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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
R. Lawton McIntosh, Circuit Court Judge

On Certiorari to the South Carolina Court of Appeals
Unpublished Opinion No. 2021-UP-278 (Filed July 21, 2021)
Court of Appeals Appellate Case No. 2017-002011

THE STATE,

Respondent,

v.

JASON FRANKLIN CARVER,

Petitioner.

Appellate Case No. 2021-001505

BRIEF OF RESPONDENT

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PETITIONER'S QUESTIONS PRESENTED

1. Did the Court of Appeals err by not finding the State's failure to disclose the details of the plea bargaining with Curry violated Petitioner's right to due process?

2. Did the Court of Appeals err by not finding the trial court abused its discretion in denying Petitioner's motion for new trial.

(BOP at 1).

STATEMENT OF THE CASE

Petitioner, Jason Franklin Carver, was indicted by the Anderson County grand jury in November of 2016 for the murder of Steven Cameron. He was tried before the Honorable R. Lawton McIntosh August 21st, through August 25th, 2017. The jury found Petitioner guilty as charged. (R. p. 775). Judge McIntosh sentenced him to thirty (30) years imprisonment. (R. p. 786). Petitioner appealed.

Initial briefs were filed in the Court of Appeals; however, by motion filed on October 23, 2018, Petitioner moved to hold his appeal in abeyance in order to file a motion for a new trial based on after-discovered evidence. (R. pp. 28-59). On December 12, 2018, the Court of Appeals granted his motion.

On December 20, 2018, Petitioner submitted a motion for a new trial pursuant to Rule 29, SCRCrimP, which he amended on December 27, 2018. (R. pp. 130-331). Judge McIntosh denied the motion, without the necessity of a hearing, on January 3, 2019. (R. p. 4). Petitioner sought reconsideration, (R. pp. 339-63), which Judge McIntosh denied on January 19, 2019, (App. 2). Petitioner appealed.

Upon returning to the Court of Appeals, Petitioner sought to consolidate the two appeals. By Order dated April 4, 2019, the Court of Appeals granted the request for consolidation, set aside the prior briefing, and ordered new briefing.

After completion of additional briefing, but without oral argument, the Court of Appeals issued an unpublished opinion on July 21, 2021 that affirmed the conviction and sentence. (App. 1-6). Petitioner filed a timely petition for rehearing on August 16, 2021, (App. 7-39 and 43-46), and, at the Court of Appeals' direction, the State filed a return on September 7, 2021, (App. 61-68). The Court of Appeals denied the petition on November 22, 2021. (App. 71). Petitioner filed a petition for writ of certiorari with this Court on January 4, 2022.

Petitioner presented 8 questions in his petition to this Court. On February 14, 2022, the State made its return to petition. By Order dated September 7, 2022, this Court granted the petition as to 2 of the questions presented (Petitioner's Questions 6 and 7). Petitioner filed his brief, as amended, on October 19, 2022. This response brief follows.

RESPONDENT'S STATEMENT OF THE FACTS

On the evening of March 28, 2016, Petitioner was at the home of James Milton Gambrell repairing the transmission of a car. (R. pp. 633-34). Gambrell's nephew was testing out a dirt bike just purchased from the victim, Steven Cameron. (R. pp. 545 and 636). Also present was Woodrow Curry. (R. p. 544 and 634). Once the sale and testing were completed, Gambrell asked Petitioner to drive Cameron back to his home. (R. pp. 544-45; 639-40). Petitioner drove Cameron back to his home on Sterling Bridge Road. (R. pp. 640-42). Petitioner then returned to Gambrell's home. (R. pp. 546; 644-45).

According to Curry, Gambrell informed Curry and Petitioner that Cameron had stolen a large amount of cocaine. (R. pp. 546-47). Curry further testified that Gambrell instructed Petitioner and Curry to go back to Cameron's house and bring back the drugs, the money, or Cameron. (*See* R. pp. 547-49 and 567). According to Curry, Gambrell then gave Curry a .38 caliber and .25 caliber handgun while Petitioner had his own gun. (R. pp. 547-48).

Petitioner testified that he was asked simply to bring Cameron back. (R. p. 646). Petitioner testified that he did not know why. (R. p. 647; p. 650). He testified that "Curry had a .38 in his lap" on the way to Cameron's house, and that he told Curry "to put it up, that we didn't need it." (R. p. 649). Petitioner testified that during the drive, Curry informed him that they were going to either bring Cameron back, or pick up money from him. (R. p. 650).

