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

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on October 20, 2022. App. 50.

QUESTIONS PRESENTED

I. Did the Court of Appeals, erroneously analyze *Blueford v. Arkansas*, 566 U.S. 599 (2012), and Rule 606(b), SCRE, to affirm the trial judge's refusal to dismiss the charge of armed robbery against Petitioner based upon a violation of his constitutional protections against double jeopardy where the first jury declared it had reached a unanimous verdict of not guilty on the charge?

II. Did the Court of Appeals err by affirming the trial judge's suppression of third party guilt evidence where Petitioner identified a specific person as the assailant, the person matched significant portions of the description provided by eyewitnesses, the person's guilt was inconsistent with Petitioner's guilt, the person lived within walking distance of the shooting scene and was found in the area of the shooting within hours of the shooting, and the person's jacket tested positive for gunshot residue?

III. Did the Court of Appeals erroneously affirm the trial court's failure to suppress evidence secured by a search warrant where (1) the affidavit contained false statements, including that that Petitioner "fits the physical description of the person fleeing the scene" when there was no single description and the descriptions available varied wildly, and (2) the affidavit provided merely conclusory statements regarding ownership of a cell phone found near the scene, and exclusion of these statements from the affidavit resulted in a lack of probable cause?

STATEMENT OF THE CASE

Petitioner was tried *twice* for the same crime. Twice, his liberty was put in jeopardy in direct contravention of the federal and state constitutions. A Charleston County grand jury indicted Petitioner for the murder of Hugh Pritchard, first degree burglary, armed robbery, and possession of a weapon during the commission of a violent offense. R. 1154-1155; R. 1158-1159; R. 1161-1162; R. 1164-1165. The state first called Petitioner to trial on June 11-14, 2018, before the Honorable Kristi Harrington and a jury. R. 567. While deliberating, the jury indicated by a note that it had reached a unanimous verdict of not guilty on armed robbery, but the jury was unable to reach unanimous verdicts on the other indictments. R. 1118-1119; Supp. R. 1. Judge Harrington instructed the jury pursuant to Allen v. United States, 164 U.S. 492 (1896), but despite the additional instruction, the jury was unable to reach a unanimous verdict on the *remaining* charges, and the judge declared a mistrial. Supp. R. 1; R. 1119-1123.

Double jeopardy violation

The state, represented by D. Bruce Durant and Jason Heggelke, called the case for a *second* trial on November 5, 2018. R. 1. Teresa L. Norris and Taylor L. Seman represented Petitioner. R. 1. Defense counsel moved to dismiss the armed robbery charge based upon double jeopardy. R. 11, ll. 2-16; Supp. R. 1. Defense counsel had obtained affidavits from two jurors indicating the jury unanimously decided Petitioner was not guilty of armed robbery and never revisited discussion of that offense during their deliberations. R. 12, ll. 8-11; 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 Petitioner's motion to dismiss. R. 93, l. 22 – R. 94, l. 5.

Improper exclusion of third-party guilt

In light of the first trial, during which evidence of a third party's guilt was admitted, resulting in a mistrial, the state moved to exclude such evidence during the second trial. Several witnesses testified in camera regarding their observations on the day of Pritchard's death. 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 5'8" and 5'10", wore all black clothing, and weighed about 170 pounds. R. 26, ll. 2-11. The shooter's face was covered. R. 26, l. 11.

Celest McBride, who lived a short distance from the deceased, told the police that she saw an individual running – a "fast jog" – down the street away from the deceased's home around the time of the shooting. R. 26, l. 20 – R. 27, l. 11; R. 53, ll. 20-23; R. 54, ll. 16-18; R. 58, ll. 10-12. 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 5'10" and 6'. R. 28, l. 18; R. 55, ll. 23-25.

Shortly after the shooting, Merit 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. Just as Williams described, the man's 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. Felder caught Goldstein's attention because "he *fit* Mr. Williams' description." R. 46, ll. 16-19 (emphasis added).

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" at 1 p.m. on December 23, 2016. R. 34, ll. 15-24; R. 35, ll. 4-7; R. 48, l. 25 – R. 49, l. 1. Felder claimed that when he arrived at the courthouse, his attorney was not there; therefore, he "rescheduled, and then went to Cordesville." R. 36, ll. 4-8; R. 50, ll. 10-12. 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. Yet, the police later learned there was no court on December 23, 2016, in Dorchester. R. 49, ll. 2-17.

