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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

On Petition for Writ of Certiorari to the Court of Appeals
Appeal from Charleston County
Honorable J.C. Nicholson, Jr., Circuit Court Judge

Court of Appeals Opinion No. 5942 (S.C. Ct. App. Filed August 31, 2022).
Appellate Case No. 2019-000781

THE STATE,……………………………………….RESPONDENT,

v.

JOSEPH LAMAR BROWN, JR.,…………………...………………...…...PETITIONER.

RETURN TO PETITION
FOR WRIT OF CERTIORARI

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I.

Petitioner's first jury did not publish a final verdict on the record for armed robbery, and no party moved to document the jury's note according to the Rules of Criminal Procedure or case law. Therefore, a mistrial was a legal, manifest necessity, and Court of Appeals properly upheld the trial court's conclusion that the Double Jeopardy Clause was not violated by a second armed robbery prosecution……………….11

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Petitioner's third-party guilt evidence was rightly excluded from trial because the facts and circumstances Petitioner pointed to only amounted to bare suspicion. The Court of Appeal properly upheld the exclusion because being found in the vicinity of a crime hours after it occurred wearing Michael Jordan's number – and wearing dreadlocks – is not substantial evidence of guilt……………………...14

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PETITIONER'S STATEMENT OF 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 the 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?

RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether the Court of Appeals properly found the Double Jeopardy Clause was not violated when the State retried Petitioner for armed robbery after no verdict was published on the record in the first trial and the defense did not move to make the jury's note to the judge official in any capacity?

II. Whether the Court of Appeals properly upheld the suppression of third-party guilt evidence when the Petitioner only proffered facts and circumstances that amounted to bare suspicion of guilt?

III. Whether the Court of Appeals properly affirmed the denial of the motion to suppress when the warrant affidavit contained no false statements, contained no statements made with reckless disregard for the truth, but contained good faith facts sufficient to establish probable cause for the search?

STATEMENT OF THE CASE

The State has the right to re-try a defendant on an indictment where his first trial ended in mistrial due to a manifest legal necessity. That is what occurred here. Petitioner was indicted by the Charleston County Grand Jury for the murder of Hugh Pritchard, burglary first degree, armed robbery, and possession of a weapon during the commission of a violent crime in July 2017. R. 1154-1155, R. 1158-1159, R. 1161-1165. Deputy Solicitor D. Bruce DuRant prosecuted the case, and Theresa L. Norris and Taylor J. Seman, Esquires, represented Petitioner. R. 1.

Petitioner's first trial ended with a hung jury before the Honorable Kristi Harrington on June 14, 2018. R. 567. Petitioner claims the State violated the Fifth Amendment's Double Jeopardy Clause because after closing arguments concluded and the charge on the law was given, the jury sent out a note to the judge a few hours into deliberations. R. 1118-1119. They indicated they were unable to reach a unanimous verdict on any of the indictments except the armed robbery one, which they said they might find Petitioner not guilty of. R. 1118-1119, Supp. R. 1. Judge Harrington gave the jury an *Allen*[1] charge, but the jury was unable to reach any final verdicts, and as neither party requested any jury verdict to be published on the record, the judge declared a mistrial. R. 11-14, R. 93-94, R. 1119-1123, Supp. R. 1.

A second trial by jury on all indictments (including armed robbery) was conducted from November 5 to 9, 2018, before the Honorable J.C. Nicholson, Jr. R. 1. The jury found Petitioner guilty as charged of murder, burglary first degree, and possession of a weapon during the commission of a violent crime, guilty of the lesser-included offense of attempted armed robbery, and not guilty of armed robbery. R. 533. Judge Nicholson sentenced Petitioner originally to life without parole for murder, but later amended the sentence to fifty-two years for murder, fifty

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

concurrent years for burglary, ten concurrent years for attempted armed robbery, and five concurrent years for the weapons charge after a motion for reconsideration. R. 543, R. 1149, R. 1149-1151, R. 1156-1166.

Petitioner filed a notice of appeal in May of 2019, and oral arguments were held on April 5, 2022. The Court of Appeals of South Carolina affirmed on August 31, 2022, and denied Petitioner's subsequent petition for rehearing. *State v. Brow*n, 437 S.C. 550, 878 S.E.2d 364 (Ct. App. 2022). Petitioner filed a petition for writ of certiorari with this Court, and this Return follows.