When Petitioner and Curry arrived, they knocked on the door but no one answered. (R. pp. 548 and 651). Cameron then came out the front door to confront the two. (R. pp. 548-49 and 652-53). What began as a discussion quickly turned physical when Cameron shoved Curry. (R. pp. 550 and 653). Curry then pulled the "silver" gun, the .25 caliber handgun, and pointed it in Cameron's face. (R. p. 653; p. 657). Curry admitted in his testimony that he had two guns when driving out to Cameron's place – a .38 caliber and a .25 caliber. (R. p. 548).

According to Petitioner, Cameron slapped the gun away from his face and "pushed Curry's right arm with the gun out of his face." (R. p. 654). Curry then fired several shots with one round hitting the house, and two others hitting Cameron – one in his neck and one in his chest killing him. (R. pp. 454-56). Petitioner and Curry left. (R. pp. 551 and 655).

Curry confirmed in his testimony that he shot Cameron, but indicated that Cameron had "charged him" and Curry did not "even remember pulling the trigger…." (R. p. 550; p. 554; pp. 575-76).

Petitioner testified that when they returned to the car, Curry pointed the .38 at him and threatened him and his mother if Petitioner ever told what happened. (R. p. 657). According to Petitioner, they returned to Gambrell's home and Curry told Gambrell that his argument with Cameron "got out of hand" and Curry shot him. (R. p. 661).

Curry was arrested sometime during the following week on drug charges. (R. pp. 552 and 669-70). Petitioner testified that he believed this to be his opportunity to disclose his involvement. (R. pp. 669-72). Investigators subsequently took a statement from Petitioner in which he admitted some involvement. Though he asserted at trial that he had no knowledge of the drugs, he referenced "the stuff" *i.e.*, drugs in the video statement, but even so, Petitioner fully admitted at trial that he had gone to Cameron's home to bring Cameron back to Gambrell or "pick up some money." (*See* R. pp. 681-83 and 691; State's Exhibit 2, 14:52 at 36 and 42).

ARGUMENT

I. Petitioner did not raise an issue regarding a failure to disclose details of a "plea deal" for Curry to the Court of Appeals and there is no ruling for this Court to review. The issue is not preserved for merits review. Alternatively, the Record shows that Petitioner was not only aware of Curry's plea, but cross-examined him on the matter including the fact that sentencing had been deferred until after Petitioner's trial. The issue lacks merit.

Petitioner argues that "the Brady rule should be applied to the plea-bargaining process," (BOP at 10), and that the State "withheld" the terms of its plea negotiations with Curry, (BOP at 11). Though he admits that he had the fact of the plea and deferred sentencing for use at trial, (BOP at 12-13), Petitioner appears to argue there were terms and/or agreements not provided to him for use at trial, and also complains that he was not informed Curry testified *over a year later* in Gambrell's trial, (BOP at 13). Making various claims based on federal law, Petitioner essentially complains he was denied a fair opportunity to cross-examine Curry. Petitioner did not raise this issue in the Court of Appeals, and it is not available for review here. Even so, the record shows the issue is without merit.

Procedural Bar to a Ruling on the Merits:

While Petitioner alleges a discovery violation, and interference with his right to confront the witness and his general right to "due process," (BOP at 10-15), he did not raise such an issue to the Court of Appeals. (*See* FBOA at 1, App. at 4). Petitioner's Issue IV asserted a due process violation, but his argument was not related to Curry, rather, he made allegations that the State failed to inform him of the charges; that the trial judge erred in having "invoked Gambrell's Fifth Amendment for him" and refused to allow Gambrell to testify; that the trial judge erred in not allowing him to recall two witnesses; and, that the trial judge's actions "suggested lack of neutrality, (FBOA at 43-49; App. at 46-52). Thus, the issue as framed to this Court was not raised to the Court of Appeals, consequently has not been ruled upon, and is not procedurally

available for merits review by this Court. Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari….").