Based upon the substantial evidence of probable cause, the police the police obtained a search warrant to search Felder's house. R. 47, l. 23 – R. 48, l. 3. 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[1] 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 Petitioner's guilt and raised a reasonable presumption of Petitioner's innocence. R. 68, ll. 11-13; Second Supp. R. 239. 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, interrogated him, and seized his clothing based upon the significant evidence against him. R. 69, ll. 6-11; Second Supp. R. 239. Importantly, Felder had shoulder length dreadlocks, unlike Petitioner. 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

[1] Defense counsel submitted the transcript from Petitioner's first trial to show how counsel would have used the evidence of third party guilt, which had not been excluded then. R. 94, ll. 9-21; R. 567. Counsel proffered body camera video from an officer who went to Felder's home. R. 297, ll. 7-11; Court's Exhibit #11. Additionally, counsel proffered photographs showing Felder, which demonstrated that his physical description, including his clothing, largely matched what the witnesses described. R. 297, l. 24 – R. 298, l. 1; Court's Exhibits #5, 6, 7, 8, 9. Counsel would have questioned law enforcement regarding their suspicions of and interactions with Felder as she had during the first trial. R. 298, ll. 1-18; R. 1127. Also, counsel would have questioned one of the officers about a shooting that occurred when Felder was detained. R. 300, ll. 16-20. Finally, counsel would have (1) introduced screenshots from the body cam of one of the officers showing Felder's arrest and (2) called a gunshot residue expert to explain the gunshot residue that was found on Felder's clothing. R. 302, l. 17 – R. 303, l. 4; Court's Exhibit #13.

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.

According to the solicitor, "[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 (emphasis added). The solicitor claimed that "probably a third of the black community" had dreadlocks and "that another third of them have" "Michael Jordan's number." R. 77, ll. 1-9.

The trial judge concluded the evidence against Felder was "a mere suspicion." R. 69, ll. 22-24. Despite knowing that Felder's alleged alibi was confirmed by his girlfriend and that Felder's claim that he went to the courthouse for a court appearance with his lawyer on December 23 was preposterous, the judge noted Felder's alibi, which the police "checked," as a basis to suppress the evidence. R. 73, ll. 20-22. The judge seemed persuaded simply because the police did not charge Felder. R. 73, ll. 24-25.

Illegal search and seizure

Finally, prior to trial, defense counsel moved to suppress evidence found in Petitioner's home pursuant to a flawed search warrant. R. 81, ll. 14-16; Second Supp. R. 1. 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 Petitioner *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 such that no one person could possibly fit the description of the suspect provided by the witnesses. R. 39, ll. 5-7; R. 82, ll. 17-18; 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 Petitioner "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 "it was determined that the above subject Joseph Lamar Brown, Jr. is the owner" of the cell phone recovered from one of the witnesses. Second Supp. R.1. The affidavit contained "no information" to explain the source of the affiant's claim that the phone belonged to Petitioner. R. 83, ll. 5-9; R. 84, ll. 20-24; Second Supp. R. 1. When the police obtained the search warrant for Petitioner's home, 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.[2]

Defense counsel argued the police failed to disclose to the magistrate that the multiple descriptions of the assailant were vastly different, and that Petitioner "matched" the descriptions only in the simplest of ways – he was a black male of medium build. R. 84, l. 25 – R.85, l. 10e; R. 87, ll. 18-23. Importantly, Petitioner did not match the portions of the descriptions that were

[2] 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.

consistent – long dreads. R. 85, ll. 6-10. As counsel argued, to say Petitioner 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 Petitioner, but contained no evidence that allegedly supported 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 [Petitioner]; 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 Petitioner 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 Petitioner "without question." R. 89, ll. 7-12; R. 83, ll. 22-24. To support its conclusion that the phone belonged to Petitioner, the state argued to the trial 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. In short, the state conceded that the statement regarding Petitioner 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 conceded that the

affidavit contained only a conclusion about the phone and failed to supply the necessary information that allegedly supported the conclusion.

Judge Nicholson 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, Judge Nicholson denied the motion to exclude the fruits of law enforcement's search of Petitioner's residence. R. 91, ll. 20-22.