STATEMENT OF FACTS

For purposes of this brief, Respondent relies on the relevant summary of facts of the crime, investigation, and trial as the South Carolina Court of Appeals set out in their direct appeal opinion:

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.

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.

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 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, 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. 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 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. 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. 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." He told law enforcement the runner had dreadlocks, the hoodie was "jet black," and the skull cap had white writing on it. 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. 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. Perez provided "the master machine that runs his system" to the police for their investigation. 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.

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." 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. 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 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.

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. 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]
>
> **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, Eichenmiller 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.

State v. Brown, 437 S.C. 550, 878 S.E.2d 364 (Ct. App. 2022) (emphasis added).

STANDARD OF REVIEW

In reviewing the Court of Appeals' holding for a Double Jeopardy claim, "[t]his Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." *Id*. at 6, 545 S.E.2d at 829; *State v. Parker*, 391 S.C. 606, 611-612, 707 S.E.2d 799, 801 (2011) (emphasis added).

"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).

"When reviewing a magistrate's decision to issue a search warrant, we must consider the totality of the circumstances." *State v. Jones*, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000) quoting *Illinois v. Gates*, 462 U.S. 213 (1983). "Although great deference must be given to a magistrate's conclusions, a magistrate may only issue a search warrant upon a finding of probable cause." *Jones*, 342 S.C. at 126, 536 S.E.2d at 678.

ARGUMENT

I. The Court of Appeals and the trial court both correctly affirmed Petitioner's armed robbery retrial. The first jury never reached a final, published verdict on the indictment in question, so the manifest legal necessity of a hung jury arose that warranted a Double-Jeopardy-Clause-approved retrial.

Petitioner argues the Court of Appeals erred in its analysis of *Blueford v. Arkansas*, 566 U.S. 599 (2012), and Rule 606(b), SCRE, when it upheld the trial court's decision to allow retrial of Petitioner on the armed robbery indictment. This is error. The Fifth Amendment's Double Jeopardy clause *does* protect individuals from being twice placed in jeopardy of life or limb by the state. U.S. Const. amend V. However, Double Jeopardy is not triggered when there is a ground of legal manifest necessity for a retrial, as there was here. *Ex Parte Prince*, 185 S.C. 150, 159, 193 S.E. 429, 433 (1937). A mistrial was providentially granted here. *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (a valid mistrial ground). This Court must affirm if <u>any</u> evidence is presented in support of the trial court's ruling. As there is plenty, this Court should deny the petition.

Here, there was no official verdict of acquittal on the record that would bar subsequent prosecution as there was in *Green v. United States*, 355 U.S. 184, 188 (1957), as Petitioner argues. Petition at 12. "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). The foreman here merely presented the trial court with a note mid-deliberation indicating they were unanimous for not guilty on armed robbery but were hung on the other three indictments. The trial court then gave an *Allen* charge, and deliberations resumed until a hung jury quite a bit later. "For 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).

At the start of the second trial, the defense attempted to offer affidavits from two jurors in support of its Double Jeopardy argument. However, the trial court (and the Court of Appeals) properly threw out the affidavits under Rule 606(b), SCRE,[2] which bars jurors from testifying about any matter that occurred while the jury was deliberating, with the exceptions of testimony referring to "extraneous prejudicial information" that was "improperly brought to the jury's attention" or the infiltration of outside influences. Petitioner argues the affidavits presented "did not concern a matter or statement occurring during the deliberations." Respondent disagrees. Inquiring about the meaning of a note sent to a judge, and then inquiring into whether the jury resumed deliberating after the note and the *Allen* charge, is exactly that: asking about a matter or statement that occurred during the deliberations. This is barred under Rule 606(b).

The Court of Appeals also properly relied upon the controlling case of *Blueford v. Arkansas*, 566 U.S. 599 (2012), to affirm the trial court on the Double Jeopardy issue. The *Blueford* case is quite like the case here: the United States Supreme Court held the foreperson's mid-deliberations' report to the judge that the jurors were currently unanimously voting not guilty as to capital murder and murder one but were hung on manslaughter <u>was not an indication of anything final</u>. *Blueford*, 566 U.S. at 603-604. "When the foreperson told the court how the jury had voted on each offense, the jury's deliberations had not yet concluded" and "nothing in the instructions prohibited the jury from reconsidering" its prior votes before the final verdict. *Blueford* at 606-607. "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.*

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[2] **Rule 606(b), SCRE**: "Upon an inquiry into the validity of a verdict or indictment, <u>a juror may not testify as to any matter or statement occurring during the course of a 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 or dissent from the verdict</u> or indictment or concerning the juror's mental processes in connection therewith . . ."

