

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. SUPREME COURT

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

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

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THE STATE,

RESPONDENT,

V.

JOSEPH LAMAR BROWN, JR.

PETITIONER.

APPELLATE CASE NO. 2022-001629

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REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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## 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.

In its statement of the case, the state claimed the first jury “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.” Ret. at 2. The record does not support the state’s characterization of what actually occurred.

The jury began deliberating at 12:18 p.m. R. 1118, l. 20. Prior to 4:51 p.m., the jury submitted four notes to the judge. R. 1118, l. 21 – R. 1119, l. 7. Although these notes were marked for identification, these notes were not saved by the Clerk of Court. R. 1118, l. 21 – R. 1119, l. 7; R. 11, ll. 13-16. The trial transcript indicated the notes had been marked immediately prior to the judge announcing that the jurors “indicated that [they] have been unable to agree on a verdict in this case.” R. 1119, ll. 9-13. The jury returned to deliberating at 4:54 p.m. R. 1121, l. 10. Thereafter, the jury sent two more notes that were marked for identification, but they were not saved by the Clerk of Court. R. 1121, ll. 22-25.

When the case was called for a second trial, everyone agreed that the jury sent a note saying “they couldn’t decide on anything except they were unanimous, not guilty, on the armed robbery charge.” R. 11, ll. 4-6. The state did not contest the substance of the note as stated by defense counsel. R. 11, ll. 15-16. Therefore, the state’s recasting of what the jury said in its return – that the jury said they “might find Petitioner not guilty of armed robbery” – is not what the state maintained at trial and is not supported by the record. Later, the state accurately

explained that the foreperson presented the trial judge with a note “indicating they were unanimous for not guilty on armed robbery.” Ret. at 11; see also Ret. at 13.

Respondent interpreted Rule 606(b) too broadly. Ret. at 12. According to Respondent, “[i]nquiring 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” was the equivalent of “asking about a matter or statement that occurred during the deliberations.” Ret. at 12. Judges must answer jurors’ questions when the answer could assist the deliberations. See Winkler v. State, 418 S.C. 643, 656, 795 S.E.2d 686, 693 (2016) (discussing the requirement that judges answer jury’s questions that could assist the jury in deliberations). The duty of the judge is to assist the jury in understanding the evidence and assisting the jury in reaching a verdict. Id. In fact, “[i]t is not always sufficient for a judge to simply open a charge book and read a generic statement of the law to a jury, no matter how correct that statement may be in the abstract. ... Quite often, the judge must tailor, mold and even sculpt the law in fashioning an answer to fit the question. In this respect, the judge must be an artist, not a mere technician.” State v. Smith, 304 S.C. 129, 132, 403 S.E.2d 162, 163 (Ct. App. 1991). Even “when a jury has twice indicated it is deadlocked, the trial judge should diplomatically discuss with the jury whether further deliberations could be beneficial.” Buff v. South Carolina Dept. of Transp., 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000).

For a trial judge to fulfill the duties owed to the jury, the trial judge often must “[i]nquir[e] about the meaning of a note sent to [the] judge.” Jurors frequently ask questions during deliberations and the questions are not always clear. Thus, in order for a judge to “tailor, mold, and even sculpt the law in fashioning an answer to fit the question,” a judge must make further inquiry regarding the meaning of notes received from jurors. Furthermore, trial judges

are required to question jurors when there is an allegation of impropriety. See e.g., State v. Green, 427 S.C. 223, 229, 830 S.E.2d 711, 713 (Ct. App. 2019) (explaining that when there was an allegation of “questionable contact between a bailiff and a juror,” the trial judge “brought each juror out separately for individual questioning on the record” regarding conversations with the bailiff), aff’d as modified State v. Green, 432 S.C. 97, 851 S.E.2d 440 (2020); State v. Kelly, 331 S.C. 132, 139-140, 502 S.E.2d 99, 103 (describing how the trial judge “questioned the jurors individually to determine who, if anyone, had read the [religious] pamphlet and what information was contained in the pamphlet”); State v. Ziegler, 364 S.C. 94, 109, 610 S.E.2d 859, 867 (Ct. App. 2005) (discussing a trial judge’s consideration of juror’s written statements to resolve a motion for new trial concerning internal juror misconduct – consideration of the criminal defendant’s invocation of his right to not testify).

Certainly, “[a]s a general rule, juror testimony is inadmissible to impeach a jury verdict.” State v. Ziegler, 364 S.C. 94, 109, 610 S.E.2d 859, 867 (Ct. App. 2005). “Normally, courts should not intrude into the privacy of the jury room to scrutinize how jurors reached their verdict.” Id. Pursuant to Rule 606(b), SCRE, “juror testimony regarding external prejudicial information or improper outside influence is allowed.” Id. Additionally, “juror testimony is competent in cases involving internal misconduct where necessary to ensure due process, i.e., fundamental fairness.” Id. This Court held inquiring into allegations of premature jury deliberations is proper because such deliberations may affect fundamental fairness of a trial. State v. Aldret, 333 S.C. 307, 310-311, 509 S.E.2d 811, 812-813 (1999). Similarly, this Court held allegations of racial prejudice involve principles of fundamental fairness. State v. Hunter, 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995).