Further, Petitioner did not address confrontation or due process concerns to the trial judge. Consequently, the underlying claim is also procedurally barred. *See, e.g., State v. Dunbar,* 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("Issues not raised and ruled upon in the trial court will not be considered on appeal."); *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))). *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…"). In fact, Petitioner's alleged discovery violation regarding plea terms rests on an after trial affidavit that actually indicates nothing more than what was known to Petitioner at trial – that Curry pled guilty to voluntary manslaughter and that Curry was going to testify in Petitioner' trial, which he did. (*See* BOP at p. 11, referencing R. pp. 788-98 and 278).[1] Though procedurally barred, the claim is factually without merit based on the record before the Court.

As noted above, Petitioner has failed to show any agreement other than what was disclosed at trial – the plea to voluntary manslaughter. Petitioner was not only aware of the

[1] Respondent notes there appears to be a "strike through" in the affidavit, striking the phrase indicating Curry would "testif[y] against Carver…." (R. p. 278). Petitioner does not acknowledge the strike-through in his brief. (*See* BOP at 13). The affidavit, though, if so read, appears not to stretch as far as Petitioner has argued.

terms of Curry's plea during trial, he made use of this knowledge on cross-examination. (*See* R. pp. 557-58). There could be no error.

***Standard of Review*:**

"In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous." *State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012). "This Court will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion." *State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012). "'An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.'" *State v. Jennings,* 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011) (quoting *Clark v. Cantrell,* 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) (citation omitted)).

Argument in the Alternative: No factual basis for finding error.

To the extent the issue could be entertained, it would afford no relief. On direct examination, Curry admitted the plea and indicated that he was not made a promise for sentencing. (R. p. 553). On cross-examination, defense counsel questioned Curry about the fact that he had pled guilty but had not, as of then, been sentenced. (R. p. 557). He questioned if there was something to "wait[] for" prior to sentencing, and underscored that, though Curry had been in the system before, he had never had a "deferred sentence before…." (R. p. 557). He returned to the deferred sentencing process after a lengthy cross-examination. (R. pp. 577-78).

In the guilty plea transcript, which Petitioner made a part of the record by a new trial motion, Curry does not indicate any time an "agreement" for a certain sentence or benefit, and, in fact, acknowledged he could get up to thirty years in prison. (R. p. 792-93). Further, Curry's

affidavit, also made a part of the record through the motion for a new trial, does not indicate any agreement for testimony, or promise of a certain sentence. (R. p. 278).

Petitioner has failed to show the very basic fact necessary for showing that information on a plea agreement was withheld which impaired his ability to conduct fair cross-examination – that an agreement existed and was withheld. The fact of the plea was known and reference at trial, and Petitioner fails to show a promise for sentencing other than Curry would be sentenced on voluntary manslaughter. Nothing was suppressed and no infringement on Petitioner's right to confrontation, or due process generally, has been shown.

"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 (1974)). The critical inquiry comes down to "whether there has been any interference with the defendant's opportunity…." *State v. Gillian*, 360 S.C. 433, 450, 602 S.E.2d 62, 71 (Ct. App. 2004), *aff'd as modified*, 373 S.C. 601, 646 S.E.2d 872 (2007). However, even when a reviewing court finds error, it is subject to a harmless error analysis. *State v. Perez*, 423 S.C. 491, 498, 816 S.E.2d 550, 554 (2018). "When determining whether an error is harmless, this Court considers, *inter alia*: 'the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Id.* (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).

Relatedly, to show improper "suppression" of information as Petitioner alleges, Petitioner must "demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to

guilt or punishment." *Sheppard v. State,* 357 S.C. 646, 659, 594 S.E.2d 462, 470 (2004) (citing *Kyles v. Whitley,* 514 U.S. 419, 432-42 (1995), *Brady v. State of Maryland,* 373 U.S. 83, 87 (1963), and *State v. Von Dohlen,* 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996)). Materiality turns on whether a reviewing court finds "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Simpson v. Moore*, 367 S.C. 587, 600, 627 S.E.2d 701, 708 (2006).

Again, for the reasons stated above, Petitioner has not shown the existence of any sentencing agreement much less suppression of information on such an agreement.[2] Consequently, there can be no violation of Petitioner's rights. Petitioner's issue lacks merit. However, the issue is procedurally barred from review and relief should be denied on that basis.

