amendment (R., pp. 11.12, 355, 359); (2) denial of Appellant's motion for continuance preventing Appellant from presenting his witnesses (R., p. 14.16); (3) failure to rebuke the prosecution's untimely disclosure of information material to Appellant's defense and allowing these to be placed in record, (R., p. 152. 156); (4) conclusory statements during the trial (R., p. 354).

In his Motion for New Trial dated September 5, 2019, Appellant challenged the trial court's action in repeatedly interjecting to warn Gambrell of his right to refuse to testify which led to him invoking the Fifth. In this Motion, Appellant averred the trial court overstepped the line by becoming an advocate for the state effectively preventing Appellant from pursuing his witness' testimony. (R., p. 11-12). The issue was raised anew in his Amended Motion for New Trial and in his Motion for Reconsideration, as part of Appellant's attempt to show the judge's bias (R., pp. 323, 355-359).

Contrary to this Panel's findings, Appellant challenged the charge of "hand of one is hand of all" in its initial Motion for New Trial, by objecting to the inclusion of the discussion on

kidnapping and robbery. (R., p. 11). This was reiterated in his Amended Motion for New Trial (R., p. 351-354), and in his Addendum to the Motion for Reconsideration, (R., p. 402-405).

The same can be argued with the issue on judge's neutrality. Appellant has challenged the judge's neutrality in not compelling two witnesses for Appellant, and in allowing untimely discovery, in his Initial Motion for New Trial. (R., p. 14-16). The same argument was raised in Appellant's subsequent Amended Motion for New Trial. R., p. 348-350).

Since the Panel erred in finding Appellant's above-cited issues unpreserved, Appellant requests that the unresolved issues in the previous briefing be allowed to be presented in the Petition for Rehearing, or in the alternative, be resubmitted for decision in this Court.

In sum, Appellant reiterates his position that this Panel erred in affirming the trial court's findings. Appellant challenges the sufficiency of evidence and his conviction. Construing ALL of the evidence and the inferences therefrom in the light most favorable to the Respondent, the evidence was not sufficient to sustain his conviction beyond reasonable doubt, for the crime of Murder.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests this Court an en banc review.

Respectfully submitted by:

s/Donald L. Smith
Donald L. Smith (SC Bar#6699)
122 N. Main Street
Anderson, SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellant

Anderson, South Carolina
August 16, 2021.

RECEIVED
Aug 16 2021
SC Court of Appeals

FORM 7
PROOF OF SERVICE

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of General Sessions

R. Lawton McIntosh, Judge

Appellate Case No. 2017-002011
Case Number: 2016A05324

State of South Carolina, Respondent,

v.

Jason Franklin Carver, Appellant.

PROOF OF SERVICE

Pursuant to Supreme Court of South Carolina's Amended Order 2020-05-29-02, I served a copy of Appellant's Petition for Rehearing, and Proof of Service, of same upon The Honorable Jenny Abbott Kitchings, Clerk of South Carolina Court of Appeals, and upon the Respondent, by and through its counsel of record, Attorney General Alan McCrory Wilson, Chief Deputy Attorney General W. Jeffrey Young, Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General Melody J. Brown, by email through the following addresses:

Ms. Jenny Abbott-Kitchings	ctappfilings@sccourts.org
Attorney General Alan McCrory Wilson	awilson@scag.gov
Chief Deputy Atty. General W. Jeffrey Young	jyoung@scag.gov
Deputy Attorney General Donald J. Zelenka	dzelenka@scag.gov
Sr. Asst. Deputy Atty. General Melody J. Brown	mbrown@scag.gov

A copy of the above-mentioned Motion shall be mailed to The Honorable Jenny

Abbott Kitchings, Clerk of Court South Carolina Court of Appeals, at PO Box 11629 Columbia, SC 29211, and the Respondents, by and through Honorable Alan Wilson at the Office Attorney General, P.O. Box 11549, Columbia, S.C. 29211, by depositing copy of it in the United States Mail, postage prepaid, as ordered.

s/Donald L. Smith
Donald L. Smith, (Bar No.: 6699)
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellants

Anderson, South Carolina
August 16, 2021.

RECEIVED
Aug 16 2021
SC Court of Appeals

FORM 8
LETTER TO THE COURT OF APPEALS CLERK OF COURT FILING APPELLANT'S PETITION FOR REHEARING

August 16, 2021

The Honorable Jenny Abbott Kitchings
Clerk of Court South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

RE: State of South Carolina v. Jason Carver
Appellate Case No.: 2017-002011
Case No. 2016-A05324

Dear Ms. Kitchings:

Please find enclosed the following documents for filing:

1. Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc,
2. Proof of Service of same.

Sincerely,

s/Donald L. Smith
Donald L. Smith (Bar No.: 6699)
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellants

cc:

Attorney General Alan McCrory Wilson
Chief Deputy Attorney General W. Jeffrey Young
Deputy Attorney General Donald J. Zelenka
Senior Assistant Attorney General Melody J. Brown

RECEIVED
Aug 23 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of General Sessions

R. Lawton McIntosh, Judge

Appellate Case No. 2017-002011
Case Number: 2016A05324

State of South Carolina,

Respondent,

v.

Jason Franklin Carver,

Appellant.

ADDENDUM TO THE PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

COMES NOW, JASON CARVER, Appellant, and hereby submits this Addendum to his Petition for Rehearing and Suggestion for Rehearing *En Banc*, duly filed with this Honorable Court on August 16, 2021.

On page 7 of his Petition for Rehearing, Appellant discussed how Woodrow Curry was arrested at Gambrell's house, where drugs were found. Curry admitted the drugs were his. Curry was charged with possession of drugs (C.A. 2016A2330202932) and drug trafficking (C.A. No. 2016A2330202933 on April 26, 2016, and April 8, 2016, respectively in Greenville County. In the meantime, Curry was charged with murder in Anderson County. He entered a plea bargain with the Solicitor's Office for the lesser offense of Voluntary Manslaughter. The proceedings for the plea bargain took place on August 22, 2017, where the Solicitor's Office requested for a

deferral of his sentencing until after Appellant's trial.

MS. MOORE: Judge, before you is Woodrow Walter Curry. He Is pleading guilty on indictment number 2017-GS-04-1648 on the charge of Voluntary Manslaughter. He's represented by Jen Byford and The State is asking that we defer sentencing until after Jason Carver's trial.

(R., p. 791, 12.17).

In Anderson County, Curry killed an unarmed man for pushing him, yet was allowed to plead to voluntary manslaughter. The Solicitor, in her respectful request to defer Curry's sentence until after Jason Carver's trial, fell a bit short of how long she needed to keep the anvil over Curry's head. In fact, Curry would not be sentenced until November 6, 2018, or after Curry had completed his work for the Solicitor (getting the conviction of James Gambrell). It should be noted in the affidavit provided by Curry, following the conclusion of the litigation surrounding the incident of March of 2016, he stated he understood from the Solicitor and lead detective fifteen (15) years was a possible sentence depending on how the trials went. Curry said when it came to the actual sentencing, the State's prosecution did nothing to lobby for a reduction in his sentence. They mouthed words which comprised of one sentence.

Based on the fact Curry had pled guilty; and provided the only evidence in Carver's conviction of his complicity, Greenville County dismissed both the possession charge and the trafficking charge, despite his admission the drugs were his. (Exhibit 1-Greenville Public Index). A trafficking conviction would have been detrimental to Curry's freedom, given his prior record. (Exhibit 2-Greenville Public Index). The dismissal of the drug charges on October 30, 2017, was roughly two months after Carver's conviction, presumably for a job well done. Had the jury been aware of Curry's aspect of the bargain he received for his testimony they would have been unable to be blind to the direct relationship between his altered testimony from one trial to the

next. Of course, the Solicitor's unilateral decision to defer Curry's sentencing until Gambrell's conviction (over fourteen (14) months after Appellant's trial) would seemingly have struck the common juror as morally reprehensible. It seems apparent the State led Curry to believe his "bargain" was directly related to the results of the trials held for Carver and Gambrell. His testimony is indicative of this conclusion.

On page 25 of the Petition for Rehearing, Appellant quoted the following:

> A number of out-of-state courts have censured bargains conditioned upon a witness's agreement to testify in a particular manner and have overturned the resulting convictions on both due process and policy grounds. (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.").

The case of *People v. Medina*, has been cited as an example of a contingent plea agreement in the article Toward a Level Playing Field: Challenges to Accomplice Testimony in the Wake of United States v. Singleton. (James W. Haldin, *Toward a Level Playing Field: Challenges to Accomplice Testimony in the Wake of United States v. Singleton*, 57 Wash. & Lee L. Rev. 515 (2000), https://scholarlycommons.law.wlu.edu/wlulr/vol57/iss2/7/)

On page 25-26 of the Petition, the cases of *United States v. Fricke*, 684 F.2d 1126, 1130 (5th Cir. 1982), cert. denied, 460 U.S. 1011 (1983); *United States v. Goodwin*, 625 F.2d 693, 703 (5th Cir. 1980); and *United States v. Hammond*, 598 F.2d 1008, 1013 (5th Cir. 1979), were cited as examples of cases where prosecutor's attempts to influence the witness' testimony is considered as due process rights violation. These cases were cited in a law article entitled *Accomplice Testimony Under Contingent Plea Agreements.* (Yvette A. Beeman, *Accomplice Testimony Under Contingent Plea Agreements*, 72 Cornell L. Rev. 800 (1987) accessed at

https://scholarship.law.cornell.edu/clr/vol72/iss4/5/).

In Appellant's trial, the prosecution's case against Appellant was based on accomplice testimony. The accomplice witnesses were compelled to testify in a "particular fashion". The deference in sentencing provided the State with the opportunity to hold a golden carrot in front of Curry to "coax" him into conjuring up beneficial facts for the first time at two different trials. The Court compelled Gambrell to testify in the "particular fashion" of silence by overwhelming him with the danger of testifying. (R.605-609, 8.12).

Ironically, the Court was so certain Gambrell would not testify, he stated that if he chose to testify, "...we will bring the jury out." (R. 595, 6.12). The Court proceeded to question Gambrell and his counsel, with an abundantly clear objective of preventing Gambrell's testimony. (R. 595-598, 13.21). When it became obvious Gambrell would testify, the Court did not "bring the jury out". Thankfully, Gambrell had a conscience.

CONCLUSION

Appellant respectfully submits this Addendum to give this Court a more comprehensive narrative of the events that led to Curry's testimony, and its inconsistencies, which Appellant knows is the only reason he was found guilty.

Respectfully submitted by:

s/Donald L. Smith
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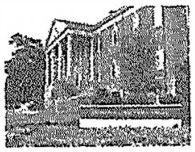
attorneydonaldsmith@gmail.com
Attorney for Appellant

Anderson, South Carolina
August 23, 2021.

Greenville County
13th Judicial Circuit
Public Index



Switch View

State of South Carolina vs Woodrow Walter Curry

Case Number:	2016A2330202933	Court Agency:	Greenville General Sessions	Filed Date:	04/08/2016
Case Type:	Criminal-Clerk	Case Sub Type:			
Status:	Dismissed	Assigned Judge:	Cagle, Diane Day	Disposition Judge:	Solicitor
Disposition:	Dismissed - Prosecutorial Discretion				
Disposition Date:	10/30/2017	Date Received:	04/07/2016	Arrest Date:	04/05/2016
Law Enf. Case:	16-57535	True Bill Date:	08/29/2017	No Bill Date:	
Prosecutor Case:		Indictment Number:	2017GS2305439	Waiver Date:	
Probation Case:					

Case Parties

Click the icon to show associated parties.

Name	Address	Race	Sex	Year Of Birth	Party Type	Party Status	Last Updated
Curry, Woodrow Walter	108 E. Morgan St. Greenville SC 29611	White	M	1971	Defendant		10/30/2017
Downey, M H	4 Mcgee Street Greenville SC 29601				Officer		04/08/2016
Monts, Joyce Krolak	Greenville Cnty. Courthouse 305 E. North St., Ste. 325 Greenville SC 29601				Solicitor		07/03/2017
Sullivan, C. Timothy Jr.	PO Box 2543 Greenville SC 29602				Public Defender		04/19/2016

Charges

Name	Charge Code - Charge Description	Original Charge Code - Original Charge	Disposition Date
Curry, Woodrow Walter	0278-Drugs / Trafficking in cocaine, 10 g or more, but less than 28 g - 1st offense	0278-Drugs / Trafficking in cocaine, 10 g or more, but less than 28 g - 1st offense	10/30/2017

Actions

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Curry, Woodrow Walter	Tracking Sheet	Filing		10/30/2017-16:37		
Curry, Woodrow Walter	True Bill Indictment	Filing		08/29/2017-11:19		
Curry, Woodrow Walter	Pre-File	Filing		07/03/2017-16:10		
Curry, Woodrow Walter	Motion/Motion for Bond/Bail	Filing		04/14/2016-16:19		
Curry, Woodrow Walter	Checklist	Filing		04/08/2016-10:31		
Curry, Woodrow Walter	Warrants	Filing		04/08/2016-10:31		

Financials

Summary

Fine/Costs:	$0.00	Total Paid for fine/costs:	$0.00	Balance Due:	$0.00

Costs

Description	Cost Code	Amount	Charge Action	Disbursed Amount
State Assessment	STAASM	$0.00		$0.00
Fine to State 44%	AFINES	$0.00		$0.00
Victim Services Asm 38.0013% / 5.7831%	ASMVIC	$0.00		$0.00
Victim Conviction Surcharge $100 / $25	CVSRCH	$0.00		$0.00
Law Enforcement Funding Surcharge $25	LEFSUR	$0.00		$0.00
PCC Surcharge	PCCSUR	$0.00		$0.00
SC Criminal Justice Academy Training	SCCJAT	$0.00		$0.00
Fine to General Fund	AFNEGF	$0.00		$0.00

Payments

Payment Date	Receipt Number	Entered By	Transaction Type Code	Payment Amount
None				

Bonds

Bond Information

Bond Id	Set Date	Amend Date	Set By	Type	Amount	Type	Amount	Condition
2016BD2330204146	04/05/2016		O'Brien	Cash Bond	$25,000.00	Surety Bond	$25,000.00	

Post Information

None

Greenville County
13th Judicial Circuit
Public Index

Switch View

State of South Carolina vs Woodrow Walter Curry

Case Number:	2016A2330202932	Court Agency:	Greenville General Sessions	Filed Date:	04/26/2016
Case Type:	Criminal-Clerk	Case Sub Type:			
Status:	Dismissed	Assigned Judge:	Cagle, Diane Day	Disposition Judge:	Solicitor
Disposition:	Dismissed - Prosecutorial Discretion				
Disposition Date:	10/30/2017	Date Received:	04/25/2016	Arrest Date:	04/05/2016
Law Enf. Case:	16-57535	True Bill Date:	08/29/2017	No Bill Date:	
Prosecutor Case:		Indictment Number:	2017GS2305438	Waiver Date:	
Probation Case:					

Case Parties

Click the icon to show associated parties.

Name	Address	Race	Sex	Year Of Birth	Party Type	Party Status	Last Updated
Curry, Woodrow Walter	108 E Morgan St Greenville SC 29611	White	M	1971	Defendant		10/30/2017
Downey, M H	4 Mcgee Street Greenville SC 29601				Officer		04/26/2016
Monts, Joyce Krolak	Greenville Cnty. Courthouse 305 E. North St., Ste. 325 Greenville SC 29601				Solicitor		07/03/2017

Charges

Name	Charge Code - Charge Description	Original Charge Code - Original Charge	Disposition Date
Curry, Woodrow Walter	0659-Drugs / Possession of 28g (1 oz) or less of marijuana or 10g or less of hash - 1st offense	0659-Drugs / Possession of 28g (1 oz) or less of marijuana or 10g or less of hash - 1st offense	10/30/2017

Actions

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Curry, Woodrow Walter	Tracking Sheet	Filing		10/30/2017-16:37		
Curry, Woodrow Walter	True Bill Indictment	Filing		08/29/2017-11:18		
Curry, Woodrow Walter	Pre-File	Filing		07/03/2017-16:10		
Curry, Woodrow Walter	Warrants	Filing		04/25/2016-10:28		
Curry, Woodrow Walter	Checklist	Filing		04/22/2016-10:29		

Financials

Summary					
Fine/Costs:	$0.00	Total Paid for fine/costs:	$0.00	Balance Due:	$0.00

Costs				
Description	Cost Code	Amount	Charge Action	Disbursed Amount
State Assessment	STAASM	$0.00		$0.00
Fine to State 44%	AFINES	$0.00		$0.00
PCC Surcharge	PCCSUR	$0.00		$0.00
Law Enforcement Funding Surcharge $25	LEFSUR	$0.00		$0.00
Victim Conviction Surcharge $100 / $25	CVSRCH	$0.00		$0.00
Fine to General Fund	AFNEGF	$0.00		$0.00
SC Criminal Justice Academy Training	SCCJAT	$0.00		$0.00
Victim Services Asm 38.0013% / 5.7831%	ASMVIC	$0.00		$0.00

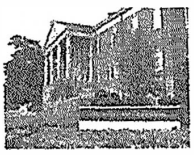
Payments				
Payment Date	Receipt Number	Entered By	Transaction Type Code	Payment Amount
None				

Bonds

Bond Information								
Bond Id	Set Date	Amend Date	Set By	Type	Amount	Type	Amount	Condition
2016BD2330204140	04/05/2016		O'Brien	Cash Bond	$620.00	Surety Bond	$620.00	

Post Information
None

Greenville County
13th Judicial Circuit
Public Index



Switch View

THE STATE OF SOUTH CAROLINA VS WOODROW W CURRY-JR

Case Number:	38755AG	**Court Agency:**	West Greenville Summary Court	**Filed Date:**	03/18/1996
Case Type:	Criminal	**Case Sub Type:**			
Status:	Disposed	**Assigned Judge:**	Cagle, Diane Day	**Disposition Judge:**	Cagle, Diane Day
Disposition:	Guilty Bench Trial				
Disposition Date:	04/17/1996	**Date Received:**		**Arrest Date:**	
Law Enf. Case:		**True Bill Date:**		**No Bill Date:**	
Prosecutor Case:		**Indictment Number:**		**Waiver Date:**	
Probation Case:					

Case Parties

Click the icon to show associated parties.

Name	Address	Race	Sex	Year Of Birth	Party Type	Party Status	Last Updated
Curry-jr, Woodrow W	418 WOODSIDE AVENUE SIMPSONVILLE SC 29681	White	M	1971	Defendant		
Palmateer					Officer		

Charges

Name	Charge Code - Charge Description	Original Charge Code - Original Charge	Disposition Date
Curry-jr, Woodrow W	0659-MARIJUANA < 28GM OR < 10GM HASHISH, 1	0659-MARIJUANA < 28GM OR < 10GM HASHISH, 1	04/17/1996

Actions

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Curry-jr, Woodrow W	CRIMINAL/TRAFFIC COURT	Event		04/17/1996-09:00	04/17/1996-09:00	
	SCHEDULED TIME PAYMENT	Action		03/18/1996-00:00	04/17/1996-00:00	

Financials

Summary

Fine/Costs:	$376.00	**Total Paid for fine/costs:**	$376.00	**Balance Due:**	$0.00

Costs

Description	Cost Code	Amount	Charge Action	Disbursed Amount
Conversion Criminal Cost	CSCONV	$376.00		$376.00

Payments

Payment Date	Receipt Number	Entered By	Transaction Type Code	Payment Amount
05/21/1996	82519	DPORTER	PY	$376.00

Greenville County
13th Judicial Circuit
Public Index

Switch View

The State of South Carolina vs. Woodrow Walter Curry Jr

Case Number:	63743CO	Court Agency:	East Greenville Summary Court	Filed Date:	06/14/2004
Case Type:	Criminal	Case Sub Type:			
Status:	Disposed	Assigned Judge:	Garrett, Charles R.	Disposition Judge:	Garrett, Charles R.
Disposition:	Guilty Bench Trial				
Disposition Date:	06/22/2004	Date Received:		Arrest Date:	
Law Enf. Case:		True Bill Date:		No Bill Date:	
Prosecutor Case:		Indictment Number:		Waiver Date:	
Probation Case:					

Case Parties

Click the icon to show associated parties.

Name	Address	Race	Sex	Year Of Birth	Party Type	Party Status	Last Updated
Cannon, J B	4 Mcgee Street Greenville SC 29601				Officer		05/12/2007
Curry Jr, Woodrow Walter	155 Woodside Rd Simpsonville SC 29681	White	M	1971	Defendant		07/16/2004

Charges

Name	Charge Code - Charge Description	Original Charge Code - Original Charge	Disposition Date
Curry Jr, Woodrow Walter	0659-Drugs / Poss. of 28g(1oz) or less of marijuana or 10g or less of hash or cocaine	0659-Drugs / Poss. of 28g(1oz) or less of marijuana or 10g or less of hash or cocaine	06/22/2004

Sentencing

And/Or	Description	Amount	Units	Begin Date	End Date	Completion Date	Consecutive or Concurrent
	Schedule Time Payment			07/08/2004			

Actions

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Curry Jr, Woodrow Walter	Scheduled Time Payment	Action		07/20/2004-00:00	07/16/2004-00:00	
Curry Jr, Woodrow Walter	Criminal/Traffic Court	Event		06/22/2004-15:00	06/22/2004-20:00	

Financials

Summary

Fine/Costs:	$565.00	Total Paid for fine/costs:	$565.00	Balance Due:	$0.00

Costs

Description	Cost Code	Amount	Charge Action	Disbursed Amount
Victim Services Asm	ASMVIC	$24.00		$24.00

38.0013% / 5.7831%				
Victim Conviction Surcharge $100 / $25	CVSRCH	$25.00		$25.00
State Assessment	STAASM	$191.00		$191.00
Law Enforcement Funding Surcharge $25	LEFSUR	$25.00		$25.00
PCC Surcharge	PCCSUR	$100.00		$100.00
Fine to General Fund	AFNEGF	$200.00		$200.00

Payments

Payment Date	Receipt Number	Entered By	Transaction Type Code	Payment Amount
07/16/2004	263483	AHEISLER	PY	$565.00

Greenville County
13th Judicial Circuit
Public Index

Switch View

State of South Carolina vs Woodrow Walter Jr Curry

Case Number:	2013A2330201947	Court Agency:	Greenville General Sessions	Filed Date:	03/12/2013
Case Type:	Criminal-Clerk	Case Sub Type:			
Status:	Pled Guilty	Assigned Judge:	Garrett, Charles R.	Disposition Judge:	Verdin, Letitia H
Disposition:	Pled Guilty				
Disposition Date:	11/05/2013	Date Received:	03/11/2013	Arrest Date:	03/08/2013
Law Enf. Case:	01-2013-035287	True Bill Date:		No Bill Date:	
Prosecutor Case:		Indictment Number:	2013GS2304893	Waiver Date:	11/05/2013
Probation Case:					

Case Parties

Click the ⊻ Icon to show associated parties.

Name	Address	Race	Sex	Year Of Birth	Party Type	Party Status	Last Updated
Azzara, K.J.	4 Mcgee Street Greenville SC 29601				Officer		03/12/2013
⊻ Curry, Woodrow Walter Jr	155 Woodside Rd Simpsonville SC 29681	White	M	1971	Defendant		04/09/2015
Ellis, Sloan Price	305 E. North Street, Ste. 325 Greenville SC 29601				Solicitor		11/05/2013
Johnson, Teresa					Court Reporter		11/05/2013
Kellett, Michael Travis - Roche Surety	P O Box 5511 Bail Out Bonding Greenville SC 29611				Bond Entity		03/12/2013
⊻ Sullivan, C Timothy	P. O. Box 2543 Greenville SC 29602				Defendant Attorney		03/25/2013

Charges

Name	Charge Code - Charge Description	Original Charge Code - Original Charge	Disposition Date
Curry, Woodrow Walter Jr	3282-Drugs / Dispisal or Assisting Disposal of Methamphetamine waste, 1st Offense	3282-Drugs / Dispisal or Assisting Disposal of Methamphetamine waste, 1st Offense	11/05/2013

Sentencing

And/Or	Description	Amount	Units	Begin Date	End Date	Completion Date	Consecutive or Concurrent
	5 yrs susp bal susp during prob						

Actions

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Curry, Woodrow Walter Jr	Form9	Filing		02/03/2017-16:18		
Curry, Woodrow Walter Jr	Form9	Filing		02/03/2017-16:17		
Curry, Woodrow	Active - Probation	Filing		11/06/2013-		

Walter Jr				10:59		
Curry, Woodrow Walter Jr	Indictment	Filing		11/05/2013-00:00		
Curry, Woodrow Walter Jr	Pre-File	Filing		06/05/2013-10:50		
Curry, Woodrow Walter Jr	Rule 6 Objection/Demand	Filing		03/25/2013-16:44		
Curry, Woodrow Walter Jr	Motion/Rule 5 Disclosure	Motion		03/25/2013-16:44		
Curry, Woodrow Walter Jr	Brady Request And Motion For Production /Inspection	Motion		03/25/2013-16:43		
Curry, Woodrow Walter Jr	Motion/Motion for Bond/Bail	Filing		03/25/2013-16:43		
Curry, Woodrow Walter Jr	Bond	Filing		03/18/2013-16:07		
Curry, Woodrow Walter Jr	Checklist	Filing		03/12/2013-00:00		
Curry, Woodrow Walter Jr	Warrants	Filing		03/11/2013-00:00		

Financials

Summary

Fine/Costs:	$288.40	Total Paid for fine/costs:	$288.40	Balance Due:	$0.00

Costs

Description	Cost Code	Amount	Charge Action	Disbursed Amount
Victim Conviction Surcharge $100 / $25	CVSRCH	$100.00		$100.00
PCC Surcharge	PCCSUR	$150.00		$150.00
Collection Fee 3%	CFEE3%	$8.40		$8.40
Law Enforcement Funding Surcharge $25	LEFSUR	$25.00		$25.00
SC Criminal Justice Academy Training	SCCJAT	$5.00		$5.00

Payments

Payment Date	Receipt Number	Entered By	Transaction Type Code	Payment Amount
04/09/2015	307404	HORTONL	PY	$213.00
04/09/2015	307406	HORTONL	PY	$63.80
01/09/2015	304939	HORTONL	PY	$11.60

Bonds

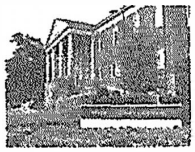
Bond Information

Bond Id	Set Date	Amend Date	Set By	Type	Amount	Type	Amount	Condition
2013BD2330202947	03/08/2013		Hicks	Cash Bond	$5,000.00	Surety Bond	$5,000.00	

Post Information

Bond Id	Bond Type	Amount	Date Posted	Posted By
2013BD2330202947	Surety Bond	$5,000.00	03/08/2013	Kellett, Michael Travis - Roche Surety

Greenville County
13th Judicial Circuit
Public Index



Switch View

State of South Carolina vs Woodrow Walter Jr Curry

Case Number:	2013A2330201932	**Court Agency:**	Greenville General Sessions	**Filed Date:**	03/12/2013
Case Type:	Criminal-Clerk	**Case Sub Type:**			
Status:	Pled Guilty	**Assigned Judge:**	Cagle, Diane Day	**Disposition Judge:**	Verdin, Letitia H
Disposition:	Pled Guilty				
Disposition Date:	11/05/2013	**Date Received:**	03/11/2013	**Arrest Date:**	03/07/2013
Law Enf. Case:	01-2013-035287	**True Bill Date:**		**No Bill Date:**	
Prosecutor Case:		**Indictment Number:**	2013GS2304892	**Waiver Date:**	11/05/2013
Probation Case:					

Case Parties

Click the ⊻ icon to show associated parties.

