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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Charleston County
J. C. "Buddy" Nicholson, Jr., Circuit Court Judge

Opinion No. 5942 (S.C. Ct. App. filed August 31, 2022)

Lower Court Case No. 2017-GS-10-04077

THE STATE,

RESPONDENT,

V.

JOSEPH LAMAR BROWN, JR.,

PETITIONER

APPELLATE CASE NO. 2019-000781

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Joseph Lamar Brown, Jr., Appellant.

Appellate Case No. 2019-000781

Appeal From Charleston County
J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5942
Heard April 5, 2022 – Filed August 31, 2022

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Assistant Attorney General Julianna E. Battenfield, and Assistant Attorney General Caroline Scrantom of Columbia, all for Respondent.

MCDONALD, J.: Joseph "Joe-Joe" Lamar Brown, Jr. appeals his convictions for murder, first-degree burglary, attempted armed robbery, and possession of a weapon during the commission of a violent crime, arguing the circuit court erred in (1) failing to find the retrial of his armed robbery charge violated the bar of double

jeopardy, (2) prohibiting evidence of third-party guilt, and (3) declining to suppress evidence secured by a problematic search warrant. We affirm.

Facts and Procedural History

Shortly before 1:00 p.m. on Friday, December 23, 2016, an intruder entered Johnny Glen Pritchard's (Victim) Lincolnville home, demanded money, and shot and killed him. After shooting Victim in the neck, the perpetrator went through Victim's pockets, took some money, and ran out the front door.

On July 11, 2017, a Charleston County grand jury indicted Brown for murder, first-degree burglary, armed robbery, and possession of a weapon during the commission of a violent crime. Brown pled not guilty, and the Honorable Kristi L. Harrington presided at the four-day jury trial. During their deliberations on June 14, 2018, the jury asked several questions. One of the jury's notes indicated the jury had reached a unanimous verdict of "not guilty" as to the armed robbery indictment but was unable to reach a unanimous decision on the remaining indictments. The circuit court responded with an *Allen* charge.[1] Despite this, the jury remained deadlocked, and the foreperson reported that the jury had "just not been able to come to a unanimous decision on any of the indictments." Thus, the circuit court declared a mistrial.

The State called the case for a second jury trial before the Honorable J.C. Nicholson, Jr. on November 5, 2018. Pretrial, the circuit court heard Brown's motions to dismiss the armed robbery indictment, admit evidence of third-party guilt, and suppress evidence retrieved during the execution of a search warrant. After considering the testimony of witnesses and arguments from the parties, the circuit court denied the motions.[2]

The State called Victim's second cousin Hugh Potter Pritchard (Cousin) as its first witness at trial. Cousin testified he spent the night of December 22, 2016 at Victim's home because he was helping Victim pack his belongings for a move. Cousin was in Victim's kitchen boxing up dishes when an intruder entered the

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[1] *Allen v. United States*, 164 U.S. 492 (1896).

[2] The State called three pretrial witnesses: Detective Barry Goldstein, who led the investigation for the Charleston County Sheriff's Office (CCSO), and eyewitnesses Celest McBride and Merit Williams, who saw a man running in the vicinity of Victim's home on the day of the shooting.

home. Cousin hid under the kitchen table and witnessed the shooting through a doorway. Immediately after the shooter ran out the front door, Cousin exited through the back door, ran across the lawn, and jumped over a fence to reach a neighbor's house and call for help. Cousin and the neighbor, James Eric Jordan,[3] then called 911 together.

CCSO was dispatched to Victim's home at 12:57 p.m. and arrived on scene at 1:03 p.m. Cousin described the perpetrator as a black man of medium height, approximately 5'8" or 5'9", with a small-frame, and hair that "wasn't long." According to Cousin, the perpetrator was dressed in dark clothing, was wearing a face covering, and had on "some kind of hat." Cousin admitted he did not see the intruder going through Victim's pockets, but testified he heard Victim's cash was taken.[4] Cousin explained that while he "didn't know exactly how old [the intruder] was," he thought he was "older than eighteen" and believed he was in his thirties. Cousin was adamant the murder weapon was "a black pistol, automatic handgun," not "a revolver." Officers found some coins and keys on Victim's person and a note on Victim's coffee table indicating Trey Coleman owed Victim $200. Officers also recovered a Speer nine millimeter Luger shell casing from Victim's living room floor.

Celest McBride, who was twenty years old at the time of Brown's second trial, lived with her family approximately one hundred yards from Victim's home. She heard "a boom" around 1:00 p.m. on the day of the shooting. McBride stated she was "being nosey" and "looked outside because [she] thought maybe someone had gotten into a car crash or something had fallen out of someone's vehicle onto the concrete." McBride testified that less than a minute after she heard the boom, she saw a man running from the direction of Victim's home:

> I saw someone running from my right to my left, which was a little odd because people don't go running around in that neighborhood just because. And just in front of

---

[3] Jordan is the stepfather of Trey "Red" Lorenzo Coleman, Brown's accomplice. Five months prior to Brown's second trial, Coleman pled guilty to manslaughter, armed robbery, and first-degree burglary; he is now serving a forty-five-year sentence.

[4] Victim withdrew $700 from his bank account a few days before he was killed.

> my house, by a telephone pole, I saw an object fall out of his pocket and—
>
> . . . .
>
> It appeared that he was bending down to pick it up. But he didn't. He continued running. And a little ways down the road from the telephone pole, he'd dropped a large amount of cash and he picked that up.

Once the runner was out of sight, McBride told her father she saw the man drop something by the telephone pole. Her father retrieved the object, an iPhone with a lock screen photo of a man and a woman, and placed it on his porch for safekeeping. McBride explained, "We were being good Samaritans and we wanted the rightful owner to pick it up because there were thieves in the neighborhood." She initially described the runner as a medium-build black man of 5'10" to 6' with dreadlocks, wearing "stone-gray sweatpants" and a dark-colored shirt.[5] At trial, McBride stated an enhanced photograph of Brown—taken from surveillance video—looked "very similar" to the man she saw running in front of her house; however, she agreed with the State that it was possible she mistook the man's hoodie for dreadlocks in giving an earlier description of him.[6] On cross-examination, McBride admitted she could not remember what color shirt the man was wearing.

Merit Williams was driving from Jordan's house to the store when he saw "a young man running from the direction from [Victim's] house." Williams recalled the runner was wearing "[r]ed Converse, black pants, a hoodie with the number 23 on it multicolored, [and a] skull cap."[7] He told law enforcement the runner had

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[5] McBride's father also described the runner to law enforcement as a black man with "longer hair." However, he was unable to describe the runner's clothing.

[6] In a previous hearing, McBride testified she was in cosmetology school. At trial, she agreed dreadlocks are "distinctive."

[7] The number 23, worn by Michael Jordan for the majority of his NBA career, remains popular on sportswear.

dreadlocks, the hoodie was "jet black," and the skull cap had white writing on it.[8] Williams thought the runner was "a young kid, you know, maybe into sports" and saw him drop something and then turn off to the left from East Owens Drive on to Brenda B Lane.[9] Williams identified the man in the video clip—also shown to McBride—as the man he saw running on December 23, 2016.

Martin Perez, who lived at the end of Brenda B Lane, was standing outside his house shortly before 1:00 p.m. on December 23 when he noticed a black car "that arrived very fast, quickly" and parked on the side of his house. The driver got out and started waving at a person and yelling for him to hurry up. Another person ran to the car, he and the driver got in, and the car sped off. Perez recalled the driver wore a red and black cap and a black T-shirt with "white figures, design, [on] it." Perez later approached law enforcement and shared what he saw. He also told the officers about his video surveillance equipment and invited them to review the footage.[10] Perez provided "the master machine that runs his system" to the police for their investigation.[11] Approximately eighteen months after Victim's death, Perez informed law enforcement he recognized the driver because the man frequently visited Perez's neighbor. Perez also knew where the driver lived. He admitted he declined to tell the police he recognized the driver on the day Victim was killed because he "was afraid something would happen to [him]."

Detective Goldstein began his investigation by interviewing Cousin shortly after Victim's death. He then interviewed McBride and her father. Detective Goldstein subsequently took into evidence the iPhone McBride's father retrieved from the ditch by the telephone pole. As the device was passcode protected, law enforcement was initially unable to retrieve its contents; however, Detective Goldstein was able to identify Brown and his girlfriend, Nautica Manigault, as the individuals in the photograph on the iPhone's lock screen.

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[8] Williams described a skull cap as "a cap made of wool or cotton that's used to warm the head and ears."

[9] Brown was eighteen at the time of the murder.

[10] Perez installed the video surveillance system because his home had been burglarized two or three times and he had been shot at in the past.

[11] The enhanced photographs of Brown shown to McBride and Williams were taken from Perez's video surveillance system.

On December 26, 2016, Detective Goldstein interviewed sixteen-year-old Manigault at her grandmother's home, which is less than a mile from the crime scene and in the same apartment complex where Brown lived. Manigault told Detective Goldstein that Brown was called "Joe-Joe" and did not have dreadlocks. Regarding Brown's clothing, Manigault explained Brown only wore Adidas or Converse shoes and "black jeans, all he wears is black."[12] Manigault confirmed she was the female in the lock screen photograph on the iPhone, and noted she had the same photograph on her own device.[13] Manigault admitted that around the time Victim was killed, Brown told her he lost his phone.

Once Manigault identified Brown in connection with the iPhone, Detective Goldstein obtained Brown's records from the Department of Motor Vehicles (DMV) to verify his identity and address. Brown's driver's license identified him as a 5'9" black male weighing 155 pounds. At this point, Detective Goldstein applied for arrest and search warrants.

On January 3, 2017, CCSO took Brown into custody and searched his home, where officers found two boxes of ammunition, one of which contained Speer nine millimeter Luger bullets—the same type and caliber as the shell casing recovered from Victim's living room. When Detective Goldstein interviewed Brown, Brown identified the iPhone as his own and claimed he was near the crime scene looking for it after he lost it in the area. Brown gave Detective Goldstein various descriptions of what he was wearing on the day of the shooting, including "an American flag outfit" and a "black t-shirt with green shorts."