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[2] Petitioner additionally calls for the Court "to review the plea-bargaining process," arguing the process may result in "discrepancies in sentencing outcomes." (BOP at 14-15). Again, Petitioner has shown no fact or agreement in bargaining that was not disclosed to him for use at trial. Even so, this Court had previously acknowledged that trials are independent and any number of reasons could result in different dispositions. *See Butler v. State,* 435 S.C. 96, 98 and n. 2, 866 S.E.2d 347, 349 and n. 2 (2021). Further, this Court has expressed concern over differing sentencing dispositions, but acknowledged that there is no provision to address such result on appeal:

> The circuit judge sentenced Petitioner to fifty-five years imprisonment, while [his co-conspirator] received a total sentence of thirty-five years imprisonment following his guilty plea to the same offenses. Although we are troubled by the disparate sentences these co-defendants received from the same circuit judge, we have no power to address that disparity. *See State v. Franklin,* 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) ("[T]his Court has no jurisdiction to review a sentence, provided it is within the limits provided by statute for the discretion of the trial court, and is not the result of prejudice, oppression or corrupt motive.").

Edwards v. State, 392 S.C. 449, 454 n. 2, 710 S.E.2d 60, 63 n. 2 (2011). The call for reviewing the process based on concerns of "discrepancies in sentencing outcomes" should be rejected.

II. The Court of Appeals did not err in declining to find an abuse of discretion in the trial judge's denial of Petitioner's motion for a new trial where the record before the lower court shows factual support for the ruling.

Petitioner also contends, in a related claim, that the Court of Appeals erred in not reversing the trial judge's denial of the new trial motion. (BOP at 21). Petitioner argues that he presented new evidence that should have been heard – in particular, he asserts that there are inconsistencies in Curry's later testimony in Gambrell's trial, along with certain assertions in Gambrell's affidavit and Curry's affidavit,[3] that, according to Petitioner, demonstrate support for a new trial. (BOP at 17-21). He further argues that Detective Marzolf who investigated this case later revealed at another trial that a neighbor reported hearing an argument and that a "dirt bike" was mentioned. (BOP at 16). At any rate, Petitioner has not shown an abuse of discretion.

Treatment in the Court of Appeals:

The Court of Appeals reasoned that the inconsistencies Petitioner offered did not rise to the level of being material evidence that "would probably change the result," and "not merely cumulative or impeaching." (Unpublished Op. at 2). Further, the Court of Appeals found Petitioner was aware of the "plea bargain and sentence deferment" which was used in cross-examination. (Unpublished Op. at 3).

***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) (brackets in original) (quoting *State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009)).

[3] Curry testified, but Gambrell asserted the Fifth Amendment and did not. (R. p. 609).

***Discussion*:**

The Record shows the trial judge did not abuse his discretion and the Court of Appeals properly affirmed. "Where there is competent evidence to sustain a jury's verdict, the trial judge may not substitute his judgment for that of the jury and overturn that verdict." *State v. Miller*, 287 S.C. 280, 283, 337 S.E.2d 883, 885 (1985). On January 3, 2019, Judge McIntosh issued an order denying Petitioner's motion for a new trial, finding no cause to hold a hearing. (R. p. 4). The judge noted "that there was competent evidence admitted to sustain the jury's verdict of guilty[,] and [that] the court may not substitute its judgment for that of the jury." (R. p. 4, citing *State v. Taylor,* 348 S.C. 152, 558 S.E.2d 917 (Ct.App. 2001)). Given the record before the circuit court, there is no evidence of an abuse of discretion. *See Mercer,* 381 S.C. at 167, 672 S.E.2d at 565 ("The deferential standard of review constrains [the reviewing court] to affirm the trial court if reasonably supported by the evidence.").

Though Petitioner relies in great part upon the Curry and Gambrell affidavits, as well as statements from Gambrell's trial, the evidence simply does not qualify as evidence which would support 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 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,* 273 S.C. 325, 329 256 S.E.2d 737, 738-39 (1979). In plain example of the failings in his argument, in his brief to the Court of Appeals, Petitioner argued:

> 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 Cameron's house during Curry'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 Cameron'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. [reference apparently to Affidavit]. 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, pp. 11-12).

e. "[I]n 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. . . . 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. 12-13).

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. 14).

These "inconsistencies" are not "new" to the event, rather, these purported discrepancies surround the event for which Petitioner was, admittedly, present. 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).