Name	Address	Race	Sex	Year Of Birth	Party Type	Party Status	Last Updated
⊻ Curry, Woodrow Walter Jr	155 Woodside Rd Simpsonville SC 29681	White	M	1971	Defendant		01/08/2015
Ellis, Sloan Price	305 E. North Street, Ste. 325 Greenville SC 29601				Solicitor		11/05/2013
⊻ Gibson, Kenneth Clifton	The Law Office Of Kenneth Gibson P.O. Box 5536 Greenville SC 29606				Defendant Attorney		11/05/2013
Johnson, Teresa					Court Reporter		11/05/2013
Kellett, Michael Travis - Roche Surety	P O Box 5511 Bail Out Bonding Greenville SC 29611				Bond Entity		04/08/2013
Reece, Jonathan S.	4 Mcgee Street Greenville SC 29601				Officer		03/12/2013

Charges

Name	Charge Code - Charge Description	Original Charge Code - Original Charge	Disposition Date
Curry, Woodrow Walter Jr	3014-Drugs / Manufacture, distribution, etc. of methamphetamine or cocaine base, 1st	3014-Drugs / Manufacture, distribution, etc. of methamphetamine or cocaine base, 1st	11/05/2013

Sentencing

And/Or	Description	Amount	Units	Begin Date	End Date	Completion Date	Consecutive or Concurrent
	10 yrs susp bal susp w/prob 30 mos						

Actions

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Curry, Woodrow Walter Jr	Form9	Filing		02/03/2017-16:18		
Curry, Woodrow Walter Jr	Form9	Filing		02/03/2017-16:16		
Curry, Woodrow	Active - Probation	Filing		11/06/2013-		

Walter Jr				11:01		
Curry, Woodrow Walter Jr	Indictment	Filing		11/05/2013-00:00		
Curry, Woodrow Walter Jr	Pre-File	Filing		06/05/2013-10:50		
Curry, Woodrow Walter Jr	Bond	Filing		03/18/2013-16:07		
Kellett, Michael Travis - Roche Surety	Surety $10 Fee	Filing		03/18/2013-10:37		
Curry, Woodrow Walter Jr	Warrants	Filing		03/11/2013-00:00		
Curry, Woodrow Walter Jr	Checklist	Filing		03/11/2013-00:00		

Financials

Summary

Fine/Costs:	$298.40	Total Paid for fine/costs:	$298.40	Balance Due:	$0.00

Costs

Description	Cost Code	Amount	Charge Action	Disbursed Amount
Victim Conviction Surcharge $100 / $25	CVSRCH	$100.00		$100.00
Law Enforcement Funding Surcharge $25	LEFSUR	$25.00		$25.00
PCC Surcharge	PCCSUR	$150.00		$150.00
Collection Fee 3%	CFEE3%	$8.40		$8.40
SC Criminal Justice Academy Training	SCCJAT	$5.00		$5.00
Surety $10	SURETY	$10.00		$10.00

Payments

Payment Date	Receipt Number	Entered By	Transaction Type Code	Payment Amount
01/09/2015	304939	HORTONL	PY	$48.40
10/07/2014	302610	HORTONL	PY	$60.00
07/08/2014	297251	HORTONL	PY	$60.00
04/04/2014	292489	JUDYS	PY	$20.00
02/21/2014	290761	lhorton	PY	$40.00
01/22/2014	289185	HORTONL	PY	$60.00
04/08/2013	240787	LHORTON	PY	$10.00

Bonds

Bond Information

Bond Id	Set Date	Amend Date	Set By	Type	Amount	Type	Amount	Condition
2013BD2330202947	03/08/2013		Hicks	Cash Bond	$15,000.00	Surety Bond	$15,000.00	

Post Information

Bond Id	Bond Type	Amount	Date Posted	Posted By
2013BD2330202947	Surety Bond	$15,000.00	03/08/2013	Kellett, Michael Travis - Roche Surety

RECEIVED
Aug 23 2021
SC Court of Appeals

FORM 7
PROOF OF SERVICE

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of General Sessions

R. Lawton McIntosh, Judge

Appellate Case No. 2017-002011
Case Number: 2016A05324

State of South Carolina, Respondent,

v.

Jason Franklin Carver, Appellant.

PROOF OF SERVICE

Pursuant to Supreme Court of South Carolina's Amended Order 2020-05-29-02, I served a copy of Appellant's Addendum to Petition for Rehearing, and Proof of Service, of same upon The Honorable Jenny Abbott Kitchings, Clerk of South Carolina Court of Appeals, and upon the Respondent, by and through its counsel of record, Attorney General Alan McCrory Wilson, Chief Deputy Attorney General W. Jeffrey Young, Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General Melody J. Brown, by email through the following addresses:

Ms. Jenny Abbott-Kitchings	ctappfilings@sccourts.org
Attorney General Alan McCrory Wilson	awilson@scag.gov
Chief Deputy Atty. General W. Jeffrey Young	jyoung@scag.gov
Deputy Attorney General Donald J. Zelenka	dzelenka@scag.gov
Sr. Asst. Deputy Atty. General Melody J. Brown	mbrown@scag.gov

A copy of the above-mentioned Motion shall be mailed to The Honorable Jenny

Abbott Kitchings, Clerk of Court South Carolina Court of Appeals, at PO Box 11629 Columbia, SC 29211, and the Respondents, by and through Honorable Alan Wilson at the Office Attorney General, P.O. Box 11549, Columbia, S.C. 29211, by depositing copy of it in the United States Mail, postage prepaid, as ordered.

s/Donald L. Smith
Donald L. Smith, (Bar No.: 6699)
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellants

Anderson, South Carolina
August 23, 2021.

FORM 8
LETTER TO THE COURT OF APPEALS CLERK OF COURT
FILING APPELLANT'S PETITION FOR REHEARING

August 23, 2021

The Honorable Jenny Abbott Kitchings
Clerk of Court South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

RE: State of South Carolina v. Jason Carver
Appellate Case No.: 2017-002011
Case No. 2016-A05324

Dear Ms. Kitchings:

Please find enclosed the following documents for filing:

1. Appellant's Addendum to Petition for Rehearing and Suggestion for Rehearing En Banc,
2. Proof of Service of same.

Sincerely,

s/Donald L. Smith
Donald L. Smith (Bar No.: 6699)
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellants

cc:

Attorney General Alan McCrory Wilson
Chief Deputy Attorney General W. Jeffrey Young
Deputy Attorney General Donald J. Zelenka
Senior Assistant Attorney General Melody J. Brown

RECEIVED
Sep 07 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County
R. Lawton McIntosh, Circuit Court Judge

THE STATE,

Respondent,

v.

JASON FRANKLIN CARVER,

Appellant.

Appellate Case No. 2017-002011

RETURN TO PETITION FOR REHEARING

Appellant, Jason Franklin Carver, filed a petition for rehearing on August 16, 2021, and an addendum to the petition on August 23, 2021. This Court has called for a response. Carver argues that the July 21, 2021 *per curiam* opinion that affirmed his conviction for murder reflects error in that this Court apparently "overlooked or misapprehended his arguments and evidence" on each of the 7 points decided.[1] (Petition, p. 1). Carver also suggest rehearing *en banc*. (Petition, p. 33). Respondent submits there is no error in this Court's opinion, and the murder conviction was properly affirmed.

1. The Court resolved that Judge McIntosh did not abuse his discretion in denying the motion for a new trial based on after-discovered evidence. Despite Carver's assertions, the evidence he offered simply did not support the necessity of a new trial. A party requesting a new

---

[1] This Court divided the separate arguments otherwise combined in Appellant's original four issues presented. (See generally FBOA, p. 1).

trial based on after-discovered evidence must show that the evidence (1) would probably change the result if a new trial was had; (2) has been discovered since the trial; (3) could not have been discovered before the trial by exercise of due diligence; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching. *State v. Caskey*, 273 S.C. 325, 329 256 S.E.2d 737, 738-39 (1979). In particular, this Court found that the evidence offered was "not material and is merely cumulative to the evidence presented at trial...." (Opinion, p. 2). The facts of record, the relevant case law and the Rules of Appellate Procedure all support this Court's resolution.

In briefing to this Court, Carver pointed to various examples of perceived inconsistent *testimony* offered by co-conspirator Woodrow Curry. He again, in the petition for rehearing complains of the Curry testimony. (See Petition, pp. 12-18). At the most, Curry's testimony at Gambrell's trial is merely cumulative or impeaching. *See Caskey*, 273 S.C. at 330, 256 S.E.2d at 739 (denying new trial after finding "the alleged after-discovered evidence was at most merely impeaching of [witness's] credibility and not material to appellant's guilt or innocence."). Further, the hearsay testimony concerning statements made by the victim's neighbors regarding overhearing mention of "dirt bike" held no exculpatory value – the victim had gone to Gambrell's home to sell a dirt bike on the day of the murder so that the mention of "dirt bike" during the altercation is unsurprising and does not change the circumstances of the murder. *Caskey*, 273 S.C. at 329, 256 S.E.2d at 739 (holding that evidence sufficient to grant a new trial must be such as would probably change the result if a new trial was had). Further, evidence of victim's aggressive tendencies was explored at trial. (See R. p. 502, l. 20 – p. 504, l. 3; p. 511, l. 19 - p. 512, l. 9; p. 536, l. 2 – p. 539, l. 6; p. 713, l. 17 – p. 715, l. 10). Respondent notes Carver's argument to this Court that "Curry has offered too many conflicting and illogical statements for his testimonial

evidence to [be] considered reliable" and suggest this Court not rely on "incredible" testimony. (Petition, p. 17). However, this Court does not pass on the credibility, that is for the jury (at trial) or the judge (in the motion for a new trial). The relevant question is whether the trial court erred as a matter of law in denying the motion for a new trial. In short, there is no indication that Judge McIntosh erred. Carver has not demonstrated that any evidence that was not cumulative and/or simply impeaching was offered. Applying *Caskey*, it is clear that the lower court was well within is discretion in denying his new trial motion as the evidence failed to satisfy the necessary elements. *See generally State v. Wells*, 249 S.C. 249, 263, 153 S.E.2d 904 (1967) ("The trial judge has the power to weigh the credibility of newly discovered evidence offered in support of a motion for a new trial.").

To the extent Carver complains this Court did not more fully explain its decision, (see Petition, p. 12), there is no error in the Court's disposition. *See generally* Rule 220, SCACR. Further, each party carefully presented their positions in lengthy briefing. (See FBOA consisting of 49 pages; FBOR consisting of 48 pages). Carver has failed to show a misapprehended fact or error of law.

2. Though it is not clear that Carver contends the Court erred on this point directly, (see Petition, p. 18, and p. 26 "same argument applies with delay in sentencing of Curry"), the Court resolved that Judge McIntosh did not abuse his discretion in denying the motion for a new trial. Despite Carver's assertions, the evidence he offered simply did not support the necessity of a new trial. Again, the facts of record, and the relevant case law support this Court's resolution. As the Court correctly resolved, the record shows merely allowable prosecutorial discretion in bring charges against co-defendants. (Opinion, p. 2). Carver was indicted by the Anderson County Grand Jury for murder. (*See* R. p. 442, l. 23 – p. 443, l. 2). He elected to go through trial, as was his

right, and a jury of his peers found that the evidence presented at trial supported a conviction of murder under a "hand of one, hand of all," accomplice liability. The State acted within its broad discretion in charging Carver with murder and allowing an accomplice to plead to manslaughter. *See State v. Harry*, 420 S.C. 290, 297, 803 S.E.2d 272, 276 (2017 (affirming a petitioner's murder conviction under "hand of one, hand of all" theory of accomplice liability, despite the fact that codefendant shot the victim and later pled guilty to voluntary manslaughter). But those charging decisions and plea decisions – particularly within the province of the prosecution – did not deny Carver the right to a fair trial. Further, the deferral of sentencing for the co-defendant did not support or warrant the granting of a new trial. *State v. Wright*, 269 S.C. 414, 416, 237 S.E.2d 764, 766 (1977) ("An unsentenced codefendant is a competent witness for the State" and resolving "it is exceedingly clear to us that appellant has failed to demonstrate a denial of his Due Process rights in the court's allowance of ... testimony before sentencing").

As to the recording of an investigative interview, the recording was not only turned over, but the trial court also adjourned early and allowed the defense additional time to review same. (*See* R. p. 465, l. 22 – p. 466, l. 1). "Rule 5(d)(2),2 as does its federal counterpart, FED.R.CRIM.P. 16(d)(2), gives the court a broad discretion in deciding what should be done where material that should have been produced in response to an earlier request does not become known until during or just before the trial." *State v. Newell*, 303 S.C. 471, 476, 401 S.E.2d 420, 423 (Ct. App. 1991). Consequently, the Judge McIntosh did not abuse his discretion in denying the motion as Carver was not denied a fair trial. The facts of record and relevant case law support the Court's resolution of this issue.

3. Next, the Court resolved that Judge McIntosh did not abuse his discretion in denying the motion for a directed verdict. (Opinion, p. 3). Carver argued a lack of evidence

establishing his presence at the scene for participation in a prearranged plan; however, evidence was presented to show that they did in fact act in concert. The State presented the testimony of codefendant Woodrow Curry to link Carver to the criminal scheme to rob and/or kidnap Steven Cameron. Furthermore, during Gambrell's interview with Law Enforcement, he specified that he told Curry and Carver to go let Cameron know that they were aware he had stolen the drugs and that he needed to pay. (R. 3: James-Milton-Gambrell-Second Interview- DVD: 12:30-16:40; 1 8:20-19:1 0.) Carver's complaints rest more in recasting the evidence in a light favorable to him, (see Petition, pp. 18-24), but that is not the standard for ruling on the motion. *See State v. Larmand*, 415 S.C. 23, 32, 780 S.E.2d 892, 896 (2015) ("[O]ur duty is not to weigh the plausibility of the parties' competing explanations."). The facts of record and relevant case law support the Court's resolution of this issue.

4. Likewise the Court did not err in rejecting Carver's due process argument based on a failure to allow a codefendant, Gambrell, to be called as a witness. Gambrell's defense counsel then testified that he anticipated that his client would invoke his Fifth Amendment Right. (R. p. 597, l. 22 – p. 598, l. 13). During *in camera* proceedings, Gambrell answered several preliminary questions, but eventually elected to exercise his Fifth Amendment Right. (R. p. 609, ll. 1-9). The trial court then released Gambrell. (R. p. 609, ll. 10-12). Through Carver requested that the trial court require Gambrell to invoke the Fifth Amendment on the stand in front of the jury, the trial judge denied that request. (R. p. 707, ll. 2-5; p. 708, ll. 10-12). As this Court resolved, *State v. Hughes,* 328 S.C. 146, 493 S.E.2d 821 (1997), is on point and controlling. (See Opinion, p. 4).

In *Hughes*, the Supreme Court of South Carolina held a witness may not be called solely for the sake of invoking his or her Fifth Amendment privilege against self-incrimination. *Id.* at 152–53, 493 S.E.2d at 824. Further, it is recognized that "[t]he right to present a defense is not

unlimited, but must bow to accommodate other legitimate interests in the criminal trial process." *State v. Hamilton*, 344 S.C. 344, 359, 543 S.E.2d 586, 594 (quoting *Rock v. Arkansas*, 483 U.S. 44, 55, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)). "Defendants are entitled to a fair opportunity to present a full and complete defense, but this right does not supplant the rules of evidence and all proffered evidence or testimony must comply with any applicable evidentiary rules prior to admission." *State v. Lyles*, 379 S.C. 328, 343, 665 S.E.2d 201, 208 (Ct. App. 2009) (citing *Hamilton*, 344 S.C. at 359, 543 S.E.2d at 594). The facts of record and the established case law support the Court's resolution of this issue.

5. The facts of record and the established case law also support the Court's conclusion that Judge McIntosh did not abuse his discretion in denying the continuance motion. (Opinion, p. 4). As noted, the grant of such motions is an exceedingly rare event. *Id, citing State v. Colden*, 372 S.C. 428, 435, 641 S.E.2d 912, 916 (Ct. App. 2007) (whether to grant a motion for continuance is in the discretion of the trial judge: "Reversals for the denial of a continuance 'are about as rare as the proverbial hens' teeth.' ") (quoting *State v. McMillian*, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002)). In briefing to this Court, Carver presented argument only on the co-defendant Grambrell's nephew, Quay Gambrell, not being available. (See FBOA, pp. 45-46). This Court appropriately limited the issue to the argument presented. (See Opinion, p. 4 n. 1). Carver's position fails, however, because he could show no new or novel points would have been raised had Carver been permitted time to locate witness. Defense Counsel's statements to the court indicated that Quay's testimony was merely cumulative to evidence already admitted. (*See* R. p. 708, l. 24 – p. 710, l. 15). Details concerning the victim's sale of the dirt bike to Quay Gambrell was before the trial court. (*See* R. p. 545, ll. 2-15; p. 562, l. 16 – 563, l. 13; p. 579, ll. 11-16; p. 600, l. 18 – p. 601, l. 16; p. 633, l. 15 – 638, l. 10; p. 644, ll. 10-16; R. 3: James-Milton-Gambrell-Second Interview-DVD).

"Where there is no showing that any other evidence on behalf of the appellant could have been produced, or that any other points could have been raised had more time been granted for the purpose of preparing the case for trial, the denial of a motion for continuance is not an abuse of discretion." *State v. Williams*, 321 S.C. 455, 459, 469 S.E.2d 49, 51–52 (1996). Again, the facts of record and the established case law support the Court's resolution of this issue.

6. Similarly, the Court did not err in affirming the trial court's decision on the denial of Carver's request to recall a witness. (Opinion, p. 5). The Court limited the issue to Carver's argument as to one of the detective as that was the scope of the argument in Carver's brief. (Opinion, p. 5 n. 2). (*See also* FBOA, p. 46). Again, this is a discretion ruling. *See State v. Sullivan*, 277 S.C. 35, 46, 282 S.E.2d 838, 844 (1981); see also Rule 611(d), SCRE ("After the examination of the witness has been concluded by all the parties to the action, that witness may be recalled only in the discretion of the court.").

7. Petitioner also complains that the Court did not reach certain errors because they errors were not preserved for appellate review. (See Petition, pp. 31-33; *see also* Opinion, p. 5). Carver argues that presentation of these issues were either "shut down by the trial judge," (Petition, p. 32, as to challenge to charges, or raised in the motion for new trial, (Petition, pp. 32-33). It is well within the province of this Court to determine if the issue were sufficiently raised and presented as to render the issue available for review on the merits. Additionally, the application of such rules actually promotes rather than detracts from reliability and fairness: "A contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition. This, in turn, allows potential errors to be prevented or cured." *State v. Torrence,* 305 S.C. 45, 66–67, 406 S.E.2d 315, 327 (1991). *See also Lambrix v. Singletary*, 520 U.S. 518, 525

(1997) ("A State's procedural rules are of vital importance to the orderly administration of its criminal courts..."). If an issue is not adequately raised, the appellate courts should find that the issue is not procedurally available for review on the merits. *See Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532–33, 564 S.E.2d 322, 323 (2001) (" 'Preserving issues for appellate review is a fundamental component of appellate practice. South Carolina appellate courts do not recognize the plain error rule.' " (quoting Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina 55 (1999))).* Carver shows no error in the Court's resolving that these issues were procedurally unavailable for merits review.

CONCLUSION

For all the above reasons, and those more fully argued and presented in the Final Brief of Respondent,[2] Carver has not shown an error in this Court's opinion. Consequently, rehearing is not warranted, and the petition should be denied

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

[2] Undersigned counsel for Respondent acknowledges that the initial brief of respondent in this matter was authored by, and submitted by, former Assistant Attorney General Samuel M. Bailey. Because Mr. Bailey is no longer with the Office, he does not appear in the listing of counsel. Even so, his work remains a fact in this case. As such, in making this response, undersigned counsel acknowledges to this Court that she has copied and relied on portions of the work submitted by Mr. Bailey for consistency within the appeal.

s/Melody J. Brown

BY:_____
MELODY J. BROWN
S.C. Bar 14244

ATTORNEYS FOR RESPONDENT

September 7, 2021
Columbia, South Carolina.

RECEIVED
Sep 07 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County
R. Lawton McIntosh, Circuit Court Judge

THE STATE,

Respondent,

v.

JASON FRANKLIN CARVER,

Appellant.

Appellate Case No. 2017-002011

CERTIFICATE OF SERVICE

I, Melody J. Brown hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Return to Petition for Rehearing, and Certificate of Service has been forwarded to Appellant's counsel, Donald L. Smith, Esquire via email today, September 7, 2021 at attorneydonaldsmith@gmail.com.

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

This 7th day of September, 2021.

s/ Melody J. Brown

Melody J. Brown
Senior Assistant Deputy Attorney General

The South Carolina Court of Appeals

The State, Respondent,

v.

Jason Franklin Carver, Appellant.

Appellate Case No. 2017-002011

ORDER

After 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. Accordingly, the petition for rehearing is denied.

J.

J.

J.

Columbia, South Carolina

cc:
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The Honorable R. Lawton McIntosh

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of General Sessions

R. Lawton McIntosh, Judge

Appellate Case No.: 2017-002011

State of South Carolina, Respondent,

v.

Jason Franklin Carver, Appellant.

FINAL BRIEF OF THE APPELLANT

October 4, 2019

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STATEMENT OF THE CASE

On March 28, 2016, Appellant Jason Carver (hereinafter referred as "Appellant") worked a full day at the Greenville Transmission shop, where he has toiled since 1999. Around 6:00 in the afternoon, he arrived at James Milton Gambrell's (hereinafter referred as Gambrell) house, where he worked on cars to supplement his income. That night, he was supposed to finish a transmission that he had been working on during the course of the preceding weekend.

At some point in the afternoon, deceased Stephen Cameron (hereinafter referred as "Cameron") came to Gambrell's house to sell his dirt bike to Gambrell's nephew, Quay. He was able to get a bill of sale created and executed the sale. Cameron stayed at the house for some considerable time to teach Quay how to ride the dirt bike. As a result of the sale, Cameron was left without a ride home. Upon learning that Cameron had no ride, and recognizing he was drunk, Gambrell asked Appellant to give Cameron a ride home. Appellant complied and drove Cameron to his home.

While Appellant was taking Cameron home, Gambrell and Woodrow Curry (hereinafter referred as "Curry") discovered that an item was missing from Gambrell's room. They believed Cameron had taken it prior to leaving.

Appellant and Cameron arrived at the latter's home at approximately 9:02. Appellant, nor Cameron, had a cellphone. So, Gambrell had no way of asking them to come back. Thus, Appellant simply dropped Cameron off and returned to Gambrell's home.

Upon his arrival to Gambrell's home, the latter told him that he needed him to return to Cameron's home and bring him back to the house. Curry jumped in the car with Appellant as the latter prepared to go back to Cameron's house. Appellant understood he was to bring Cameron back to Gambrell's house. Appellant left Mr. Gambrell's home without knowledge of the theft. The only thing he knew about Cameron at that point was the latter's transaction regarding the dirt bike.

When Curry got in the car, a handgun fell from his pocket. Appellant was shocked to see the gun. He had no idea why a gun would be necessary. In an effort to downplay the need for a gun, he told Curry that there would be no need for a gun with two of them there. Curry left the gun on the floorboard of the car.

Upon arrival at Cameron's house, Curry knocked on the door. When no one answered, Curry and Appellant headed back to the car. Curry, however, noticed Cameron peeking out the window. Curry turned back and started to the porch. As he ascended the stairs, and approached the door, Cameron came out of the house in an aggressive manner. Curry announced that he and Gambrell knew that Cameron had taken an ounce of cocaine from Gambrell's home. Cameron immediately denied taking such an action. Curry continued to accuse Cameron of

theft; and, requested that he return it or pay for it. At that point, Cameron pushed Curry. He pushed him with such force that he nearly knocked Curry off of the porch. Out of nowhere, Curry drew out a gun; and, pointed the same toward Cameron. Upon seeing the incident, Appellant immediately began pleading with Curry to put the gun away. Cameron, showing no fear of the gun, slapped the gun out of his face and said incredulously, "what are you going to do, shoot me?" As Curry brought the gun back up, he shot Cameron.

Appellant, recognizing that his attempts to dissuade Curry fell on deaf ears, decided he would not be part of the argument and started towards the car, intending to leave Curry behind. Shocked and fearful for his life, Appellant attempted to put the key into the ignition, but in his state of panic, dropped the keys to the floorboard. By the time he collected the keys, Curry had gotten in the car; brandished the gun towards Appellant; and, demanded he drive the car out of the neighborhood with the lights off. Appellant complied. On the drive to Gambrell's home, Curry warned Appellant he would kill him and his mother, if Appellant told anyone of the incident.

When they got back to Gambrell's house, Appellant began crying. Curry, on the other hand, casually remarked, "Shit got out of hand." His apathetic view towards Cameron's life struck a nerve in Gambrell; and, they began to argue vociferously. Appellant took this opportunity to show himself out. He went directly to his mother's home. Minutes later, he witnessed Curry drove by in his green Grand Am. (R. p. 654 & p. 655, l.9).

Appellant took Curry's threats to heart. He knew he had just seen Curry shoot Cameron. He knew he had just seen Curry drive by his mother's home. Given Curry's violent tendencies, Appellant did not wish to give him reason to believe he told on him. So, when Detective

Marzolf and Detective Call initially questioned him at his workplace, he did not disclose the shooting. (R. p. 658-660, 18.6).

On Thursday April 11, 2016, an opportunity presented itself to tell the police what had happened. Law enforcement executed a search warrant of Gambrell's home on Appaloosa. They found Curry, but not Gambrell, who was absent from his home. Curry took ownership of the cocaine that was located. Based on the weight found, Curry was charged with trafficking cocaine. With Curry safely behind bars, Appellant immediately sought to do the right thing.

On that Monday morning, Appellant sought the advice of his employer, Mr. Timothy Jacobs (hereinafter referred as "Jacobs"), who suggested he share the incident with his mother, and; go directly to the police. Thereafter, Appellant decided to go to the police without an attorney because he knew that he had nothing to hide. Appellant convinced Gambrell to talk with the police about what they knew of the incident that transpired on March 28, 2016. (R. p. 660, 19.24). Appellant only learned of the stolen item during their drive to the sheriff's office, when Gambrell told him about it. (R. p. 673, 17.24). Confident Curry would not be able to hurt his mother, Appellant went to the police, intending to assist them with details of the shooting incident. Instead, he was arrested and charged with murder.

At the trial, the State and the defense differed over the events that led to Cameron's killing. According to the State, Appellant was connected to a drug trade, and that Curry and Appellant worked for Gambrell. The State's theory was that Gambrell, Curry and the Appellant planned to collect on a drug debt, rob or kidnap Cameron. In support of its theory the State presented eleven (11) investigating officers, who seemed to have not been coordinating 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, 8.23); (2) the .25 was not recovered, but the .38 caliber revolver was found at Appaloosa (R. p. 528-529, 20.1); (3) the residence where Buick was found was owned by Gambrell's friend (R. p. 495, 11.15); (4) Appellant was not provided any gun (R. p., 526, 3.14); (5) Appellant's fingerprints did not match the one found on the .38 caliber (R. p. 529, 2.9); (6) Appellant came to the ACSO voluntarily; (7) there had been people who had come and gone from Cameron's house, (R. p. 500; p. 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, lines 23-25& pp. 508, lines 1-3); (11) ACSO reviewed two videos but he did not review all the videos taken during the night of the shooting (R. p. 509, 7.12); (12) he could not say that Appellant was part of any drug enterprise (R., p. 520, 2.6); (13) Appellant was not in Gambrell's residence when cocaine was taken (R. p. 525-526, 23.1); (14) Curry expressed to Appellant and Mrs. Curry that if they told anyone about anything, he would kill them (R. 531-532, 18.1); and, (15) Appellant 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) Appellant 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; p. 390, 4.12); (4) Gambrell gave him a gun (R. p. 571, 13.15); (5) he had a .25 caliber gun in his waistband (R. p.