Eventually, Detective Goldstein was able to access the contents of Brown's iPhone. Text messages on the phone reflected a conversation between Brown and "Red" just prior to the shooting. From the contents of these messages, Detective Goldstein suspected Coleman was Red. To verify this, investigators identified a

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[12] Manigault's mother, Tawanna Alston, told Detective Goldstein that on the afternoon of the murder, Brown came to her mother's home "all hysterical and stuff like that, telling yeah, we did it" but never explained what "it" was before he left. She said Brown was dressed in a "[b]lack shirt, black jeans, [and] red Converse" with a white shirt on underneath his black shirt. Additionally, she described his hair that day as "nappy and twists" on the top of his head, "the very top part."

[13] During a May 2, 2017 interview with Detective Goldstein, Coleman also identified Brown's iPhone from the lock screen photograph.

text message in which Red told Brown his Facebook name was "Moneybag Fly." Goldstein obtained search warrants for the subscriber information for the phone number associated with Red and for the Facebook account for Moneybag Fly. After obtaining these records, Goldstein was able to verify that Trey Coleman, Moneybag Fly, and Red were the same person.[14]

In the early morning hours of December 23, Coleman texted Brown asking to borrow his gun. Brown responded that since he "just been about to get robbed," he needed his gun "to stay on point." Around the same time, between 1:00 a.m. and 1:30 a.m., someone used the iPhone to photograph Brown holding a handgun in his right hand.[15] The same photograph shows Brown wearing red Converse shoes with white toes. Another photo on the iPhone depicts Brown wearing a black T-shirt, "the jeans with the holes," and "red-and-white Converse-style shoes."

Shortly before noon on December 23, the following text exchange—as read into the record at Brown's second trial by Chief Investigator Raymond Haupt of the Ninth Circuit Solicitor's Office—occurred:

> Coleman: Where you?
>
> Brown: My house.
>
> Coleman: [M]an, you got to rob dude today; I'm with him now.
>
> Brown: [P]ull up my hood right now; with—I don't give a—I don't give a f***; I'm going to rob him now.
>
> Brown: [P]ull up with him, blood; for real, for real.
>
> [Two missed calls from Brown to Coleman]

---

[14] At trial, Coleman confirmed his nickname is Red and that he previously had a Facebook account under the name Moneybag Fly.

[15] The handgun's serial number is visible in these photographs. A trace on the serial number revealed the firearm was a Smith and Wesson M&P9c.

Coleman: [Man], we can't do it like that; then he going to know I set him up.

Brown: [M]an, Bruh, just act like you are pulling up to get one of your peoples and I'm going to rob both of y'all to make it look real; Christmas bumming up; I ain't got shuck for my peoples; I'm going to make it look like I'm robbing both of y'all.

Brown: I'm just going to bum from around the building.

Brown: Where you at; at your house; I'll act like you my homeboy and rob you in the yard; he ain't going to think you set him up then because I came to your yard; I'm telling you, Bruh, it's now or never; what's up; let me eat, Bruh.

Coleman: [N]ot my house; the f***; just wait till you get to his house and I'm going to come in then; and Bruh, don't try and shit me; we split fifty-fifty.

Brown: [Y]eah, [man], you know that; when y'all going—when y'all going be at his house; and you want me to just knock on his door.

Coleman: I'll let you know when we get there; I'm going to be home when you do it; just do it and go to the back of Bell Street or to the circle by Smokey them house; you ball me and I bum—get you from there.

Brown: This a white man or black, and who all in the house?

Coleman: [H]is fat-ass brother and him; the skinny one got the money though; I want you to run his pockets and take his wallet and all; the fat one ain't got nothing; but do whatever to take it; hell, take his pants off him and take his phone too.

Brown: Aye, Balmy.

> Coleman: [W]e bumming down Royal Road.
>
> Brown: [S]o you want me to go in there when they both in there?
>
> Coleman: [T]hey packing because he about to move; they some pussies and ain't no gun in the house.
>
> Brown: [W]here y'all at?
>
> [Call from Coleman to Brown at 12:27:54 p.m. that lasts one minute and forty-eight seconds]
>
> Coleman: [H]old on; he out here talking to my peoples in my yard; I'll let you know when he leaves my house.
>
> Brown: [W]here his brother?
>
> Coleman: [I]n his house.
>
> [Call from Coleman to Brown at 12:42:09 p.m. that lasts three minutes and thirty-two seconds]
>
> [Final call from Coleman to Brown at 12:47:00 p.m. that lasts forty-eight seconds]

There is no further activity on Brown's iPhone after these calls.

Michelle Eichenmiller, a firearms examiner for the South Carolina Law Enforcement Division, was qualified without objection as an expert in the area of firearms identification. Following her examination of the bullet recovered at Victim's autopsy, Eichenmiller concluded "[i]t was a .9 millimeter Luger caliber bullet with five grooves, right-hand twist." Eichenmiller identified the cartridge casing recovered from Victim's living room floor as "a Speer manufacturer .9 millimeter Luger caliber cartridge casing" consistent with the bullet removed from the Victim. Additionally, Eichemiller noted the Smith and Wesson handgun identified by the serial number visible in the photograph taken with Brown's iPhone used a teardrop-shaped firing pin, which was consistent with the firing pin marking on the cartridge casing she examined. Eichenmiller opined the "lands and

grooves on the spent projectile" she examined were consistent with having been fired by a Smith and Wesson M&P9c. She further noted the teardrop-shaped firing pin impression on the spent casing eliminated the possibility that another brand fired the projectile and ejected the casing. According to Eichenmiller, the Smith and Wesson M&P9c nine millimeter is the only pistol in the firearms analysis database that matches all of these specific characteristics. On cross-examination, Eichenmiller admitted she did not have the opportunity to examine the murder weapon, and as such could not testify with certainty that the gun in the photograph on Brown's iPhone was the same gun used to shoot Victim.

Trey "Red" Coleman also testified for the State. Coleman pled guilty to setting up the Victim and enlisting Brown to rob him. Coleman admitted he knew Brown owned a gun and identified it as the gun in the photograph from Brown's iPhone. He also confirmed he asked Brown to borrow the gun a few times, including in the early morning hours of December 23, 2016. Coleman knew Victim had recently received some money following a car accident and that Victim had used the funds to buy a mobile home and vehicle. He testified Victim was generous with his time and money and had given or lent money to Coleman in the past. In fact, Victim gave Coleman a ride to the liquor store and Family Dollar on the day he was killed. Approximately ten minutes after Victim and Coleman returned from running errands, Coleman began texting Brown about the robbery plan. He then went to the store to buy cigarettes before returning to Brenda B Lane to pick up Brown. Coleman identified himself and Brown on Perez's surveillance video but claimed he netted no money from the robbery because Brown told him "[h]e didn't get nothing." After Coleman dropped Brown off at home, he returned to his stepfather's house and learned Victim was dead.

After closing arguments, the State requested a jury instruction on attempted armed robbery as a lesser included offense. Ultimately, the jury found Brown guilty of murder, first-degree burglary, attempted armed robbery, and possession of a weapon during the commission of a violent crime. The circuit court sentenced Brown to life imprisonment without the possibility of parole for murder, fifty years' imprisonment for burglary, ten years' imprisonment for attempted armed robbery, and five years' imprisonment on the weapons charge. Following a hearing on Brown's motion to reconsider his sentence, the circuit court amended Brown's life sentence for murder to fifty-two years' imprisonment and ordered the remaining unchanged sentences to run concurrent to the fifty-two years.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." *State v. Gordon*, 414 S.C. 94, 98, 777 S.E.2d 376, 378 (2015). "Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* "The same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." *State v. Banda*, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006). "The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court." *State v. Torres*, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *State v. Cope*, 405 S.C. 317, 335, 748 S.E.2d 194, 203 (2013).

Law and Analysis

I. Double Jeopardy and the Armed Robbery Charge

Brown argues the circuit court erroneously allowed the retrial of his armed robbery charge in violation of his constitutional protections against double jeopardy. He posits that because the jury in his first trial declared through its note that it had reached a unanimous verdict of "not guilty" on the armed robbery charge, both the United States and South Carolina Constitutions bar his retrial on this indictment. Under the reasoning of *Blueford v. Arkansas*, 566 U.S. 599 (2012), we disagree.

"The Double Jeopardy Clauses of the United States Constitution and the South Carolina Constitution protect citizens from repetitive conclusive prosecutions and multiple punishments for the same offense." *State v. Benton*, 435 S.C. 250, 258, 865 S.E.2d 919, 923 (Ct. App. 2021); *see also* U.S. Const. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."); S.C. Const. art. I, § 12 ("No person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . . ."). "[T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage . . . that . . . appl[ies] to the States through the Fourteenth Amendment." *Benton v. Maryland*, 395 U.S. 784, 794 (1969). "Under the law of double jeopardy, a defendant may not be prosecuted for the same offense after an acquittal, a conviction, or an improvidently granted mistrial." *Benton*, 435 S.C. at 258–59, 865 S.E.2d at 923 (quoting *State v. Parker*, 391 S.C. 606, 612, 707 S.E.2d 799, 801 (2011)).

In *Blueford*, the defendant was charged with capital murder. 566 U.S. at 602. The trial court instructed the jury on capital murder and the lesser-included offenses of

first-degree murder, manslaughter, and negligent homicide. *Id.* Following an *Allen* charge, the jury "deliberated for a half hour more before sending out a second note, stating that it 'cannot agree on any one charge in this case.'" *Id.* at 603. The trial court subsequently summoned the jury, and the foreperson reported the jury was deadlocked. *Id.* When the trial court asked the foreperson to disclose the jury's votes on each offense, the foreperson reported the jury was unanimous in finding the defendant not guilty of capital murder and first-degree murder but was deadlocked on manslaughter and had not voted on negligent homicide. *Id.* at 603–04. Following this exchange, the court gave another *Allen* charge and sent the jurors back to the jury room. *Id.* at 604. When the jury returned half an hour later and the foreperson stated the jury had not reached a verdict, the court declared a mistrial. *Id.*

Prior to his retrial, Blueford moved to dismiss the capital murder and first-degree murder charges on double jeopardy grounds, citing the foreperson's report that the jury had voted unanimously against guilt on these offenses. *Id.* The trial court denied the motion, and the Supreme Court of Arkansas affirmed on interlocutory appeal, concluding "the foreperson's report had no effect on the State's ability to retry Blueford, because the foreperson 'was not making a formal announcement of acquittal' when she disclosed the jury's votes." *Id.* 604–05 (quoting *Blueford v. State*, 370 S.W.3d 496, 501 (2011)). The United States Supreme Court affirmed, explaining, "[t]he fact that deliberations continued after the report deprives that report of the finality necessary to constitute an acquittal on the murder offenses." *Id.* at 606. Thus, the Court held:

> The jury in this case did not convict Blueford of any offense, but it did not acquit him of any either. When the jury was unable to return a verdict, the trial court properly declared a mistrial and discharged the jury. As a consequence, the Double Jeopardy Clause does not stand in the way of a second trial on the same offenses.