While there may be minor inconsistencies on immaterial points, Petitioner has not shown prejudice to him on any point of consequence. In fact, some of the testimony makes the shooting more egregious and more prejudicial *to Curry*. *See* para. e, *supra.* Some of the testimony appears to involve semantics. *See* para. c ("voluntarily" taking Cameron home does not necessarily exclude being asked to do so).[4] None denies Petitioner's presence and involvement. At best, it is potentially *additional* impeachment for a witness who was thoroughly cross-examined during trial. Notably, Petitioner would not wish to have a fact-finder determine that Curry not credible in total – after all Curry admitted to shooting Cameron with a gun that came from Gambrell.

Even so, Respondent notes that whether Petitioner had his own gun was disputed, and Petitioner cross-examined Curry *on that very point*. (*See* R. pp. 569 and 576). Curry testified that Petitioner had a gun when he left Gambrell's, his own gun. (R. p. 547; p. 569; p. 573-74; p. 576).[5] It just matters not as, without question, Curry was armed and Curry *admitted shooting Cameron*.[6] There has never been an indication or assertion that Petitioner *used* a gun, or even

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[4] The particular alleged inconsistency would also be inconsistent with Petitioner's own testimony, when Petitioner agreed that Gambrell "sent" Petitioner "again" to Cameron's home. (R. pp. 680-81).

[5] Petitioner simply does not acknowledge Curry's testimony about Petitioner's gun in briefing to this Court. (See BOP at 3-6). Instead, Petitioner asserts that he was unarmed. (BOP at 5). Petitioner, however, did acknowledge in his brief filed with the Court of Appeals that Curry testified that Petitioner "had a shiny gun that had a long barrel." (FBOA at p. 6; see also p. 12).

[6] The prosecutor noted the same in closing, that, though the jury heard "some testimony" that Petitioner "may have been armed," the testimony was consistent that Curry was definitely armed. (Tr. p. 683). Curry admitted being armed and admitted shooting Cameron. Either the jury or the judge could reasonably credit Curry's plain testimony that Petitioner carried a gun. If the jury did not believe that Petitioner had a gun initially, there is ample evidence to convict under hand of one, hand of all. No one indicated Petitioner was forced to drive to Cameron's.

held a gun during the confrontation. [7] Nor has there been an assertion that Petitioner was unaware that Curry had a gun *while on the way to* Cameron's home – the home that Petitioner knew how to get to, and took Curry to, while knowing Curry was armed. (R. p. 644-51). And, importantly, even Petitioner admitted at trial that he had gone to Cameron's home to bring Cameron back to Gambrell, or, as he indicated he learned from Curry, that they would alternatively "pick up some money," which is indicative in itself of an enforcement move.[8] (R. p. 650-51).

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[7] At one point, the transcript reflects Petitioner testified as to events *after* the shooting: "I had the gun on me at that time." (R. p. 691). He had however indicated Curry *pointed* a gun *at him* and, admittedly, the passage can be read in context to mean just that, but it is an odd way to respond and could be a slip of admission. Petitioner did not offer clear testimony on who had the two identified guns after the shooting, (*see* R. pp. 656-57), and referenced in briefing (somewhat curiously) testimony from Gambrell's trial that would place a gun in Petitioner's own hands at Gambrell's home after the shooting, (*see* para. f, *supra*). If something more, it would not have been the first time Petitioner appeared to trip in his testimony. Though he asserted at trial that he had no knowledge of the drugs, Petitioner referenced what sounds like "the stuff" *i.e.*, drugs, in his videotaped statement. (See R. pp. 681-83 and 691; State's Exhibit 2, 14:52 at 36 and 42). And, rather inconsistent with his testimony of great fear, Petitioner admits to *instructing* Curry to leave the gun in the car indicating no fear, (R. p. 684), and he testified to just leaving Curry and Gambrell after the shooting without any conversation or permission, (R. pp. 662 and 688), further undermining his professed fear. Further still, Petitioner was inconsistent in other testimony such as relating that he heard the discussion about drugs between Cameron and Curry prior to the shooting, (R. p. 676), but testifying on cross-examination that he only learned of the drugs after the shooting when going to the sheriff's office, (R. p. 682). Petitioner was also constrained to admit that he did not "usually" "bring a gun to" pick up someone, which presented an additional fact in support his intent and/or knowledge. (R. p. 687). As much as Petitioner complains as to perceived inconsistencies in Curry's subsequent testimony in the Gambrell trial, Petitioner's own testimony was internally inconsistent. That logically affects his credibility on the portion of his testimony offered as exculpatory, and places Petitioner in a tenuous position to assert prejudicial error based on Curry's subsequent inconsistencies on the hope of additional impeachment opportunity regarding Curry's testimony.

