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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Florence County
The Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

MICHAEL CHRISTIAN BARCLAY,

APPELLANT.

Appellate Case No. 2021-000976

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. In violation of Appellant's right to due process as explained in *Brady v. Maryland*, 373 U.S. 83 (1963), did the trial judge err by failing to dismiss the criminal charge against Appellant where the state engaged in a pattern of discovery abuses culminating in the destruction of in-camera video footage and body-worn camera footage of the crime scene immediately after the shooting because the evidence was material to Appellant's guilt?

II. Did the trial judge err by instructing the jury regarding accomplice liability where the evidence presented was Appellant alone fired the fatal shot?

III. Did the trial court err in refusing to instruct the jury on the lesser included offense of voluntary manslaughter where evidence in the record required the instruction, including the solicitor's assertion during the co-defendant's guilty plea that such evidence existed and the judicial finding of a factual basis to support that the shooter acted upon the sudden heat of passion based upon sufficient legal provocation?

IV. Did the trial judge err by failing to instruct the jury that it may draw an adverse inference against the state where it was undisputed that the state destroyed video footage of the crime scene captured by the first responding officer in this weak circumstantial evidence case?

STATEMENT OF THE CASE

Michael Christian Barclay (hereinafter "Appellant") was indicted for the murder of twelve-year-old Fantasia Jackson. (2019-GS-21-00579). Appellant was tried alongside co-defendant Demonta Kabora Hickson (hereinafter "KB") who carried the same charge. Appellant and KB proceeded to a jury trial before the Honorable D. Craig Brown on August 23rd, 2021 through August 26th, 2021. Appellant was represented by attorney Christie Henderson and KB was represented by attorney James Hoffmeyer. The State was represented by 12th Circuit Solicitor Edgar L. Clements, III.

At the conclusion of the State's case-in-chief, KB opted to accept a guilty plea. (R. p. 491). The trial court conducted the guilty plea hearing outside the presence of the jury, after which KB was sentenced to 15 years imprisonment for the lesser included offense of voluntary manslaughter. Appellant proceeded to the conclusion of his trial and was convicted as charged by the jury. (R. p. 559). Following the arguments of counsel regarding sentencing, the trial court sentenced Appellant to life in prison. (R. p. 560). This appeal now follows.

STATEMENT OF FACTS

On August 25, 2018, twelve-year-old Fantasia Jackson (hereinafter "Victim") was shot and killed while in front of the home of "Ms. Gee", located at *** East Byrd Street, in Timmonsville, South Carolina. Ms. Gee is Victim's aunt.[1] Her death came when armed assailants hopped out of cars, demanded to know "where's Boogie?", and opened fire toward the crowd of friends and family in front of the home. The evidence presented at trial demonstrated the following facts.

[1] Victim's Aunt is Ms. Beverlena Gee. She is referred to as Ms. Gee or Bev in various witness testimonies.

The Drive-By Shooting by Boogie

On August 25th, 2018, Cedric Young (aka "Boogie") and John "JJ" Hampton, Jr. got into an argument and fight while at a party at the home of Cassandra Simon. The fight was broken up by JJ's family members and JJ was instructed to go home. JJ testified that he drove himself home in his blue Mustang and remained home for the rest of the night. (R. p. 101-103; p. 106-108). The record demonstrates that Captain Strickland of the Timmonsville PD was later dispatched to *** White Street on August 25th to address a shooting that took place at the home of the Hickson's and Hampton's family member, "Aunt Dot".[2] No one was injured, but Boogie was arrested that night and ultimately charged with the drive-by shooting of the home of "Aunt Dot". (R. p. 251-252; p. 256; p. 259; p. 282; p. 288).

The Shooting That Killed Victim

Witness Timothy Washington was at Ms. Gee's on the night of August 25th. He testified that Boogie had pulled up at Ms. Gee's home that night talking about "how they got down and shot somebody Grandma's house or something like that in a drive-by." Mr. Washington testified that it was only a few minutes later that the cars connected to Victim's shooting arrived. (R. p. 204, lines 1-6).

The testimony of witnesses regarding the cars was voluminous. Witnesses Fandando Jackson, Jr., Jaquan Jackson, James Jackson, Sha'Tyra Gee, and Timothy Washington were all at the scene of the crime. They consistently testified to seeing a red car, a white car, and blue car driving up to the home together at the time of the shooting. (R. p. 127; p. 153; p. 160; p. 169; p. 205). A few also noted the presence of a burgundy truck. (R. p. 152; p. 160; p. 205). Certain witnesses' vantage points and efforts to flee left them with only the memory of seeing the red car.

[2] Aunt Dot's name is Dorothy Hickson.

These witnesses included Markev Moses, Vernessa Jackson, and George Dunn. (R. p. 188-189; p. 196-198; p. 394-395). Other witnesses were able to testify as to what make and model of the cars they saw involved.

Specifically, Sha'Tyra Gee testified to seeing a red Dodge Challenger, a white Dodge Challenger, and a blue Dodge Charger. Witness Timothy Washington confirmed the colors, but testified that he thought all three were Dodge Chargers. (R. p. 205). The State then offered testimony from numerous witnesses as to those vehicles, their owners, and their roles in the shooting.