During his closing argument, the solicitor capitalized on the ammunition the police illegally seized from Petitioner'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 [Petitioner's] box spring" were the "same" "make and caliber of ammunition" "as the one that killed Johnny Pritchard." R. 487, ll. 13-21.

Ultimately, the second jury found Petitioner guilty of murder, first degree burglary, attempted armed robbery, and possession of a weapon during the commission of a violent crime. R. 533, ll. 2-22. Judge Nicholson sentenced Petitioner to life imprisonment without the possibility of parole for murder, fifty years imprisonment for burglary, ten years for attempted robbery, and five years for the weapon. R. 543, l. 24 – R. 544, l. 19; R. 1156-1157; R. 1160; R. 1163; R. 1166.

Petitioner filed a motion to reconsider his sentence. R. 1149. Judge Nicholson convened a hearing on the motion on May 8, 2019. R. 545. On May 10, 2019, Judge Nicholson issued an order reconsidering Petitioner's sentences. R. 1151. He amended Petitioner's sentence for murder from life imprisonment to fifty-two years. R. 1151; R.1157. Petitioner's remaining sentences were unchanged. R. 1151.

On May 10, 2019, Petitioner served his notice of appeal. After oral argument on April 5, 2022, the Court of Appeals issued a published opinion affirming Petitioner's convictions and sentences. State v. Brown, Op. No. 5942 (S.C. Ct. App. filed Aug. 31, 2022) (Howard Adv. Sh. No. 31 at 39); App. 1-21. Petitioner filed a petition for rehearing, which was denied. App. 22-50. Petitioner now files this petition for writ of certiorari seeking review of the erroneous published opinion issued by the Court of Appeals.

ARGUMENT

I. The Court of Appeals erroneously analyzing *Blueford v. Arkansas*, 566 U.S. 599 (2012), and Rule 606(b), SCRE, affirmed the trial judge's refusal to dismiss the charge of armed robbery against Petitioner based upon a violation of his constitutional protections against double jeopardy where the first jury declared it had reached a unanimous verdict of not guilty on the charge.

Both the federal and state constitutions protect individuals from being twice placed in jeopardy by the state. U.S. Const. amend V; Benton v. Maryland, 395 U.S. 784 (1969); S.C. Const. Art. 1, § 12. "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). The guarantee against double jeopardy protects against a second prosecution for the same offense after acquittal. 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"). 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.

Petitioner 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 Petitioner of the armed robbery charge. The note expressed the jury's finality with regard to the armed robbery indictment. Further, the affidavits presented by Petitioner 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. The Court of Appeals erroneously concluded the affidavits should not be considered pursuant to Rule 606(b), SCRE. Under the rule, 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 the jurors' minds or emotions. Rule 606(b), SCRE. The affidavits presented here did not concern a matter or statement occurring during the deliberations. The affidavits concerned the opposite – the jurors did not

revisit the armed robbery indictment after the Allen instruction. Thus, the affidavits were properly before the trial judge and the appellate court.

Finally, and most importantly, the supplemental instruction given by Judge Harrington showed the jury did not reconsider its verdict on armed robbery. 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.

The Court of Appeals relied upon the distinguishable case of Blueford v. Arkansas, 566 U.S. 599 (2012), to affirm the trial judge's erroneous conclusion that the second trial did not violate Petitioner's right to be free from double jeopardy. 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.

Petitioner'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, Petitioner's first jury – just as his second jury – was not consider a single indictment. Instead, the state called Petitioner 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, Petitioner'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).

The Court of Appeals, just as the trial judge did, erred in failing to bar Petitioner's re-trial on the armed robbery indictment where the first jury acquitted him of the offense. The Court of Appeals placed form above substance. Petitioner respectfully requests this Court grant certiorari on this issue as the opinion issued by the Court of Appeals conflicts with the opinions issued by the United States Supreme Court concerning this federal issue. Rule 242(b)(5), SCACR. Furthermore, this case involves substantial federal and state constitutional issues – the right to be free from being twice put in jeopardy of losing one's liberty. Rule 242(b)(4), SCACR.

II. The Court of Appeals erred by affirming the trial judge's suppression of third party guilt evidence where Petitioner identified a specific person as the assailant, the person matched significant portions of the description provided by eyewitnesses, the person's guilt was inconsistent with Petitioner's guilt, the person lived within walking distance of the shooting scene and was found in the area of the shooting within hours of the shooting, and the person's jacket tested positive for gunshot residue.