Id. at 610.

Despite Brown's argument to the contrary, we find nothing in the record from the first trial—aside from the language of the note as read into the record by the circuit court—to indicate the jury did not continue deliberating or even reconsider its decision regarding Brown's armed robbery charge following the *Allen* charge. Brown submitted affidavits from defense counsel, as well as affidavits from two members of the first jury, as exhibits to his motion to dismiss the armed robbery

indictment prior to his second trial. *But see* Rule 606(b), SCRE ("Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.").

The circuit court read the *Allen* charge verbatim from the General Sessions Jury Instructions outline provided to circuit court judges. While South Carolina law requires a jury to consider each indictment separately and distinctly, the trial transcript is devoid of information regarding which charges the jury considered following the *Allen* charge. Even though the State, defense counsel, and the circuit court were aware of the note stating the jury had determined Brown was "not guilty" of armed robbery, no action was taken other than the court's supplemental instruction via an *Allen* charge. Both the State and defense counsel indicated they had no objections to the *Allen* charge, and no other discussion followed at that time. *Contra Blueford*, 566 U.S. at 604 (stating defense counsel "asked the court to submit new verdict forms to the jurors, to be completed 'for those counts that they have reached a verdict on,'" following the *Allen* charge); *State v. Bilton*, 156 S.C. 324, 324, 153 S.E. 269, 273 (1930) ("A verdict of a jury should be presented in open court by the jury, properly published, assented to by all the jury, received by the court, and ordered placed [on] record before the final discharge of the jury."). The circuit court in Brown's second trial denied his motion to dismiss the armed robbery indictment because defense counsel failed to raise this issue of the jury's note during the first trial to the first circuit judge; thus, the first circuit judge made no ruling addressing the information in the jury note or otherwise specifically addressing the armed robbery indictment.

We find *Blueford* controlling in Brown's case for two reasons: (1) there was an additional period of deliberation in Brown's first trial after the circuit court received the jury's note indicating the jury had reached a verdict on armed robbery; and (2) following this period of deliberation, the jury foreperson announced, "We, Your Honor, have just not been able to come to a unanimous decision on any of the indictments." While not binding on this court, we are persuaded by the fact that other jurisdictions have declined to apply the bar of double jeopardy in similar

circumstances following an *Allen* charge. *See e.g.*, *State v. Combs*, 900 N.W.2d 473, 482–83 (2017) ("While the jury may have voted or tentatively voted to acquit Combs on three of the counts in its deliberations, it did not reach a verdict. The verdict form was not filled out or signed, the jury did not announce a verdict and was not available to be polled by the parties, nor was any verdict accepted by the district court."); *contra Nickson v. State*, 293 So. 3d 231, 237 (Miss. 2020) ("The foreperson did not simply disclose the jury's votes on each offense. Instead, the foreperson announced that the jury had reached a verdict on two counts and had delivered a verdict in writing and in proper form. The jury was then polled and the trial court determined that the jury's verdict was unanimous. In fact, the trial court referred to the jury's verdict as a 'partial verdict of the jury on Count 1 and 2.'"). Accordingly, we find the circuit court did not err in denying Brown's motion to dismiss the armed robbery indictment.

II. Third-Party Guilt

Brown next argues the circuit court erred in excluding evidence of third-party guilt because Brown identified David Felder as Victim's assailant; Felder matched the descriptions of the assailant as to significant details provided by witnesses; Felder's guilt was inconsistent with Brown's guilt; Felder lived within walking distance of the crime scene and was found in the area within hours of Victim's death; and Felder's jacket tested positive for gunshot residue. We disagree.

In *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941), the supreme court adopted the following rule regarding third-party guilt:

> [E]vidence 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. . . . "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. at 104–05, 16 S.E.2d at 534–535 (quoting 16 C.J., Criminal Law § 1085 (1918) and 20 Am. Jur., Evidence § 265 (1939)).

Decades later, in *State v. Gay*, 343 S.C. 543, 541 S.E.2d 541 (2001), *abrogated by Holmes v. South Carolina*, 547 U.S. 319 (2006), our supreme court attempted to expand *Gregory*. There, the court affirmed the circuit court's exclusion of third-party guilt evidence because of "the strong evidence of appellant's guilt—especially the forensic evidence—and the fact that the forensic experts found that the samples from [the third party] did not match *any* evidence gathered in this case, the proffered evidence about [the third party] did not raise 'a reasonable inference' as to appellant's own innocence." *Id.* at 550, 541 S.E.2d at 544 (quoting *Gregory*, 198 S.C. at 104, 16 S.E.2d at 534)). The court further explained that "while the proffered evidence about [the third party] may have established evidence of motive and opportunity for [the third party] to kill the victim, the evidence simply was not inconsistent with appellant's guilt." *Id.*

In *Holmes*, the defendant sought to introduce evidence that a third party had perpetrated the crimes for which he was charged. 547 U.S. at 323. He proffered several witnesses who testified the third party had been in the neighborhood where the crime occurred on the morning it was committed. *Id.* He also presented witnesses who claimed the third party admitted to committing the crimes. *Id.* Relying on *Gregory*, the circuit court refused to admit the evidence of third-party guilt. *Id.* at 323–24. On appeal, our supreme court found no error in the exclusion of petitioner's third-party guilt evidence. *Id.* at 324. Citing both *Gregory* and its later decision in *Gay*, the supreme court affirmed, noting the substantial incriminating evidence presented by the State and concluding the defendant "could not 'overcome the forensic evidence against him to raise a reasonable inference of his own innocence.'" *Id.* (quoting *State v. Holmes*, 361 S.C. 333, 343, 605 S.E.2d 19, 24 (2004)). However, the United States Supreme Court reversed, holding the circuit court violated the defendant's right to a "meaningful opportunity to present a complete defense" by excluding evidence of third-party guilt on the ground that the State introduced forensic evidence strongly supporting a guilty verdict. *Id.* at 330–31 (internal quotation omitted).

Here, in his filings seeking to introduce evidence of Felder's third-party guilt, Brown argues no evidence suggests Brown and Felder acted together in the effort to rob Victim and contends Felder's guilt is inconsistent with his own. Brown asserts Felder matched certain aspects of the descriptions witnesses provided to law enforcement. Indeed, officers approached Felder when they canvassed the area in the hours following Victim's death because Felder was wearing red Air Jordan shoes and a red leather jacket with the number "23" on the back. Moreover, Felder's shoulder-length dreadlocks matched the hairstyle described by two witnesses; Brown has never had shoulder-length dreadlocks. Officers located Felder 920 feet from Victim's home, Felder lived nearby, and Felder's jacket had gunshot residue on one sleeve.[16] Thus, Brown—much like the defendant in *State v. Mansfield*, 343 S.C. 66, 85, 538 S.E.2d 257, 267 (Ct. App. 2000)—attempted to show a third party, who matched the physical description of the perpetrator, lived in close proximity to the Victim and was found at home on the day in question.

In *Mansfield*, this court rejected such proximity evidence as casting "a mere 'bare suspicion'" on the third party, finding "[t]he fact that [the third party] generally fit the description of the perpetrator and lived in the apartment complex does not show his guilt, nor is it inconsistent with [the defendant's] guilt. Because the evidence was not inconsistent with [the defendant's] own guilt, the trial court exercised sound discretion in excluding it." *Id.* at 85–86, 538 S.E.2d at 267; *see also Miller v. State*, 379 S.C. 108, 116, 665 S.E.2d 596, 600 (2008) (concluding similar descriptions were not enough to raise a reasonable inference of innocence), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

We find the information offered here to support a theory of third-party guilt is akin to that in *Mansfield*. Law enforcement found Felder within close proximity of

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[16] Law enforcement approached Felder near Victim's home within hours of Victim's death. When Felder's dog became aggressive with Deputy Charles Gaillard, the deputy fired a gunshot into the ground within about one foot of Goldstein. As this occurred, Goldstein and Detective Michael Thompson were handcuffing Felder for transport to CCSO for an interview. A subsequent residue test revealed particles characteristic of gunshot primer residue on the sleeve of Felder's jacket, which the State argues is consistent with Felder being cuffed by Goldstein while in close proximity to Gaillard when he fired his service weapon to scare the approaching dog. Much of this interaction can be seen on bodycam video footage admitted into evidence.

Victim's house shortly after Victim was robbed and killed, learned he lived within walking distance, and noted Felder's physical description matched portions of the perpetrator's description as provided by the witnesses. Based on these facts, officers obtained a search warrant and searched Felder's home. However, because officers found nothing to indicate Felder was responsible for the robbery or the murder, detectives eliminated him as a suspect. Felder certainly behaved suspiciously—he went "back and forth" about whether he attended court on the afternoon of December 23, 2016 (he didn't), and his alibi was "shaky" because the Dorchester County Courthouse was closed on December 23. Felder then claimed he met with his lawyer on the day of the shooting but later indicated his lawyer was out of town for Christmas and they had to reschedule. Finally, Felder claimed that after he left the courthouse, he met with his landlord in Cordesville.

We acknowledge Felder's problematic alibi tales and the various eyewitness descriptions of the perpetrator running from the scene. But unlike the *Holmes* defendant, Brown presented no witnesses suggesting Felder claimed responsibility for the crimes nor otherwise offered evidence of Felder's guilt to the exclusion of Brown. No witness described the perpetrator as dressed in mostly red from head-to-toe (as Felder was) or mentioned a leather jacket like that worn by Felder. Instead, the witnesses consistently described the perpetrator's clothing as dark-colored (gray or black) and indicated the runner had something on his head—dreadlocks, twists, a hoodie, a skullcap, or "some kind of hat." We are not convinced that the facts that Felder had dreadlocks, as initially described by two of the witnesses, and wore a jacket with Michael Jordan's number 23 on the back, as noted by one witness, point to Felder as the guilty party to the exclusion of Brown such that an abuse of discretion has occurred. Critically, when officers showed McBride and Williams photographs of Felder from December 23, both stated he was not the person they saw running from or near Victim's home. Other than "bare suspicion" and the close proximity of his home, there is simply no evidence to suggest Felder was the perpetrator here. As evidence in the record supports the circuit court's denial of Brown's motion to introduce evidence of third-party guilt, we find no abuse of discretion. *See e.g.*, *Cope*, 405 S.C. at 341, 748 S.E.2d at 206 (recognizing under *Gregory* that "evidence of third-party guilt that only tends to raise a conjectural inference that the third party, rather than the defendant, committed the crime should be excluded" and must be "limited to such facts as are inconsistent with [the defendant's] own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence." (alteration in original) (quoting *Gregory*, 198 S.C. at 104, 16 S.E.2d at 532)).