Here, the inquiry into whether the jurors revisited the armed robbery charge during deliberations was permitted under Rule 606(b), SCRE and controlling case law because the right to be free from double jeopardy is so fundamental to our concept of ordered liberty and fairness that it is contained within the federal and state constitutions. See State v. Mills, 281 S.C. 60, 62, 314 S.E.2d 324, 326 (1984) (stating that the law of double jeopardy applies because of fundamental fairness). Thus, contrary to Respondent's assertions, the trial court was required to consider the jurors' affidavits to determine if the state's sought-after retrial violated Petitioner's right to be free from being placed in jeopardy twice.

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.

In its return, Respondent argued the proffered evidence of third party guilt presented by Petitioner was "too thin to be anything other than bare, mere suspicion." Ret. at 14. Respondent's current position is surprising in light of law enforcement's use of the very same evidence in order to establish probable cause to obtain a search warrant for the third party's residence. The "abbreviated facts" cited by Respondent in support of its tenuous position that the evidence against the third party was mere suspicion is suspect. See Ret. at 15-16.

For example, Respondent claimed that Pritchard "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." The record does not support these alleged "abbreviated facts." Importantly, Pritchard did not testify during the pretrial hearing on the motion to admit third party guilt. Instead, Barry Goldstein testified to Pritchard's description. Pritchard said the assailant was a black male, between 5'8" and 5'10", wearing all black clothing, with facial hair, and had on some type of facial cover. R. 26, ll. 6-11. Pritchard did not mention long hair or dreadlocks. R. 26, ll. 12-14. During this hearing, there was no mention of Pritchard describing the assailant as having a small frame, having hair that was not long, being in his thirties, or wearing a hat as Respondent now claims. At trial, Pritchard testified he believed the assailant's

face was covered, but he was unsure if he had on a hat. R. 121, ll. 4-22. He changed his story from his statement to police to say the man wore dark clothes and was either 5'8" or 5'9". R. 121, l. 14 - R. 122, l. 3. Having not mentioned the assailant's hair to police, Pritchard testified before the jury the assailant's hair was not long. R. 132, ll. 11-13.

Another important example of Respondent's inaccurate recounting of the record is the claim that the third party "had a corroborated alibi" and was "cleared of all wrongdoing" by the police. Ret. at 15-16. The third party, David Felder's supposed alibi was allegedly corroborated by his girlfriend. R. 34, l. 25 – R. 35, l. 3. Felder told the police that at the time of the shooting, he "had to meet his attorney up at the Dorchester County courthouse." R. 34, ll. 15-19; R. 35, ll. 4-7. His meeting was at 1 p.m. on December 23, 2016. R. 34, ll. 22-24; R. 48, l. 25 – R. 49, l. 1. Felder claimed that when he arrived at the courthouse, his attorney was not there. R. 36, ll. 3-5. Felder "rescheduled, and then went to Cordesville." R. 36, ll. 6-8; R. 50, ll. 10-12. The police later learned there was no court on December 23, 2016, in Dorchester. R. 49, ll. 2-17. Even the Court of Appeals characterized Felder's alibi as problematic, which was generous. State v. Brown, 437 S.C. 550, 878 S.E.2d 364 (Ct. App. 2022).

One final point that must be addressed was Respondent's contention that "[t]he 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." Ret. at 16. There was evidence presented that an officer shot and killed Felder's dog in Felder's presence, and the state unconvincingly argued the GSR on Felder's jacket was from this shooting; however, there was no definitive proof of the source of the GSR. Recognizing the feebleness of its suggestion for the source of the GSR, the state even suggested that Goldstein may have transferred GSR to Felder's jacket because

Goldstein had his hand on his weapon prior to restraining Felder in handcuffs. R. 51, l. 19 – R. 52, l. 13.

Respondent asks this Court to agree with the Court of Appeals that proximity evidence may not be used to establish third party guilt. Ret. at 16. For the claim that the Court of Appeals “rejected proximity evidence” to establish inconsistency with the defendant’s guilt, Respondent cited State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000). Ret. at 16. First, Petitioner submits the Court of Appeals did not reject proximity evidence for use in establishing third party guilt, which will be discussed in greater detail infra. Second, however, to the extent Mansfield may be read as Respondent does to say that proximity evidence serves no purpose for third party guilt analysis, this Court must grant certiorari here to clarify the law.