Due Process requires the prosecution prove every element of the charged offense beyond a reasonable doubt – including the element that the defendant is the actual perpetrator. In re Winship, 397 U.S. 358 (1970); Todd v. State, 355 S.C. 396, 400, 585 S.E.2d 305, 307 (2003); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000). The United States Constitution guarantees a criminal defendant the right to present a complete defense through the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment. Crane v. Kentucky, 476 U.S. 683, 690 (1986); State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986) (holding the Sixth Amendment "constitutionalizes" the right to present a defense in a criminal trial). "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane, 476 U.S. 683, 690 (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)). South Carolina's Constitution provides similarly: "Any person charged with an offense shall enjoy the right ... to be fully heard in his defense...." S.C. Const. art. I, § 14; see also S.C. Code Ann. § 17-23-60 ("Every person accused shall, at his trial, be allowed ... to produce witnesses and proofs in his favor....").

"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)). As this case involves the substantial constitutional issue of the right to present a defense, this Court should grant certiorari. See Rule 242(b)(4), SCACR.

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).

This 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). 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.

This 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. This 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.

The Court of Appeals erroneously relied upon its own decision in State v. Mansfield, 343 S.C. 66, 85, 538 S.E.2d 257, 267 (Ct. App. 2000), to affirm the trial judge's suppression of the significant third-party guilt evidence presented here. The Court of Appeals ignored this Court's decision in Miller; thus, the decision issued by the Court of Appeals directly conflicts with a

decision of this Court, and this Court should grant certiorari for this reason. See Rule 242(b)(3), SCACR.

The proffered evidence – that Felder was the one who shot Pritchard and ran from the scene – was inconsistent with Petitioner's guilt. According to the only eyewitness to the shooting, there was only one shooter. Additionally, each of the witnesses who described someone running from the scene only described one person. Thus, the first part of the Gregory test was satisfied by the evidence presented.

In ruling that Petitioner had not satisfied the threshold requirement for presentation of third-party evidence, the Court of Appeals suggested that presentation of such evidence required a confession by the third party. This places too high a burden on defendants. Here, 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.

III. The Court of Appeals erroneously affirmed the trial court's failure to suppress evidence secured by a search warrant where (1) the affidavit contained false statements, including that that Petitioner "fits the physical description of the person fleeing the scene" when there was no single description and the descriptions available varied wildly, and (2) the affidavit provided merely conclusory statements regarding ownership of a cell phone found near the scene, and exclusion of these statements from the affidavit resulted in a lack of probable cause.

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." Further, "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). 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)).

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.

This Court, applying Franks, found probable cause lacking in State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999). The officer acted recklessly in making a false statement and in omitting exculpatory information. Id. at 555, 524 S.E.2d at 397. Although the affidavit contained the sentence indicating that an individual told a confidential informant that the individual had crack, the individual never said this. The officer 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. Examining the affidavit by excluding the false information and inserting the exculpatory information, this Court concluded the affidavit failed to support a finding of probable cause. Id. at 555, 524 S.E.2d at 397.

This 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." 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," this 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.

The search warrant affidavit for Petitioner's home contained deliberately false statements and omissions. Contrary to the affidavit's assertion that Petitioner matched the witnesses' descriptions of the person seen running from the shooting scene, Petitioner 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, Petitioner 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.

Petitioner 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 Petitioner *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 Petitioner did not

match. Further, the statements in the search warrant affidavit regarding the cell phone were merely conclusions. "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).

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. Petitioner did not match the detailed descriptions, including a distinctive hairstyle and clothing, offered by the witnesses. At best, Petitioner 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 Petitioner to the phone. The trial judge erred in failing to suppress the evidence that resulted from the execution of the search warrant pertaining to Petitioner's home.

CONCLUSION

Petitioner respectfully requests this Court issue the writ of certiorari and order full briefing on the issues presented.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of November, 2022.

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SC Court of Appeals

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. (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

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 writ of certiorari to the Court of Appeals and appendix in the above-referenced 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; the South Carolina Court of Appeals; and on Joseph Lamar Brown, #378211, at Turbeville Correctional Institution, 1578 Clarence Coker Hwy., Turbeville, SC 29162, this 28th day of November, 2022.

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