563-564, 22.13); (6) the minute Appellant pulled in the driveway, Gambrell and Curry told him that he needed to go back and get Cameron (R. p. 572, 21.24); (7) Appellant had a shiny gun that had a long barrel (R. p. 573, 22.25); (8) there was no plan to kill anybody (R. p. 574, 20.25); (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, 22.4); (12) he was charged with murder but pled guilty to voluntary manslaughter (R. p. 553, 4.5); and, (13) despite his many charges before, this was the first time his sentence was deferred (R. p. 557). The State did not introduce into evidence the gun which Appellant 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 Appellant drove Cameron to his house. Sometime after, it showed the white Buick, that Appellant 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 Appellant and his mother's life, Appellant intended to establish Curry's propensity for violent behavior. Appellant 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).

Appellant also presented his employer, Timothy Jacobs, who testified that he has known Appellant since 1999. Appellant worked at Greenville Transmission Clinic, which Jacobs owns. (R. p. 586-587, 20.15). He vouched for Appellant's reliable, loving, hardworking and family-oriented personality. (R. p.587-589, 16.2).

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 Appellant 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. Appellant merely sought to establish he was not at Gambrell's home long enough to learn of the alleged theft.

However, the Court would have not 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. 605-609, 1.12).

Appellant believed that Gambrell would have testified as to what he relayed to Appellant, would have exonerated the latter from the murder charge. Since Gambrell could no longer stand in court, Appellant attempted to introduce the audio recording of Gambrell's police interrogation. The court initially denied Appellant'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 Appellant. (R. p. 620, 5.16).

Appellant 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 Appellant. (R. p. 709,7.25 & p. 710, 1-16).

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, Appellant was convicted of murder on August 25, 2017. He moved to vacate or arrest the

verdict; or, in the alternative grant a new trial, but was denied in an Order, dated September 14, 2017.

Appellant perfected his appeal. (R. p. 22). He was finalizing the record on appeal when he learned of the trial for Gambrell. Gambrell was charged with "Accessory before the fact to a Felony" and "Solicitation to Commit Murder". Detective Marzolf and Curry were made State witness against him. These two witnesses offered statements that were either not introduced or ran inconsistent with their previous testimonies in Appellant's case. Appellant believed that these statements should be explored in depth as they go to the very core of the crime for which Appellant was convicted and sentenced to thirty (30) years of imprisonment.

Appellant moved to hold his appeal in abeyance based on newly discovered evidence on October 19, 2018, which this Court granted on December 10, 2018.

In the trial court, Appellant filed his Motion for New Trial on December 20, 2018. He amended the same on December 27, 2018, which was summarily denied on January 4, 2019. Appellant moved to reconsider the said Order on January 14, 2019 and submitted an Addendum to it on January 17, 2019. The trial judge denied the motion on January 30. 2019.

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

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

ARGUMENTS

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL

A. Newly Discovered Evidence surfaced that

warrants the examination of this case.

The trial of James Milton Gambrell in the murder case of Steven Cameron, ushered new evidence that was not available during Appellant's trial. The newly discovered evidence consists of trial testimonies of Curry and Gambrell, as well as statements by witnesses in Gambrell's trial. Appellant could not have obtained this evidence during his trial since they were either intentionally omitted or were fabricated.

From the inception of this case, the State relied heavily on Curry's testimonies, which have been proven to be inconsistent and unreliable in many instances.

First, during the trial for Appellant's case, Curry denied having named anyone as the shooter, insisting that it was him who shot Cameron.

14. Q. When you originally spoke to
15. detectives who did you say shot Steven
16. Cameron?
17. A. I didn't.
18. Q. You didn't?
19. A. (Negative gesture).
20. Q. So you're telling us today who shot
21. Steven Cameron?
22. A. Yes, ma'am. It just happened, I
23. didn't mean to shoot him. He was just coming
24. at me. I don't even remember pulling the
25. trigger, it just went—(pause)—I wish I
01. could turn back time, but I can't.
02. Q. Thank you, Mr. Curry. Please answer
03. any questions that Mr. Smith may have for
04. you.

(R. p. 554-555, 14.4)

However, in the Gambrell trial, Appellant learned that Curry, initially tried to pin the shooting on Appellant. Marzolf, who interviewed Curry, testified to the following:

16. Q. Now, did Mr. Curry, the shooter, admit to you what
17. had happened, or did he deny all knowledge of what had
18. happened?

19. A. He gave me a version of what had happened in which
20. he said that they did go to the house and that Jason
21. Carver was the shooter that night.
22. Q. But didn't Mr. Curry later change his mind and
23. admit that, in fact, he was the shooter?
24. A. Yes, sir, he did.
25. Q. But at the time he was lying about that to you,
01. correct?
02. A. Yes, sir.

(R. p. 806-807, 16.2).

Second, when Curry was asked what he did after leaving Cameron's house during Curry's trial, Curry stated in a straightforward manner that they went back to Gambrell's house.

03. Q. What did you and Jason Carver do
04. when you left Steven Cameron's house?
05. A. Went back to Milt's.

(R. p. 552, 3.5).

However, when the same question was asked at the Gambrell trial, Curry revealed, for the first time, that he called Gambrell on the way back to his house and told him of Cameron's shooting.

09. Q. Okay. Did you do anything on the way to
10. Mr. Gambrell's house?
11. A. Yes, ma'am. I called him there and told him
12. that he better be sure that Steven got that dope. I
13. mean, I just shot him.
14. Q. You called Milt and told him that?
15. A. Yes, ma'am.

(R. p. 810, 9.15).

Out of nowhere, the prosecutor asked Curry if he did anything on the way to Gambrell's home. This response was not elicited during Appellant's trial. It is very clear from the direct examination that the solicitor brought out Curry's alleged call to Gambrell to paint the picture of the consigliere calling the mob boss after he had done a dirty deed on his behalf.

Gambrell contradicted Curry's claims. In his sworn affidavit, Gambrell categorically denied that Curry called him since Curry had no phone at the time. (R. p. 280). Th State did not offer Gambrell or Curry's respective phone records from the night of the incident to support Curry's statements. It is the Appellant's belief that there has never been such proof, given the fact that Curry did not have a phone.

Third, at Appellant's trial, Curry testified that Gambrell instructed Appellant to drive Cameron to his house.

Q. What were y'all doing?
A. Well, at the time—at the time I was working on a car. I was working on a car and I guess he was in there with them. Then Milton came out there and told Jason to take Steven home.

(R. p. 544-545, 21.1).

In his subsequent testimony at Gambrell's trial, Curry implied that Appellant voluntarily took Cameron home.

Q. What we're y'all doing?
A. Well, I mean like I say, I was out there working – to begin with, I was out there working on a car. Carver wasn't even there yet. I was working on a car there, and they was in the house. Steven had come over with a dirt bike, and he was in the house. And then later on, when Carver got off work, he come over there like he normally did. He went in the house and come back out, him and Steven there, and he took Steven home.

(R. p. 809, 16.25).

Fourth, Curry, implicated Appellant by testifying that he had a gun when they went to Cameron's house, only to deny the same in his subsequent testimony.

Q. Did you have a gun when you left Appaloosa Drive?

17. A. Yes.
18. Q. Where did you get that gun?
19. A. Milton Gambrell.
20. Q. Did Jason Carver have a gun when you
21. left Appaloosa Drive?
22. A. Yes.
23. Q. Where did he get that gun?
24. A. It was his.
25. Q. Did you have more than one gun with
01. with you?
02. A. Yes.
03. Q. How many guns did you have?
04. A. Two.
05. Q. Do you remember what kind of guns
06. they were?
07. A. .38 and a .22--.25, I mean.

(R. p. 547-548, 15.7).

However, in the same examination, Curry stated:

02. Q. And the weapon that you said that
03. you had seen, was that the same weapon that
04. you allege that he had at this time?
05. A. I don't know that he owned one.
06. Q. The one with the sight on it, the
07. one that he allegedly brought out and showed
08. you previous to his incident, you still
09. don't know what that is?
10. A. No, sir.

(R. p. 549, 2.10).

Gambrell confirmed that Appellant did not have a gun on March 28 or 29, 2016. (R. p. 280). Gambrell stated that the only time he saw Appellant with a gun was in 2015, one year prior to the shooting incident. At that time, Appellant was showing his brother's gun to Gambrell. *Id.*

Fifth, in recalling what transpired between him and Cameron, Curry testified that he only realized that he had a gun with him when Cameron came charging at him and that he had no choice but to shoot the latter.

Q. So you had a chat with Steven Cameron. And after he did not give you any money and he did not give you any drugs, what did you do?

A. I don't know, I like turned and he come at me, and I looked down, I didn't know I had the gun but obviously I did—I had it, I mean. Then like, 'oh.' He charged at me and – I don't even remember pulling the trigger but I heard *Pop! Pop!* So—(pause).

Q. So you shot Steven Cameron?

A. Yeah, I guess.

(R. p. 550, 14.25).

In his testimony at Gambrell's trial, Curry testified that he pulled the gun to intimidate Cameron, who charged at him at that point. He pulled the gun prior to any exchange of words between him and Cameron.

Q. Why did you do it?

A. Because for some reason or another I had done pulled the gun, I guess to intimidate him or whatever, and he charged at me. "What are you going to do, shoot me?" And he charged at me. I don't know what to do. What's he going to do, take the gun and shoot me or what? I don't know. I mean, that's just—

Q. Why did you feel the need to try to intimidate him?

A. He's bigger than I am.

Q. He's bigger than you are?

A. A lot bigger than I was.

Q. But you just said you were just going to have a conversation with him. Why should him being bigger than you make a difference if you're just going to have a conversation?

A. Man, like I said, I was high. I was 150 pounds. I was all drawed up myself, you know I mean.

(R. p.816, 8.25).

Appellant believes that the purpose of Curry's new testimony was to eliminate any self-defense argument. By saying that he had already pulled the gun, it sounded as if he was a bank

robber, who goes into the bank with gun drawn ordering everyone on the ground and announcing, "This is a stick up".

Ironically, that exchange also illustrated the fabrication of Appellant having a gun. By having Curry testify that Appellant had a gun, the State made it appear that Appellant was "part of the team". The only statement regarding Appellant possessing a gun was from Curry. Appellant painstakingly discussed how he pleaded with Curry to leave the .38 (the only gun that Appellant knew Curry had) in the car. Obviously, Appellant did not have a gun; or, he would not have been so aggressive with his plea for Curry to leave his gun in the car. More importantly, if Curry's testimony were to be believed then Curry would not have felt threatened when Cameron lunged at him during their exchange of words. It was irrational that Appellant, having a gun with him, did not use the same against Cameron, whether it was just to intimidate or to ensure that the latter complied with Curry 's demands. It would have shown unity in action and purpose. But that is not the case at hand. In the instant case, when Appellant realized that Curry would not heed his pleas to put the gun down, Appellant ran away from the two men, with the intention of leaving Curry behind, *because he could not protect the deceased or himself without a weapon.* That is not the action of a man in agreement with Curry's actions.

Sixth, in Gambrell's trial, Curry testified that upon returning to Gambrell's house from Cameron's place, Appellant went in to return the gun to Gambrell. Of course, this testimony conflicts with Curry's prior testimony that Appellant had his own gun.

16. Q. And what happened when you got back to Appaloosa
17. Drive?
18. A. When – Carver went in before me there, but we
19. went in there and trying to give Milt there the guns
20. there. And I mean, Carver had a – there, and I
21. turned around and left there. I told him I was going
22. home; I was done for the night
23. Q. Okay what did you do with the gun when you got

24. back to Mr. Gambrell's house?
25. A. I gave them back to Mr. Gambrell.

(R. p. 810, 16.25).

Curry slipped with the following statement, "*we went in there and trying to give Milt there the guns there. And, I mean, Appellant had a -- there, and I ...*" (Id.). The .25 caliber was never seen prior to the shooting. Neither was it found following the shooting. On the other hand, the .38 was returned to Gambrell's house. In testifying that "*(W)e went in there to return the guns*", Curry tied Appellant in with him. Curry admitted returning only one gun to Gambrell. More importantly, he caught himself saying that Appellant returned the gun he allegedly had. If it were true that Appellant had his own gun, he would have no need to return his own gun to Gambrell. In addition, if he just came over to work on the transmission, he would have no need for it.

Whenever confronted with the inconsistencies in his testimonies, Curry conveniently pulled the memory lapse excuse.

14. Q. Why did you testify in your first trial that you
15. went back to Milt's house and that's when you told him
16. about the shooting when you're testifying in this trial
17. that you called him on the way on your cell phone?
18. Which is the truth?
19. A. I called him on the cell phone.
20. Q. Why is this the first time you're saying this?
21. A. First time I recall being asked.
22. Q. Weren't you asked in the first trial? And,
23. specifically, I'm talking about your codefendant's
24. trial, the other person who was with you, Jason
25. Carver's trial.
01. A That's 11 months ago, sir. It's hard for me to
02. remember that far back. But, I mean, I told him on the
03. way, you know. When I got there, he smelled the gun.
04. I mean...

(R. p. 811-812, 14.2).

Q. Okay. So the first trial, you testified that after the shooting, you drove back to Milt's house, Mr. Gambrell's, and then you told him inside of his house --
A. Uh-huh.
Q. -- that you shot the guy.
A. I don't recall that, but if you say I did, I did.
Q. Do you recall what you told him as to why you shot the poor man, why you shot Mr. Cameron?
A. He didn't ask.
Q. Didn't you say something like, "Well, things just went crazy and I shot him"?
A. No. Like I say, he didn't ask. I told him on the way back over there that he better have been sure that that guy took his dope there because I shot him.
Q. You said the way back over there?
A. On the way back over there, I called him. He answered the phone. I said, "You better be sure that the man took your dope, Steven took your dope, because I just shot him."
Q. Did you tell any of the detectives this, that you called him on the way back over there on your cell phone?
A. Sir, I was under the influence. I don't recall speaking there to y'all, to detectives. Are you talking about when I was first arrested?
Q. No, sir. When you were interviewed by the police, when you're sitting in Greenville County jail.
A. Like I said, when I was first arrested 31 months ago, I was still under the influence of methamphetamines at that time. I went through their drug and alcohol treatment program in Greenville County Detention Center.
Q. So you're telling this jury –
A. The first time I spoke to a detective, I did not tell them nothing. I can tell you that much. The second time I spoke to them, I don't -- I don't recall what I told them. I mean, I was still, you know, as they told me in drug class, I was still high.
Q. My question to you, sir, is: Why are we hearing this story that you called Mr. Gambrell on your cell phone after the shooting before you got back to the house? Why are we hearing this the first time today?
A. It's the first time it's been asked.
Q. The detectives never asked you the details of what happened?

13. A. Not that I recall.

(R. p. 812-814, 17.13).

However, during his plea bargaining, prior to the trial, Curry stated that he was not under the influence and his lawyer said that he was competent to plea.

18. THE COURT: Are you under the influence of
19. any medications, drugs, or alcohol today?
20. MR. CURRY: No, sir.
21. THE COURT: Counsel, are you satisfied that
22. Mr. Curry's competent to plea?
23. MS. BYFORD: I am, Your Honor.

(R. p. 793, 18.23).

Clearly, Curry's testimonies were inconsistent and unreliable. It was another illustration of Curry being led by the "sentencing" carrot" offered by the State. Even assuming that Curry's testimonies were to be believed, he still deliberately withheld information that was relevant to Appellant's case. The defense counsel in the Gambrell trial perfectly summed up the flexibility in Curry's testimony, with the following question:

02. Q. Okay. Well, if your memory was so messed up, why
03. should this jury believe anything you have to say today
04. about what happened over two years ago?

(R. p. 817, 2.4).

On September 6, 2018, Gambrell who, following the prosecution's theory, was the mastermind of the "hand of one is hand of all", was acquitted of accessory before the fact. He was found guilty of solicitation of a felony.

On ACSO and police officers

At Gambrell's trial, 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 word "dirt bike" was mentioned.

Q. So when you mentioned that on the first video that a neighbor had heard the argument and heard what went on down that night, that just was not true, correct?
A. Actually, that was true. We had -- during the neighborhood canvass, it's my understanding that one of the detectives talked with a neighbor who overheard an argument and the words "dirt bike" were mentioned during the argument.
Q. Did they hear gunshots?
A. No one -- I don't recall. I don't recall if somebody heard gunshots or not. I know that they talked to several people in the neighborhood.

(R. p. 804-805, 20.6).

A All I know is what, you know, what the detective that was told to canvass told me, which was that, you know, somebody had overheard an argument involving the words "dirt bike."
Q. But no gunshots?
A. I don't recall if they had heard gunshots or not, sir. I don't want to tell you the wrong thing.

(R. p. 805, 15.21).

This neighbor was not mentioned in previous reports. Neither was it mentioned by any of the detectives who testified in the Appellant's trial. Appellant maintains that this should have been disclosed in the previous trial as this confirms what he previously asserted he believed why he was being sent back to get Cameron. The sale of the dirt bike reasoning shows Appellant's lack of criminal intent.

This was not the first time that the officers investigating this case failed to be forthright with information at their disposal.

Appellant's counsel asked Marzolf twice regarding Cameron's violent tendencies, which the officer denied having knowledge. (R. p. 502, 20.25). However, Marzolf had knowledge of Cameron's volatile behavior. He admitted that he had a supplemental report from Officer Scott Hill who interviewed a neighbor who recounted Cameron's violent behavior. (Ibid.). Marzolf

himself interviewed Cameron's siblings, Erica and Christopher. Erica told him of Cameron's history of domestic violence against his wife. (R., p. 268). Christopher stated that Cameron had punched him at one instance; and, jumped on his daughter and left bruises on her, on another. (Ibid.)

As discussed in the previous section, Marzolf has shown no qualms in offering conflicting testimonies/statements. He testified not having knowledge of, nor even participated in, Curry's plea deal.

Q. Do you know when he changed his mind about that, decided to admit he was the shooter?
A. Sometime after he had been charged.
Q. Charged by you?
A. Yes, sir.
Q. With these crimes? And to your knowledge, was that part of a plea agreement with him?
A. I don't know what the actual -- I know he's agreed to testify.
Q. As a matter of fact, he's here today, isn't he ready to testify?

(R. p. 807, 3.14).

Curry contradicted Marzolf's statement. In his sworn affidavit, Curry specifically stated that Marzolf and Solicitor Moore suggested to reduce his charge to voluntary manslaughter, if he plead guilty and implicated Appellant. (R. p. 278). Curry exposed that it was Marzolf and the prosecutor's idea to reduce his charge.

Appellant believes that had this information been provided to him prior to his trial, it would have helped him formulate his defense.

In State v. Caskey, the South Carolina Supreme Court established the criteria necessary to grant a new trial on newly discovered evidence. The Court explained: "[a] party requesting a new trial based on after-discovered evidence must show that the evidence: (1) is such as would

probably change the result if a new trial was had; (2) has been discovered since the trial; (3) could not by the exercise of due diligence have been discovered before the trial; (4) is material to the issue of guilt or innocence; and, (5) is not merely cumulative or impeaching." State v. Caskey, 256 S.E.2d 737 (S.C. 1979), cited in Hayden v. State, 299 S.E.2d 854 (S.C. 1983).

Appellant avers that he has satisfied the aforementioned requirements for the motion for new trial. The crux of the State's case against Appellant is Curry's testimony. Now that Curry's lies, and misleading statements have come to light, these cast doubt as to his testimony.

The inconsistent statements by Curry and Marzolf, as well as statements from Gambrell about Appellant not having a gun on the day of the shooting are evidence that could not have been discovered by Appellant during his trial despite exercise of due diligence because they were intentionally omitted or withheld from him. Appellant believes that had the information been made available as to a neighbor overhearing a conversation about a "dirt bike", it would establish a doubt into the minds of the jury as to Appellant's intent in returning to Cameron's house. Had Curry not lied about the Appellant having a gun or about Gambrell's instructions; then there is a probability that the jury would have considered Appellant's narrative of what transpired during the night of the shooting. Curry's ever-changing testimonies would have a negative effect on his credibility as a witness and would affect the jurors' judgment. The State knowingly put forth Curry's alternative testimonies to ensure two (2) convictions.

The aforementioned evidence was discovered by Appellant after his trial. Despite exercise of due diligence, counsel for defense could not and would not have discovered the lies and misrepresentations that Curry divulged during Gambrell's trial. The State's efforts to conceal important information deterred Appellant from preparing for a comprehensive defense.

The newly discovered evidence is not merely cumulative nor impeaching, as it goes to the very essence of the elements of the crime of murder for which Appellant was convicted.

Appellant asserts that due to this newly discovered evidence which are not available during his trial, he is entitled to remedy under Rule 29 SCRCrimP.

B. Appellant is entitled to a new trial or judgment against him vacated because he was deprived of fair trial.

Appellant further asserts that he is entitled to new trial and/or that the judgment against him vacated by reason of the State's misconduct in the handling of this case.

Appellant insists that the prosecution abused its discretion in filing different charges against him, Curry and Gambrell. The prosecution's theory was that the three conspired to rob or kidnap Cameron, and that under the "hand of one is hand of all" doctrine, all three of them were guilty of the killing of Cameron. However, the prosecutor charged Curry and Appellant with murder [1], and "the boss", Gambrell, with the lesser crimes of solicitation to commit a felony and accessory before the fact to a felony. The same prosecutor handled Appellant's and Gambrell's trial. But while she was emphatic and steadfast with her argument on the application of the accomplice liability doctrine on Appellant and Curry, she deliberately and cautiously omitted the same argument in her prosecution of Gambrell.

Appellant was tried by himself because there would be no way to separate him from the other two. Gambrell and Curry were the ones involved with the cocaine trade. This cannot be better exemplified than by the fact that when the law enforcers raided Gambrell's house and found enough cocaine to fetch a trafficking charge (following Mr. Cameron's death), Curry was the only person found there.

[1] Curry admitted to shooting Cameron, but his original charge of murder was reduced to voluntary manslaughter after a plea bargaining.

Appellant avers that in its zealousness to get a conviction for this case, the prosecution went beyond its bounds.

First, according to the prosecution's star witness, Curry met with the prosecution team, three times. Marzolf was in at least one of these meetings. The prosecution provided no recording, or failed to make one, of the time they visited Curry to speak to him on his manslaughter deal. Appellant's counsel received two video interviews, but the Solicitor withheld (or conveniently did not make) the third. Appellant was not shown the video, or any other evidence, of what exactly the prosecution offered Curry. Curry maintained that Marzolf and Ms. Moore would reduce his charges to voluntary manslaughter, if he plead guilty and testified against Appellant. (R. p. 278).

Second, the State deferred Curry's sentencing for over a year, when the Order specifically stated that it would only be until after Appellant's trial. (R. p. 793 2.6). However, the State liked the results of holding the anvil over Curry's head so much that they held off sentencing for another year; or, after Gambrell's trial. Curry testified as to what would convict Appellant, and then Gambrell. Curry's testimony as to calling Gambrell on the way to the latter's house, a statement which Curry did not offer at Appellant's trial, is a testament to the extent by which they went to get a conviction.

Due to Curry's lies, Appellant and Gambrell were convicted of the charges brought against them. In this appeal, the State contends it merely has to show some evidence to defeat an appeal. However, considering Curry's testimony is the cornerstone of the State's evidence in both cases, and it was shown that he had offered conflicting statements, as well as withholding important information, Appellant asserts that the State has no evidence. Curry cannot be considered credible evidence when his testimony varies to fit the prosecutor's needs. Likewise,

Curry and Marzolf withheld information that would be beneficial to the Appellant. Withholding information deprived Appellant his right to a fair trial.

During Appellant's trial, the prosecutor argued that all three were liable under the "hand of one is hand of all" doctrine.

> So what happened here is that Milton Gambrell, a known drug dealer, Mr. Smith just told you all about that, sent his two ""do boys"--- that is what Woodrow Curry called himself and Carver on the stand—they were his "do boys." He sent them in a car that he owned to collect on a drug debt. That is working together for an illegal purpose. That is the hand of one, hand of all.

(R. p. 228, 4.12).

But in the Gambrell trial, this was all she stated:

> In order for James Milton Gambrell to be found guilty of accessory before the fact to murder, he must have the same criminal intent as Woodrow Curry. They must have intended the same thing before the murder was committed. They must have intended for Woodrow Curry to take the money, to take the drugs, or to bring Steven Cameron back to James Gambrell. But James Gambrell is also liable for any criminal act which, in the ordinary course of things, was the natural or probable consequence of the crime that he advised or commanded. So was the murder of Steven Cameron a natural and foreseeable consequence of James Gambrell's order? I submit to you that it was.

(R. p. 261, 19.25 & p. 262, 1.6).

Clearly, the prosecutor applied a different standard at Gambrell's trial.

Third, Curry's sentencing was deferred for more than one year with no legitimate reason other than to ensure that his testimony would once again be beneficial to the State. This piece of information only came to light after the Gambrell trial, where Curry was called as a witness.

The only logical conclusion was that the State dangled Curry's sentencing over his head for him to testify according to its wishes.

Fourth, in prosecuting the case, the State failed to disclose information and/or witness that may exculpate Appellant. A prosecutor's primary duty is to seek justice. Under the law, a prosecutor shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense. (Rule 3.8(d) of the Rules of Professional Conduct). It failed to do the same.

The investigation on Appellant's case was completed April or May 2016. The State offered Appellant a copy of the discovery response in December 2016, which Appellant was unable to open. By the State's own admission, what they provided had been faulty.

02. SOLICITOR MOORE: Yes, Judge. I cannot
03. guarantee that the flash drive will be able
04. to play for the jury. We have, as you know,
05. had some difficulty with that.

(R. p. 229, 2.5).

Appellant repeatedly requested the discovery materials, which included surveillance video which ran in excess of 36 hours. These materials have been in the State's possession since the first week of the investigation. Appellant was provided the materials a year after. Another set of materials which included an audio recording and three supplemental reports was provided by the State on August 9, 2017, or two (2) weeks prior to Appellant's trial. The State failed to give the defense the opportunity to review materials which it had for more than one (1) year. Even the Trial Court judge took notice of this.

17. THE COURT: I want to know what
18. evidence that was delayed to August 9th, that
19. kind of delayed delivery that y'all gave to
20. the defense. This guy is on trial for murder
21. and if he gets found guilty, then he's

looking at life in prison.
SOLICITOR MOORE: I understand, Your Honor.
THE COURT: So playing with evidence is not satisfactory. I'm not saying that anyone is playing with the evidence but I want to know why after over a year it's just getting to the defense. That's inexcusable and I can't understand how, under any circumstances, that could be. Now, I might just be wrong --and it wouldn't be the first time. But I want an explanation and I want to know what else could be missing. We're not going through this trial, jerking and stopping here and there, because the State, either through its officers or through your office did not bother to give discovery. Okay? So I want to know why.
SOLICITOR MOORE: Your Honor, I can assure you that we gave Mr. Smith ---
THE COURT: I want to know why --I don't care what you did. I want to know why it just got sent out August 9th of this year.
SOLICITOR MOORE: Because I'd just received it, Your Honor.
THE COURT: From whom?
SOLICITOR MOORE: From Detective Henry.
THE COURT: Who is Detective Henry?
SOLICITOR MOORE: He is the man who was just testifying.
THE COURT: Why, sir, was it not until the 9th of August of this year that you didn't give this information up?
OFFICER HENRY: What information?
THE COURT: Why did you wait until this year, over a year, to give this information to the Solicitor's Office?
OFFICER HENRY: I thought that I had given it to a supervisor at an earlier point in time.
THE COURT: You thought you had.
OFFICER HENRY: Yes, sir.
THE COURT: So it was a case of honest mistake?
OFFICER HENRY: Yes, sir. Seriously, yes, sir.

THE COURT: If it is a case of honest mistake, I can understand. But if it's a case of a recurring pattern—and the reason why I say that is because this is the second time that I've heard it in this case, in two days. Not from you. Okay. Is there other evidence that was not delivered until late in the game? If so, why?

SOLICITOR MOORE: Your Honor, if you will allow me to go through my discovery with Mr. Smith and look at my exhibit list, I can tell you exactly

THE COURT: I'll be right back. I want to get this cleared up.

SOLICITOR MOORE: Yes, sir.

THE COURT: Officer, if it is an honest mistake, it's okay. I'll be right back. Don't anybody leave until I get back.