[8] Indeed, Judge McIntosh denied the directed verdict motion based on evidence of an agreement to commit a criminal act, (R. p. 719), and in sentencing noted his perception "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… you engaged in a criminal conspiracy that ultimately spiraled out of control." (R. p. 785). The judge also noted that Petitioner "drove away with the lights off, 911 wasn't called, and" that Petitioner

The bits of evidence offered as "new" are largely insignificant in light of the totality of the evidence actually presented. Petitioner has even admitted that some "new" evidence would again place a gun *in Petitioner's hand* when they *returned to Gambrell*. (*See* para. F, *supra*). 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."); *see also State v. Harris*, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011)(the responsibility to assess credibility is assigned to the lower court).

That Curry's later testimony in a separate trial demonstrated minor differences in the testimony does not undercut the core facts demonstrated in Petitioner's trial by properly received evidence: that Petitioner understood that he, with Curry, at Gambrell's direction, went to Cameron's home to bring him, the drugs, or money back to Gambrell; that Curry had a gun; and that Curry shot Cameron. *See generally Butler v. State,* 435 S.C. 96, 98, 866 S.E.2d 347, 349 (2021) ("Because the State met this burden in Butler's trial, it does not matter to the validity of Butler's conviction that Donavon was subsequently acquitted of the murder in a separate trial."); *State v. Crowe*, 258 S.C. 258, 265, 188 S.E.2d 379, 382 (1972) ("if two or more combine together to commit an unlawful act, such as robbery, and, in the execution of that criminal act, a homicide is committed by one of the actors, as a probable or natural consequence of the acts done in pursuance of the common design, all present participating in the unlawful undertaking are as guilty as the one who committed the fatal act"). This indicates ample evidence that Petitioner was in a criminal enterprise with a gun and that a natural and probable consequence of their actions was that Cameron was shot and killed. *Id. Accord State v. Williams*, 427 S.C. 246,

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did not report his participation until Curry was taken in, which, again, though could be interpreted differently, would also support guilt. (R. p. 785).

250–51, 830 S.E.2d 904, 906 (2019) ("act of intentionally bringing a loaded, unlawfully-possessed pistol to an illegal drug transaction was a 'violation of law' that was 'reasonably calculated to produce' violence.") (quoting *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999)). Further still, on cross-examination, Petitioner even admitted that he saw Curry point the gun a Cameron and offered that Cameron did not appear to be frightened. (R. p. 692). Petitioner placed himself at the scene at the critical moment, without any indication of attempted intervention or withdrawal.

As to Gambrell's affidavit, the trial judge could easily discount the allegations as not credible, but more so, the allegation on the gun is that Petitioner did not have one, but not that he was not given a gun, or took one of the guns from Curry at some point. (*See* R. p. 280). At any rate, Gambrell asserted his right not to testify. (R. p. 609). That testimony was not available during trial, but there is also no indication it would be available later given that fact. Even so, nothing in the allegations indicates Petitioner did not go to Cameron's at Gambrell's request and participate as described, knowing Curry had a gun. Petitioner's assertion the allegations, if true, "debunks" the State's case against Petitioner, (*see* BOP at 18), does not hold up under scrutiny, even in a light most favorable to Petitioner. The type of allegations need to "debunk" the State's case simply are not in the affidavit offered.

Lastly, Petitioner also mentions testimony from Detective Marzolf at Gambrel's trial, asserting the detective referenced a neighbor hearing some argument between the victim and another over a "dirt bike." (BOP at 16-17). That testimony similarly does not show any relief is warranted. Testimony concerning statements made by the victim's neighbors could only be hearsay and could possess no exculpatory value. Even so, 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.

The judge reasonably found the offered evidence insufficient to warrant a new trial. Petitioner has not shown an abuse of discretion. Again, the record supports both the trial judge's ruling, and the Court of Appeals affirmance of that ruling. Petitioner is due no relief.

CONCLUSION

For all the foregoing reasons, Respondent submits that this Court should either dismiss as improvidently granted, or otherwise affirm the Court of Appeals.

Respectfully submitted,

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