III. Motion to Suppress and the Warrant Affidavit

Brown moved to suppress the bullets recovered from his bedroom, arguing they were seized pursuant to a search warrant flawed by a lack of supporting probable cause. Brown contends Detective Goldstein's warrant affidavit lacked facts sufficient to support a finding of probable cause because the affidavit did not separately particularize, by witness, the descriptions each of the three witnesses gave of the perpetrator. Brown further asserts that because the affidavit gave only a conclusory description of the connection to the recovered iPhone, the phone's contents were insufficient to support issuance of the search warrant. In sum, Brown argues the affidavit in support of the search warrant was disingenuous to the point that the fruits of the warrant must be suppressed in accordance with *Franks v. Delaware*, 438 U.S. 154 (1978). We disagree.

"In *Franks v. Delaware*, the United States Supreme Court held that the Fourth and Fourteenth Amendments gave a defendant the right in certain circumstances to challenge the veracity of a warrant affidavit after the warrant had been issued and executed." *State v. Missouri*, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999). The *Franks* court explained:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment, as incorporated in the Fourteenth Amendment, requires that a hearing be held at the defendant's request.

438 U.S. at 154. Our own supreme court has explained that *Franks* addresses more than affirmative false statements by law enforcement:

> [T]he *Franks* test also applies to acts of *omission* in which exculpatory material is left out of the affidavit. To be entitled to a *Franks* hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge. There will be no *Franks* violation if the affidavit, including the omitted

> data, still contains sufficient information to establish probable cause.

Missouri, 337 S.C. at 554, 524 S.E.2d at 397 (citation omitted) (footnote omitted). In *State v. Porch*, 417 S.C. 619, 790 S.E.2d 440 (Ct. App. 2016), this court discussed *Franks*:

> The defendant has the burden of proving the officer acted with the requisite intent. A party attempting to demonstrate information was intentionally or recklessly omitted from an affidavit bears a heavy burden of proof. The defendant must also show that the omitted material was necessary to the finding of probable cause, i.e., that the omitted material was such that *its inclusion* in the affidavit would defeat probable cause.
>
> ….
>
> Probable cause is a commonsense, nontechnical conception [ ] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.

Id. at 627–28, 790 S.E.2d at 444 (alteration in original) (internal citations and quotations omitted).

The probable cause affidavit provided with the search warrant request here reads:

> That on 12/23/16 at approximately 13:00hrs, the victim John Glenn Pritchard W/M/ DOB [redacted] was shot and killed during the commission of an armed robbery, burglary at [redacted] E. Thomas St. Lincolnville S.C. That the subject documented above Joseph Lamar Brown Jr. is believed to be the assailant in this incident [through] the affiant's investigation. At the time of the robbery the defendant was armed with a 9mm firearm. Recovered at the crime scene was one 9mm spent casing within proximity of the deceased inside the residence. The assailant was wearing running pants or some type of trouser, stone washed with a shirt of some type with the

> number 23 on it, and a pair of red sneakers. These descriptions are listed in various statements of witnesses in the area of the homicide who spoke with detectives from the CCSO. A short distance away from the scene of the homicide a witness gave an audio statement that the assailant was dropping cash and his cellphone from his pant pocket onto E. Owens St. Lincolnville, S.C. as he was running away from the residence. The cellphone was taken as evidence by the CCSO, and during the investigation it was determined that the above subject Joseph Lamar Brown Jr. is the owner. The driver's license and other records reflect that the above subject Joseph Lamar Brown Jr. also fits the physical description of the person fleeing the scene, dropping the cellphone as stated above in this affidavit. The affiant believes that the above evidence is at Joseph Lamar Brown Jr.'s listed above, that is also on his SCDL and is in the proximity of the homicide.

Brown contends the affidavit's statement that Brown "fits the physical description of the person fleeing the scene, dropping the cellphone" is false because there was no single description of the perpetrator and the witness descriptions varied widely. He argues the individual descriptions were more vividly contrary to each other than the affidavit conveys and the only commonalities were that the perpetrator was a black male of medium build:

> For example, one witness described the assailant as a "young boy," and another described him as someone in his twenties or thirties. One witness said the person was wearing sweatpants, another witness said he was in all black clothing, and the third witness said he was wearing black jogging pants. Only one witness described the black hoodie with a number 23 on the back and distinctive red shoes. Two witnesses said the person had dreadlocks, and the other witness provided no description about the person's hair at all.

In our view, the evidence does not establish Detective Goldstein knowingly or intentionally made false statements in the warrant affidavit, or made statements in the affidavit with reckless disregard for the truth. Although the witnesses'

descriptions do vary in certain respects, all of the witnesses described the perpetrator as a medium-build, black male, dressed in dark clothing, and between the ages of eighteen and thirty. When shown still photos taken from the surveillance video, the witnesses unequivocally identified Brown.

Even if we accept for argument purposes Brown's premise that Detective Goldstein acted recklessly in omitting from his affidavit some of the contradictory details from the witness descriptions or details related to ownership of the iPhone, we find Brown has failed to demonstrate a *Franks* violation because if the affidavit were to include the referenced omitted details, it would still provide the probable cause necessary for issuance of the warrant. *See Missouri*, 337 S.C. at 554, 524 S.E.2d at 397 ("There will be no *Franks* violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause."). The lock screen photograph on the iPhone and Manigault's confirmation that the iPhone belonged to Brown and that Brown told her he ran from Red Coleman's house following the gunshot—facts admittedly omitted from the search warrant affidavit—supported law enforcement's reasonable belief that the iPhone recovered near the crime scene belonged to Brown. Moreover, Perez's video surveillance and Brown's DMV records, as well as the fact that Brown matched descriptions of the perpetrator, provided additional probable cause supporting issuance of the warrant. *See Porch*, 417 S.C. at 627, 790 S.E.2d at 444 ("The mere fact that the affiant did not list every conceivable conclusion does not taint the validity of the affidavit." (quoting *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990))). Accordingly, we find the circuit court did not err in denying Brown's motion to suppress the evidence seized from his home and iPhone.

Conclusion

For the foregoing reasons, Brown's convictions are

AFFIRMED.

THOMAS and HEWITT, JJ., concur.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JOSEPH LAMAR BROWN, JR.

APPELLANT

APPELLATE CASE NO. 2019-000781

Appeal from Charleston County

J. C. Buddy Nicholson, Circuit Court Judge

Opinion No. 5942

PETITION FOR REHEARING

On August 31, 2022, this Court affirmed Appellant's convictions and sentences. State v. Brown, Op. No. 5942 (Howard Adv. Sh. No. 31 at 39) (S.C. Ct. App. filed Aug. 31, 2022). Pursuant to Rule 221(a), SCACR, Appellant respectfully seeks rehearing regarding the three issues presented on appeal due to significant factual and legal points overlooked and misapprehended by this Court.

Double Jeopardy

Appellant was tried twice. When his case was called for the second trial on November 5, 2018, defense counsel moved to dismiss the armed robbery charge based upon double jeopardy.

R. 11, ll. 2-16; Supp. R. 1. Counsel explained that "[d]uring the week of June 11, 2018, the state tried [Appellant]." Supp. R. 1; see also R. 11, ll. 2-4. At that time, "[t]he jury hung on the charges of possession of a firearm during a violent crime, burglary (first degree), and murder, but did reach a unanimous verdict of not guilty on the charge of armed robbery." Supp. R. 1; see also R. 11, ll. 2-7. Defense counsel explained more fully that during its deliberations, "the jury returned five notes," and "[o]ne of those notes indicated that the jury had reached a unanimous verdict of not guilty on armed robbery, but was unable to reach unanimous agreement on the other indictments." Supp. R. 1. Subsequently, the first trial judge instructed the jurors pursuant to Allen v. United States, 164 U.S. 492 (1896). Supp. R. 1; R. 567. Even after receiving the supplemental instruction, the jury was unable to reach a verdict. Supp. R. 1; R. 567. Thus, the first trial judge declared a mistrial. Supp. R. 1; R. 567.

Additionally, after the first trial, defense counsel obtained affidavits from two jurors indicating the jury unanimously decided Appellant was not guilty of the armed robbery charge and never revisited discussion of that offense again during their deliberations. R. 12, ll. 8-11; Supp. R. 1. In fact, the foreperson had signed the form indicating the jury's verdict of not guilty on the armed robbery charge prior to the jury continuing its deliberations on the remaining charges. Supp. R. 1.

The second trial judge questioned whether anyone made a motion to accept the verdict when the jury revealed it reached a unanimous verdict of not guilty as to the armed robbery charge, and defense counsel candidly admitted she did not. R. 11, ll. 13-23. The judge found the jurors "thought they reached a decision," but the decision was "never ... documented by anyone." R. 14, ll. 23-25. The judge found the jury's unanimous not-guilty verdict as to armed robbery "was brought to [the state's] attention, the defense counsel's attention, and the Court's attention ... by

note." R. 18, ll. 11-14. The judge asserted that "the time to have raised this was when the Foreman or Forelady, or whoever, announced that they had reached that verdict." R. 14, ll. 16-19. According to the judge, it was incumbent upon "[e]ither [defense counsel] or the state or the judge, or someone, ... to say I accept that verdict." R. 14, ll. 19-20.

Thus, the judge denied Appellant's motion to dismiss. R. 93, l. 22 – R. 94, l. 5. He denied the motion because "no one raised that issue at the prior trial, ... [and] the time to have raised that issue was at the trial." R. 93, ll. 23-25. The judge reiterated that the jury's verdict on armed robbery was not "raised by the Court or the solicitor or the defense counsel" and "was never accepted by the Court, documented by the Court." R. 94, ll. 1-3.

Both the United States Constitution and the South Carolina Constitution protect individuals from being twice placed in jeopardy by the state. U.S. Const. amend V; S.C. Const. Art. 1, § 12. The Double Jeopardy Clause embodies the vitally important interest "the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Yeager v. United States, 557 U.S. 110, 117-118 (2009).