(R. p. 460-463, 17.11).

Henry's testimony was suspect at best. If he did not know that the defense did not have the discovery, how would he suddenly have learned this fact immediately prior to trial?

The trial judge initially found this delay as unacceptable.

Q. Why is there such a delay in getting that information?

SOLICITOR MOORE: Your Honor, I can only provide to Mr. Smith what I have for myself.

THE COURT: That is not an excuse.

SOLICITOR MOORE: I understand—

THE COURT: That is not acceptable.

SOLCITOR MOORE: I understand, Judge.

THE COURT: Then there is going to be some consequences for the delay in getting this information to him. The information is going to be suppressed. There's going to be some problems with it, I'm telling you.

SOLICITOR MOORE: I understand, Judge.

(R. p. 459, 6.19).

The judge went easy on the State and allowed all the information in the record. (R., p. 462,18.23). The Court changed gears and attacked Appellant's counsel for his failure to view the 36-hour long video; analyze the same; and, review the plethora of other materials submitted to him in the two (2) weeks leading up to trial. (R. p. 463, 19.24). The Court failed to consider that Appellant's counsel is a sole proprietor, whom unlike the prosecution, did not have enough manpower and resources to devote to a comprehensive analysis of copious, delayed discovery materials. (R. p. 464-465, 21.4). What is apparent is that the Court was lenient with law enforcement's haphazard handling of this case but applied strict standards with Appellant's counsel.

Failing to submit the video surveillance and required discovery materials within the reglementary period is tantamount to the State denying Appellant his right to due process. The delay in providing discovery materials to defense counsel seems to have become the norm. Considering that this was not the first instance it happened in this case alone, the trial judge should have addressed the issue more sternly. In State v. Fullwood, the Supreme Court ruled that the Defendant was entitled to a new trial on the ground that he was deprived of fair trial because of withholding by Solicitor of information relevant to defendant's plea. State v. Fullwood, 262 S.E.2d 10, 274 S.C. 60 (1979).

Fifth, the State's questionable conduct continued during Gambrell's trial, when it deliberately offered Curry despite knowledge of his tendencies to lie and/or withhold information from the beginning. In fact, he was offered *because* of his willingness to change his testimony to bolster the State's respective cases.

Lastly, the State charged Appellant with murder. He was indicted for said crime. Nowhere in his charge sheet was he charged with kidnapping, robbery, attempted assault or

drug distribution, and yet the State included the aforesaid felonies during the trial. At most, Appellant was denied his right to be informed of what he was charged.

Prosecutors have a unique role in society. They are the administrators and advocates of justice, as officers of the court. They have the sole responsibility of deciding who to charge, what to charge, what plea to offer, and what evidence to present to a jury at trial. Due to this vast power, there lies the inherent potential for abuse, which is not subject to review, except in the most unusual circumstance.

In this case, the State instituted the murder charge against Appellant, knowing it was possible that Curry could avoid same with a self-defense argument. Curry admitted to the shooting but offered the alibi of self-defense. The prosecutor offered Curry a plea deal. Curry's sentencing was deferred for no legitimate reason. In the meantime, he was tasked to testify against Appellant, whose only mistake was to do car jobs for Gambrell. While this goes into the matter of prosecutorial discretion, this was clearly abused in this case to the detriment of Appellant. The State knew that murder would not hold. Petitioner is presently serving a sentence of thirty (30) years for a crime that he did not commit. Petitioner is serving a harsher penalty for a crime that Curry did commit.

Appellant submits that the prosecutors' obligation to convict should be balanced by the overriding goal of seeking justice. As it stands, the purpose and goal of liberal prosecutorial discretion, have been subverted. Appellant was extremely prejudiced in his defense of the murder charge, and in the interest of justice, this Court should reverse his conviction, or allow a re-trial for same.

II. THE TRIAL COURT ERRED IN CHARGING THE JURY THE "HAND OF ONE, HAND OF ALL" DOCTRINE.

Appellant contends that the trial judge erred by instructing the jury the "hand of one is hand of all" doctrine. This doctrine, otherwise known as the accomplice liability, provides that: "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to execution of common design and purpose." State v. Mattison, 388 S.C. at 479, 697 S.E.2d at 584.

Under the accomplice liability, "a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet or assist in the commission of that crime, through some overt act." State v. Langley, 334 S.C. 643, 649-50, 515 S.E.2d. 98, 101 (quoting State v. Austin, 299 S.C. 456, 459, 485 S.E. 2d., 830, 832 (1989).

Appellant asserts that the evidence does not support the charge of accomplice liability. Firstly, the State admitted that Appellant did not shoot deceased Cameron. (R. p. 765, 11.12). The State's own witness, Curry, confessed to shooting the deceased when Cameron charged at him during their heated exchanges. (R. p. 550, 18.25).

Secondly, while Appellant was present at the scene, the State failed to establish that there was common design and purpose among Appellant, Curry and Gambrell to commit any criminal act.

The State failed to show unity in purpose.

Curry admitted that Gambrell spoke to him about the stolen item while Appellant was driving the deceased to his house. (R. p. 570, 14.25). He also stated that Gambrell did not tell Appellant about any stolen item.

21. Q. So the minute that Mr. Carver pulls
22. in that driveway, you and Mr. Gambrell tell
23. him that he needs to go back and get him?

24. A. Yes, sir.
25. Q. You don't take the next twenty
01. minutes telling him about the unbelievable
02. Mr. Cameron taking his cocaine, do you?
03. A. No. No, he didn't.

(R., p. 572-573, 21.3).

Nor was Appellant aware of the gun that Curry took from Gambrell.

09. Q. And he was not aware of that gun, was he?
10. A. Who?
11. Q. Mr. Carver?
12. A. Maybe not.

(R., p. 574, 9.12).

Curry categorically stated that there was no plan to kill anybody.

14. Q. So Mr. Carver thought— 'I told him
15. to leave it in the car, he left it in the
16. car.' So going up to the door, you told the
17, guy, 'Hey you have something of his' or 'do
18. you have some money?' Does that sound about
19. right?
20. A. Yeah. I mean, I don't – there—
21. this wasn't – there wasn't no plan to kill
22. nobody.
23. Q. Nobody had that plan, did they?
24. A. No, sir.

(R., p. 574, 14.24).

This confession belied prosecution's theory that an agreement to carry out a plan transpired among the three. More importantly, the State's own witness affirmed what the Appellant had been telling all along: that he had no knowledge of any missing or stolen item at the time that he proceeded to Cameron's house with Curry.

Since Appellant was not in Gambrell's house when the latter learned of the theft; and, was not apprised of it when he returned to Gambrell's home, the only thing he knew was Cameron's transaction involving the dirt bike. As Curry testified, Gambrell instructed Appellant to go back

to get Cameron the moment he pulled up in Gambrell's driveway. (R. pp. 572-573, 21.23). Thus, there was no common design, no prior agreement nor plan concocted among the three. Appellant could not have agreed to something of which he did not know. He could not have agreed to recover a stolen item from Cameron, if he had no knowledge of the item, nor it being stolen or missing.

There was no Unity in Intent.

In her closing argument, the Solicitor for the State averred that Appellant and Curry, by driving to Cameron's house, armed with guns and with intent to get drugs, money and/or to bring Cameron back to Gambrell's home, planned to commit, were committing, and/or committed robbery and/or kidnapping. That the State could not determine what underlying felony did Appellant and Curry planned to commit proved that the State failed to establish malicious intent. There was no underlying crime for which the hands of one, hands of all would apply. Based on Cameron's aggressive approach to Curry, Curry didn't even have the opportunity to request that Cameron return to Gambrell's home. There was no kidnapping. There was no robbery (unless, Cameron's alleged theft is taken into account).

Curry confessed that Gambrell instructed him to get the stolen item, or the money.

01. Q. Why were y'all going to Sterling
02. Bridge Road?
03. A. To go retrieve -- Milton had told us
04. that Steven had stolen some drugs and that
05. since Carver knew where his house was for us
06. to go back over there and get either the dope
07. or the money.

(R. p. 547, 1.7).

It is clear by Curry's actions that he intended to carry-out such order.

16. Q. So you say that you spoke to Steven

Cameron that night. What did you say to him again?

A. I told Milt Gambrell wanted his coke back, that he had stole the coke; that Milt wanted him to pay for it or he wanted his coke back.

(R. p. 549, 16.22).

On the other hand, Appellant did not know about the stolen item. He was told to give Cameron a drive back to his house. His actions manifested his desire to comply with the instructions.

Q: Did Mr. Gambrel tell you, "go get that thief"?

A. No, sir, he just told me to go up there and pick him up, to bring him back, since I knew where I'd dropped him off at.

(R. p. 673, 4.8).

Appellant was consistent in his cross examination:

Q. When you got back to Milton Gambrell's house, he sent you away again; didn't he?

A. Yes, ma'am.

Q. He sent you away to get drugs, to get money, or bring Steven Cameron back: isn't that right?

A. He told me to go pick up Cameron and bring him back.

Q. So when did you know – you say in the video that you were supposed to down there, get the drugs, get the money or bring him back,

A. Gambrell did not tell me anything about picking up—

Q. When did you know that?

A. It was probably around about Sunday before we come down here to turn ourselves in, to tell them.

(R. p. 679-680, 19.12).

13. Q. So you didn't know anything about any
14. drugs?
15. A. No, sir.
16. Q. Even though---
17. A. No, ma'am.

(R. p. 683, 13.17).

To reiterate here, Curry himself admitted that Appellant did not know about the missing drugs. (R. p. 572, 21.25 & p. 573,1.3).

Appellant and Curry did not act with the same objective, as they clearly were given different orders.

16. Q. I completely agree that would be
17. inappropriate. So, you planned to bring
18. Steven Cameron back with you. Correct?
19. A. I was only asked to go up there and
20. give him a ride back. That's all that was
21. said. We weren't supposed to do no more.
22. Q. You were supposed to bring him back.
23. A. No, we were asked to go back up there and
24. give him a ride back. If he wanted to come
25. back, he would have come back. If not, then
01. we would have returned back without him.
02. Q. So if Steven Cameron had said 'no,
03. I'm not coming with you'—
04. A. I would have left.
05. Q. You would have just left?
06. A. Yes, ma'am. "

(R. p, 693, 16.25 & p.694, 1.6).

If there was anything Curry was consistent of, it was that there was no plan to kill, rob, assault or kidnap Cameron. In his testimony during Gambrell's trial, Curry stated:

04. Q. Did you go over there with the intent to kill
05. Mr. Cameron?
06. A. No, sir.
07. Q. Did anybody tell you to go kill him?
08. A. No, sir.
09. Q. Did anybody tell you to go beat him up?

A. No, sir.
Q. Did anybody tell you to go threaten that you were going to beat him up?
A. No, sir. I was just told to go get the dope or get paid for it.
Q. What does that mean --
A. I never intended to --
Q. What does that mean, you were told to steal the dope from him?
A. No. I was just told to go and retrieve it. He stole the dope.
Q. What if he refused? What if he said, "I'm not going to give it to you?" What were you going to do then?
A. Well, this is where this here seemed to blow out there. I mean, I didn't have intentions to do nothing.

(R. p. 815, 4.25).

Q. Well, isn't it true that what Mr. Gambrell wanted you to do was to relay the message that he knew Mr. Cameron had the drugs and that he should either pay for them or give the drugs back, correct?
A. I don't know what he was thinking.
Q. All right. But you are positive he did not tell you to go intimidate Mr. Cameron?
A. Right.
Q. He did not tell you to threaten Mr. Cameron in any way?
A. No, sir.

(R. p. 264, 17.25 & p. 265, 1.2).

This was confirmed by Marzolf, who was asked about his interview with Gambrell:

Q. He also emphasized to you that all he wanted was for them to let Mr. Cameron know that he had the drugs, they knew it, and to pay for it, right? Wasn't that his story?
A Yes, sir.
Q. Okay. You -- also on that video, at one point I believe I heard you say that Mr. Cameron -- dope was found on Mr. Cameron after he was killed?
A. Yes, sir. During the autopsy, they did find some drugs.
Q. Okay. Did you mean in his system?

A. No, sir. I mean they found actual drugs on his person.
Q. Do you know how much?
A. I think in his tennis shoes, I believe. I don't know the exact quantity, sir.
Q. Okay. So obviously --
A. It was significant, but I don't know exactly what it was.
Q. Couldn't have put it there after he was killed, so it was there in his shoes before he was killed, obviously. You don't know how much?
A. I don't know exactly, sir.
Q. Okay. Did anybody -- were his shoes still on when he was lying there on the porch?
A. Yes, sir, I believe so.
Q. All right. So nobody, obviously, tried to pull his shoes off to look for anything, correct?
A. I would imagine not.

(R. p. 808, 2.25 & p. 809, 1.5).

Curry's foregoing testimonies belied the State's insistence on robbery and kidnapping as the underlying felonies that the three planned to commit. There was no robbery. Gambrell, Curry and Appellant did not intend to, nor did any of them take nor attempt to take property belonging to Cameron. (S.C. Code Ann. § 16-11-330). It was Cameron who stole from Gambrell. Curry was tasked to recover stolen item or to collect payment for it, while Appellant was instructed to return Cameron to Gambrell's house. Upon examination of Cameron's body, drugs were found inside his shoes. That there were drugs found on Cameron's person showed that Curry and Appellant did not intend to take the stolen item by any means. This is particularly important considering that it has been established through testimonies and video surveillance that other individuals entered Cameron's house.

Gambrell, Curry and Appellant did not plan to kidnap or attempt to kidnap Cameron, because neither one unlawfully seized, confined, inveigled, decoyed, abducted or carried Cameron away, or attempted to commit said acts by any means whatsoever without authority of

[illegible] that it has been established through testimony [illegible]

[illegible] Cameron's house.

[illegible] and Appellant did not plan to kid nap or attempt to kidnap [illegible]

law. (S.C. Code Ann. § 16-3-910 (2012). If we were to believe Curry, as the prosecution so insisted, it was actually Cameron who initiated the aggressive behavior by advancing/lunging toward Curry. (R. p. 816, 63).

Furthermore, Appellant was unarmed. If he really conspired with Curry to commit any crime, he would have provided himself with a weapon. But he did not. In fact, despite the State's insistence on Appellant bringing his gun to the crime scene, the prosecution did not introduce any gun in evidence. Neither did the State find Appellant's fingerprints on the .38 caliber gun.

The evidence at trial did not support the State's assertion that this was a case of drug distribution gone wrong. Even the State's witness did not admit to any drug transaction. At the very least, Curry testified to (a) Cameron stealing Gambrell's property, and (b) being ordered to recover the stolen item or give its equivalence in value.

What the evidence showed, through Appellant's testimony, which was corroborated by State's own witnesses, Curry and Detective Marzolf, was that Appellant was not privy to whatever conversation that transpired between Gambrell and Curry. Gambrell's sole instruction to Appellant was to bring back Cameron to his house, and that Appellant had no prior knowledge of any missing or stolen item, nor of the gun that was in Curry's possession. Appellant's only participation in the events of March 28, 2016 was to drive Cameron to his house. He did not have the opportunity to return Cameron to Gambrell's home. Appellant's actions, under this circumstance were in no way criminal. No malicious intent can be attributed to Appellant's driving. He didn't commit a crime when he took Cameron home. Why would he be guilty of murder for bringing him back?

There was no Unity in Action.

To determine if Appellant conspired or agreed with Curry's action, the focus of inquiry should necessarily be the overt acts of Appellant, before, during and after the shooting of Cameron. From this viewpoint, Appellant avers that there were several facts of substance which militate against the finding that he conspired or acted in unison with Curry.

First, there was no evidence of enmity or grudge between Appellant and Cameron.

Second, Appellant had no interaction with Cameron that can be remotely interpreted as coercion or grave threats, nor even kidnapping. Appellant drove Cameron to his house. The two had no verbal nor physical interaction, before nor during the shooting incident.

Third, Appellant had no prior knowledge of any missing nor stolen item, and he could not have known that Curry's purpose in tagging along was to get the stolen property or its monetary equivalent.

Fourth, no malicious intent can be attributed to Appellant's desire to follow what appeared to him was a harmless errand to get Cameron back to Gambrell's house. Gambrell's instruction, on its face, was not unlawful nor illegal.

Fifth, unlike Curry, Appellant was unarmed during this incident, negating intent to coerce, threaten, inflict physical harm, much less kill, the victim.

Sixth, the first time Appellant saw Curry with a gun, which had fallen on the car's floorboard, Appellant endeavored to prevent any untoward incident from happening by admonishing Curry to leave it in the car, which the latter did.

Seventh, Appellant upon seeing Curry's second gun, pleaded with him to put the gun away. It was Appellant's understanding that he had averted the possibility of violence.

Eighth, the shooting incident appeared to have arisen from a physical exchange between Curry and Cameron.

Ninth, Appellant attempted to drive and leave Curry behind, before the latter caught up with him and threatened him at gun point to drive him back to Gambrell's house.

Tenth, that Appellant driving Curry back to Gambrell's house was done under extreme duress. Curry, with a gun, threatened to kill Appellant and his mother.

And finally, Appellant voluntarily presented himself to the ACSO to recount his side of the story, when the threat to his and his mother's lives ceased with Curry's arrest.

Taken together, these acts by the Appellant do not meet the test of moral certainty in order to establish that he acted in unity with Curry in the commission of the crime of murder.

Appellant did not aid nor abet in Curry shooting Cameron.

The State argued that Appellant is liable for the crime of murder by assisting, aiding, and/or abetting its commission. It averred that he actively participated in the murder not only by "delivering Woodrow Curry to Steven Cameron's doorstep", but also by driving Curry back to Gambrell's house, even after witnessing the shooting incident. (R., p. 765, 11.18). It argued that Appellant's acts proved complicity.

By prosecution witness' statement, Appellant's participation was limited to him driving the car. Appellant's driving was not necessary nor indispensable to the commission of the crime of murder. It was sufficiently explained that Appellant was the only one who knew where Cameron lived because he just dropped the latter off at his house a short time prior.

Appellant attempted to prevent Gambrell from any untoward action at every opportunity presented to him, but he was not willing to die fighting Curry that night. So Appellant drove Curry back to Gambrell under duress. The Court, however, seemed to set an unrealistic

expectation for Carver. For him to prove his non-complicity of the shooting, it would seem that Appellant had to die.

The State also contended that Appellant manifested malicious intent by failing to call the 911 on a man that has been shot. It sought to use accomplice liability to provide a harsher penalty for an alleged omission already addressed by a separate statute. In asserting that Appellant's failure to report the shooting of Cameron as part of a concerted act of aiding or abetting in the crime of murder, the prosecutor asks this Court to blur a hard line recognized in South Carolina law that accomplice liability requires affirmative action and intent.

Under South Carolina law, any person who fails to prevent a felony from being committed, or to report of such is liable for the offense of misprision of felony. §17-25-30 S.C. Code Ann. Under this law, one who commits misprision of felony is liable as an accessory to the felony. Id. To expand the scope of accomplice liability by the aiding and abetting, to include the offense of misprision of felony, is to impose additional criminal penalty, and obscure the difference between a principal and accessory.

To the extent that the State alleged that Appellant's omission is an act that promotes the commission of a crime, then Appellant may not be convicted under accomplice liability.

As a general rule, the Appellate Court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441. The Appellate Court does not evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. State v. Mattison, 352 S.C. 577. Appellant however challenges the integrity of the evidence submitted by the State. Appellant avers that since the State's evidence is a fabrication, it is not evidence.

III.

THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT FOR THE APPELLANT FOR THE CHARGE OF MURDER.

A defendant is entitled to a directed verdict when the State fails to produce evidence tending to prove every element of the offense charged. State v. Brannon, 388 S.C. 498. When reviewing the denial of a motion for a directed verdict, an appellate court must review the evidence and all inferences therefrom in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006).

Appellant avers that the evidence does not justify the verdict. To understand why the verdict is unjust as applied to the facts of this case, one must examine the purpose of felony murder. The crime of felony murder requires proof of premeditation and malice. It is inferred from the commission or attempt to commit certain specified felonies. Malice and premeditation are presumed if a death ensues during the commission or an attempt to commit arson, robbery, kidnapping, burglary, and the likes. In this case, the State is uncertain whether the underlying offense is drug distribution, coercion, kidnapping or attempted robbery.

The State contends that Gambrell, Curry and Appellant planned to commit the felony of murder or kidnapping simply because Curry was armed. Appellant had not figured in any discussion about Gambrell's guns. It had always been Curry who either took it from Gambrell or received it from him. Before leaving Gambrell's house, Appellant had no knowledge of any stolen items, nor guns. Reference to Appellant were all speculations by the police.

Q. Mr. Carver did not have a gun, did he?
A. There were two guns and two---
Q. Mr. Carver did not have, did he?
A. They had guns. They were given a .38 by Mr. Gambrell and Mr. Curry carried a

10. .25 automatic with him.
11. Q. Where was the .25 carried?
12. A. In a fanny pack, is my understand-
13. ing.
14. Q. Who knew about the .25?
15. A. Mr. Curry knew about it and I know
16. that his wife knew about it, she told me
17. about it as well.
18. Q. So neither of those people are Mr.
19. Gambrell or Mr. Carver, right?
20. A. No.

(R. p. 521, 3.20).

08. Q. When Mr. Gambrell took that gun, Mr.
09. Carver had not returned from Mr. Cameron's
10. yet; had he?
11. A. Mr. Gambrell didn't take the gun,
12. sir. Mr. Curry received the gun from Mr.
13. Gambrell or took it from him.
14. Q. Mr. Curry took it from Mr. Gambrel?
15. A (No verbal response).

(R. p. 522, 8.15).

03. Q. You also learned that the .38 nor
04. any other guns were provided to Jason Carver;
05. right?
06. A. The gun was provided to Curry and
07. Carver when they were leaving, so I don't
08. know.
09. Q. Which gun was provided to Mr. Curry?
10. A. The .38.
11. Q. Which gun was provided to Mr.
12. Carver?
13. A. There were no other weapons
14. provided.
15. Q. And Mr. Gambrell told you that it
16. was not provided to him, meaning Mr. Curry
17. (sic); right?
18. A. He said that Mr. Curry took the weapon.

(R. p. 526, 3.18).

Appellant submits that this Court take note of Curry's categorical denial of any agreement or intent to commit criminal acts against Cameron. Curry stated there was no plan

nor instruction to intimidate, rob, hurt or kill Cameron. As Curry testified, he shot Cameron because the latter was aggressively advancing towards him.

Curry confessed to the following that: (1) Appellant had no knowledge of the stolen cocaine; (2) the gun was given to him (and him alone); (3) Appellant was not aware that Curry was carrying any weapon when they left Gambrell's house; (4) when Appellant saw Curry's gun, Appellant convinced the latter to leave the gun in the car; (5) Appellant was not aware that Curry was carrying another weapon; (6) he shot the deceased to defend himself; (7) he knew where Appellant's mother's lives; and, (8) Appellant did not take part in the shooting. As the prosecutor urged the jury, this Court should believe Curry's confession: he alone, killed Cameron.

On the other hand, there is no showing that Appellant had knowledge of the criminal intent of Curry. Appellant driving Curry to and from Gambrell's house was not in furtherance of Curry's aim to (1) get the money/drug, (2) forcibly bring Cameron to Gambrell's house; nor (3) to kill Cameron. Appellant's actions were acts of courtesy and self-preservation. Appellant had just witnessed Curry shot Cameron in cold blood. Curry still had the gun with him. To resist or go against Curry would have been an invitation to get shot. Appellant's subsequent actions did not show consent, voluntariness nor willingness to help Curry. Appellant's actions were seemingly those of someone who was fearful of his life and that of his mother.

Furthermore, it is well established that a trial judge should grant a directed verdict when the evidence merely raises a suspicion that accused is guilty. State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004); State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984). The evidence presented does not prove murder through accomplice liability. Based on Curry's testimony, he was the only one who shot Cameron; that the shooting was unplanned and that it was a knee

jerk reaction to Cameron's aggressive conduct. The State failed to prove clearly and convincingly that Appellant intended to commit, or has committed a felony, nor that he acted in unity with Curry (and Gambrell). The State failed to prove, beyond reasonable doubt, that Appellant was guilty of murder.

IV

THE TRIAL COURT ERRED IN DENYING APPELLANT HIS DUE PROCESS.

The Court denied Appellant his right to be informed of the charges against him.

The Prosecution, in an attempt to bring this case into the realm of the "hand of one is hand of all", referenced the terms "kidnapping" and "robbery" during the trial. The Appellant was never charged with these two felonies. The underlying offenses were not presented to Carver, until the trial started. Defense Counsel objected to the use of such terms as facts not in evidence. The Court overruled the objection. (R. p. 766, 10.22). Appellant believes that the Court, in allowing the State to argue using these terms that were not part of the charge, highly prejudiced Appellant. Despite a belated attempt to instruct the jury on its right to believe or not believe statements made by the counsels on both sides, the Court had allowed the jury to make findings of facts that are not in evidence. Carver insists that he did not receive Due Process because he was not informed in advance, of the facts for which he was charged.

This is also relevant in that it shifted the burden of proof to Carver. Instead of the State having the burden of proving that Carver had a gun, that he shot Cameron, which was what was in the indictment, Carver had to prove that he did not commit a crime. Carver had to prove that (1) there was no plan to commit any of the underlying offenses; or (2) that if there was any agreement between Curry and Gambrell, that Carver had no knowledge of such; (3) he did not abet nor aid Curry in the commission of murder; and (4) he did not shoot Cameron. By charging

the "hand of one is hand of all" theory, the State and this Court forced Carver to disprove that he did not have co-defendants, without being indicted for conspiracy.

The State introduced the video surveillance, with a two-hour hour time gap. The video showed individuals, one of which is a woman, arriving at Gambrell's house hours after his death. The video confirmed that the crime scene was compromised. Appellant believed that this confirmed, or at the very least cast doubt, that there are other individuals who may have committed what the prosecution so conveniently accused the Appellant of committing.

The trial judge erred in refusing to let Gambrell take the witness stand.

Appellant raises his concerns on the judge's overzealous efforts to explain to Mr. Gambrell about his Fifth Amendment Rights, which he invoked, then waived, and invoked again after repeated warnings by the judge. As Supreme Court noted in Webb v. Texas, 409 .S. 95, 98 (1972)- a trial judge's efforts to protect a defense witness—in this case, from prosecution for perjury—may impermissibly intrude upon a defendant's right to produce evidence.

More importantly, Appellant questions the propriety of the Court's ruling on refusing to let Gambrell take the witness stand for pleading the Fifth, striking his entire testimony, and refusing to allow the Appellant to call him on the witness stand to plead the Fifth in front of the jury.

The witness' privilege against self-incrimination does not provide an absolute right to remain silent. It is well settled that a witness, who is not also a defendant, can invoke that privilege only after a potentially incriminating question has been put. State v. McGuire, 272 S.C. 550-551. In short, unlike a defendant (or co-defendant) who is called to testify, a witness must invoke the privilege to specific questions, and may not assert "blanket privilege". Gambrell should have been allowed to take the stand and invoke the privilege in response to each question that could

yield a self-incriminatory answer, but not to completely refuse to testify. The Court presiding over the proceeding in which a Fifth Amendment privilege is claimed has a duty to scrutinize a witness' invocation of the privilege.

In the case at bar, the trial judge invoked Gambrell's Fifth Amendment for him; and, prevented him from testifying in the witness stand, in contravention of the law. He overstepped his role as a non-biased, neutral referee.

Appellant was denied a meaningful defense when the Court refused his motion for continuance to present his witnesses.

Firstly, Appellant was denied his right to present Mr. Gambrell. Mr. Gambrell was key to the whole case, as he would testify that his instruction to Appellant was simply to bring back deceased Cameron to his (Gambrell's) house. Gambrell was clearly describing the events that transpired on March 28, 2016, which confirmed Appellant's story. When he started to explain about the missing item, the Court advise him of his Fifth Amendment right to silence, which he eventually invoked. At that point, the Court ruled that his statements to the Court will be stricken from the record.