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

At trial, the jury learned that while the police were searching for the perpetrator, one of the police officers mentioned a man named Guan Perry who fit the suspect’s description. Id. at 80, 538 S.E.2d at 264. Mansfield wanted to introduce a photograph of Perry as well as testimony that Perry lived in the apartment complex where Mansfield was found and was there on the day of the

attempted burglary. *Id.* at 81, 538 S.E.2d at 254. He also wanted to introduce evidence that Perry was 5'7" or 5'8", of medium build, and had light brown skin. *Id.* The Court of Appeals held "[t]he fact that Perry generally fit the description of the perpetrator and lived in the apartment complex does not show his guilt" and was not "inconsistent with Mansfield's guilt." *Id.* at 85-86, 538 S.E.2d at 267.

As mentioned, Petitioner does not read Mansfield as broadly as Respondent; however, to the extent *anyone* may read Mansfield in the way espoused by Respondent, this Court must grant certiorari to clarify that not only may proximity evidence be a factor to establish third party guilt, but it may also be critical evidence for such a claim.

Here, the evidence against Felder was more substantial than a bare suspicion, and the best starting point for establishing the significance of the evidence against Felder is with the how the police viewed the evidence. 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 from the incident location wearing red sneakers and had the number 23, on his clothing." Second Supp. R. 1. Further, "[t]he witness also advised that the suspect ran in the direction" of a street where Felder lived. Second Supp. R. 1. The affidavit claimed the case agent "observed a person matching the description a short time" after the murder. Second Supp. R. 1. In short, the following facts were sufficient to establish probable cause to search Felder's home for evidence of Pritchard's murder: Felder's appearance matched the description provided by a witness, his home was within walking distance of the murder scene, and he was found in the area within hours of the murder.

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

Indeed, the evidence against Felder showed a connection to the murder. As the police determined, Felder matched most of Williams' description of the perpetrator. Of all the witnesses, Williams provided the most specific description, and Felder satisfied almost all of the important criteria relayed by Williams. Just a few hours after the shooting, Felder was wearing the jacket with the distinctive 23 on the back. He was even wearing red shoes as Williams said. Felder also had shoulder-length dreadlocks as described by Williams and Celest. Felder's alleged alibi was implausible due to the date. There was no court on December 23. Felder equivocated between claiming he had a court appearance and claiming he was meeting with his lawyer. Further, his alleged alibi was confirmed by his girlfriend and a friend, both of whom had motives to lie in light of their relationships with Felder. Critically, Felder's jacket tested positive for gunshot residue. Thus, evidence of Felder's guilt established a sufficient connection to the murder to pass this portion of the Gregory test. It was not that Felder matched a general description of a perpetrator as it was in Mansfield; here, Felder matched a very specific description of the perpetrator.

Not only was the evidence of Felder's guilt inconsistent with Appellant's guilt, but the evidence established a connection between Felder and the murder. When the police established probable cause to search Felder's home, the police used Felder's description matching the description provided by a witness, his location to the murder scene shortly after the murder, and his home being within walking distance of the murder scene. The evidence against Felder only strengthened subsequently. Felder's alleged alibi grew less reliable and more incredulous as the

police learned there was no court on December 23. Finally, and most damning, Felder's jacket – the one with the distinctive number 23 on the back – tested positive for gunshot residue.

Despite Respondent's strident insistence that the evidence against Felder raised merely a suspicion of Felder's guilt, the evidence of Felder's guilt was at least to the level of probable cause as shown by the state obtaining a search warrant for Felder's home.

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.

In its harmless error argument, Respondent argued that text messages from Petitioner's phone revealed the most overwhelming evidence of guilt produced at trial. While making this argument Respondent claimed the text messages were obtained by consent. The record does not support this assertion. While the police did not search the phone pursuant to the search warrant at issue here, the police did search the phone pursuant to a separate warrant. Goldstein testified that the police had been unable to "get into the cell phone." R. 323, ll. 1-2. Then, at some time prior to March 21, 2017, Goldstein learned the police obtained funding to examine cell phones. R. 322, l. 19 – R. 323, l. 25. This funding was used to obtain the services of Cellebrite "to defeat the pass code" on the cell phone. R. 324, ll. 4-6. The examination of the cell phone was hardly with consent.

On appeal, Respondent appeared to concede that the affiant's claim that Petitioner fit the witnesses' descriptions of the shooter was false, or at least, given with reckless disregard of the truth. Ret. at 17. However, Respondent argued Petitioner failed to show what information was omitted that misled the magistrate. To reiterate what was argued in the written motion, during the hearing on the motion before trial, in the briefing at the Court of Appeals, and in the petition for writ of certiorari, the omitted information was the vastly different descriptions of the assailant provided by the witnesses.

**CONCLUSION**

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

  
Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER

This 17<sup>th</sup> day of January, 2023.