The same thing happened here. The foreman came out mid-deliberations with a note that informed the trial court the jury was currently unanimous for a not guilty on armed robbery, but that they were hung on every other indictment. *Brown*, 437 S.C. at 564-565, 878 S.E.2d at 372. There was no definite indication of anything final. The trial court then read an *Allen* charge but did not give instructions to cease deliberating on armed robbery, or to refrain from rethinking about any issue. *Id*. The Court of Appeals, therefore, correctly held there was nothing in the record aside from the language in the note to "indicate the jury did not continue deliberating or even reconsider its decision regarding Brown's armed robbery charge following the *Allen* charge." *Id*. And as no party ever moved to make the note an official verdict, the judge rightly declared a mistrial on all counts, holding the "time to raise that was at trial." *Id*.; *Wertz v. State*, 349 S.C. 291, 296, 562 S.E.2d 654, 657 (2002).

Petitioner argues that *Blueford* is distinguishable because that jury was only considering one indictment. Petition at 16. However, that jury was also considering various lesser-included offenses, all of which required deliberation. Therefore, how is that case all so different from the case here, where the jurors had various indictments before them, all of which required deliberation? Petitioner is reaching, and for no good reason. The rules on how to publish a verdict are very clear and straightforward in South Carolina: put it on the record in open court. There is no need to muddy the case law waters. Petitioner also argues the affidavits prove the jury did not revisit the armed robbery charge after receiving the *Allen* charge. However, there is no way to know that for sure. That is why South Carolina case law requires verdicts to be presented in open court, via an on-the-record verdict form, so there is no confusion or guessing. This Court should deny the petition.

II. The Court of Appeals and Trial Court were both correct in their reasoning as to why Petitioner's third-party guilt evidence should be excluded. Living within walking distance of the crime, being found in his area of residence and coincidentally also the crime hours after, having dreadlocks, and wearing the number 23 only conjure bare suspicions of guilt, and are not facts directly inconsistent with Petitioner's guilt.

Petitioner argues the Court of Appeals improperly affirmed the exclusion of third-party guilt evidence because "[e]very person accused shall, at his trial, be allowed . . . to produce witnesses and proofs in his favor . . . ," and the evidence that another man was in the area hours later with dreadlocks and the number 23 on his jacket was a proof in his favor. S.C. Const. art. I, § 14; S.C. Code § 17-23-60. This is error. The right to produce witnesses and proofs in one's favor is not unlimited. If it were, there would be no need for the Rules of Evidence. No. Instead, we have the trial court, who is the gatekeeper of what evidence is admissible or inadmissible, and he or she has a wide zone of discretion within which to act in and amongst the Rules. The trial court and the Court of Appeals were both correct that the third-party evidence was too thin to be anything other than bare, mere suspicion. This Court should deny the petition as there was no abuse of discretion.

Third-party evidence must be limited to the facts that are inconsistent with a defendant's guilt and that raise reasonable inferences or presumptions as to a defendant's innocence. *State v. Gregory*, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941). It *cannot* be admitted if it "cast[s] a bare suspicion upon another or raise[s] a conjectural inference as to the commission of the crime by another." *Id*. <u>There must be</u> a "train of facts and circumstances" that clearly point out "such other person as the guilty party. Remote acts, disconnected and outside of the crime itself, cannot be separately proved for such a purpose." *Id*. at 104-105; *see also State v. Cooper*, 334 S.C. 540, 514 S.E.2d 584 (1999); *State v. Williams*, 321 S.C. 327, 468 S.E.2d 626 (1996); *State v. Parker*, 294 S.C. 465, 366 S.E.2d 10 (1988). Here, Petitioner only raises remote, disconnected acts that do not clearly point out his third party as the guilty party. He only raises bare suspicions.

The State called Petitioner to trial a second time on November 5, 2018. *Brown*, 427 S.C. at 554, 878 S.E.2d at 366. The trial court heard pretrial motions, including one to admit evidence of third-party guilt.