"It is a rule of general recognition that one is in jeopardy when a legal jury is sworn and impaneled to try him, upon a valid indictment, in a competent Court, unless the jury before reaching a verdict be discharged with the prisoner's consent, or upon some ground of legal necessity or the verdict, if rendered be set aside according to law." Ex Parte Prince, 185 S.C. 150, 159, 193 S.E. 429, 433 (1937); see also State v. Baum, 355 S.C. 209, 214, 485 S.E.2d 419, 421 (2003). The guarantee against double jeopardy offers three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against

prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. State v. Cuccia, 353 S.C. 430, 434, 578 S.E.2d 45, 48 (Ct. App. 2003); see also State v. Easler, 327 U.S. 121, 130 (1997) (citing Brown v. Ohio, 432 U.S. 161 (1977) (holding "The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction and protects against multiple punishments for the same offense"). Further, under the law of double jeopardy, a person may not be prosecuted for the same offense after an improvidently granted mistrial. State v. Coleman, 365 S.C. 258, 263, 616 S.E.2d 444, 446 (Ct. App. 2005). The bar on re-trials after acquittal is "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence." United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

"[I]t has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and even when not followed by any judgment is a bar to a subsequent prosecution for the same offense." Green v. United States, 355 U.S. 184, 188 (1957) (internal quotation omitted). Essentially, "[f]or a jury note regarding the jury's inability to reach a verdict to bar a subsequent prosecution after a mistrial, there must be some indication that the jury had finally resolved to acquit the defendant." Traylor v. State, 567 S.W.3d 741, 744 (Tex. Crim. App. 2018). "[F]orm is not to be exalted over substance in determining the double jeopardy consequences of a ruling terminating a prosecution." Sanabria v. United States, 437 U.S. 54, 66 (1978). "[W]hat constitutes an 'acquittal' is not to be controlled by the form of the judge's action." United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977). The court "must determine whether the ruling of the judge [or jury], whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." Id.

Appellant readily admits that typically a jury's verdict must be presented in open court and received by the court. "A verdict of a jury should be presented in open court by the jury, properly published, assented to by all the jury, received by the court, and ordered placed on record before the final discharge of the jury." State v. Bilton, 156 S.C. 324, 324, 153 S.E. 269, 273 (1930). However, in this case, the jury sent a note to the trial judge explaining they were unanimous in their decision to acquit Appellant of the armed robbery charge. The note expressed the jury's finality with regard to the armed robbery indictment.

Further, the affidavits presented by Appellant in his motion to bar his re-trial explained the jury did not revisit the armed robbery charge after being instructed by the judge to continue its deliberations. Supp. R. 1. This Court refused to consider the juror affidavits submitted by Appellant, citing Rule 606(b), SCRE. Appellant respectfully requests rehearing regarding the propriety of consideration of the affidavits submitted here.

> Upon an inquiry into the validity of a verdict or indictment a juror may not testify as to any matter of statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Rule 606(b), SCRE. Importantly, the evidentiary rule restricts inquiry into the "validity of a verdict." Id. The juror affidavits did not concern a verdict at all. In fact, the affidavits concerned the absence of a verdict. The questions answered by the affidavits was whether the jurors unanimously voted not guilty as to armed robbery and whether the jurors reconsidered the armed robbery charge after the Allen instruction. In no way were the affidavits an attack on the validity of a verdict because the affidavits merely addressed whether verdicts were reached at all – not on

how the verdicts were reached. This Court's application of Rule 606(b), SCRE is misplaced, and Appellant respectfully requests rehearing in regarding the applicability of Rule 606(b), SCRE, to the instant matter.

Finally, and most importantly, the supplemental instruction given by Judge Harrington showed the jury did not reconsider its verdict on armed robbery. When giving the supplemental charge, Judge Harrington told the jurors that they "ha[d] been unable to agree on a verdict in this case." R. 1119. She explained that she had told them earlier that their verdict "must be unanimous." R. 1119. She instructed the jury "to make every reasonable effort to reach a unanimous verdict." R. 567. Thus, the jury was told to resume deliberating on the charges for which they were unable to reach unanimity. The jury was not instructed to deliberate further on the charge for which they had reach unanimity – the armed robbery charge. Therefore, the jury's verdict of not guilty on the armed robbery offense was its final determination on that charge.

At Appellant's second trial, the state relied upon the easily distinguishable case of Blueford v. Arkansas, 566 U.S. 599 (2012), in requesting the judge not bar the state from requiring Appellant to run the gauntlet twice on the charge of armed robbery. R. 18, ll. 15-21. Unfortunately, this Court held Blueford was controlling here because (1) there was an additional period of deliberation in [Appellant]'s first trial after the circuit court received the jury's note indicating the jury had reached a verdict on armed robbery; and (2) following this period of deliberation, the jury foreperson announced, 'We, Your Honor, have just not been able to come to a unanimous decision on any of the indictments." Appellant respectfully disagrees and requests rehearing regarding the applicability of Blueford.

The State of Arkansas charged Blueford with capital murder. Blueford v. Arkansas, 566 U.S. 599, 602 (2012). The jury was instructed to consider capital murder, first-degree murder,

manslaughter, and negligent homicide. Id. The judge instructed the jurors to consider first-degree murder if they had a reasonable doubt about Blueford's guilt on the capital murder charge. Id. Similarly, the judge instructed the jury to consider manslaughter if it had a reasonable doubt as to the first-degree murder charge. Id. Finally, the jury was told to consider negligent homicide if it had a reasonable doubt of Blueford's guilt of manslaughter. Id.

When the jury revealed that it was deadlocked, the judge inquired as to the votes on each offense. Id. at 603. The jury unanimously voted against capital murder and murder in the first degree, but was hung on manslaughter. Id. at 604. The jury had not considered negligent homicide yet. Id. The judge instructed the jury to continue deliberating. Id. Additionally, the judge denied Blueford's request for new verdict forms to be submitted to the jury on those counts for which they had reached verdicts. Id. Ultimately, the jury was unable to reach a verdict, and the judge declared a mistrial. Id. When the state subsequently sought to retry Blueford, he moved to dismiss the capital murder and first-degree murder charges on double jeopardy grounds based upon the foreperson's report that the jurors had voted unanimously against guilt on those offenses. Id.

The United States Supreme Court held "[t]he foreperson's report was not a final resolution of anything." Id. at 606. "When the foreperson told the court how the jury had voted on each offense, the jury's deliberations had not yet concluded." Id. According to the Court, "[t]he fact that deliberations continued after the report deprive[d] that report of the finality necessary to constitute an acquittal on the murder offenses." Id.

Further, the Court was unconvinced by Blueford's argument that the jury instructions, which told the jurors not to consider a lesser offense unless it had a reasonable doubt as to the greater offense, meant the jurors had not revisited the greater offenses during the extended deliberations. Id. at 606-607. The Court reasoned that "nothing in the instructions prohibited the

jury from reconsidering" its prior votes. Id. at 607. "The jurors were never told that once they had a reasonable doubt, they could not rethink the issue. The jury was free to reconsider a greater offense, even after considering a lesser one." Id. Due to the possibility that the jurors could revisit their votes on the greater offenses, "the foreperson's report prior to the end of deliberations lacked the finality necessary to amount to an acquittal on those offenses, quite apart from any requirement that a formal verdict be returned or judgment entered." Id. at 608.

Appellant's case is easily distinguished from Blueford. The Blueford jurors were considering only one indictment. While the jurors were instructed to consider lesser-included offenses, the jurors were only concerned with the facts and circumstances surrounding the one indictment for capital murder. Therefore, when the Blueford jurors were instructed to resume deliberations, inevitably, the jurors were re-considering the facts and circumstances surrounding the one indictment for capital murder, including whether Blueford's conduct constituted capital murder, first-degree murder, manslaughter, or negligent homicide. Here, Appellant's first jury – just as his second jury – was not consider a single indictment. Instead, the state called Appellant to trial on four separate and distinct indictments, which the judge, and South Carolina law, require the jury to consider separately and distinctly. Unlike in Blueford where the jury was considering the same conduct for the single indictment, Appellant's jury was considering a variety of sets of facts and circumstances applicable to separate and distinct indictments. See State v. Robinson, 360 S.C. 187, 191, 600 S.E.2d 100, 102 (Ct. App. 2004) (explaining that the jury returned a not guilty verdict on the charge of possession of a firearm during the commission of a crime, but was not unanimous on two other charges resulting in a mistrial only as to those two other charges). Appellant respectfully requests this Court rehear the applicability of Blueford in light of these material distinctions that were not considered by the Court when arriving at its opinion.

Third Party Guilt

During the pre-trial hearing, several witnesses testified regarding their observations on the day of Pritchard's death. Barry Goldstein, the case agent, informed the judge of the descriptions he received from the various witnesses on the scene. R. 24, ll. 18-20. Hugh Potter Pritchard was present in the home when the shooting occurred. R. 26, ll. 2-5. He told the police the assailant was a black male who stood between five eight and five ten. R. 26, ll. 9-10. The shooter was wearing all black clothing and weighed about 170 pounds. R. 26, ll. 10-11. Pritchard was unable to make out any facial features because the shooter's face was covered. R. 26, l. 11.

Celest McBride, lived a short distance from the deceased. R. 26, l. 20 – R. 27, l. 1; R. 53, ll. 20-23. She told the police that she saw an individual running down the street away from the deceased's home around the time of the shooting. R. 27, ll. 7-11; R. 54, ll. 16-18. She saw the individual drop a large amount of money and his cell phone. R. 27, ll. 11-14; R. 55, ll. 2-12. The individual picked up the cash, but he left the cell phone. R. 27, ll. 17-20; R. 55, ll. 13-17. Celest told the police the man whom she saw running was "a black male" wearing "stone-gray sweatpants." R. 28, ll. 17-18; R. 55, ll. 21-25. The man had dreads, was of a medium build, and stood between five ten and six foot. R. 28, l. 18; R. 55, ll. 23-25. According to Celest, the man was not running fast – it was a "fast jog." R. 58, ll. 10-12.