Secondly, Appellant called two other witnesses, one of which was Quay, Gambrell's nephew, to testify regarding the transaction for the sale of dirt bike between him and Cameron. Appellant intended to probe the witness for the details of the transaction, specifically, whether a monetary value was involved. (R. p. 709, 9.25 & p. 710, 1.15). Appellant avers that Quay's testimony is material in showing lack of malicious intent on the part of the Appellant when he returned to Cameron's house. The only transaction involving Cameron and Gambrell that Appellant knew of, was the sale of the bike. Appellant believes that Quay's testimony would negate the State's theory that this case was about drug distribution.

'The right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts to the jury so it may be able to decide where the truth lies. Just as an accused has the right to confront the prosecution's own witnesses for the purposes of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.' State v. Lyles, Op. No. 4406, (Ct. App., 2008), citing Washington v. Texas, 388 U.S. 14, 19 (1967),

Appellant was denied his right to confront his accuser.

The trial court also denied Appellant the right to confront his accuser, when it denied Appellant's attempt to recall two important witnesses: Detective Marzolf, and Sheila Curry. According to Detective Marzolf testimony, Curry disclosed to him that Gambrell gave him the guns, which run counter to Gambrell's statement that Curry took the gun without his permission. Appellant intended to clarify the disparity in the testimonies. He believed that this is material to the case because it goes into the intent of Curry, and how it varied from that of Gambrell. The request to recall the witness is not merely for purposes of impeaching the witness, but to show that there is no unity of purpose, and that Curry intended to act independently. Gambrell's statement did not come in until the state consented to it. Marzolf had already testified but Appellant could not quash him on the interview, because the Court was refusingits admission.

Furthermore, while the law provides that it is upon the discretion of the Court to allow a witness to be recalled, Appellant avers that the interest of justice will be served if these witnesses have been allowed to testify considering that Gambrell's testimony was stricken out by the Court. It is important that the facts are set straight because Appellant's life and freedom are at stake.

The trial judge's actions in the presence of the jury suggested lack of neutrality.

Appellant's rights to due process and fair trial was impaired by the actions of the trial judge that suggested an outcome or conveyed a lack of neutrality to the jury. In several instances, the judge has showed his bias against the Appellant:

a. On showing the video of Gambrell's police interview

When Gambrell pled the Fifth Amendment, Appellant had no other way to introduce Gambrell's side of the story other than to show the latter's police interview, under the doctrine of unavailable declarant. The judge, in initially denying the same without prior viewing, offered the following:

> THE COURT: Well, let me think about that on the hand of one, hand of all. But here are my thoughts on that. First, I don't think that it exculpates your client, the reason being --I think that they had a criminal enterprises regardless of the shooting; that is, 'go get him', go get this man, go get the drugs or go get the money like he said and the other officers testified to.
>
> If the jury finds that to be the case, that's a illegal plan or scheme in that they have --the cases are replete with the nexus between drugs and guns, also drugs and violence.
>
> So, if you look at the charge of hand of one, hand of all, it says that "if two people join with another to commit an unlawful act then they are responsible for everything done by the other person which happens as a probable or natural consequence of the act(s) in carrying out the common plan or purpose."
>
> So therefore -- although I think probably that your client did not know that a gun—that he was going to shoot this fellow, but—the cases recognize the connection between guns, drugs and violence where the plan was illegal and it just spiraled out of hand.
>
> So, the jury may believe that he was an innocent bystander, but that's my belief as to why the video of Mr. Gambrell does not exculpate your client. "

(R. p. 702, 6.25 & p. 703, 1.10).

b. On using the term "criminal conspiracy"

The judge had made-up his mind that there was criminal enterprise, even when the State had not illustrated that Appellant acted in unity with Curry and Gambrell in intending to take money or cocaine from Cameron or bringing him forcefully to Gambrell's.

> Mr. Gambrell tells us specifically that Curry took the gun. That is the hand of one, hand of all.
> THE COURT: I disagree. The hand of one is the hand of all is when they went down there to talk to the man about drugs and it spiraled out of control.
> Do you think if they just went down there and said --picked up the money for this gentleman, that that would have been an illegal act?
> MR. SMITH: I don't know what status that is, sir. I don't know of a criminal act here.
> THE COURT: Selling drugs and buying drugs, that as illegal as it can be.
> MR. SMITH: Sure.
> THE COURT: Going to retrieve drugs is illegal too.

(R. p. 617, 1.19).

This comment by the Judge was made prior to hearing other witnesses for the defense.

> "THE COURT: This isn't necessarily an accomplice, but it's the hand of one, hand of all. I deny the Motion.
>
> I think that there are sufficient facts in the record that a jury can determine—although he might not have gone down there for the ultimate act that was committed, the jury has a right to find or could find that it was a natural and probable consequence of their initial criminal conspiracy. So I deny your Motion. "

(R. p. 718, 22.25 & p. 719, 1.7).

Note that the judge used the term "criminal conspiracy" when the State has yet to prove an agreement or plan to commit robbery, kidnapping or drug distribution.

c. The judge's bias can be gleaned from his sentencing statement.

> THE COURT: So I—I am convinced that it was not necessarily Mr. Carver's intention to kill anybody when they went down there.. But

> I'm equally convinced that you went down there to get the man, the money or the drugs back. As such you, engaged in a criminal conspiracy that ultimately spiraled out of control. It was notable to me that you drove away with the lights off, 911 wasn't called, that you didn't involve yourself with law enforcement until Mr. Curry was involved with the law enforcement himself. You can interpret that several ways.
>
> I think it's clear that when you start messing around with drugs, especially the type of drugs that y'all were using, a natural and probable consequence such as what ultimately happened in this case is what you will see.
>
> Also, the fact that this car of Mr. Gambrell's was used instead of yours is an indication that you did go with the intent to bring this guy back. And then you hid it after the fact, too; which is a sign that y'all knew that you had a problem.
>
> That being said and done, I think it is only fair that you be treated equally, so I am going to sentence you to thirty (30) years. You have ten days to appeal this decision. If he is entitled to any credit, give him credit for any time served. Okay?"

(R. p. 785-786, 5.10).

Appellant believed that it was improper for a judge to comment on evidence, especially when the same was not established in the trial (i.e. no evidence presented that Appellant hid Gambrell's car) or to suggest an outcome to the jury (i.e. "criminal conspiracy"). The trial judge did both.

CONCLUSION

For the reasons set forth above, Appellant pray to this Honorable Court that his conviction be reversed, or in the alternative, for this Court to reverse the lower court's decision denying his Motion for New Trial and allow the re-litigation of this case.

{SIGNATURE TO FOLLOW}

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Anderson, South Carolina
October 4, 2019.

ORIGINAL

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Anderson County

The Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

Respondent,

v.

JASON FRANKLIN CARVER,

Appellant.

Appellate Case No. 2017-002011

FINAL BRIEF OF RESPONDENT

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III. Whether the trial court erred in refusing to direct a verdict for the Appellant on the charge of murder?

IV. Whether the trial court erred in denying Appellant's right to Due Process?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Did the trial court abuse its discretion in denying Appellant's motion for a new trial where the evidence presented by Appellant was plainly available at the time of Appellant's trial or could have been discovered through due diligence?

II. Did the trial court abuse its discretion in instructing the jury on the "hand of one, hand of all" theory of accomplice liability where the State presented evidence that supported that Appellant was present at the murder, and that Appellant and codefendant were conspiring to kidnap or rob the victim immediately prior?

III. Was the directed verdict properly denied where the evidence shows that prior to the murder, Appellant was knowingly engaged in the conspiracy to rob or kidnap the victim?

IV. Did Appellant's trial and subsequent conviction satisfy Constitutional requirements?

STATEMENT OF THE CASE

Jason Carver ("Appellant") was indicted by the Anderson County grand jury for the murder of Steven Cameron (2016-GS-04-2279). At trial, Appellant was represented by Donald L. Smith, Esquire. Assistant Solicitor, Chelsey Lauren Moore, Esquire, prosecuted the case on behalf of the Tenth Circuit Solicitor's Office. (R. p. 438). Appellant was tried before the Honorable R. Lawton McIntosh, August 21st, through August 25th, 2017. (R. p. 438). At the conclusion of the trial the jury found Appellant guilty. (R. p. 775, ll. 13-24). Following the conviction, Judge McIntosh sentenced Appellant to the minimum sentence of thirty (30) years. (R. p. 771, ll. 16-19). Appellant then filed a timely Notice of Appeal.

Appellant's defense counsel continued representation and perfected the appeal by the submission of a briefing. Respondent submitted an Initial Brief of Respondent on July 30, 2018. Appellant subsequently submitted a Reply Brief on August 9, 2018. Thereafter, on August 29, 2018, Appellant submitted a motion to limit the pages to be included in the Record on Appeal. Respondent responded by letter consenting to the page reduction but designating additional items to be included. On October 19, 2019, Appellant moved this Court to hold his appeal in abeyance in order to file a motion for a new trial based on after-discovered evidence.

On October 29, 2018, Respondent submitted a response disagreeing with Appellant's assertions regarding the after-discovered evidence, but consenting to holding the appeal in abeyance. On December 12, 2018, this Court granted Appellant's motion. Thereafter, on December 20, 2018, Appellant submitted to the trial court a motion for a new trial pursuant to SCRCrimP, Rule 29. Appellant submitted an amended motion on December 28, 2018. Appellant's motion was subsequently denied by the Honorable R. Lawton McIntosh. Appellant moved for reconsideration which was also denied. Appellant has since submitted a Notice of Appeal seeking review of Judge McIntosh's dismissal of the New Trial Motion. Appellant also

sought to consolidate this case with his Direct Appeal. Respondent responded that it did not oppose the motion should this Court determine the consolidation appropriate. On April 4, 2019, this Court issued an order granting Appellant's request for consolidation. Appellant submitted his Initial Brief on May 3, 2019. This Brief of Respondent follows.

RESPONDENT'S STATEMENT OF THE FACTS

On the evening of March 28, 2016, Jason Carver ("Appellant") was at the home of James Milton Gambrell repairing the transmission of a car. (R. pp. 633, l. 14 – p. 634, l. 15). Appellant worked as a technician at a transmission repair shop, but repaired vehicles on the side for extra money. (R. pp. 625, l. 24 – p. 627, l. 1; p. 632, ll. 15-23). While Appellant was busy with the car repair, Gambrell was finalizing the purchase of a dirt bike from the victim, Steven Cameron. (R. p. 636, ll. 15-21; p. 545, ll. 2-12). Also present at Gambrell's house was Woodrow Curry. (R. p. 634, ll. 8-25; p. 544, ll. 3-16). Once the sale was completed, Gambrell asked Appellant to drive Cameron, who was without transportation, back to his home. (R. p. 639, l. 2 – p. 640, l. 9; p. 544, l. 22 - p. 545, l. 21). Appellant agreed and drove Cameron back to his home at 108 Sterling Bridge Road. (R. p. 640, l. 23 - p. 642, l. 10). Appellant then proceeded back to Gambrell's home to finish up on the car he had been working on. (R. p. 644, l. 17 – p. 645, l. 10; p. 546, ll. 6-10). When he arrived, Gambrell informed Appellant that Cameron had stolen a large amount of cocaine. (R. p. 546, l. 20 – p. 547, l. 7). Appellant did not own a cellphone, so Gambrell was unable to reach him during the drive. (r. p. 644, ll. 4-6). Gambrell instructed Appellant to take Curry and go back to Steven Cameron's house. (R. p. 646, l. 4 - p. 647, l. 7; p. 546, ll. 11-19). They were told to bring back the drugs, the money, or Steven Cameron. (R. p. 647, ll. 5-7; p. 366, ll. 1-7). Gambrell then gave Curry a .38 caliber and .25 caliber handgun. (R. p. 547, ll. 15-24). Appellant had his own gun. (R. p. 569, ll. 6-7).

Appellant took Gambrell's Buick sedan and drove back to Cameron's house with Curry. (R. p. 647, ll. 8-13; p. 648, ll. 17-20; p. 548, ll. 8-17). As they were driving, Appellant told Curry to leave his gun behind. (R. p. 574, ll. 1-13). When they arrived they knocked on the door but no one answered. (R. p. 651, ll. 3-10; p. 548, ll. 19-21). As they stepped away from the patio, Curry observed Cameron peeking out from the window. (R. p. 652, ll16-21). They then reapproached

the home, whereupon, Cameron came out the front door to confront the two. (R. p. 652, l. 22 – p. 653, l. 1; p. 548, l. 25 – p. 549, l. 2). Appellant stood by the patio steps while Curry spoke with Cameron on the patio. (R. p. 651, ll. 18-20; p. 653, ll. 3-5; p. 549, ll. 3-22). The discussion quickly turned physical when Cameron shoved Curry. (R. p. 653, ll. 13-20; p. 550, ll. 18-19). Curry then pulled the .25 caliber handgun that he'd had hidden on his person and pointed it in Cameron's face. (R. p. 653, ll. 20-25). Cameron, undeterred, slapped the gun away from his face. (R. p. 654, ll. 4-18). Curry then fired three shots. (R. p. 655, ll. 10-13; p. 550, ll. 19-25). One round hit the house, while the other two entered Cameron's neck and chest killing him. (R. p. 454, l. 8 – p. 455, l. 15; p. 456, ll. 14-18).

Appellant and Curry quickly departed the scene. (R. p. 655, ll. 13-25; p. 551, ll. 8-12). Appellant alleged that during the drive Curry threatened Appellant to keep his mouth shut about the murder. (R. p. 657, ll. 13-18). Curry denied having made any threats. (R. p. 565, ll. 4-8). The two then drove back to Gambrell's with the headlights turned off. (R. p. 658, ll. 2-12). After dropping off Curry at Gambrell's, Appellant returned to his mother's home, where he was currently residing. (R. p. 662, ll. 11-21). He claimed that he then spotted Curry driving past his mother's home later that same night. (R. p. 664, ll. 2-15). Curry denied this as well. (R. p. 565, ll. 9-20). After law enforcement arrested Gambrell and Curry on drug related charges, Appellant went to the Anderson County Sheriff's Office to give a statement. (R. p. 669, ll. 9-13; R. p. 670, ll. 3-13). Appellant disclosed what had occurred and admitted his involvement in the murder. (DVD unredacted statement of Carver).

Curry later elected to plead guilty to involuntary manslaughter. (R. p. 553, ll. 1-15). Appellant, on the other hand, proceeded to trial. At trial, Appellant claimed that he was unaware that they were going to Steven Cameron's house in response to Cameron stealing drugs from

Gambrell. (R. p. 647, ll. 20-24). His understanding was that they were to simply bring Cameron back to Gambrell's. (R. p. 649, ll. 17-21). However, Curry testified for the State. During his testimony, he claimed that Appellant was aware that they were going to Cameron's with instruction to bring him back, or recover money or the stolen drugs. (R. p. 546, l. 23 – p. 547, l. 7).

SUMMARY OF THE ARGUMENT

Appellant first contends that the trial court erred in denying his motion for a new trial in light of after-discovered evidence presented during the trial of Appellant's co-conspirator. However, the judge was within his discretion in denying Appellant's motion, because the evidence presented by Appellant was plainly available at the time of Appellant's trial or could have been discovered through due diligence. Furthermore, the evidence undoubtedly would not have affected the outcome of Appellant's trial. Also, despite Appellant's contention, the State acted within its discretion in charging Appellant and deferring the sentencing of his accomplice. Lastly, the trial court was correct in finding that the State did not commit misconduct in providing Appellant with certain discovery material two-weeks prior to trial.

Next, Appellant claims that the trial court erred in instructing the jury on the "hand of one is the hand of all" because the evidence presented did not support accomplice liability. Contrary to Appellant's assertions, the evidence presented at trial supported that Appellant and Curry were involved in a criminal scheme to either kidnap or force the victim to turn over drugs or money. Thus, the facts of record suggest the shooting death of the victim was a likely and probable outcome of the enterprise. Moreover, Appellant asserts that the trial court erred in not granting his motion for a directed verdict because the State failed to prove criminal intent. However, the State presented evidence at trial that Appellant was aware of the criminal scheme prior to driving his codefendant to the victim's house.

Lastly, Appellant avers that he was denied Due Process. Appellant asserts that the trial court reflected bias when, among other examples, it denied Appellant the opportunity to examine a codefendant after the codefendant asserted Fifth Amendment right against self-incrimination, and declined to allow a continuance on the fifth and final day of trial when Appellant sought additional time to locate two other witnesses. Nevertheless, the Record reflects that the trial

satisfied the Appellant's Constitutional rights, and that the trial judge executed his duties in a fair and impartial manner. Appellant is not entitled to any relief.

ARGUMENT

I. The Trial Court Was Within Its Discretion In Denying Appellant's New Trial Motion.

How the Issue Arose

On December 20, 2018, Appellant, by Counsel, moved the trial court for a new trial. In support, Counsel submitted a forty-page brief in which he cites the following grounds as basis for his motion:

1. Witnesses from the Carver case, such as Detective Kreig Marzolf and Curry, took the witness stand against Gambrell. These two witnesses offered statements that were either not introduced or ran inconsistent with their previous testimonies in the Defendant's case. He believed [sic] that these statements should be explored in depth as they go through [sic] the very core of the crime for which Carver was convicted and sentenced to thirty (30) years of imprisonment. (Amended Motion for New Trial, December 27, 2018, p. 297).
2. The newly discovered evidence consists of statements by witnesses in the Carver trial, whom [sic] the defense could not have been obtained during his trial since they were inconsistent and false statements. (Amended Motion for New Trial, December 27, 2018, p. 298).
    a. "[D]uring the trial for Carver's case, Curry denied having named anyone as the shooter, insisting that it was him who shot Cameron. . . . However, in the Gambrell trial, Carver learned that Curry, [sic] initially tried to pin the shooting on Carver. (Amended Motion for New Trial, December 27, 2018, pp. 297-298).
    b. "[W]hen Curry was asked what he did after leaving [the victim's] house during Car's [sic] trial, Curry stated in a straightforward manner that they went back to Gambrell's house. . . . However, when the same question was asked at the Gambrell trial, Curry revealed, for the first time, that he called Gambrell on the way back to this house and told him of [the victim's] shooting." (Amended Motion for New Trial, December 27, 2018, p. 300).
    c. "[A]t the Carver trial, Curry testified that Gambrell instructed Carver to drive Cameron to his house. . . . In his subsequent testimony at Gambrell's trial, Curry implied that Carver voluntarily took Cameron home." (Amended Motion for New Trial, December 27, 2018, p. 301).
    d. "Curry, implicated Carver by testifying that he had a gun when they went to Cameron's house, only to deny the same in his subsequent testimony. . . . Gambrell dismissed these contradicting statements of Curry. Gambrell confirmed that Carver did not have a gun on March 28 or 29, 2016.

(Exhibit 7-Gambrell Affidavit). Gambrell stated that the only time he saw Carver with a gun was in 2015, one year prior to the shooting incident. At that time, Carver was showing his brother's gun to Gambrell." (Amended Motion for New Trial, December 27, 2018, pp. 301-302).

e. "[I]n recalling what transpired between him and [the victim], Curry testified that he only realized that he had a gun with him when Cameron came charging at him and that he had no choice but to shoot the latter. . . . In his testimony at Gambrell's trial, Curry testified that he pulled the gun to intimidate Cameron, who charged at him at that point. He pulled the gun prior to any exchange of words between him and Cameron." (Amended Motion for New Trial, December 27, 2018, pp. 302-303).

f. "[I]n Gambrell's trial, Curry testified that upon returning to Gambrell's house from Cameron's place, Carver went in to return the gun to Gambrell. Of course, this testimony conflicts with Curry's testimony that Carver had his own gun." (Amended Motion for New Trial, December 27, 2018, p. 304).

g. At Gambrell' s trial, Detective Kreig 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 [sic] unidentified person wherein the word "dirt bike" was mentioned. . . . This neighbor was not mentioned in previous reports. Neither was it mentioned by any of the detectives who testified in the Carver hearing. Carver maintains that this should have been disclosed in the previous trial as this confirms what he has long been saying: that he was being sent back to Cameron in relation to the sale of the dirt bike. This statement goes through [sic] his lack of criminal intent. (Amended Motion for New Trial, December 27, 2018, p. 308).

h. Carver's counsel asked Marzolf twice regarding Cameron's violent tendencies, which the officer denied having heard of any such instance. (Exhibit 1- Motion to Hold Appeal in Abeyance, P. 47). However, Marzolf had knowledge of Cameron's volatile behavior. He admitted that he got [sic] hold of a supplemental report from Officer Scott Hill who interviewed a neighbor who recounted the [sic] Cameron's volatile behavior. (Exhibit 1- Motion to Hold Appeal in Abeyance, P. 47). Marzolf himself interviewed Cameron's siblings, Erica and Christopher. Erica told him of Cameron's history of domestic violence against his wife. (Exhibit 1- Motion to Hold Appeal in Abeyance, P. 97). Christopher stated that Cameron had punched him at one instance and jumped on his daughter and left bruises on her. (Exhibit 1- Motion to Hold Appeal in Abeyance, P. 97). (Amended Motion for New Trial, December 27, 2018, pp. 19-20).

i. As discussed in the previous section, Marzolf has shown no qualms in offering conflicting testimonies/statements. He testified not having knowledge of, nor even participated [sic] in, Curry's plea-bargaining deal. Curry exposed that it was Marzolf and the prosecutor's idea to reduce his charges. (Amended Motion for New Trial, December 27, 2018, p. 309).

3. Carver further asserts that he is entitled to new trial and motion to vacate and/or set aside judgment by reason of the State's misconduct in the handling of this case. Carver insists that the prosecution abused its discretion in filing different charges against him, Curry and Gambrell. The prosecution's theory was that the three conspired to rob or kidnap Cameron, and that under the "hand of one is hand of all" doctrine, all three of them were guilty of the killing of Cameron. However, the prosecutor charged Curry and Carver with murder and "the boss", Gambrell, with the lesser crimes of solicitation to commit a felony and accessory before the fact to a felony. The same prosecutor handled Carver's and Gambrell's trial. But while she was very emphatic and steadfast with her argument on the application of the accomplice liability doctrine on Carver and Curry, she has deliberately and cautiously omitted the same argument in her prosecution of Gambrell. (Amended Motion for New Trial, December 27, 2018, pp. 309-310).
    a. First, according to the prosecution's star witness. Curry met with the prosecution team, three times. Marzolf was in at least one of these meetings. The prosecution provided no recording of the time they visited Curry to speak to him on his manslaughter deal. (Amended Motion for New Trial, December 27, 2018, p. 310).
    b. Second, the State deferred Curry's sentencing for over a year, when the Order specifically stated that it will only be until after Carver's trial. However, they liked the results of holding the anvil over Curry's head so much that they held off sentencing for another year, or after Gambrell's trial. (Amended Motion for New Trial, December 27, 2018, p. 311).
    c. Third, Curry's sentencing was deferred for more than one year with no legitimate reason other than to ensure that his testimony would once again be beneficial to the State. This piece of information only came to light after the Gambrell trial, where Curry was called a witness. The only logical conclusion was that the State dangled Curry's sentencing over his head for him to testify according to its wishes. (Amended Motion for New Trial, December 27, 2018, p. 312).
    d. Fourth, in prosecuting the case, the State failed to disclose information and/or witness that may exculpate Carver. A prosecutor's primary duty is to seek justice. Under the law, a prosecutor shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense. (Rule 3.8(d) of the Rules of Professional Conduct). It failed to do the same. Instead, it allowed its star witness, Curry, to offer inconsistent and false statements during Carver and Gambrel's respective trials. The State also failed to disclose the terms of its plea bargaining with Curry, which coupled with the deferment of his sentencing, is suspect. (Amended Motion for New Trial, December 27, 2018, p. 313).
    e. Carver repeatedly requested the discovery materials, which included surveillance video which ran in excess of 36 hours. These materials have been in the State's possession since the first week of the investigation. Carver was provided the materials only a year after. Another set of materials which included an audio recording and three supplemental

reports was provided by the State on August 9, 2017, or two (2) weeks prior to Carver's trial. The State failed to give the defense the opportunity to review materials which it had for more than one (1) year. Even the trial court judge took notice of this. (Amended Motion for New Trial, December 27, 2018, p. 313).

f. Fifth, the State's questionable conduct continued during Gambrel's trial, when it deliberately offered Curry despite knowledge of his tendencies to lie and/or withhold information from the beginning. (Amended Motion for New Trial, December 27, 2018, p. 316).

4. First, Carver believes that his case was prejudiced by the actions of the trial judge. In several instances, the trial judge made controversial rulings, such as ruling on sustaining when there was no objection. (Amended Motion for New Trial, December 27, 2018, p. 321).
5. Second, Carver avers that he was denied his right to present his witnesses. Carver believes that Mr. Gambrell was key to the whole case, as he would testify that his instruction to Carver was simply to bring Cameron back to his (Gambrell) house. This then would rule out conspiracy or unity in purpose and action. Gambrell was called as a witness on behalf of Carver. The trial judge advised Gambrell of his rights, particularly his rights against self-incrimination. (Amended Motion for New Trial, December 27, 2018, p. 323).
6. Defense subpoenaed Dequavious Gambrell, Milton Gambrell's nephew, and his friend, Tykeon Gardner. Dequavious had purchased the bike from Cameron that day. When the defense called the witnesses, neither of them were available to testify. As expected, defense counsel could not track down the witnesses. This was especially true since Mr. Gambrell was no longer an issue to testify. Carver was unable to show to the jury that Gambrell had prevented the boys from going that night because he was concerned of the personality clashes that may have occurred had they gone down there. The Court did not attempt to compel the presence of the witnesses with any significance. The defense's Motion for Continuance, which was raised when the witnesses subpoenaed by Carver failed to appear to testify, was summarily dismissed by the judge. Carver believes that the Court had a duty to compel the witnesses who been subpoenaed properly, so as to give Mr. Carver some semblance of equity. (Amended Motion for New Trial, December 27, 2018, p. 327).
7. The trial judge also denied Carver's attempt to introduce in evidence the audiotape of Gambrel's interview with the ACSO officers as an exception to the hearsay rule. Gambrell can be considered as an unavailable declarant under the doctrine laid down in the State v. Doctor, 413 S.E.2d. 36. The judge insisted that contents of the Gambrell's interview do not exculpate Carver, nor were they clearly corroborated by evidence that indicates the trustworthiness of Gambrell's statement. With the new developments in this case, Carver could not have provided evidence that will corroborate the trustworthiness of Gambrell's testimonies because of the lies and conflicting statements that Curry perpetuated. (Amended Motion for New Trial, December 27, 2018, p. 329).

On January 3, 2019, Judge McIntosh issued an order denying Appellant's new trial motion. Judge McIntosh offered the following reasoning as basis for his denial:

> Defendant filed an Amended Motion for a New Trial on December 27, 2018. It is Ordered that the Defendant's Amended Motion for a New Trial is denied without the necessity of a formal hearing. The court finds that there was competent evidence admitted to sustain the jury's verdict of guilty and the court may not substitute its judgment for that of the jury. *State v. Taylor,* 348 S.C. 152, 558 S.E.2d 917 (Ct.App. 2001).

Order Dismissing Defendant's Motion for New Trial, January 3, 2019.

Standard of Review

"'The decision whether to grant a new trial rests within the sound discretion of the trial court, and [the appellate court] will not disturb the trial court's decision absent an abuse of discretion.'" *State v. Senter*, 396 S.C. 547, 552, 722 S.E.2d 233, 236 (Ct.App.2011) (quoting *State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009)). "If there is no evidence to support a conviction, [this court] should uphold an order granting a new trial." *State v. Garrett*, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct.App.2002) (citing *State v. Smith*, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993)). "However, if competent evidence supports the jury's verdict, the trial [court] may not substitute [its] own judgment for that of the jury and overturn that verdict." *Id.* (citing *State v. Miller*, 287 S.C. 280, 283, 337 S.E.2d 883, 885 (1985)).