The abbreviated facts are as follows:

- Police were dispatched to the shooting at 12:37 P.M. on December 22, 2016.

- Hugh Potter Pritchard, cousin of the victim, was in the home and witnessed the shooting. He 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. He was dressed in dark clothing, was wearing a face covering, and had on "some kind of hat." He was in his thirties.**

- Celest McBride, 20, lived 100 yards from the victim and heard a "boom" around 1:00 P.M. the day of the crime. She saw a man running from the direction of the victim's house about one minute after the "boom." She thought it odd.

- Celest saw an object fall out of his pocket, but he continued running. He then dropped and picked up cash. Her father retrieved the phone that had a lock screen of a man and a woman; police said the woman identified herself as Petitioner's girlfriend and the man in the photo as Petitioner shortly after the crime occurred. The woman also said Petitioner told her he lost his phone the day of the crime.

- **The man was a medium-build black man of 5'10" to 6' with dreadlocks, wearing "stone-gray sweatpants" and a dark-colored shirt.** At trial, Celest disavowed the dreadlocks, insisting instead that he wore a dark hoodie.

- Merit Williams was driving when he saw a "young man running from the direction of" the victim's house. He was wearing **"Red Converse[s], black pants, a hoodie with a number 23 on it, multicolored, and a skull cap." The runner had dreadlocks, the hoodie was "jet black," and the skull cap had white writing on it**. He saw the runner drop an object.

- Martin Perez was standing outside his house when he noticed a black car arrive very fast and park on the side of his house. The driver got out and waved at a person running, yelling for them to hurry up. The driver wore a red and black cap and black T-shirt with "white figures, designs."

- Petitioner's DMV records indicated he was a **5'9" black male, 155 pounds.**

- The third party had a corroborated alibi for the time of the crime.

- ❖ Two witnesses were shown a picture of the third party, and both firmly said he was not the man they saw running.
- ❖ The third party was found wearing **head-to-toe red with a leather jacket with the number 23 on it (and GSR), red Air Jordans, and dreadlocks**. He was investigated by law enforcement and cleared of all wrongdoing.

Brown, 437 S.C. at 554-558, 569-570, 878 S.E.2d at 367-368, 375.

Putting the descriptions together, they all indicate the running man was wearing black or stone-gray pants, a black hoodie, and was a younger, medium-build black man around 5'9". The third party was also a black male but was found in head-to-toe red clothing with a leather jacket, which no witness described. The GSR on the third party's jacket came from an officer firing his weapon at a charging dog while he was picking up the third party for questioning. Therefore, Petitioner did not meet his burden (by a preponderance of the evidence) of showing third-party description evidence inconsistent with his guilt. Petitioner argues no evidence in the record shows the third party and he worked together to commit the crime, which is further evidence inconsistent with his guilt. To the contrary, all that shows is that the crime was committed by one person.

Lastly, Petitioner argues the third party lived in close proximity to the scene, and that, combined with his above arguments together, meet the *Gregory* test. *Brown*, 437 S.C. at 568, 878 S.E.2d at 374. However, the Court of Appeals has already rejected proximity evidence, holding it could not be used to meet the *Gregory* test element of inconsistency with the defendant's guilt, as it only casts a bare suspicion in *State v. Mansfield*, 343 S.C. 66, 85, 538 S.E.2d 257, 267 (Ct. App. 2000). And unlike in *Miller v. State*, which Petitioner offers as its seminal case in support of his argument, here there was no direct link between the third party and the crime. *Miller v. State*, 379 S.C. 108, 665 S.E.2d 596 (2008) (granting post-conviction relief after trial counsel failed to present evidence that a third party drove the same vehicle to the crime *Miller* was on trial for and two other identical crimes that all occurred in rapid succession.) This Court should deny the petition.

III. The Court of Appeals correctly affirmed the trial court's denial of Petitioner's motion to suppress. The Fourth Amendment does not require an affiant to include all potentially exculpatory information in an affidavit; just enough facts to show a good faith belief that the person accused is the person who committed the crime. That was done here. Petitioner has not shown how any of the statements made were false.