The police also spoke to Merit Williams who lived near the deceased. R. 29, ll. 1-7. Shortly after the shooting, Williams was driving down the road when he saw someone running and dropping items as well. R. 29, ll. 4-18; R. 62, ll. 16-21; R. 64, ll. 8-13. He described the person as "a young black male, dark skin, black hoodie with the number 23 on the back of it." R. 29, ll. 19-21; R. 62, l. 22 – R. 63, l. 3. The number 23 was multicolored. R. 29, ll. 22-25; R. 63, ll. 7-12. According to Williams, the man wore black warm-up pants and red Converse sneakers. R. 30, ll.

8-9; R. 63, ll. 1-6. Additionally, Williams said the man had shoulder length dreads. R. 30, ll. 15-16; R. 66, ll. 3-6. Contrary to Celest's description, Williams asserted the man "was trying to get out of Dodge quick in a hurry." R. 64, ll. 11-13. Williams believed "the guy was running for exercise." R. 66, ll. 14-16.

While canvassing the area between three and four o'clock in the afternoon, Goldstein "saw an individual that had dreads, wearing a red-and-black jacket with a 23 on the back." R. 31, ll. 5-8; R. 35, ll. 8-16. In fact, his dreadlocks were shoulder length. R. 46, ll. 14-15. The individual – David Felder – was within walking distance of Pritchard's home. R. 46, ll. 3-8; R. 47, ll. 3-7. The man's jacket was "a leather-type jacket" that was predominantly red. R. 31, ll. 13-16. He was wearing red pants and red shoes. R. 31, ll. 20-23. Additionally, Felder had a red cap in his hand. R. 33, ll. 11-13. See also Court's Exhibits #5, 6, 7, 8. Felder caught Goldstein's attention because "he fit Mr. Williams' description." R. 46, ll. 16-19.

However, Goldstein claimed Felder had an alibi. R. 32, ll. 6-10. Felder told the police that at the time of the shooting, he "had to meet his attorney up at the Dorchester County courthouse." R. 34, ll. 15-19; R. 35, ll. 4-7. His meeting was at 1 p.m. on December 23, 2016. R. 34, ll. 22-24; R. 48, l. 25 – R. 49, l. 1. According to Goldstein, Felder's alibi was confirmed by two women, one of whom was Felder's girlfriend. R. 34, l. 25 – R. 35, l. 3. Felder claimed that when he arrived at the courthouse, his attorney was not there. R. 36, ll. 3-5. Felder "rescheduled, and then went to Cordesville." R. 36, ll. 6-8; R. 50, ll. 10-12. The police later learned there was no court on December 23, 2016, in Dorchester. R. 49, ll. 2-17.

Based upon the information available to the police – finding Felder within close proximity to the shooting scene shortly after the murder and his physical description matching portions of the description provided by the witnesses – the police obtained a search warrant to search his

house. R. 47, l. 23 – R. 48, l. 3. In other words, the police were able to establish probable cause that Felder's residence contained evidence of Pritchard's shooting death. R. 47, l. 23 – R. 48, l. 12. Additionally, the jacket Felder was wearing – the one with the distinct 23 on the back – tested positive for gunshot residue. R. 49, ll. 21-23.

Defense counsel argued for the admission of evidence linking Felder to the shooting. R. 68, ll. 2-5; Second Supp. R. 239. As counsel explained, the evidence against Felder was inconsistent with Appellant's guilt and raised a reasonable presumption of Appellant's innocence. R. 68, ll. 11-13; Second Supp. R. 239. As defense counsel explained, Felder fit Williams' description of the person he saw running from the shooting scene and portions of the description offered by Celest. R. 68, l. 24 – R. 69, l. 5; Second Supp. R. 239. In fact, the police were convinced that Felder met the description provided by Williams – at least, in large part. R. 69, ll. 3-4; R. Second Supp. R. 239. The police detained Felder, transported him to the police station and interrogated him, and seized his clothing based upon the significant evidence against him. R. 69, ll. 6-11; Second Supp. R. 239. Without question, Felder "match[ed]" "certain portions" of the descriptions provided by the witnesses. R. 70, ll. 15-20. Importantly, Felder had shoulder length dreadlocks, unlike Appellant. R. 73, ll. 5-8; R. 75, ll. 7-17; see also R. 46, l. 25 – R. 47, l. 2; R. 72, ll. 21-23; R. 77, ll. 10-17. Not only did Felder live near Pritchard, but he was found by the police a short distance away from Pritchard's home within hours of the shooting. R. 73, ll. 15-18.

The state argued there was "no evidence in th[e] case pointing out David Felder as the guilty party." R. 76, ll. 22-24. Later, the solicitor qualified his statement: "[T]here's no evidence whatsoever pointing to him as being responsible for this crime, other than the fact that he had dreads and he wore Michael Jordan's number. Period." R. 77, ll. 22-23. When the judge inquired about Felder having dreadlocks just as a witnesses described, the solicitor responded that

"probably a third of the black community" had dreadlocks. R. 77, ll. 1-4. Similarly, when the judge questioned the solicitor about the distinctive number 23 on the jacket, he maintained that the number was "Michael Jordan's number" "that another third of them have." R. 77, ll. 6-9. According to the state, the defense was required "to show such a fact, a train of facts or circumstances tending to clearly point out Mr. Felder as the guilty party." R. 78, l. 25 – R. 79, l. 2.

The trial judge erroneously concluded the evidence against Felder was "a mere suspicion." R. 69, ll. 22-24. He noted that Felder had an alibi, which the police "checked." R. 73, ll. 20-22. He was unmoved by the fact that one of the women who claimed to be Felder's alibi was his girlfriend. Likewise, he was unmoved by the fact that Felder told the police that he went to the courthouse in Dorchester to meet with his lawyer on December 23 – a day that courthouse was closed. In fact, Felder actually claimed that he had a court appearance that day. R. 74, ll. 13-22; Second Supp. R. 239. Instead, the trial judge seemed persuaded simply because the police did not charge Felder. R. 73, ll. 24-25.

Ultimately, the judge granted the state's motion to suppress any evidence concerning third party guilt as to Felder. R. 92, ll. 7-9. He found "[a]t best," the evidence raised "a mere suspicion that he had dreadlocks and some residue on his sleeves." R. 92, ll. 9-11. He remarked that the witnesses described the assailant's clothing as "dark," but that Felder was mostly wearing red. R. 92, ll. 12-21. In the judge's estimation, when the witnesses claimed the assailant was in a hoodie that meant he was wearing "some type of cloth or sweatshirt." R. 92, ll. 14-16. Goldstein said Felder was wearing a leather jacket. R. 92, ll. 16-17. He determined the only similarity was the "colored 23." R. 92, ll. 20-21. Thus, he concluded the significant evidence against Felder "raise[d] a mere suspicion ... that the fellow possibly had committed the crime." R. 92, ll. 22-25.

This Court compounded the trial court's error by concluding that "[o]ther than 'bare suspicion' and the close proximity of his home, there is simply no evidence to suggest Felder was the perpetrator here." This Court stated it was "not convinced that the facts that Felder had dreadlocks, as initially described by two of the witnesses, and wore a jacket with Michael Jordan's number 23 on the back, as noted by one witness, point to Felder as the guilty party to the exclusion of [Appellant]." Appellant respectfully requests this Court rehear the matter due to significant factual and legal points overlooked and misapprehended.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." Taylor v. Illinois, 484 U.S. 400, 408 (1988) (citing Chambers v. Mississippi, 410 U.S. 284, 302 (1973)). "'The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.'" Id. at 408-409 (quoting United States v. Nixon, 418 U.S. 683, 709 (1974)). "'The right to offer the testimony of witnesses ... is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.'" Id. at 409 (quoting Washington v. Texas, 388 U.S. 14, 19 (1967)). Without question or hesitation, the United States Supreme Court declared "'[t]his right is a fundamental element of due process of law.'" Id.

South Carolina's third party guilt evidence rule provides that

> The evidence offered by an 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. ... [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts and 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.

State v. Gregory, 198 S.C. 98, 104-105, 16 S.E.2d 532, 534-535 (1941).

The South Carolina Supreme Court determined Bruce Miller was entitled to post-conviction relief where trial counsel failed to present evidence of third-party guilt. Miller v. State, 379 S.C. 108, 665 S.E.2d 596 (2008), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Bruce Miller's defense was third-party guilt. Id. at 114, 665 S.E.2d at 599. He claimed his nephew, Derrick Miller, was the culprit. Id. at 116, 665 S.E.2d at 600. The state presented Stephanie Pauling, Bruce's girlfriend as a witness to establish that Bruce had access to a car – her car – that fit the description of the car used by the assailant. Id. at 111, 665 S.E.2d at 597. Pauling also claimed that Bruce owned a handgun and that he was wearing a gold medallion on the day of the robbery, as these facts were helpful to the state's case by corroborating the description given by the complaining witness. Id.

On cross-examination, Pauling admitted that she and Derrick had been charged with three armed robberies in the same area. Id. at 112, 665 S.E.2d at 597-598. She also described Derrick, and this description was very similar to the one given by the complaining witness of the armed robbery. Id. at 112, 665 S.E.2d at 598. Although Pauling testified during a proffer that her car was used during each of the three robberies for which she and Derrick were charged as well as the one for which Bruce was charged, trial counsel did not elicit this testimony from Pauling in front of the jury. Id. at 112-113, 665 S.E.2d at 598.

The Court held that "[b]ased on the proffer of Pauling's testimony and the transcript from the PCR hearing, it [was] clear that trial counsel could have established Derrick Miller's third party guilt by showing that Pauling's vehicle was used as the 'get away' car in each of the robberies and that a

similar handgun was used." Id. at 116, 665 S.E.2d at 600. The Court recognized that "[a]lthough trial counsel, through Pauling's testimony was able to establish a physical description of Derrick Miller, this was not sufficient to adequately establish a defense of third-party guilt." Id. The complaining witness's description of the robber was "akin to Derrick Miller's physical features rather than Bruce Miller's," but the similar descriptions was not enough to raise a reasonable inference of Bruce's innocence. Id.

Instead of relying upon Miller, this Court relied exclusively upon its own decision in State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000). This reliance was misplaced. Mansfield sought to introduce evidence of the guilt of Guan Perry at his trial for attempted burglary. State v. Mansfield, 343 S.C. 66, 81, 538 S.E.2d 257, 264 (Ct. App. 2000). Keith Diamond saw a man behind his neighbor's house. Id. at 69, 538 S.E.2d at 258-259. The man kicked in the front door to the neighbor's house, but stopped what he was doing when Diamond yelled out to him. Id. at 70, 538 S.E.2d at 259. The man then walked away. Id. Diamond called the police and provided a description of the perpetrator. Id. One of the officers saw Mansfield walking in a nearby apartment complex. Id. Mansfield fit the description; therefore, the officer attempted to stop him, but Mansfield ran. Id. The officer found him shortly thereafter hiding in a storage closet. Id.