Analysis

a. The Evidence Presented Did Not Qualify As After-Discovered Evidence And Would Not Have Changed The Resulting Conviction

Appellant avers that the trial courts committed reversible error in denying his new trial motion. In the present appeal, Appellant submits "[a]ffidavits of Curry and Gambrell, as well as statements by witnesses in Gambrell's trial" as a basis for a new trial. Appellant further alleges that he could not have obtained this evidence during his trial because "they were either

intentionally omitted or were fabricated." Initial Brief of Appellant, p. 9. Despite the assertions made by Appellant, the evidence he offers do not qualify a new trial. A party requesting a new trial based on after-discovered evidence must show that the evidence (1) would probably change the result if a new trial was had; (2) has been discovered since the trial; (3) could not have been discovered before the trial by exercise of due diligence; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching. *State v. Caskey*, 273 S.C. 325, 329 256 S.E.2d 737, 738-39 (1979).

The first examples of "after-discovered" evidence offered in Appellant's Initial Brief consists of various examples of inconsistent testimony offered by co-conspirator Woodrow Curry. Specifically, Appellant contends that Curry provided differing testimony to that offered during Appellant's trial. Initial Brief of Appellant, pp. 9-14. Appellant offers the following inconsistencies as grounds for a new trial:

a. "[D]uring the trial for Appellant's case, Curry denied having named anyone as the shooter, insisting that it was him who shot Cameron. . . . However, in the Gambrell trial, Carver learned that Curry, [sic] initially tried to pin the shooting on Appellant. (Initial Brief of Appellant, pp. 9-10).
b. "[W]hen Curry was asked what he did after leaving [the victim's] house during Car's [sic] trial, Curry stated in a straightforward manner that they went back to Gambrell's house. . . . However, when the same question was asked at the Gambrell trial, Curry revealed, for the first time, that he called Gambrell on the way back to this house and told him of [the victim's] shooting." (Initial Brief of Appellant, p. 10).
c. "[A]t Appellant's trial, Curry testified that Gambrell instructed Appellant to drive Cameron to his house. . . . In his subsequent testimony at Gambrell's trial, Curry implied that Appellant voluntarily took Cameron home." (Initial Brief of Appellant, p. 11).
d. "Curry, implicated Appellant by testifying that he had a gun when they went to Cameron's house, only to deny the same in his subsequent testimony. . . . Gambrell confirmed that Carver did not have a gun on March 28 or 29, 2016. (Affidavit of James Milton Gambrell, November 30, 2018). Gambrell stated that the only time he saw Appellant with a gun was in 2015, one year prior to the shooting incident. At that time, Carver

was showing his brother's gun to Gambrell." (Initial Brief of Appellant, p. 12).

e. "[I]n recalling what transpired between him and [the victim], Curry testified that he only realized that he had a gun with him when Cameron came charging at him and that he had no choice but to shoot the latter. . . . In his testimony at Gambrell's trial, Curry testified that he pulled the gun to intimidate Cameron, who charged at him at that point. He pulled the gun prior to any exchange of words between him and Cameron." (Initial Brief of Appellant, pp. 13).

f. "[I]n Gambrell's trial, Curry testified that upon returning to Gambrell's house from Cameron's place, Carver went in to return the gun to Gambrell. Of course, this testimony conflicts with Curry's testimony that Carver had his own gun." (Initial Brief of Appellant, p. 15).

The trial court's denial of Appellant's new trial motion was appropriate because the inconsistencies cited by Appellant do not qualify as after-discovered evidence. Appellant was aware of any alleged inconsistencies at the time of trial because the was present during the circumstances to which Curry testified and Gambrell swore to. Therefore, he had knowledge of any alleged inconsistencies testified to during trial.

Evidence presented, which was known to the defendant at the time of his trial, cannot be considered "new evidence" for purposes of receiving a new trial. *See Hayden v. State*, 278 S.C. 610, 612, 299 S.E.2d 854, 855–56 (1983). Furthermore, while Appellant presents nefarious reasoning by the State for these differences in testimony[1], they are nonetheless insignificant to the outcome of Appellant's trial as they are immaterial to Appellant's guilt. At the most, Curry's testimony at Gambrell's trial is merely cumulative or impeaching. *See Caskey*, 273 S.C. at 330, 256 S.E.2d at 739 (denying new trial after finding "the alleged after-discovered evidence was at

[1] Appellant offers: "It is clear from the direct examination that the solicitor brought out Curry's alleged call to Gambrell to paint the picture of the consigliere calling the mob boss after he had done a dirty deed on his behalf." He further contends "Appellant believes that the purpose of Curry's new testimony was to eliminate any self-defense argument." Initial Brief of Appellant, p. 11-14.

most merely impeaching of [witness's] credibility and not material to appellant's guilt or innocence.").

The next examples Appellant cites in his brief is testimony offered during Gambrell's trial by Anderson County Detective Kreig Marzolf. Appellant offers that Detective Marzolf omitted statements made by the victim's neighbors. Specifically that a neighbor overheard the word "dirt bike" during the confrontation between the victim and Appellant and Carver.

> At Gambrell's trial, Detective Marzolf testified that during one of their neighborhood canvasses, one of his detectives talked to a neighbor who heard about an argument between Cameron and [sic] unidentified person wherein the word "dirt bike" was mentioned.
>
> [. . .]
>
> This neighbor was not mentioned in previous reports. Neither was it mentioned by any of the detectives who testified in the Appellant's trial. Appellant maintains that this should have been disclosed in the previous trial as this confirms what he previously asserted be believed why he was being sent back to get Cameron. The sale of the dirt bike reasoning shows Appellant's lack of criminal intent.

(Initial Brief of Appellant, pp. 18-19).

The trial court's denial of Appellant's new trial motion was proper in this regard as Law Enforcement's testimony at Gambrell's trial would not have changed the result of Appellant's prior conviction. To obtain a new trial based on after discovered evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had . . .). *Clark v. State*, 315 S.C. 385, 387–88, 434 S.E.2d 266, 267 (1993) (citing *Caskey*, 273 S.C. 325, 256 S.E.2d 737 (1979)). While Appellant contends that this testimony regarding the "dirt bike" reflects on a lack of criminal intent, it would not change the outcome in a new trial. This testimony concerning statements made by the victim's neighbors could only be hearsay and possesses no exculpatory value. Because the victim had gone to Gambrell's home to sell a dirt bike on the day of the murder, the mention of "dirt bike" during the altercation is unsurprising and does not change the circumstances of the murder. *Caskey*, 273 S.C. at 329, 256 S.E.2d at 739 (holding that evidence

sufficient to grant a new trial must be such as would probably change the result if a new trial was had).

Appellant further seeks to impeach Law Enforcement testimony, alleging that Detective Marzolf had prior knowledge of the victim's violent tendencies. Specifically:

> Appellant's counsel asked Marzolf twice regarding Cameron's violent tendencies, which the officer denied having knowledge. (Carv. Trial R., p. 502, 20.25). However Marzolf had knowledge of Cameron's volatile behavior. He admitted that he had a supplemental report from Officer Scott Hill who interviewed a neighbor who recounted Cameron's violent behavior. Marzolf himself interviewed Cameron's siblings, Erica and Christopher. Erica told him of Cameron's history of domestic violence against his wife. (Marzolf's Supplementary Report, April 13, 2016).

(Initial Brief of Appellant, p. 19).

Appellant has not alleged that Law Enforcement committed violations pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Instead, he simply alleges that Detective Marzolf's testimony was misleading. Dismissal by the trial court was proper in this regard as Appellant was clearly aware of the victim's aggressive tendencies during trial as Counsel questioned Law Enforcement and other witnesses on it. During Appellant's trial, Counsel extensively cross-examined Detective Marzolf with an incident and supplemental incident report that were provided with the State's discovery. R. p. 502, l. 20 – p. 504, l. 3; p. 511, l. 19 - p. 512, l. 9; p. 536, l. 2 – p. 539, l. 6. Additionally, Counsel examined the victim's neighbor who further testified to instances of aggression by the victim. R. p. 713, l. 17 – p. 715, l. 10. The trial record supports that Appellant was fully aware the victim's aggressive tendencies at the time of trial. Therefore, testimony substantiating this element of the victim's character cannot be presented as after-discovered evidence. *See Hayden*, at 612, 299 S.E.2d at 855–56 (denying new trial motion because evidence offered was clearly known by and available to respondent at trial). Further, the only value to be gleaned from this testimony would be purely for impeachment of Detective Marzolf and other

Law Enforcement. This is not sufficient to grant a new trial. *See Caskey*, at 329, 256 S.E.2d at 738-39. Lastly, this issue would not have changed Appellant's conviction. The victim's aggressive tendencies were presented to the jury during Appellant's trial and did not affect their determination.

Appellant continues his focus on Detective Marzolf in the next cited sub issue:

> As discussed in the previous section, Marzolf has shown no qualms in offering conflicting testimonies/statements. He testified [sic] not having knowledge of, nor even participated in, Curry's plea-bargaining deal.
>
> [. . .]
>
> Curry contradicted Marzolf's statement. In his sworn affidavit, Curry specifically stated that Marzolf and Solicitor Moore suggested to reduce his charge to voluntary manslaughter, if he plead guilty and implicated Appellant. (Affidavit of Woodrow Walter Curry, November 5, 2018). Curry exposed that it was Marzolf and the prosecutor's idea to reduce his charge.

(Initial Brief of Appellant, pp. 19-20).

Appellant's allegation is based purely on conjecture. Furthermore, it acts solely to impeach Detective Marzolf's testimony. *State v. Fowler*, 264 S.C. 149, 153, 213 S.E.2d 447, 449 (1975) ("The present testimony was therefore cumulative and impeaching. As such, it could not be after-discovered evidence."). Applying *Caskey* to the evidence offered by Appellant, it is clear that the lower court was well within is discretion in denying Appellant's new trial motion as the evidence failed to satisfy the necessary elements. *See generally State v. Wells*, 249 S.C. 249, 263, 153 S.E.2d 904 (1967) ("The trial judge has the power to weigh the credibility of newly discovered evidence offered in support of a motion for a new trial.").

b. State Acted Within Its Broad Discretion In Charging Appellant And His Fellow Accomplices.

Appellant next asserts that he is entitled to a new trial due to the State's misconduct in filing different charges against himself, Curry, and Gambrell. (Initial Brief of Appellant, p. 21). Respondent interprets the presented issue as claim of prosecutorial misconduct.[2] The trial court acted properly in dismissing Appellant's claim as the facts presented do not support such an allegation. "[A] defendant asserting prosecutorial misconduct carries a "heavy burden of proving that the ... prosecution 'could not be justified as a proper exercise of prosecutorial discretion." *U.S. v. Wilson*, 262 F.3d 305, 316 (4th Cir.2001) (internal quotations omitted). Additionally, a prosecutor "has discretion in choosing how to proceed with a case, including whether to prosecute in the first place and whether he brings it to trial or offers a plea bargain." *State v. Langford*, 400 S.C. 421, 435 n. 6, 735 S.E.2d 471, 479 n. 6 (2012). "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

In *United States v. Goodwin*, the U.S. Supreme Court held, "[a] prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution." *U.S. v. Goodwin*, 457 U.S. 368, 382 (1982). In *United States v. Esposito*, the Third Circuit Court of Appeal eloquently held, "[w]e will not apply a presumption of vindictiveness to a subsequent criminal case where the basis for that case is justified by the evidence and does not put the defendant twice in jeopardy. Such a presumption is tantamount to making an acquittal a waiver of criminal liability for conduct that arose from the operative facts

[2] "[O]ur supreme court has abolished the rule against inconsistent verdicts in this state." *State v. Mitchell*, 399 S.C. 410, 422, 731 S.E.2d 889, 896 (Ct. App. 2012) (citing *State v. Alexander*, 303 S.C. 377, 383, 401 S.E.2d 146, 150 (1991).

of the first prosecution. It fashions a new constitutional rule that requires prosecutors to bring all possible charges in an indictment or forever hold their peace.... We reject such a proposition for it undermines lawful exercise of discretion as well as plain practicality." *United States v. Esposito*, 968 F.2d 300, 306 (3d Cir.1992).

Nothing in the Record support's a claim of Prosecutorial Misconduct. Petitioner was indicted by the Anderson County Grand Jury for murder. *See* R. p. 442, l. 23 – p. 443, l. 2. He elected to proceed to trial. A jury of his peers found that the evidence presented at trial supported a conviction of murder under a "hand of one, hand of all" theory of accomplice liability. The road to Appellant's conviction was procedurally proper. Furthermore, the State acted within its broad discretion in charging Appellant with murder and pleading his accomplice to manslaughter. *See State v. Harry*, 420 S.C. 290, 297, 803 S.E.2d 272, 276 (2017 (affirming a petitioner's murder conviction under "hand of one, hand of all" theory of accomplice liability, despite the fact that codefendant shot the victim and later pled guilty to voluntary manslaughter). For these reasons the issue is without merit.

c. The State Was Not Required To Provide Appellant With Recordings Of The State's Alleged Plea Bargaining With Woodrow Curry

AND

d. The State Acted Within Its Discretion In Deferring Woodrow Curry's Sentencing

Appellant next faults the State for not providing him with video recordings of alleged bargaining between the State and Curry:

> First, according to the prosecution's star witness, Curry met with the prosecution team, three times. Marzolf was in at least one of these meetings. The prosecution provided no recording, or failed to make one, of the time they visited Curry to speak to him on his manslaughter deal. Appellant's counsel received two video interviews, but the Solicitor withheld (or conveniently did not make) the

> third. Appellant was not shown the video, or any other evidence, of what exactly the prosecution offered Curry. Curry maintained that Marzolf and Ms. Moore would reduce his charges to voluntary manslaughter, if he plead guilty and testified against Appellant. (Affidavit of Woodrow Curry, November 5, 2018).

(Initial Brief of Appellant, p. 22).

Appellant also cites Misconduct in the State's Deferment of Woodrow Curry's sentencing:

> [T]he State deferred Curry's sentencing for over a year, when the Order specifically stated that it would only be until after Appellant's trial. (Curry Plea-Bargaining Trial, p. 427, 2.6). However, the State liked the results of holding the anvil over Curry's head so much that they held off sentencing for another year; or, after Gambrell's trial.

(Initial Brief of Appellant, pp. 22-23).

"The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias." *State v. Gracely*, 399 S.C. 363, 372, 731 S.E.2d 880, 885 (2012) (citing *State v. Clark*, 315 S.C. 478, 481, 445 S.E.2d 633, 634 (1994). "A defendant demonstrates a Confrontation Clause violation when he is prohibited from 'engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias ... from which jurors ... could draw inferences relating to the reliability of the witness.'" *Id.* (quoting *State v. Stokes*, 381 S.C. 390, 401–02, 673 S.E.2d 434, 439 (2009)).

Appellant was aware of Woodrow Curry's plea during trial and made use of this knowledge to impeach Curry's testimony:

> Q. Did you remember when you pled guilty yesterday?
>
> A. Yes.
>
> Q. You don't have a sentence yet; right?
>
> A. Right.
>
> Q. Right. Why not?
>
> A. They deferred sentence on me.
>
> Q. What's that?

A. I said that they deferred sentencing.

Q. What are we waiting for? Is something going to happen?

A. No.

Q. Okay. You've been in trouble before.

A. (Affirmative nod).

Q: And you've been sentenced before?

A: (Affirmative nod).

Q. How many times have you had a deferred sentence before?

A. Not any. I never had.

Q. So you've never had a deferred sentence before this time?

A. No, I hadn't.

Q. You were part of that conversation, right?

A. I don't know what you mean.

Q. Well, this is different than anything that you'd experienced before.

A. Yeah.

Q. I want to know why.

A. I don't know.

R. p. 557, l. 1 – p. 558, l. 8.

Appellant is unable to show any error or prejudice. Appellant was aware Curry's plea and was permitted the opportunity to cross-examine the witness concerning bias

In regards to deferring Curry's sentence, a prosecutor "has discretion in choosing how to proceed with a case, including whether to prosecute in the first place and whether he brings it to trial or offers a plea bargain." *State v. Langford*, 400 S.C. 421, 435 n. 6, 735 S.E.2d 471, 479 n. 6 (2012). "The decision whether to offer a plea bargain is within the solicitor's discretion." *State v. Whipple*, 324 S.C. 43, 49, 476 S.E.2d 683, 686 (1996) (citing *State v. Chisolm*, 312 S.C. 235, 439 S.E.2d 850 (1994)). "This Court is not empowered to infringe upon the exercise of this prosecutorial discretion." *Id.* (citation omitted).

In *State v. Wright*, our Supreme Court address whether the deferral of sentencing of codefendants until after an appellant's trial encouraged perjury and deprived appellant of due process of law. *State v. Wright*, 269 S.C. 414, 416, 237 S.E.2d 764, 766 (1977). In this regard, the Court held:

> An unsentenced codefendant is a competent witness for the State. *Taylor v. State*, 258 S.C. 369, 188 S.E.2d 850 (1972); *State v. Lewis*, 255 S.C. 466, 179 S.E.2d 616 (1971). Although these decisions did not consider the issue on Due Process grounds, it is exceedingly clear to us that appellant has failed to demonstrate a denial of his Due Process rights in the court's allowance of Lazarus' and Stanley's testimony before sentencing them. This ground is without merit.

Id., at 417, 237 S.E.2d at 766.[3]

Appellant is unable to show error by the trial court in dismissing his new trial motion as the State acted within its discretion in pleading Curry and deferring his sentence. Furthermore, Appellant was made aware of these actions prior to trial and was permitted meaningful cross-examination of the witness on the issues. Appellant's above claims are without merit and must be dismissed.

e. The Trial Court Properly Found That The State Did Not Intentionally Withhold Evidence From Appellant At Trial

Appellant raises issue with the fact that evidence was not timely turned over to his defense counsel during trial.

> The investigation on Appellant's case was completed April or May 2016. The State offered Appellant a copy of the discovery response in December 2016, which Appellant was unable to open. By the State's own admission, what they provided had been faulty.
>
> [. . .]

[3] *Cf., Missouri v. Frye*, 566 U.S. 134, 144, 132 S. Ct. 1399, 1407, 182 L. Ed. 2d 379 (2012) (quoting Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L. J. 1909, 1912 (1992)) ("To a large extent ... horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.").

> Appellant repeatedly requested the discovery materials, which included surveillance video which ran in excess of 36 hours. These materials have been in the State's possession since the first week of the investigation. Appellant was provided the materials a year after. Another set of materials which included an audio recording and three supplemental reports was provided by the State on August 9, 2017, or two (2) weeks prior to Appellant's trial. The State failed to give the defense the opportunity to review materials which it had for more than one (1) year.

(Initial Brief of Appellant, pp. 24-25).

"[W]here a party fails to comply with Rule 5, the court may order the noncomplying party to permit inspection, grant a continuance, prohibit introduction of the nondisclosed evidence, or enter such order as it deems just under the circumstances." *State v. Kerr*, 330 S.C. 132, 150, 498 S.E.2d 212, 221 (Ct. App. 1998) (citing Rule 5(d)(2), SCRCrimP; *State v. Trotter*, 322 S.C. 537, 542, 473 S.E.2d 452, 458 (1996)). "Sanctions for noncompliance with disclosure rules are within the discretion of the trial judge and will not be disturbed absent an abuse of discretion." *Id.* (citing *State v. Davis*, 309 S.C. 56, 63, 419 S.E.2d 820, 825 (Ct. App. 1992)).

The tape that Appellant cites to consists of audio from an interview with the victim's brother. R. p. 457, l. 25 – p. 458, l. 24. Appellant does not specifically state a Rule 5 / *Brady* violation. However, he does raise issue with the timeliness of the of particular discovery material. *See* SCRCrimP Rule 5(d)(2) (Time for Disclosure. The prosecution shall respond to the defendant's request for disclosure no later than thirty (30) days after the request is made, or within such other time as may be ordered by the court.). "Rule 5(d)(2),2 as does its federal counterpart, FED.R.CRIM.P. 16(d)(2), gives the court a broad discretion in deciding what should be done where material that should have been produced in response to an earlier request does not become known until during or just before the trial." *State v. Newell*, 303 S.C. 471, 476, 401 S.E.2d 420, 423 (Ct. App. 1991).

During the trial court's inquiry into the delay, the court determined that the delay resulted from Law Enforcement misplacing the particular piece of material. R. p. 461, l. 17 – p. 463, l. 11. While the trial judge in Appellant's case rebuked the State for failing to turn over the particular material in a timely manner, it determined that suppression was inappropriate under the circumstances. *See* 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2d § 261 at 126 (1982) (adverse orders regarding discovery may be reviewed on appeal but they must be affirmed unless the trial court abused its discretion). The trial judge was well within his discretion in reaching this determination. The trial court determined that Appellant was in possession of the tape for two-weeks and have been allocated sufficient time to review it prior to trial. *See* R. p. 463, ll. 19-24 (Trial Court to Defense Counsel: "First, let me -- I'm giving them a hard time. You received it on the 9th, it is now the 22nd and you told me that you haven't listened to it. That's unacceptable as well. You have an obligation. So that cuts both ways."). In addition, the trial court adjourned court early on the day the discovery issue arose, in order to permit Defense Counsel additional time to review the cited material. *See* R. p. 465, l. 22 – p. 466, l. 1; *see also Patterson v. South Carolina*, 482 U.S. 902 (1987) (the State's failure to produce tape of interview with a prosecution witness until the morning of jury selection did not warrant a dismissal or a mistrial where the court allowed defense counsel to listen to the tape before the witness took the stand for direct examination and the court delayed cross-examination until the next day).

Lastly, Appellant asserts that the State "failed to disclose information and/or witness that may exculpate Appellant."Initial Brief of Appellant, p. 24. In support, Appellant offers that he was unable to open portions of the digital discovery provided by the State. *During a pretrial hearing*, Defense Counsel briefly commented that he had had trouble opening a video on his

computer. Counsel did not make any accusations of prosecutorial misconduct. The trial court instructed the parties to get together and facilitate Defense Counsel's access to the material. The State indicated that Counsel could review the material at their office, and affirmed that it had already offered Defense Counsel this opportunity. The trial court took notice of this during trial and moved on after both sides declined to take up further issue. R. p. 440, l. 24 – p. 441, l. 9.

It is a violation of a defendant's due process rights for the prosecution to withhold evidence favorable to the defendant. *Brady v. Maryland*, 373 U.S. 83 (1963). The prosecution's obligation to turn over evidence favorable to the defense applies to both exculpatory and impeachment evidence. *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). However, in *Anderson v. Leeke*, 271 S.C. 435, 438, 248 S.E.2d 120, 122 (1978), our Supreme Court held that the Brady rule "applies only to favorable evidence which the prosecution has but which is unavailable to the defendant."

In the present case, the digital material was provided to Appellant's Counsel prior to trial. While Appellant's Counsel cites difficulty in opening the file on his computer, the record wholly support that this material was nonetheless available to Appellant and his Counsel through due diligence. Accordingly, the access issue with the document does not constitute any violation by the State.

f. The State Did Not Commit Misconduct By Not Charging Appellant With "Kidnapping, Robbery, Attempted Assault

Lastly, Appellant cites misconduct in the State failure to charge Appellant with various other crimes:

> [T]he State charged Appellant with murder. He was indicted for said crime. Nowhere in his charge sheet was he charged with kidnapping, robbery, attempted assault or drug distribution, and yet the State included the aforesaid felonies during the trial. At most, Appellant was denied his right to be informed of what he was charged.

(Initial Brief of Appellant, p. 28).

What Appellant offers as "charges" constitutes the *res gestae* of the subsequent murder. "Evidence of other crimes is admissible under the *res gestae* theory when the other actions are so intimately connected with the crime charged that their admission is necessary for a full presentation of the case." *Anderson v. State*, 354 S.C. 431, 435, 581 S.E.2d 834, 836 (2003) (citing *State v. Adams*, 322 S.C. 114, 122, 470 S.E.2d 366, 370–71 (1996)); *see also State v. Hough*, 325 S.C. 88, 480 S.E.2d 77 (1997) ("One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case"). When evidence is admissible to provide this "full presentation" of the offense, there is "no reason to fragmentize the event under inquiry by suppressing parts of the res gestae." *State v. Sweat*, 362 S.C. 117, 133, 606 S.E.2d 508, 517. Without reference to Appellant and Curry's illegal conspiracy, the jury would not be able to discern the context of the victim's subsequent murder. The State's reference to the criminal conspiracy was necessary for a full presentation of the evidence to the jury. Moreover, the acts are not independent, prior acts. Rather they are part and parcel of the same series of events involving the same actors. The State did not commit misconduct by introducing these prior acts at trial. Of note, Appellant did not object to its admission.

II. The Trial Court Did Not Abuse Its Discretion In Instructing The Jury On "Hand Of One, Hand Of All" Where The Evidence Presented At Trial Supported That Appellant's Codefendant Murdered The Victim, Appellant Was Present, And Prior To The Murder Appellant And Codefendant Were Planning On Either Kidnapping Or Robbing The Victim As Redress For A Prior Drug Theft.

Issue Preservation

Appellant failed to preserve the above issue for appellate review, as he failed to offer any objection to the court's jury charge during trial. *See State v. Williams*, 303 S.C. 410, 411, 401

S.E.2d 168, 169 (1991) ("A defendant must object at his first opportunity to preserve an issue for appellate review."). The trial court gave Appellant the opportunity to object at both the charge conference and at the conclusion of the jury charge. Appellant declined both times. R. p. 698; p. 737; *see State v. Stone*, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985) ("[A] defendant's failure to object to the charge as made or to request an additional charge, when an opportunity has been afforded to do so, results in a waiver of his right to complain about the charge on appeal.").

Standard of Review

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). In reviewing jury charges for error, appellate courts must consider the trial court's charge as a whole and in light of the evidence and issues presented at trial. *State v. Logan*, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013) (citation omitted). "A jury charge is correct if, when read as a whole, the charge adequately covers the law." *Id.* at 90-91, 747 S.E.2d at 448. A charge that is substantially correct and covers the law does not require reversal. *Id.* "[I]f as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error." *State v. Jackson*, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989).

Analysis

"The law to be charged is determined from the evidence presented at trial." *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002) (citing *State v. Harrison*, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000)). "A trial court has a duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by the evidence. *Id.* If any evidence exists to support a charge, it should be given." *Id.*, (citing *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999)).

Under the "hand of one is the hand of all" theory of accomplice liability, a person who joins with another to accomplish an illegal purpose is criminally liable for everything done by his accomplice incidental to the execution of the common plan. *State v. Langley*, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999). Our Supreme Court has further held that "[l]ike a lesser-included offense, an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of a fact." *Barber v. State*, 393 S.C. 232,236, 712 S.E.2d 436,439 (2011). In *Barber*, four men committed an armed robbery and, during the robbery, one of the men shot two of the victims. *Id.* at 234-35, 712 S.E.2d at 437-38. On appeal, Barber argued the evidence at trial did not support a jury charge on accomplice liability. *Id.* at 236, 712 S.E.2d at 438. Our Supreme Court noted "[t]o support an accomplice liability charge in this case, the question is whether there is any evidence that another co-conspirator was the shooter and Barber was acting with him when the robbery took place." *Id.* at 237, 712 S.E.2d at 439. Under this test, the Court ultimately found the trial court did not err in instructing the jury on accomplice liability because "the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter." *Id.* at 236, 712 S.E.2d at 439; *see State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989) ("The law to be charged to the jury is to be determined by the evidence presented at trial.").