Petitioner argues the Court of Appeals was incorrect when it upheld the trial court's denial of his motion to suppress. He argues the warrant affidavit contained false and conclusory statements that could not amount to probable cause. Petitioner even admits the affidavit did "'match [] the descriptions' in the most rudimentary of ways," but argues a rudimentary match is the same as a false statement. Petition at 24. He also argues that because the witnesses' descriptions of the perpetrator were not absolutely identical, the affidavit was sworn to with "reckless disregard of the truth." Lastly, he argues the statements about the cell phone were conclusory, again making the affidavit invalid. Petition at 24-25. These are all error.

The detective, having been told by Petitioner's girlfriend that Petitioner was the man in the photo on the phone dropped by the assailant, and having compared the witness descriptions with Petitioner's DMV photos, told the magistrate in the affidavit that Petitioner fit the witness descriptions, and that the phone dropped by the assailant was Petitioner's.[3] Even if, for argument's sake, there were incorrect statements (*i.e.* he may not have completely "fit" the descriptions,) the warrant was still valid. The affidavit contained facts that demonstrated a good faith belief that the person accused was the person who committed the crime. This Court should deny the petition, as there is far more than any evidence to support the ruling, and there is no clear error. "The duty of

[3] *See Brown*, 437 S.C. at 571-572, 878 S.E.2d at 376: "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 . . . [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. The driver's license and other records reflect that the above subject . . . also fits the physical description of the person fleeing the scene, dropping the cell phone . . . ."

a reviewing court is simply to ensure that the magistrate has a 'substantial basis' for concluding that probable cause exists." *Illinois v. Gates*, 462 U.S. 213, 236 (1983).

After police obtained the search warrant, they found two boxes of ammunition, one of which matched the type and caliber as the shell casing from the victim's living room. *Brown*, 437 S.C. at 558, 878 S.E.2d at 368-369. Petitioner argues the trial court should have suppressed them because the warrant was faulty. However, Petitioner admitted the iPhone seen dropped near the scene was his. Also, text messages from the phone (not retrieved via the search warrant but by consent) revealed the most overwhelming evidence of guilt produced at trial: Petitioner and another man (who later testified against Petitioner at his trial) clearly planned and executed the crime over obvious text and phone calls. *Brown*, 437 S.C. at 558-560, 878 S.E.2d at 369-370. Therefore, even if the ammunition was excluded, Petitioner would still have been convicted. Even so, the warrant affidavit was valid, and Petitioner has not shown that the detective made a knowingly or intentionally false statement or made statements with reckless disregard for the truth.

Petitioner offers the holding in *Franks v. Delaware*, 438 U.S. 154, 171-172 (1978), in support of his petition, arguing that he made a "substantial preliminary showing (by a preponderance of the evidence) that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit," and therefore the trial court erred in denying his motion. *Franks*, 438 U.S. at 171 (giving a defendant the right in certain circumstances to challenge the veracity of a warrant affidavit); Petition at 22-23 (parentheses added.) He also offers *State v. Missouri*, 337 S.C. 548, 524 S.E.2d 394 (1999), where this Court held the warrant affidavit failed to support a showing of probable cause where an officer acted recklessly in making a false statement and omitting exculpatory information. These are not the same as Petitioner's case. In *Missouri*, the officer plainly lied to the magistrate, telling him a

defendant told a confidential informant he had crack when the defendant never said that; in fact, he had told the informant he and his wife were trying to go straight and were no longer cooking crack. *Id*. at 553-555, 524 S.E.2d at 397. Petitioner cannot show the detective did the same here.

> [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. <u>There will be no *Franks* violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause</u>.

Missouri, 337 S.C. at 554, 524 S.E.2d at 397 (citation and footnote omitted.)

Petitioner also has the burden of showing what omitted information misled the issuing judge. He has not done so. "Probable cause is a commonsense, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *State v. Porch*, 417 S.C. 619, 790 S.E.2d 440 (Ct. App. 2016) ([ ] omitted). "Probable cause is defined as a good faith belief that a person is guilty of a crime." *State v. Blassingame*, 338 S.C. 240, 250, 525 S.E.2d 535, 540 (Ct. App. 1999). "The mere fact that the affiant did not list every conceivable conclusion does not taint the validity of the affidavit." *Porch*, 417 S.C. at 627, 790 S.E.2d at 627. Here, the detective acted in good faith and submitted an affidavit that sufficiently fit into the factual and practical considerations of everyday life; he did not make false or misleading statements. Even if the statements Petitioner alleges were false were removed, the affidavit would still meet the probable cause threshold. This Court should deny the petition for writ of certiorari.

CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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