At trial, the jury learned that while the police were searching for the perpetrator, one of the police officers mentioned a man named Guan Perry who fit the suspect's description. Id. at 80, 538 S.E.2d at 264. Mansfield wanted to introduce a photograph of Perry as well as testimony that Perry lived in the apartment complex where Mansfield was found and was there on the day of the attempted burglary. Id. at 81, 538 S.E.2d at 254. He also wanted to introduce evidence that Perry was 5'7" or 5'8", of medium build, and had light brown skin. Id. This Court held "[t]he fact that Perry generally

fit the description of the perpetrator and lived in the apartment complex does not show his guilt" and was not "inconsistent with Mansfield's guilt." Id. at 85-86, 538 S.E.2d at 267.

The evidence against Felder in the instant case is easily distinguished from the bare suspicion cast on Guan Perry in Mansfield. Importantly, the police were convinced that the evidence was more substantial than a bare suspicion. When the police obtained a search warrant for Felder's residence, the police represented to the magistrate that they had sufficient evidence to establish probable cause that evidence of Pritchard's murder would be found in Felder's residence. Specifically, the police told the magistrate that "a witness" told the police "that a black male suspect was seen running form the incident location wearing red sneakers and had the number 23, on his clothing." Second Supp. R. 1. Further, "[t]he witness also advised that the suspect ran in the direction" of a street where Felder lived. Second Supp. R. 1. The affidavit claimed the case agent "observed a person matching the description a short time" after the murder. Second Supp. R. 1. In short, the following facts were sufficient to establish probable cause to search Felder's home for evidence of Pritchard's murder: Felder's appearance matched the description provided by a witness, his home was within walking distance of the murder scene, and he was found in the area within hours of the murder.

When the magistrate signed the search warrant, the magistrate agreed with the police that sufficient evidence existed to establish probable cause that evidence of Pritchard's murder would be found in Felder's residence. The subsequent argument by the solicitor at trial that the evidence against Felder merely established a suspicion was incredulous and disingenuous, at best.

Indeed, the evidence against Felder showed a connection to the murder. As the police determined, Felder matched most of Williams' description of the perpetrator. Of all the witnesses, Williams provided the most specific description, and Felder satisfied almost all of the important criteria relayed by Williams. Just a few hours after the shooting, Felder was wearing the jacket with

the distinctive 23 on the back. He was even wearing red shoes as Williams said. Felder also had shoulder-length dreadlocks as described by Williams and Celest. Felder's alleged alibi was implausible due to the date. There was no court on December 23. Felder equivocated between claiming he had a court appearance and claiming he was meeting with his lawyer. Further, his alleged alibi was confirmed by his girlfriend and a friend, both of whom had motives to lie in light of their relationships with Felder. Critically, Felder's jacket tested positive for gunshot residue. Thus, evidence of Felder's guilt established a sufficient connection to the murder to pass this portion of the Gregory test. It was not that Felder matched a general description of a perpetrator as it was in Mansfield; here, Felder matched a very specific description of the perpetrator. This Court's reliance on Mansfield is misplaced, and Appellant requests rehearing on the facts and law overlooked or misapprehended by this Court in arriving at its conclusion to equate the two.

Not only was the evidence of Felder's guilt inconsistent with Appellant's guilt, but the evidence established a connection between Felder and the murder. When the police established probable cause to search Felder's home, the police used Felder's description matching the description provided by a witness, his location to the murder scene shortly after the murder, and his home being within walking distance of the murder scene. The evidence against Felder only strengthened subsequently. Felder's alleged alibi grew less reliable and more incredulous as the police learned there was no court on December 23. Finally, and most damning, Felder's jacket – the one with the distinctive number 23 on the back – tested positive for gunshot residue.

Defective Search Warrant

Prior to trial, defense counsel moved to suppress evidence found in Appellant's home pursuant to a flawed search warrant. R. 81, ll. 14-16; Second Supp. R. 1. Specifically, defense counsel argued the search warrant affidavit contained deliberately false statements or false

statements made with reckless disregard for the truth. Second Supp. R. 1. First, the affidavit presented to the magistrate indicated that Appellant fit the description of the suspect as provided by the witnesses. R. 82, ll. 12-16; R. 82, l. 23 – R. 83, l. 1. However, the witnesses gave wildly varying descriptions of the assailant. R. 39, ll. 5-7; R. 82, ll. 17-18. There was not a single description of the assailant; instead, there were many descriptions that varied tremendously. R. 83, ll. 1-4. Specifically, the search warrant affidavit informed the magistrate "[t]he assailant was wearing running pants or some type of trouser stone washed with a shirt of some type with the number 23 on it, and a pair of red sneakers." Second Supp. R. 1. Further, the affidavit claimed "[t]hese descriptions are listed in various statements of witnesses in the area of the homicide." Second Supp. R. 1. After recounting a witness's statement that "the assailant was dropping cash and his cell phone from his pant pocket ... as he was running away from the residence," the affidavit asserted that Appellant "fit[] the physical description of the person fleeing the scene, dropping the cell phone." Second Supp. R. 1.

Additionally, the search warrant affidavit contained only a conclusory statement regarding the cell phone recovered near the deceased's home. Specifically, the affidavit said "[t]he cellphone was taken as evidence by the CCSO, and during the investigation it was determined that the above subject Joseph Lamar Brown, Jr. is the owner." Second Supp. R.1. The affidavit contained "no information" to explain the source of the affiant's claim that the phone belonged to Appellant. R. 83, ll. 5-9; R. 84, ll. 20-24; Second Supp. R. 1. When the police obtained the search warrant, they had not obtained access to the contents of the phone. R. 84, ll. 12-14.

On January 3, 2017, the police executed the search warrant and recovered two boxes of .9 millimeter ammunition. R. 237, l. 3 – R. 245, l. 24; Second Supp. R. 1. One of the boxes contained

four .9 millimeter Speer Luger bullets, which were the same type of shell casing found at the crime scene. R. 237, l. 3 – R. 245, l. 24; Second Supp. R. 1.

As previously discussed during the pre-trial hearing, several witnesses testified regarding their observations on the day of Pritchard's death. Goldstein provided an overview of the information the police obtained, including descriptions of the assailant from the various witnesses on the scene. R. 24, ll. 18-20. Hugh Potter Pritchard, who was present in the home when the shooting occurred, told the police the assailant was a black male who stood between five eight and five ten, weighed about 170 pounds, and was wearing all black clothing. R. 26, ll. 2-5; R. 26, ll. 9-11. According to Pritchard, the man wore a mask over his face and a hat over his head. R. 26, l. 11; R. 40, ll. 18-20. Pritchard was certain the shooter "wasn't a teenager," and he estimated the man was in his late twenties or thirties. R. 40, ll. 14-17.

From her window, Celest she saw an individual running down the street away from the deceased's home shortly after the shooting. R. 27, ll. 7-11. According to Celest, the individual dropped cash money and a cell phone. R. 27, ll. 11-14. The individual picked up the cash, but he left the cell phone. R. 27, ll. 17-20. The man was "a black male," – medium-dark complexion – wearing "stone-gray pants," and had shoulder length dreads. R. 28, ll. 17-18; R. 42, ll. 12-15. He was of a medium build, and stood between five ten and six foot. R. 28, l. 18; R. 41, ll. 22-25.

Williams saw "a young black male, dark skin, black hoodie with the number 23 on the back of it." R. 29, ll. 19-21. The number 23 was multicolored. R. 29, ll. 22-25. The man also wore black warm-up pants and red Converse sneakers. R. 30, ll. 8-9. Critically, Williams said the man had dreads. R. 30, ll. 15-16. Further, Williams told the police the man was wearing a skully cap with white writing on it. R. 43, ll. 9-11.

Defense counsel argued the police failed to disclose to the magistrate that the multiple descriptions of the assailant were vastly different, and that Appellant "matched" the descriptions only in the simplest of ways – he was a black male of medium build. R. 84, l. 25 – R.85, l. 10; R. 87, ll. 18-23. Importantly, Appellant did not match the portions of the descriptions that were consistent – long dreads. R. 85, ll. 6-10. As counsel argued, to say Appellant matched the description provided by any of the witnesses was a false statement. R. 86, ll. 17-21. Further, law enforcement failed to inform the magistrate that the police stopped someone else – Felder – near the crime scene within hours of the shooting based upon Felder matching significant portions of a specific description provided by a witness. R. 88, ll. 7-11. Finally, the affidavit contained a conclusory statement that the phone belonged to Appellant, but failed to inform the magistrate of the evidence that allegedly support such a conclusion. R. 83, ll. 5-25; R. 84, ll. 20-24; R. 91, ll. 4-8.

As predicted, the state argued the police "had basically three descriptions of a black male of medium build." R. 88, ll. 22-23. In the solicitor's view, "all [the affiant] was saying in that affidavit is when they got the DMV information for [Appellant]; he was a black male of medium build." R. 88, ll. 23-25; R. 89, ll. 2-6. According to the solicitor, "that's what [the affiant] was trying to state in the affidavit." R. 89, l. 1.

Finally, the solicitor argued that the affiant's sworn statement that Appellant matched the descriptions provided by witnesses was not what established probable cause for the search. R. 89, ll. 7-12. Instead, the only portions of the affidavit necessary to establish probable cause were that "Johnny Pritchard [was] shot, black male [was] seen running from the - - from the direction of the residence, dropping a phone in the ditch," and that the phone belonged to Appellant "without question." R. 89, ll. 7-12; R. 83, ll. 22-24. To support its conclusion that the phone belonged to

Appellant, the state argued to the judge that information not known to the magistrate supported the conclusion. Specifically, the state argued the phone had a picture on its lock screen. R. 89, ll. 21-23. The picture was of Appellant and his girlfriend, which the police determined after first locating Appellant's girlfriend and asking her to identify the person in the photograph with her. R. 90, ll. 1-20. In short, the state seemed to concede that the statement regarding Appellant matching the descriptions was false and argued instead that the affidavit supported a finding of probable cause without consideration of the false statement. Further, the state seemed to concede that the affidavit contained only a conclusion about the phone and failed to supply the necessary information that allegedly supported the conclusion. Nevertheless, the solicitor argued the affidavit supported probable cause for the search.