Here, the evidence presented at trial supported the inference that Appellant and his accomplices conspired to kidnap or rob the victim, leading to his murder. *See State v. Fleming*, 243 S.C. 265, 274,133 S.E.2d 800, 805 (1963) (holding the State need not show a formal expressed agreement to prove parties acted as accomplices, but may prove the agreement by circumstantial evidence and the conduct of the parties). The State presented testimony from

codefendant Woodrow Curry. Curry testified that after it was discovered that the victim had stolen drugs from James Gambrell, Gambrell instructed Curry and Appellant to go to Cameron's house and either get money, the drugs, or bring Cameron back. *See* R. p. 546, l. 20 – p. 547 l. 7; p. 567, ll. 3-7. Curry testified that Gambrell then provided Curry with two guns. *See* R. p. 547, l. 15 – p. 548, l. 7. Moreover, he stated that Appellant had his own gun prior to departing for the victims house. *See* R. p. 547, ll. 20-24. Curry also testified that Appellant drove to and from the murder scene and was present at the moment of the shooting. *See* R. p. 548, ll. 8-10; p. 549, ll. 11-15; p. 551, ll. 9-22. Curry's testimony is evidence that he, Gambrell, and Appellant were involved in a criminal scheme, to commit armed robbery and/or kidnapping, that went tragically wrong. *See State v. Thompson*, 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct. App. 2007) (internal quotation omitted) ("Under the hand of one is the hand of all theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.").[4]

Finally, the trial court did not abuse its discretion in its instructions where the record shows the jury charge, as a whole, was correct. *See Logan*, 405 S.C. at90, 747 S.E.2d at 448 (holding appellate courts must consider the jury charge as a whole and in light of the evidence presented at trial when reviewing the instructions for error). The court instructed the jury at length on the law of the case, including the elements of the charged crimes, witness credibility and reasonable doubt. (R. p. 720, l. 4 – p. 730, l. 15). During the accomplice liability charge, the court also cautioned the jury that a defendant's mere presence at the scene was insufficient to

[4] Appellant asks this court to find error based solely on the credibility of Appellant's trial testimony, despite contradicting testimony from his codefendant. Initial Brief of Appellant, p. 30. However, "[t]he assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, at 464, 725 S.E.2d at 141.

prove he was guilty, reminding the jury that they must find the State demonstrated, beyond a reasonable doubt, that appellant actively participated in the crime. (R. p. 730, l. 16 – p. 733, l. 12). The record shows the jurors thoroughly and thoughtfully considered the entire charge, as they deliberated for close to two hours and requested that the judge repeat the instructions regarding "hand of one, hand of all." (R. p. 767, l. 12 – p. 774, l. 13). *See Logan*, 405 S.C. at 90-91, 747 S.E.2d at 448 (holding a jury charge is correct if, when read as a whole, it adequately covers the law, and such a charge does not require reversal). Therefore, the trial court did not err in charging the jury on accomplice liability as the evidence presented at trial supported the instruction.

III. The Trial Court Properly Denied Defendant's Motion For A Directed Verdict Because The Evidence Shows That Prior To The Murder, Appellant Was Knowingly Engaged In The Conspiracy To Rob Or Kidnap The Victim.

Standard of Review

"On appeal from the denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the State." *State v. Bennett*, 415 S.C. 232, 235–36, 781 S.E.2d 352, 353–54 (2016) (quoting *State v. Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014)). "The Court's review is limited to considering the existence or nonexistence of evidence, not its weight." *Id.* (citing *State v. Cherry*, 361 S.C. 588, 593, 606 S.E.2d 475, 478–79 (2004)). "When the evidence submitted raises a mere suspicion that the accused is guilty, a directed verdict should be granted because suspicion implies a belief of guilt based on facts or circumstances which do not amount to proof." *Id.* 415 S.C. at 236, 781 S.E.2d at 354. However, "[u]nless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776-77 (2011).

Analysis

Appellant argues the trial court erred in denying his motion for a directed verdict because the State failed to present evidence which reasonably tended to prove his guilt. However, the record in the present case supports the trial judge's denial of Appellant's directed verdict motion because the State presented direct evidence supporting Appellant's guilt.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *Cherry*, at 593, 606 S.E.2d at 477–78. "If the State presents any evidence which reasonably tends to prove defendant's guilt, or from which defendant's guilt could be fairly and logically deduced, the case must go to the jury." *State v. Burdette*, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999) (citing *State v. Poindexter*, 314 S.C. 490, 431 S.E.2d 254 (1993)).

In the similar case of *State v. Harry*, the appellant appealed his murder conviction under the "hand of one, hand of all" theory of accomplice liability. He argued the circuit court erred in denying his motion for directed verdict, as the State failed to present any direct or substantial circumstantial evidence he acted in concert with his codefendant who had admitted shooting the victim. *State v. Harry*, 420 S.C. 290, 803 S.E.2d 272 (2017). In the Order of Dismissal, our Supreme Court set forth the following:

> This tragic story culminates with an attempt by Petitioner and his enlisted cohorts to retrieve Petitioner's forty-seven-inch plasma-screen television from Kevin Bowens (Victim). Victim was shot and killed on his property by one of Petitioner's accomplices during the confrontation. The State contends the evidence demonstrates that Petitioner intended to retrieve his television by any means necessary, including the use of force. According to the State, Victim's death was therefore a natural and foreseeable consequence of Petitioner's plan to retrieve his television and, under the theory of accomplice liability that says the hand of one is the hand of all, Petitioner is guilty of murder. Petitioner counters that he only wanted to peacefully reclaim his television, he had no idea his accomplice was armed, and he actually tried to be a calming influence when the situation became tense. In light of the differing inferences that may be drawn from the evidence, we emphasize that because we are reviewing a directed verdict

> motion, we are required to " 'view[ ] the evidence and all reasonable inferences in the light most favorable to the State.' " *State v. Bennett*, 415 S.C. 232, 235, 781 S.E.2d 352, 353 (2016) (quoting *State v. Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014)).

Harry, at 293, 803 S.E.2d at 273.

To withstand Appellant's directed verdict motion in the trial of this case, the State was required to produce evidence of Appellant's presence at the scene of the shooting as a result of a prior arranged plan to undertake an illegal act. The gist of Appellant's argument that he was entitled to a directed verdict harkens back to his argument regarding the jury charge: Appellant believes there is insufficient evidence to show he and his co-defendant were acting in concert. As explained in the first issue above, evidence was presented to show that they did in fact act in concert. The State presented the testimony of Appellant's codefendant Woodrow Curry to prove that Appellant participated in the criminal scheme to rob and/or kidnap Steven Cameron. Furthermore, during Gambrell's interview with Law Enforcement, he specified that he told Curry and Carver to go let Cameron know that they were aware he had stolen the drugs and that he needed to pay. R. 3: James-Milton-Gambrell-Second Interview- DVD: 12:30-16:40; 1 8:20-19:1 0. Furthermore, Gambrell stated that Appellant did not like the victim. R. 3: James-Milton-Gambrell-Second Interview-DVD: 41:32-41:40 .Appellant has cited the proper standard of review, but rejects it in application, preferring instead to recast the evidence in a light favorable to him. *See Harry*, at 299, 803 S.E.2d at 277. Despite this, the record clearly shows that State presented evidence sufficient to overcome the nominal burden of a directed verdict.

Lastly, Appellant repeatedly asks this Court to accept the credibility of his trial testimony over that of his codefendant's. *See State v. Larmand*, 415 S.C. 23, 32, 780 S.E.2d 892, 896 (2015) ("[O]ur duty is not to weigh the plausibility of the parties' competing explanations.").

This Court should refrain from Appellant's invitation to act as a thirteenth juror and usurp the jury's role in weighing the evidence. *See United States v. Ashley*, 606 F.3d 135, 141 (4th Cir. 2010) (internal citation omitted) ("Though a jury may not convict on the basis of 'rank speculation,' it is entitled to deduce and to infer. . . . Our system of lay juries is designed to allow jurors to draw upon common experience and to rely upon reasonable intuitions, and it is not the province of an appellate court to undermine these virtues by picking apart a properly instructed verdict.").

IV. Appellant's Trial And Subsequent Conviction Satisfied Sixth Amendment And Due Process Requirements.

Appellant raises several perceived injustices by the trial court, and asserts that these resulted in violations of his Sixth Amendment and Due Process Rights. In support, Appellant presents a ten page argument, citing very little authority. Appellant's argument is largely conclusory. *See State v. Tyndall*, 336 S.C. 8, 518 S.E.2d 278 (Ct. App. 1999) (conclusory arguments constitute an abandonment of the issue on appeal.); *State v. Colf*, 332 S.C. 313, 504 S.E.2d 360 (Ct. App. 1998) (issue is deemed abandoned if argument in brief is merely conclusory); *State v. Black*, 319 S.C. 515, 462 S.E.2d 311 (Ct. App. 1995) (a conclusory argument of an issue by appellant amounts to an abandonment of the issue). Nevertheless, careful review of the record reflects that the trial court maintained its role as judicial administrator and neutral arbiter in every issue raised by Appellant. Below, Respondent has addressed Appellant's sub-issues as presented in his Initial Brief of Appellant

a. "The Court denied Appellant his right to be informed of the charges against him."

Issue Preservation

Should this court determine that in presenting the above issue, Appellant seeks to attack the sufficiency of the indictment, this issue is not preserved for review. "A challenge to the

indictment on the ground of insufficiency must be made before the jury is sworn as provided by § 17–19–90." *State v. Gentry*, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). "Because appellant did not raise the sufficiency of the indictments before the jury was sworn, he cannot now raise this issue on appeal." *Id.* The issue is not preserved for review.

Analysis

Appellant offers that his right to due process was violated by the State not presenting the "underlying offenses" of kidnapping and robbery prior to trial. Initial Brief of Appellant, p. 43. Appellant contend that the court committed error in "allowing the State to argue using these terms that were not part of the charge."

Fairness and due process of law require that the defendant receive notice of the charges against him sufficient to enable him to prepare his defense. S.C. Code § 17–19–20 (1976); *see also State v. Hiott*, 276 S.C. 72, 81, 276 S.E.2d 163, 167 (1981). "In determining whether an indictment meets the sufficiency standard, the trial court must look at the indictment with a practical eye in view of all the surrounding circumstances." *State v. Baker*, 411 S.C. 583, 589, 769 S.E.2d 860, 864 (2015) (quoting *State v. Tumbleston*, 376 S.C. 90, 97, 654 S.E.2d 849, 853 (Ct.App.2007). In doing so, "one is to look at the 'surrounding circumstances' that existed pre-trial, in order to determine whether a given defendant has been 'prejudiced,' i.e., taken by surprise and hence unable to combat the charges against him." *Id.*, (quoting *State v. Wade*, 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991).

Appellant was duly indicted for the murder of Steven Cameron. Appellant was not charged with any other crime. The indictment stated with sufficiency the crime charge, the victim, the location, and the narrow period to time in which the crime occurred. *See* R. 1: Indictment. Given the sufficiency and circumstances, it would be unreasonable to believe

Appellant was caught by surprise. The indictment for murder was sufficient to give Appellant proper notice.

Moreover, the State proceeded on a theory of "hand of one is the hand of all" theory. "Under the 'hand of one is the hand of all' theory [of accomplice liability], one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct.App.2002). Accordingly, it was the States burden, under this theory, to prove that Appellant joined with Curry to accomplish an illegal purpose. At trial, the State maintained its burden by establishing that Appellant and Curry conspired to kidnap and/or rob the victim prior to the murder.

Lastly, the conspiracy entered into between Appellant and Curry constitutes the *res gestae* of the murder. "The res gestae theory recognizes that evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred." *State v. Preslar*, 364 S.C. 466, 473–74, 613 S.E.2d 381, 385 (Ct. App. 2005) (citations omitted). "When evidence is admissible to provide this "full presentation" of the offense, there is 'no reason to fragmentize the event under inquiry by suppressing parts of the res gestae.'" *Id.* (quoting *State v. Sweat*, 362 S.C. 117, 133, 606 S.E.2d 508, 517 (Ct.App.2004)). In order for the jury to fully understand why the victim was murdered, the jury had to understand the illegal conspiracy which Appellant and Curry had endeavored. Consequently, the trial court did not abuse its discretion in admitting the evidence that Appellant and Curry had conspired to rob and kidnap the victim immediately prior to his murder. Further, Appellant did not object to its admission.

b. "The trial judge erred in refusing to let Gambrell take the witness stand."

How the Issus Arose at Trial

At trial, Appellant sought to call codefendant James Gambrell as a witness. Gambrell was present and represented by defense counsel. The trial court indicated that, after discussion with Gambrell and his counsel, it was the court's understanding that Gambrell would be invoking his Fifth Amendment Right. (R. p. 595, ll. 3-9). However, the trial court held an in camera examination to confirm. The trial court began by informing Gambrell of his Fifth Amendment Right. (R. p. 596, l. 7 – p. 599, l. 21). Afterwards, Gambrell's defense counsel then testified that he anticipated that his client to invoke his Fifth Amendment Right. (R. p. 597, l. 22 – p. 598, l. 13). Defense Counsel then proceeded to examine Gambrell in camera. (R. p. 598, ll. 14-18). Gambrell answered several preliminary questions. (R. p. 598, l. 24 – p. 605, l. 6). Once testimony began crossing into the realm of culpability, Gambrell's defense counsel objected and reiterated his advice to his client to invoke the Fifth Amendment. (R. p. 605, ll. 7-20). Gambrell expressed some confusion to his attorney's suggestion, whereupon the trial court again explained the Fifth Amendment and cautioned the witness that he risked incriminating himself if he chose the testify further. (R. p. 605, l. 24 – p. 608; l. 17). The court then allowed the witness additional time to speak with his counsel. (R. p. 439, ll. 19-25). Thereafter, Gambrell elected to exercise his Fifth Amendment Right and to cease testifying. (R. p. 609, ll. 1-9). At this point the trial court released Gambrell. (R. p. 609, ll. 10-12). Thereafter, Appellant requested that the trial court require Gambrell to invoke the Fifth Amendment on the stand in front of the jury. (R. p. 707, ll. 2-5). The trial court quickly denied the request. (R. p. 708, ll. 10-12).

Standard of Review

"The Constitution of the United States guarantees a criminal defendant certain fundamental rights." *State v. Lyles*, 379 S.C. 328, 341, 665 S.E.2d 201, 208 (Ct. App. 2008)

(citing U.S. Const. amend. VI). "The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." *State v. Gillian*, 360 S.C. 433, 449–450, 602 S.E.2d 62, 71 (Ct. App. 2004).

However, "[i]n the exercise of this right [to present a defense], the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038 (1973). "The right to present a defense is not unlimited, but must bow to accommodate other legitimate interests in the criminal trial process." *State v. Hamilton*, 344 S.C. 344, 359, 543 S.E.2d 586, 594 (quoting *Rock v. Arkansas*, 483 U.S. 44, 55, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)). "'The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.' " *Montana v. Egelhoff*, 518 U.S. 37, 42, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (quoting *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988)). "Defendants are entitled to a fair opportunity to present a full and complete defense, but this right does not supplant the rules of evidence and all proffered evidence or testimony must comply with any applicable evidentiary rules prior to admission." *Lyles*, 379 S.C. at 343, 665 S.E.2d at 208 (citing *Hamilton*, 344 S.C. at 359, 543 S.E.2d at 594).

Analysis

Appellant insists that the trial court's refusal to require Gambrell to assert his privilege against self-incrimination before the jury denied him of Sixth Amendment right. While the Sixth Amendment permits broad protection in Appellant's ability to present a defense, it does not

permit him the ability to ignore well established state evidentiary rules or to ignore the Constitutional rights afford to other defendants.

Similar to Appellant's case, in *State v. Hughes* the trial court denied the petitioner's motion to compel a witness to assert his Fifth Amendment right before the jury. At Hughes' trial for murder, defense counsel sought to call the petitioner's codefendant as an adverse witness. The solicitor advised that the codefendant would not testify for the state and was planning to assert his Fifth Amendment privilege against self-incrimination. The codefendant asserted the privilege during an in camera hearing. The trial court ruled that the codefendant was "unavailable" to testify such that cross-examination before the jury was inappropriate. The trial court held that the petitioner was not permitted to call his codefendant to the stand for the purpose of requiring him to assert his Fifth Amendment privilege. *State v. Hughes*, 328 S.C. 146, 149, 493 S.E.2d 821, 822 (1997)

On review, the Supreme Court of South Carolina modified its prior holdings regarding the issue and held, "[i]t is desirable the jury not know that a witness has invoked the privilege against self-incrimination since neither party is entitled to draw any inference from such invocation." *Id.*, at 150, 493 S.E.2d at 823. Moreover, "it has been recognized that neither the [S]tate nor the defendant should be allowed to call witnesses who either side knows will invoke the Fifth Amendment in front of the jury and then be subject to inferences in a form not subject to cross-examination." *Id.* at 152, 493 S.E.2d at 823. The *Hughes* Court concluded that, thereafter, a witness may not be called solely for the sake of invoking his or her Fifth Amendment privilege against self-incrimination. *Id.* at 152–53, 493 S.E.2d at 824; *see Marshall v. Lonberger*, 459 U.S. 422, 438 n. 6, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983) ("[T]he Due Process Clause does not permit the federal courts to engage in a finely-tuned review of the wisdom of

state evidentiary rules[.]"); *Spencer v. Texas*, 385 U.S. 554, 563–564, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967) (While the Due Process clause guarantees "the fundamental elements of fairness in a criminal trial", the United States Supreme Court is not "a rule-making organ for the promulgation of state rules of criminal procedure.").

Case law reflects that the trial court's actions regarding defense witness's invocation of his Fifth Amendment rights adhered to the juris prudence set forth by this State's highest Court. Therefore, any issue raised by Appellant, in this regard, is without merit.

c. "Appellant was denied a meaningful defense when the Court refused his motion for continuance to present his witness."

How the Issue Arose at Trial

After the Trial Court denied Appellant's request to examine Gambrell, after Gambrell invoked his Fifth Amendment rights, Appellant then sought to introduce into evidence Gambrell's interview with Law Enforcement. (R. p. 610, l. 15 - p. 611, l. 10). After watching and analyzing the case under *State v. Doctor*, 306 S.C. 527, 413 S.E.2d 36 (1992) (holding "out-of-court statements against penal interest by unavailable declarant are admissible in civil and criminal trials; however, if offered to exculpate accused in criminal trial, they are admissible only if corroborating evidence clearly indicates trustworthiness of statement."), the Trial Court denied Appellant's request, concluding that the video did not exculpate but only impeached Appellant's codefendant, Woodrow Curry. (R. p. 613, l. 7- p. 620, l. 16). The entirety of this communication took place outside the purview of the jury. (R. p. 613, ll. 2-5).

Afterward, Defense Counsel then sought to recall one of the investigating detectives regarding potentially impeaching material gleaned from Gambrell's interview. (R. p. 621, ll. 15-16). The Trial Court again denied after noting that Defense Counsel had been in possession of the Gambrell interview well before trial and should have presented that line of questioning

during his extensive and lengthy cross-examination of Detective Marzolf. (R. p. 622, l. 8 – p. 623, l. 16; p. 495, l. 18 – p. 540, l. 22). The entirety of this communication took place outside the purview of the jury. (R. p. 624, ll. 14-15).

At the conclusion of day four, the Defense had several witnesses who had not been located, despite bench warrants being issued. (R. p. 696, ll. 13 – p. 697, l. 6). Despite having already rested, the Trial Court permitted Appellant and Counsel another day to locate the witness. (R. p. 697, ll. 13-20). Thereafter, at the advice of the trial court, Appellant renewed his objection regarding the trial court's denial of the Gambrell law enforcement interview. (R. p. 700, l. 23 – p. 701, l. 4 – p. 702, l. 5). After putting on the Record that it did not find that the statement exculpated Appellant as required by *State v. Doctor*, *supra*, the Trial Court indicated that it would reconsider the issue overnight. Immediately thereafter, the State interjected that it did not have an issue with the Defense introducing Gambrell's interview with Law Enforcement. (R. p. 703, ll. 18-23) (SOLICITOR MOORE: "Your Honor, if Mr. Smith wishes to put into the record another person who says that his defendant knew that they were going to get drugs or money from Steven Cameron, then I agree we need to let him do that."). The entirety of this communication took place outside the purview of the jury. (R. p. 696, l. 12).

On the morning of the fifth day of trial, Defense Counsel indicated that one of the missing witnesses had been located. (R. p. 706, l. 9 – p. 707, l. 1). In response, the Trial Court stated the following:

> THE COURT: Okay. So it would seem to me that the best thing to do is just to tell the jury that some things developed after the case was closed and it is being reopened for that purpose. Also we will allow the playing of the videotape and also additional testimony of one witness and then go to the next phase. Does anybody have a problem with that?

(R. p. 706, ll. 16-24).

Defense then requested that Gambrell be required to plead the Fifth on the witness stand, in front of the jury. (R. p. 707, ll. 7-10). This request was denied. (R. p. 708, ll. 10-12). Defense then requested a continuance so that the other two witnesses could be located. (R. p. 708, ll. 16-21). When asked by the court about the substance of the missing witnesses' testimony, the following communication took place:

> MR. SMITH: They would testify to - - what I know they would testify to is things related to that bike, things related to Mr. Cameron,
>
> THE COURT: Things related to what?
>
> MR. SMITH: To the bike, the dirt bike. The bike that was sold.
>
> THE COURT: What would that have to do with the guilt or nonguilt of your client?
>
> MR. SMITH: Basically that Mr. Cameron was there, everybody had a good relationship, the vehicle--the bike was sold. I'm not sure if the monies were transferred. And Mr. Quay Gambrell, uh, is the one that was dealing with Mr. Cameron. He is the one that sold--Mr. Cameron sold him the bike. I don't know what Mr. Gambrell gave him in exchange for the bike. I don't know if it was the cocaine that we are talking about. I'm not sure. In order to exhaust my client's defenses, I need those people to testify.
>
> THE COURT: At most what I am hearing you say that you could elicit from these witnesses, other than the circumstances of this collateral issue of the sale of the bike, that there was an amicable relationship between everybody out there. Right?
>
> MR. SMITH: That Quay and the other gentleman under subpoena, they were originally going to get Mr. Cameron and then they didn't go get Mr. Carver. This could all be elicited while they are on the stand. It's imperative that the jury see all of these things because of what my client is charged with.
>
> THE COURT: And the other witness, you'll elicit the same information?
>
> MR. SMITH: He was the one that knew how to ride the bike and was part of the sale by Mr. Cameron.
>
> THE COURT: All right. I'm going to deny your Motion.

(R. p. 708, l. 24 – p. 710, l. 15). The entirety of this communication took place outside the purview of the jury. (R. p. 711, l. 14).

Thereafter, the jury was brought in and the law enforcement interview with Gambrell was played. (R. p. 712, ll. 12-16).

Standard of Review

The admission or exclusion of evidence is left to the sound discretion of the trial court. *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). Specifically, a motion for continuance based upon the absence of a witness is addressed to the sound discretion of the trial judge. *State v. Bradley*, 263 S.C. 223, 209 S.E.2d 435 (1974). These types of rulings will not be disturbed absent an abuse of discretion. *Saltz*, *supra*; *Bradley*, *supra*.

Analysis

Appellant asserts that he was denied a meaningful defense to present witnesses that would exculpate him. First, addressing the issue of the recorded law enforcement interview with Gambrell, the record supports the Trial Court's initial denial to admit it. Under *State v. Doctor*, "out-of-court statements made by an unavailable declarant that are offered to exculpate the accused in a criminal trial, are admissible only if corroborating evidence clearly indicates the trustworthiness of the statement." *Doctor*, 306 S.C. at, 529, 413 S.E.2d at 38 (applying SCRE 804(b)(3)). The Trial Court was correct in concluding that there was no other evidence in the record that could corroborate the trustworthiness of Gambrell's statement to law enforcement by as required by *Doctor*. *See* R. p. 619, l. 20 – p. 620, l. 16. Gambrell had incentive to lie, as he was facing significant charges in relation to Cameron's murder. *See* R. p. 619, ll. 23-25; R. 3: James-Milton-Gambrell-Second Interview-DVD. Furthermore, as the trial court indicated, nothing in the interview exculpated Appellant. *See* R. p. 616, l. 18 – p. 619, l. 19. During the interview, Gambrell confirmed that Appellant was aware of why he was to retrieve the victim. R.

3: James-Milton-Gambrell-Second Interview-DVD: 12:30-16:40; 18:20-19:10. Gambrell also indicated that Appellant did not like the victim. R. 3: James-Milton-Gambrell-Second Interview-DVD: 41:32-41:40. If anything, the interview further established Petitioner's complicity in the criminal scheme.

Despite being within the court's discretion to deny the admitting the record interview, it eventually permitted Appellant to play it to the jury without objection. *See* R. p. 703, l. 18 – p. 704, l. 14; p. 707, ll. 21-24; p. 712, l. 16. Therefore, any initial error was rendered harmless by the trial court's own actions.

Second, addressing the trial court's refusal to allow for continuance for the defense to locate its missing witness, Appellant's issue is without merit. This court, along with the Supreme Court of South Carolina has repeatedly set out that "[r]eversals of refusal of a continuance are about as rare as the proverbial hens' teeth." *State v. Lytchfield*, 230 S.C. 405, 95 S.E.2d 857 (1957)). More specifically, "[w]here there is no showing that any other evidence on behalf of the appellant could have been produced, or that any other points could have been raised had more time been granted for the purpose of preparing the case for trial, the denial of a motion for continuance is not an abuse of discretion." *State v. Williams*, 321 S.C. 455, 459, 469 S.E.2d 49, 51–52 (1996). No new or novel points would have been raised had Appellant been permitted time to locate witness Quay Gambrell. Defense Counsel's statements to the court indicated that Quay's testimony was merely cumulative to evidence already admitted. *See* R. p. 708, l. 24 – p. 710, l. 15; Initial Brief of Appellant, p. 18. Defense had already presented testimony from Carver, Curry, and Gambrell in which they discuss in detail the victim's sale of the dirt bike to Quay Gambrell. *See* R. p. 545, ll. 2-15; p. 562, l. 16 – 563, l. 13; p. 579, ll. 11-16; p. 600, l. 18 –

p. 601, l. 16; p. 633, l. 15 – 638, l. 10; p. 644, ll. 10-16; R. 3: James-Milton-Gambrell-Second Interview-DVD.

Lastly, in regards to Appellant's attempts to recall Detective Marzolf, the trial court's denial of the request was the proper decision. Appellant asserts his reason for recalling Marzolf was "[a]ccording to Detective Marzolf [sic] testimony, Curry disclosed to him that Gambrell gave him the guns, which run counter against Gambrell's statement that Curry took the gun without his permission. Appellant intended to clarify the disparity in the testimonies." Initial Brief of Appellant, p. 46.[5] Yet, Curry actually testified *at trial* that Gambrell had given him the guns. R. p. 555, l. 11 – p. 556, l. 20.[6] Thereafter, Gambrell's interview with law enforcement was presented to the jury. During the interview he alleges that Curry stole the guns. Accordingly, the testimony Appellant sought to extract by recalling Marzolf was already clearly presented to the jury. Therefore, the Trial Court did not abuse its discretion in denying Appellant's recall request.

d. "The trial judge's actions in the presence of the jury suggested lack of neutrality."

Standard of Review

The Code of Judicial Conduct requires a judge to "disqualify himself in a proceeding in which his impartiality might reasonably be questioned." Canon 3(C)(1) of the Code of Judicial Conduct, Rule 501, SCACR. A judge must exercise sound judicial discretion in determining whether his impartiality might reasonably be questioned. *Christy v. Christy*, 317 S.C. 145, 452 S.E.2d 1 (Ct. App. 1994). Absent evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal. *Ellis v. Procter & Gamble Dist. Co.*, 315 S.C. 283, 433

[5] Appellant also contends that the Trial Court was in error in denying his request to recall Sheila Curry, however, Appellant fails to provide any explanation in his brief as to what additional testimony Sheila Curry could have offered. *See* Initial Brief of Appellant, p. 46.

[6] Curry further testified that Appellant had his own gun when they went to the victim's house on the night of the murder. R. p. 569, ll. 6-9.