Incredulously, the trial judge wanted to know if any case said "a police officer has got to sit down and put in great detail what the descriptions are, other than putting a conclusion or a statement in there under oath in his affidavit that he matched these descriptions in his opinion." R. 85, ll. 11-22. Ultimately, the trial judge denied the motion to exclude the fruits of law enforcement's search of Appellant's residence. R. 91, ll. 20-22.

On January 3, 2017, the police searched Appellant's home pursuant to the flawed search warrant. R. 238, ll. 3-9. In the bedroom that law enforcement claimed belonged to Appellant, the police found two boxes of ammunition under a box spring. R. 239, ll. 8-14; R. 285, l. 23 – R. 286, l. 10. According to one of the officers, one of the boxes contained some "CCI .9 mm Luger" and some "Speer .9mm Luger." R. 241, ll. 3-5; R. 245, ll. 8-20.

During the trial, it was revealed that when the police arrived at the scene of the shooting, they found "a Speer .9mm Luger shell casing that was recovered from the living room floor of the residence." R. 229, ll. 4-5. Additionally, a state's witness told the jury that the fired bullet

recovered from Pritchard's body during the autopsy was "most consistent with [a] .9mm Luger caliber bullet." R. 401, l. 16 – R. 402, l. 9. Based upon further examination, the witness opined the fired bullet was either Fabrique Nationale, Ruger, or Smith and Wesson. R. 403, ll. 3-10. The witness also examined the shell casing found at Pritchard's home. R. 403, ll. 18-25. According to the witness, the shell casing was "Speer manufacturer .9mm Luger caliber." R. 404, ll. 17-18. She opined the cartridge case and the fired bullet were both .9mm Luger caliber. R. 404, ll. 19-22. Finally, and critically, the witness opined that "a few" of the rounds in the box of ammunition found in Appellant's house had "a Speer-head stamp with the same color case and type of bullet that [she] examined in this case." R. 409, l. 18 – R. 410, l. 3.

During his closing argument, the solicitor capitalized on the ammunition the police illegally seized from Appellant's home and the testimony he was able to illicit based upon the judge's erroneous ruling permitting its introduction. He told the jurors that "the ammo, the Speer .9 mm Luger rounds found under [Appellant's] box spring" were the "same" "make and caliber of ammunition" "as the one that killed Johnny Pritchard." R. 487, ll. 13-21.

Appellant's right for his affects to be free from a search not based upon probable cause is rooted in the United States Constitution and the South Carolina Constitution. The Fourth Amendment to the United States Constitution provides for

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Additionally, the South Carolina Constitution provides similarly "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated" and for "no warrants [to] issue but upon

probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained." S.C. Const. Art. 1, § 10.

Thus, a search warrant must be based upon probable cause. "Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious person, under the circumstances to believe likewise." Wortman v. City of Spartanburg, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992); see also State v. George, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996); Jones v. City of Columbia, 301 S.C. 62, 65, 389 S.E.2d 662, 663 (1990); Gist v. Berkeley County Sheriff's Dep't, 336 S.C. 611, 615, 521 S.E.2d 163, 165 (Ct. App. 1999). If the warrant affidavit is insufficient to establish probable cause, it may be supplemented by sworn oral testimony before the magistrate. State v. Crane, 296 S.C. 336, 338, 372 S.E.2d 587, 588 (1988); State v. Sachs, 264, S.C. 541, 216 S.E.2d 501 (1975). Evidence obtained in violation of the Fourth Amendment is inadmissible in both state and federal court. State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001) (citing Weeks v. United States, 232 U.S. 383 (1914), Mapp v. Ohio, 367 U.S. 643 (1961), Wolf v. Colorado, 338 U.S. 25 (1949)).

In Franks v. Delaware, 438 U.S. 154, 171-172 (1978), the United States Supreme Court held that the Fourth and Fourteenth Amendments gave defendants the right to challenge the veracity of warrant affidavits after the warrants were issued and executed in certain circumstances, including where the affidavit omits necessary information. The Court explained that "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." Franks v. Delaware,

438 U.S. 154, 155-156 (1978). If the falsity or reckless disregard for the truth is established by a preponderance of the evidence, then the court must set aside the false material and determine whether the affidavit's remaining content provides probable cause. Id. In other words, first, a defendant must show the affidavit contained deliberately false statements or false statements made with reckless disregard for the truth. Second, a defendant must show that excluding those false statements, the warrant does not establish probable cause.

Our Supreme Court, applying Franks, found probable cause lacking in State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999). The Court found the officer acted recklessly in making a false statement and in omitting exculpatory information. Id. at 555, 524 S.E.2d at 397. The officer testified that although the affidavit contained the sentence indicating that an individual told a confidential informant that the individual had crack, the individual never said this. Additionally, the officer testified that he neglected to place in the affidavit that the informant had visited the individual's house and informed the officer that no crack was there and that the individual said he was not going to cook crack in his house because his wife was trying to go straight. Id. at 553, 524 S.E.2d at 396. The Court then examined the affidavit by excluding the false information and inserting the exculpatory information. Id. at 555, 524 S.E.2d at 397. The Court concluded that the affidavit failed to support a finding of probable cause to search the individual's house. Id.

The Court presumed that the Fourth Amendment did not require an affiant to include all potentially exculpatory information in the affidavit. However, the Court found the information omitted in Missouri's case went "to the very heart of the affidavit's purpose," which was to establish probable cause to search the individual's apartment for crack cocaine. The Court explained that the omitted information did more than create "some uncertainty," rather it created "an affirmative hurdle which the remaining portions of the affidavit must overcome." Id. at 555-

556, 524 S.E.2d at 397-398. Although finding the case presented a "close call on the probable cause determination," the Court held the combination of the officer's false statement and omission of critical facts "pollute[d] the affidavit to the extent that a magistrate could not have found that probable cause existed to issue the search warrant." Id. at 556, 524 S.E.2d at 398.

Just as our Court has held that material information omitted from a warrant may qualify as a false statement or reckless disregard of the falsity of the statement, other federal courts of appeals have concluded the same. See Madiwale v. Savaiko, 117 F.3d 1321, 1327 (11th Cir. 1997); United States v. Martin, 615 F.2d 318, 329 (5th Cir. 1980).

The search warrant affidavit for Appellant's home contained deliberately false statements and omissions. Contrary to the affidavit's assertion that Appellant matched the witnesses' descriptions of the person seen running from the shooting scene, Appellant only "matched the descriptions" in the most rudimentary of ways because the descriptions were vastly different from each other. In fact, the state argued that the descriptions expressed two commonalities: (1) black male, and (2) medium build. If this were all that were necessary to satisfy probable cause, then the requirement would be meaningless. Thus, the state argued, Appellant matched the descriptions. However, the descriptions were much more vivid and wildly contrary to each other.

For example, one witness described the assailant as a "young boy," and another described him as someone in his twenties or thirties. One witness said the person was wearing sweatpants, another witness said he was in all black clothing, and the third witness said he was wearing black jogging pants. Only one witness described the black hoodie with a number 23 on the back and distinctive red shoes. Two witnesses said the person had dreadlocks, and the other witness provided no description about the person's hair at all.

Frankly, Appellant did not match the descriptions provided, except in the most basic sense because he was a black male of medium build. However, the police informed the magistrate that Appellant *matched* the descriptions of the assailant provided by the witnesses. This was a false statement. To the extent there was any truth to the statement, it was made with reckless disregard of the truth because of the considerable disagreement among the witnesses on the description of the assailant and the distinctive attributes provided for which Appellant did not match. Unfortunately, this Court concluded that Goldstein's statement that Appellant matched the description of the assailant was not a false statement because despite the significant discrepancies in the descriptions given, "all of the witnesses described the perpetrator as a medium-build, black male, dressed in dark clothing, between the ages of eighteen and thirty." The vagueness of this alleged consistency cannot be overstated. The number of individuals who satisfy this description is astronomical. Surely, if the magistrate had known that it was only this bare similarity between the descriptions and Appellant, the magistrate would not have believed Appellant "matched" the description of the perpetrator where the specific descriptors offered by the witnesses were absent. Appellant respectfully requests this Court to rehear the matter to address the significant facts overlooked or misapprehended.

Further, the statements in the search warrant affidavit regarding the cell phone were merely conclusions without any basis for the magistrate to determine probable cause. "Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient." State v. Weston, 329 S.C. 287, 291, 494 S.E.2d 801, 803 (1997) (internal quotation omitted). Yet, this Court absolved law enforcement of this fatal error. According to this Court facts "omitted from the search warrant affidavit" "supported law enforcement's reasonable belief that the iPhone recovered near the crime scene belonged to [Appellant]." How can information to

supplied to the magistrate support probable cause? This Court's reliance on information not transmitted to the magistrate misapprehends the law governing searches and seizures. Appellant respectfully requests rehearing concerning this Court's consideration of information about the cell phone not supplied to the magistrate.

Removing the false statements from the search warrant affidavit reveals a lack of probable cause. Second Supp. R. 1. Further, supplying the significant omitted information reveals a lack of probable cause. Appellant did not match the detailed descriptions, including a distinctive hairstyle and clothing, offered by the witnesses. At best, Appellant matched the most basic description offered by those witnesses of a black male of medium build. By offering a mere conclusion as to the cell phone's ownership, the police failed to provide the magistrate with a basis for linking Appellant to the phone. The evidence seized pursuant to this defective search warrant should have been seized. Appellant respectfully requests rehearing on this matter.

Respectfully Submitted,

Susan B. Hackett

SUSAN B. HACKETT
Appellate Defender

This 12th day of September, 2022.

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable J. C. Buddy Nicholson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSEPH LAMAR BROWN, JR.

APPELLANT

APPELLATE CASE NO. 2019-000781

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon Julianna E. Battenfield, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is juliannabattenfield@scag.gov;; and Joseph Lamar Brown, #378211, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 12th day of September, 2022.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

The South Carolina Court of Appeals

The State, Respondent,

v.

Joseph Lamar Brown, Jr., Appellant.

Appellate Case No. 2019-000781

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:
Alan McCrory Wilson, Esquire
Melody Jane Brown, Esquire
Susan Barber Hackett, Esquire
Caroline Scrantom, Esquire
Julianna E. Battenfield, Esquire
Donald J. Zelenka, Esquire
The Honorable J. C. Nicholson, Jr.

FILED
Oct 20 2022