S.E.2d 856 (1993). It is not enough for a party seeking disqualification to simply allege bias. The party must show some evidence of bias. *Christensen v. Mikell*, 324 S.C. 70, 476 S.E.2d 692 (1996); *Mallett v. Mallett*, 323 S.C. 141, 473 S.E.2d 804 (Ct. App. 1996). "Furthermore, the alleged bias must be personal, as distinguished from judicial, in nature." *Parker v. Shecut*, 340 S.C. 460, 531 S.E.2d 546 (Ct. App. 2000)

Analysis

Appellant's contends that the trial court's actions suggest an outcome or lack of neutrality *to the jury*. However, every single transcript quote Appellant has cited in support of this allegation was made outside the presence of the jury, during discussions of legal matters necessary to affect a fair proceeding. *See* R. p. 696, l. 12; p. 610, l. 13; p. 613, ll. 3-5; p. 718, l. 4; p. 777, l. 1.

In addition, Appellant cites to the trial court's statement found at Trial R. p. 718-719. However, these statements by the trial court, away from the jury, were made immediately after Appellant's motion for a directed verdict. R. p. 718, ll. 10-14 ("Mr. Smith: I move for a directed verdict on the [sic] based on the fact that Mr. Carver is not party of any conspiracy, did not have knowledge that a crime was going to be commited."). While Appellant takes issue to the trial court's statements, the Record would reflect that they were simply offered as support for the court's decision in regards to the directed verdict motion.

Lastly, Appellant takes issue with the judge's statement during sentencing. "A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." *State v. Hicks*, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) (citing *Wasman v. United States*, 468

U.S. 559, 563, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984)). "It is also true that before making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come." *State v. Franklin*, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) (citing *U.S. v. Magliano*, 336 F.2d 817 (4th Cir. 1964); *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)). The judge's statements during sentencing articulated the Court's reasoning for the sentence imposed and conformed to the evidence presented at trial. *See* R. p. 776, l. 9 – p. 786, l. 12.[7] Respondent contends that the judge was professional and maintained his role as neutral arbiter, despite presiding over a contentious trial plagued with delays. Appellant's claim of judicial bias is without merit.

e. "On the issue of video with the missing two-hour [sic]"

In regards to the missing two-hour, this issues contradicts the Defense's entire theory at trial. Appellant's entire defense at trial was based on mere presence. *See* R. p. 445, l. 10 – p. 450, l. 9 (Opening Statement by Defense). He never wavered from the fact that he was present at the scene when Curry shot the victim. Despite this, Appellant now appears to assert a third-party defense on appeal. In *State v. Gregory* the South Carolina Supreme Court held that a defendant seeking to present evidence of third party guilt must meet a heightened standard:

> [T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.

State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941)

The *Gregory* court furthered:

---

[7] Of note, the trial court sentenced Appellant to the minimum 30-years for the murder conviction. R. p. 786, ll. 5-10.

> But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty.

Id., 198 S.C. at 104-105, 16 S.E.2d at 535 (citing 20 Am. Jur. 254).

The only support for the current issue is a vague surveillance footage of a women showing up to Appellant's home hours after the murder occurred. R. p. 491, l. 19 – p. 493, l. 12. Appellant's belated third-party defense argument is unsupported by the evidence presented at trial and falls far short of the heightened standard required by *Gregory*.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the appeal be dismissed.

Respectfully submitted,

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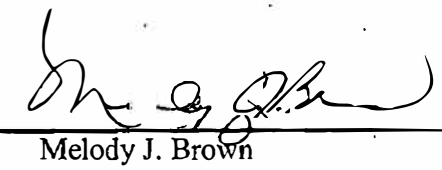
By: 
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October 28, 2019.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Anderson County
The Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

Respondent,

v.

JASON FRANKLIN CARVER,

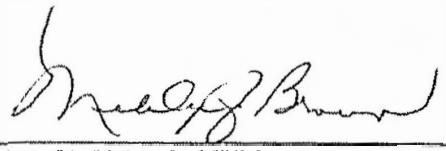
Appellant.

Appellate Case No. 2017-002011

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 28th day of October, 2019.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of General Sessions

R. Lawton McIntosh, Judge

Appellate Case No.: 2017-002011

State of South Carolina, Respondent,

v.

Jason Franklin Carver, Appellant.

FINAL REPLY BRIEF OF THE APPELLANT

October 4, 2019

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STATEMENT OF THE CASE

Appellant adopts and incorporates by reference the Statement of Case and Facts presented in his Initial Brief. This appeal is brought pursuant to Appellant's indictment and subsequent conviction for the murder of Steven Cameron, under the "hand of one, hand of all" theory. Appellant timely filed his Notice of Appeal and filed his Initial Brief on May 16, 2018. Respondent filed its Initial Brief on July 30, 2018.

ARGUMENTS

I. THE EVIDENCE PRESENTED QUALIFIED AS AFTER-DISCOVERED EVIDENCE AND WOULD HAVE CHANGED THE RESULTING CONVICTION

Respondent contends that the evidence submitted by Appellant in his Motion of New Trial do not qualify as after-discovered evidence. It stated:

> Appellant was aware of any alleged inconsistencies at the time of the trial because the (sic)was present during the circumstances to which Curry testified and Gambrell swore to. Therefore, he had knowledge of any alleged inconsistencies testified during trial.

Appellant was not a participant in the trial of Gambrell. He was not even informed of the trial. Appellant's counsel had to exert due diligence to discover that Gambrell was charged with a different offense, despite the State's theory of accomplice liability. The only way Appellant learned about the inconsistencies in Curry's testimony during Gambrell's trial was because Appellant's counsel sat as an observer during the trial. He was not permitted to cross-examine both Curry and Gambrell at that time.

The inconsistencies in Curry's testimony raises questions on the credibility of this entire testimony regarding Appellant's involvement in the shooting of Cameron.

Curry's inconsistent testimony is material to the issue of guilt because the State used it to make a case for murder, an intentional crime. The State posits that Curry carrying the guns were

meant to threaten or intimidate Cameron to accede to returning the drugs, giving its monetary equivalent or going back to Gambrell's house. According to the State's theory, by bringing the gun to Cameron's place, Appellant and Curry intended to commit either the offense of intimidation, drug conspiracy, kidnapping and/or murder.

The inconsistent statement of Curry could not have been discovered before he Appellant's trial by the exercise of due diligence because they have been presented during Gambrell's trial, which took place nearly a year after Appellant started serving his sentence. Appellant could not have anticipated Curry issuing false testimonies to the court. Thus, they can only be discovered after Appellant's trial.

Appellant believes that this discovery would change the result of Appellant's trial. Without the testimony on the gun, the prior knowledge of the missing drugs and Appellant allegedly volunteering to drive to Cameron's house, the State could not attribute motive and means in the commission of the crime. Appellant could not have committed an intentional offense when he had no knowledge of the same.

With regards to the law enforcement's testimony regarding the dirt bike, Respondents downplayed it as hearsay and devoid of exculpatory value. (Initial Brief of the Respondent, p. 16). Respondent's contend that "(B)ecause the victim had gone to Gambrell's home to sell a dirt bike on the day of the murder, the mention of "dirt bike" during the altercation is unsurprising and does not change the circumstances of the murder." *Ibid.*

Contrary to Respondent's arguments, Appellant believed that police reports and law enforcer's testimony may be considered as records of regularly conducted activity, and as such is an exception to hearsay rule.

The law enforcer testified having interviewed a neighbor of Cameron. The neighbor overheard a discussion on dirt bike. The neighbor was not privy to the transaction involving the dirt bike. Taken with other arguments and evidence presented by Appellant, the mention of "dirt bike" can be an exculpatory evidence, as it goes to the issue of motive (or lack of ill motive). This information which the police authorities concealed from the Appellant, could help establish and support his claim that he had no prior knowledge of any drug stolen by Cameron. As stated in his Initial Brief, the only thing Appellant knew about Cameron being at Gambrell's house was to sell his (Cameron's) dirt bike.

Respondent contends that since the record showed that Appellant was aware of Cameron's aggressive tendencies at the time of his trial, any evidence substantiating the same cannot be presented as after-discovered evidence.

First, Appellant submitted that the misleading statements of law enforcers were not introduced by Appellant as an after-discovered evidence but as an evidence of fraud and/or falsity, which entitled Appellant to a new trial; if not a dismissal of the charge.

Respondent claims that the questioned testimony was meant purely to impeach Marzolf's testimony. (Respondent's Initial Brief, p. 17). Petitioner insists that he submitted such discovery not to substantiate victim's character, but to show Respondent's intentional act of presenting false, misleading and/or incomplete evidence in court. Respondent asserts that the evidence offered was available to Appellant during his trial. Appellant could not and would not have discovered the lies and misrepresentations that occurred during Gambrell's trial, as it transpired months after his own trial concluded.

Appellant is confident that a new trial, wherein the jury is presented with all the misleading and false and incomplete information on this case, would result in Appellant's acquittal.

Deferral of sentence

Respondent related the issue of Curry's deferred sentencing as part of the vast prosecutorial discretion. It further cited the case of State v. Wright, 269 S.C. 414 to advance its claim that "the deferred sentencing of co-defendants until after an appellant's trial does not encourage perjury". Respondent cited:

> An unsentenced co-defendant is a competent witness for the State. Taylor v. State, 228 S.C. 369, 188 S.E.2d (1972); State v. Lewis, 255 S.C. 466, 179 S.E.2d 616 (1971), it is exceedingly clear to us that appellant has failed to demonstrate a denial of his Due Process rights in the court's allowance of Lazarus' and Stanley's testimony before sentencing them. This ground is without merit

First, Appellant posits that deferral of sentencing is within the purview of the court and not a prosecutorial discretion.

Second, Appellant submits that Wright doctrine does not apply in this case due to difference in circumstances. In Wright, the co-defendants' sentencing was deferred until the conclusion of Appellant's trial. In this case, Curry took the plea immediately prior to Appellant's trial. Curry's sentence was deferred until after Appellant's trial. (R. p. 791, 16.17). Appellant was not informed that Curry's sentencing was extended. He discovered this information only after the Gambrell trial where Curry was called as State's witness.

In Wright, the co-defendants were the only witnesses against Appellant. The co-defendants' testimonies were consistent with one another. In this case, Curry, the shooter, was used as the prosecution's witness against his two co-defendants. He testified in two separate

trials, where he was found to have offered conflicting statements. Thus, the doctrine at Wright does not apply in this case.

On the issue of withheld evidence, Appellant submits that Rule 5 (c) of South Carolina Rules of Criminal Procedure mandate the State a continuing duty to disclose.

> If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material.

This law requires that State to make timely disclosure to the defense of ALL evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense. If the State fails to comply with the aforementioned requirement, the court may prohibit the party from introducing evidence not disclosed, among other things. [1]

Appellant avers that the totality of Respondent's conduct prior to, and during the trial was questionable and was considered as violative of the Rules of Criminal Procedure. Respondent failed to provide Appellant material evidence, which is not limited to the defective audio recording, but also included the recording of prosecutor's visit to Curry in prison to negotiate the terms for his plea bargaining and statements from law enforcement. Respondents abused its discretion when it unilaterally extended Curry's deferred sentence. More importantly, Respondents offered a dubious witness like Curry, who had not indicated that he had shot Cameron until the day before Appellant's trial. Prior to that, Curry had stated that Appellant had been the shooter.

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[1] Rule 5(d)(2) Failure to Comply With a Request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY CHARGING THE JURY WITH THE "HAND OF ONE, HAND OF ALL" THEORY

Appellant concedes that ordinarily, an appellate court will not reverse the trial court's decision regarding a jury charge, absent an abuse of discretion. State v. Brandt, 393 S.C. 526, 550, 713 S.E.2d 591, 603 (2011). In *Carlyle v Tuomey Hospital*, the Court defined that abuse of discretion as occurring "when the ruling is based on error of law or factual conclusion that is without evidentiary support." Carlyle v. Tuomey Hospital, 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991). Appellant contends that in this case, the trial judge abused his discretion in instructing the jury with the "hand of one, hand of all" theory because the overwhelming evidence did not support the instruction.

The "hand of one, hand of all", otherwise known as the accomplice liability doctrine, provides that "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to execution of common design and purpose." State v. *Mattison*, 388 S.C. at 479, 697 S.E.2d at 584. No evidence was presented that will show Appellant's common design and purpose with the self-confessed shooter, Curry.

The uncontroverted facts and evidence in the present case are as follows:

(1) Appellant was at Gambrell's house to work on a car, a side job he has been doing to supplement his income.

(2) It was the first time Appellant met Stephen Cameron, who was at Gambrell's to sell his dirt bike.

(3) Gambrell instructed Appellant to take Cameron home, as Cameron had no ride following the sale of his motorcycle; and, Gambrell was admittedly intoxicated.

(4) Carver had no knowledge of any stolen item/s as he was not in Gambrell's house when the latter discovered the missing cocaine. (R. p. 525, 23.25; R. p. 526,1.2).

(5) As he was pulling up to Gambrell's driveway, Carver was instructed by Gambrell to drive back to Cameron's house to bring him back to Gambrell's residence.

(6) Curry had two (2) guns, and Appellant has none. (R. p. 526, 3.14, R. p. 572, 21.25; R. p. 574, 1.3; R. p. 574:9-13).

(7) In his Sworn Affidavit, Gambrell stated that Appellant had no gun on the day of the shooting. (R. p. 280).

(8) Curry had a heated exchange with Cameron. Curry shot Cameron and after being apprehended by the police, confessed to shooting the deceased. (R. p. 550).

(9) Appellant did not shoot, abet, aid or assist Curry in shooting the victim.

(10) In fact, he attempted to avoid any such incident when he told Curry to leave the gun in the car (which he did); and, he also screamed at him to put the subject gun away, of which Appellant was unaware.

(11) State did not introduce any gun purportedly belonging to Appellant, nor were his fingerprints found on any weapon in the State's possession.

(12) No drugs were found on the deceased's person and property, nor from the Appellant's. No evidence was presented during the trial to support the State's assertion of drug distribution gone wrong.

(13) Curry threatened his own wife and Carver if they told anyone about the incident. (R. pp. 531-532; R. p. 583, 13.17).

Respondent cited the case of *Barber v. State*, 393 S.C. 232, 236 (2011) in establishing the accomplice liability. The Court in *Barber* found that the judge was justified in charging the jury with accomplice liability because "the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter." (Respondent's Initial Brief, p. 8). In Barber, all of his co-conspirators testified that Barber was armed with a semi-automatic handgun and shot the victim. (Barber, 235). More importantly, it was established early on in the trial that Barbers and his companions conspired to rob the victim Heintz. This was clearly the objective because when they learned that there were more occupants in the Heintz house, they left to procure a second firearm before returning to the Heintz'.

Unlike in Barber, where the intent of the conspirators was established among themselves, there was no such unity of intent, nor action in the present case. Appellant, in driving back to

Cameron's house had no prior knowledge of (a) any stolen item belonging to Gambrell's; (b) Gambrell's instructions to Curry); (c) Curry having any gun in his person. (R. p. 572, 21.25, R. p. 573, 1.3, R. p. 574, 9.13). Thus, there was no common design, no prior agreement or plan concocted among the three. Appellant could not have agreed to something he did not know. Appellant was not guilty of a crime he took Cameron home; and therefore, he could not be guilty of a crime for bringing him back. Gambrell was still intoxicated and Cameron did not have a ride.

There was no evidence of unity in action. Appellant's only participation in the events of March 28, 2016 was to transport Cameron to his house, and back to Gambrell's. As far as Appellant knew, Cameron had a transaction with Gambrell involving his bike. Appellant surmised that the late instruction had something to do with the bike sale. Appellant was instructed to drive Cameron because he already knew where the latter lived, having taken him to his house within the previous thirty (30) minutes.

Appellant did not conspire with Curry (nor Gambrell). Nothing can be gleaned from his overt acts prior to, during and subsequent to the shooting incident. From this viewpoint, Appellant avers that there are several facts of substance that weigh against the finding that he conspired or acted in unison with Curry (or even with Gambrell):

(1) There is no enmity or grudge between Appellant and Cameron.

(2) Appellant had no verbal nor physical interaction, before nor during the shooting incident.

(3) Appellant had no prior knowledge of any missing nor stolen item and could not have known that Curry's purpose in tagging along was to get Gambrell's missing item.

(4) No malicious intent can be attributed to Appellant in following what appeared to him as harmless errand to transport Cameron to and from his house. Gambrell's instruction, on its face, is not unlawful nor illegal.

(5) Appellant was unarmed during the incident, negating intent to coerce, threaten, inflict physical harm, much less kill the victim. By prosecution's witness statement, Appellant's participation was limited to him driving the car. Carver's driving was not necessary nor indispensable to the commission of the crime of murder. Curry could have still shot or injured Cameron at any other time they met. Carver was at the wrong place at the wrong time.

(6) The first time Appellant saw Curry with a gun, which had fallen on the car's floorboard, Appellant endeavored to prevent any untoward incident from happening by admonishing Curry to leave the gun in the car, which he did.

(7) Upon seeing Curry with a second gun, which he brandished during his heated exchange with Cameron, Appellant pleaded with Curry to put the gun away.

(8) Appellant ran towards the car, intending to leave Curry, when the shooting started.

(9) Curry threatened Appellant at gun point and ordered him to drive with the lights out until they had left Sterling Bridge Road (a fact which was proven by the surveillance video).

(10) The State did not offer this fact to Appellant. He had independent knowledge of the headlights not being engaged.

(11) Appellant's act of driving Curry back to Gambrell's, was done under extreme duress, as Curry threatened Appellant and his mother's lives.

(12) Due to his extreme fear for his and his mother's safety, Appellant was unable to tell the police anything during their first encounter at Appellant's workplace. However, the moment the threat ceased upon Curry's arrest; Appellant voluntarily presented himself to the ACSO.

(13) Curry was arrested due to his presence at Gambrell's home where Anderson County executed a search warrant of Gambrell's home, finding Curry and cocaine. Curry took responsibility for the cocaine, seemingly because of his business relationship with Gambrell.

Taken together, these acts by the Appellant do not meet the test of moral certainty to establish that he acted in unity and purpose with Curry in the commission of the crime of murder. There is no evidence that Appellant agreed and conspired with Curry to commit an illegal act. Appellant did not aid, abet or assist in Curry's shooting of Cameron. Appellant, at several

instances, tried to stop Curry from using his gun. Thus, the trial judge committed an abuse of discretion when he chose to charge the accomplice liability theory, despite all the evidence showing no conspiracy or unity in action and intent between Curry and the Appellant. It was an error of law.

III. THE TRIAL COURT ERRED BY NOT GRANTING A DIRECTED VERDICT

Respondent avers that it presented sufficient evidence to overcome Appellant's Motion for a Directed Verdict. To bolster its case, the State cited the case of State v. Harry, 420 S.C. 290, 803 S.E.2d 272 (2017). The Supreme Court in *State v. Harry* affirmed the trial court's denial of the motion for directed verdict, holding that "the evidence yielded a reasonable series of inference consistent with the State's theory that Appellant engaged in a scheme to commit an illegal act, the result of which was Victim's shooting death, and the trial court properly denied Appellant's motion for a directed verdict. Id. 300, 803 S.E.2d at 277." (Initial Brief of Respondent, p. 11).

Appellant contends that the ruling in *State v. Harry* cannot be applied in this case as they are not on point. In *Harry*, the evidence pointed to a conspiracy or a prior agreement between Appellant Harry and the shooter Castro: Harry went out of his way to drive 16.3 miles to employ the help of Castro in retrieving his television[2]; Harry knew Castro carries a gun; Harry did not prevent the shooting, and in fact instigated it[3], and Harry had an elaborate escape plan for Castro. These actions by Harry showed conscious and deliberate act of agreement with Castro's felonious actions. The hand of one is hand of all theory applies in his case because he was present and aided and assisted Castro in the shooting of the victim.

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[2] Instead of proceeding directly to Victim's nearby home, Appellant instead drove 16.3 miles to the Myrtle Beach home of his friends, and fellow drug dealers, Tommy Byrne and Saire Castro. State v Harry, at 295.

[3] According to Castro's own testimony, Appellant "gave ... [a] head nod" just prior to Castro firing the fatal shots. State v Harry, at 300.

None of such actions can be attributed to herein Appellant. He had no motive nor means to harm Cameron, no knowledge of Curry's plan, voiced disagreement with Curry carrying a gun, ran away when Curry refused to lower the gun, and presented himself to the police voluntarily once the threat to his and his mother's lives ceased. Appellant's actions in no way indicate acquiescence of Curry's actions.

Respondent's entire case rests on the testimony of a criminal, who confessed only when he was offered to plea to a lesser offense. The Respondent itself asserted, insisted in fact, for the jury to put faith in the words of the killer, Curry, whom it argued had no reason to lie. (Of course, Curry would have said anything the prosecution would like for him to say in exchange for a lighter sentencing, but that is beside the point).

Curry confessed to the following: (1) Appellant had no knowledge of the stolen item; (2) gun(s) were given to him (and him alone); (3) Appellant was not aware he was carrying any weapon when they left Gambrell's house; (4) that Appellant was not aware that Curry was carrying another weapon when Appellant convinced him to leave the other weapon in the car; 5) that Appellant did not take part in the shooting; (6) that he shot the deceased to defend himself; (6) that he knew where Appellant's mother resides. As the prosecutor urged the jury, this Court should believe Curry's confession: he alone, committed the crime of murder.

Furthermore, it is well established that a trial judge should grant a directed verdict when the evidence merely raises a suspicion that accused is guilty. *State v. Arnold*, 361 S.C. 386, 605 S.E.2d 529 (2004); *State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984). The only relevant evidence here is Appellant's presence at the scene of the incident. However, mere presence, absent mutual understanding or acts showing aid, abetment or assistance to an illegal act, is not

enough to convict a person of a crime. There is no direct or circumstantial evidence that supports a reasonable inference of Appellant's guilt.

IV. THE TRIAL COURT DENIED APPELLANT HIS SIXTH AMENDMENT RIGHT TO DUE PROCESS

On the denial of Appellant's right to present witnesses that would exculpate him

Appellant insists that the recorded interview with Gambrell would have had the effect of exculpating the Appellant. Contrary to Respondent's assertion that interview established Appellant's complicity in the criminal scheme, Gambrell mostly talked about Curry, his instructions to Curry, how the latter took the gun from him and how the shooting was not intended. Gambrell did not mention that Appellant knew that the cocaine was stolen. The interviewer asked an all-inclusive question, which Gambrell responded in the positive. He did not single out Carver as having knowledge of the drugs. Gambrell corroborated Appellant's assertions that he was asked to drive Cameron because he had already taken him to his house.

It is noteworthy that Respondent cast doubts on the trustworthiness of Gambrell's statements, stating that he had incentive to lie (Respondent's Initial Brief, p. 19), and yet, anchored its entire case on Curry's confession, the criminal who was offered a lesser penalty to implicate more people to prosecute.

Appellant also avers that the refusal of the court to continue the trial to accommodate the two other defense witnesses denied him the opportunity to establish his innocence. Appellant asserts that he had no knowledge of the stolen item and surmised that the instruction to transport Cameron back to Gambrell's was connected to the bike sale involving the witnesses. This was intended to corroborate his statements and established lack of malicious intent on his part.

Appellant reiterates that the request to recall Detective Marzolf was relevant because it corroborated Gambrell's assertion in his interview. The request to recall was not merely to

impeach Curry, but to show that there is no unity of purpose, and that Curry acted independently. Appellant submits that the interest of justice would have been served had the above-mentioned witnesses been allowed to testify considering that Gambrell's testimony was stricken out of record. It is important that the facts are set straight because Appellant's life and liberty are at stake.

It should be noted that Respondent, in its Initial Brief, indicated that Appellant's counsel was in possession of Gambrell interview well before the trial. (Respondent's Initial Brief, p. 16.). Appellant takes exception to this due to the fact that the State furnished the Appellant a copy of the voluminous records of this case a week prior to the trial. When Appellant brought this to the trial court's attention, the judge only reminded the State to be more proactive in the future. Appellant believes that the trial judge should have been stricter in dealing with such matters, considering that it is a direct violation of Rule 5 of the South Carolina Rules on Criminal Procedure and that Appellant's life and liberty are at stake.

The trial judge's action suggested an outcome or lack of neutrality.

Appellant submits that whether the cited statements were made in the presence of the jury or not, they all showed that the trial judge had pre-determined the "hand of one is hand of all" doctrine, despite (1) the Respondent not showing any proof of its "drug distribution" theory; and (2) not having heard other witnesses for the defense.

On the issue of video with missing two-hour

Respondent submitted the theory of kidnapping and robbery to establish a criminal scheme. However, other than Curry who confessed to shooting Cameron in self-defense, Respondent did not present any evidence of kidnapping/robbery. Curry, whose testimony should

be given credence according to the Respondent, disclosed his intention (which happened to be Gambrell's instructions to him) as follows:

Q. Why were y'all going to Sterling Bridge Road?
A. To retrieve—Milton had told us that Steven had stolen some drugs and that since Carver knew where his house was for us to go back over there and get either the dope or the money.

(R. p. 547, 1.7).

Q. All right. What did you say at that point? What did you ask him? What did you tell him?
A. That Milton wanted his drugs back or wanted him to pay for it.
Q. Was there anything more to that?
A. (Negative gesture).
Q. Is that a "no"?
A. Yes, sir.

(R. p. 575, 8.16).

In fact, when asked of Carver's participation, Curry confirmed Appellant's claim.

Q. Why did Mr. Carver drive you there?
A. Because I don't have a driver's license.
Q. So Milton asked him to drive you because he had a driver's license and you didn't, right?
A. He'd just told Carver—he's just took Steven home. So he know where Steven lived. I didn't.
Q. Yes, sir. So that is why Mr. Carver was going?
A. Yes, sir.
Q. He was talking you there. He was driving back to get Mr. Cameron because Mr. Gambrell told him, 'Hey, you need to go get him.' Isn't that right?
A. Yes, sir."

(R. p. 566, 16.25; R. p. 567, 1.7).

There was nothing in Curry's testimony that can be interpreted to mean that he was to kidnap or rob the victim.

Furthermore, Appellant raised the issue of the video with a missing two-hour in reference to Respondent's drug distribution theory. Respondent posited that the Appellant and Curry conspired to rob or kidnap the victim, and yet it did not present any evidence of drugs, nor any acts of taking by the two. The two-hour gap in the video coincided with the statement of the victim's family member who told the police that someone came that morning and rolled the body checking his person for drugs or money and ransacked the house. Since the Respondent raised the issue of kidnapping/robbery, Appellant was entitled to all evidence that would disprove such allegation.

On the unbridled prosecutorial discretion

Appellant insists that Respondent abused its discretion by prosecuting him, whose only fault was to do car jobs for Gambrell. In its desire to get a conviction for murder, or perhaps to get Gambrell for his alleged drug-related activities, Respondent was willing to see an innocent man to jail. The State instituted the murder charge against Appellant, knowing it cannot convict Curry of same. Curry admitted to the shooting but invoked self-defense. Up to this time, Curry has not been sentenced. Gambrell's case is not even on the docket. Appellant is presently serving a sentence of 30 years for a crime that he did not commit. Appellant is serving a harsher penalty for a crime that Curry admitted doing. There is no greater injustice than what happened to Appellant.

Appellant submits that the prosecutors' obligation to convict should be balanced by the overriding goal of seeking justice. As it stands, the purpose and goal of liberal prosecutorial

discretion, has been subverted. In the interest of justice, Appellant appeals to this Court to right this egregious wrong.

On the issue of Gambrell taking the Fifth Amendment

Appellant maintains that the trial judge exerted overzealous efforts to make Gambrell invoke the Fifth. Gambrell's ever-changing decision (his counsel claimed he will invoke the fifth, only to waive, and invoked again after repeated warnings by the judge) raises a question on voluntariness of Gambrell's actions. As Supreme Court noted in *Webb v. Texas*, 409 .S. 95, 98 (1972)- a trial judge's efforts to protect a defense witness—in this case, from prosecution for perjury—may impermissibly intrude upon a defendant's right to produce evidence.

CONCLUSION

For these reasons, as well as those addressed in his Initial Brief, Appellant respectfully requests that the lower court's judgment or orders be reversed, and this case be remanded for trial.

Respectfully submitted by:

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