Doc Smith testified during the State's case-in-chief. He noted that he was on his porch and heard gun shots in the distance on August 25th, 2018. Afterward, he saw three Dodge cars pass by and his family members were driving two of the vehicles. (R. p. 209). Mr. Smith testified that Jimmy Lee, Jr. drove the blue Charger, "Mr. Hampton" drove the white Challenger, and the red car was new to him. (R. p. 211-212). Mr. Smith testified that he was not sure what was going on, so he hopped into his burgundy/cherry colored truck to follow and find out. (R. p. 210). He followed them as they first went to "Candy's", then to the post office, and finally to "Gee's house", who he knows well, also being part of his extended family. He jumped out of the truck to speak with them but then heard gunshots. In reaction to the gunfire he jumped back into the truck and drove off. (R. p. 210).

Witnesses Markev Moses and George Dunn, who specifically saw the red car, testified that gunfire was coming from the person in the red car. (R. p. 188, lines 14-16; p. 196, lines 11-23). Markev further testified that no one visiting the home that night was shooting back at the cars. (R. p. 188, lines 18-20). Dunn testified that the male driver of the red car was yelling about Boogie

prior to starting shooting, and that this individual had a *northern accent to his voice.*[3] (R. p. 196, lines 12 through p. 199, line 12). Witnesses Fanando Jackson, Jr., Jaquan Jackson, and Timothy Washington confirmed that multiple individuals got out of the cars, asked for Boogie, and then started shooting. (R. p. 123; p. 152; p. 205). Co-defendant KB was identified by Sha'Tyra as one of the individuals from the blue Charger, who had dreadlock hair at the time, and was a participant in the shooting. (R. p. 169-172; p. 183). She testified that the angle of the vehicles did not permit her to see what was happening in the red car. (R. p. 175). In addition to the testimony offered that there were multiple shooters that night, witnesses also confirmed hearing multiple gunshots with either "different sounds" or explicitly noting that different guns were being used. (R. p. 160-161; p. 169; p. 371-372). Forensic evidence from the scene confirmed this fact, as .380 shell casings were found at the scene, a .380 projectile bullet was found at the scene, but Victim was struck by a 9 millimeter projectile bullet. (R. p. 232; p. 236-239).

J.J., the individual who fought with Boogie earlier in the night, is the brother of Josh Hampton. Josh testified that he was on his way home from Florence when he received a phone call; the details of his conversation were prevented by hearsay objection, but he testified that after the phone call he chose to go to his Aunt's home instead. (R. p. 105-109). When he arrived, there were a number of cars at his Aunt's home on White Street. These included a blue Dodge Charger and a Red Dodge Challenger. Josh testified that he was not familiar with the red Challenger, but that his cousin, Jimmy Hampton, Jr., drives a blue Charger like the one he encountered. These cars proceeded to drive off "fast" and Josh testified that he chose to follow them in *his white Dodge Challenger*. Josh testified that he did so "to see what was going on." (R. p. 109-111). Though Josh testified that he followed these vehicles, when he brought his car to a near stop and "heard shots"

[3] Appellant lived in New York and was visiting Timmonsville, South Carolina. (*Supra*).

sounding like they were *coming from everywhere*, he maintained that he at the time could not see either vehicle. (R. p. 113). Josh testified that "he left" and went home upon hearing multiple gunshots. (R. p. 114).

Testimony linking Appellant to the red Dodge Challenger was presented from multiple witnesses. First, Chief Billy Brown, testified that law enforcement had learned that one of the vehicles may have been a rental car. He went to the Enterprise rental company and identified a car matching the red Challenger described from the shooting. He notified the Florence County Sheriff's Department, who took over the case, and they took possession of the vehicle.[4] (R. p. 220-221).

During their investigation, law enforcement learned of Appellant's family relationship to the Hamptons, and his potential connection to the crime. (R. p. 257). In conducting a search of the car, law enforcement learned that the car's Bluetooth connection showed a recent connection to "Michael's iPhone". Inside the car, law enforcement officers found a funeral program for "Delonte Marquist Rouse" in the glovebox. (R. p. 307-308). The Enterprise rental agreement showed that Jimmy Lee Hampton Jr. was the renter. (R. p. 326).

Jimmy Hampton, Jr. (hereinafter "Jimmy") testified that he is kin to Josh Hampton, JJ Hampton, KB Hickson, and Appellant. (R. p. 331-332). *He testified that he learned about someone shooting up his aunt's house, which prompted him, KB, Appellant, and Josh to go check on it.* (R. p. 336-337). He confirmed that he was driving his blue Charger with KB as a passenger, Josh was

[4] Timmonsville Police Chief at that time, Chief Billy Brown, was off-duty and on medical leave due to a knee injury. By Chief Brown's own testimony, he did not do much in the way of investigative assistance in this case. (R. p. 218-227). However, due to the Timmonsville Police Chief's family connection to the potential suspects, the case was transferred to the Florence County Sheriff's Department to avoid a conflict of interests. (R. p. 281; p. 224).

driving a white car, and "Mike Mike"[5] was driving a red Challenger.[6] Jimmy explained that Appellant was coming down from New York by bus for a funeral for *"Delonte"*, and had called to ask Jimmy if he would arrange a rental car for him during the visit. (R. p. 338-340; p. 374). During the visit, Jimmy never saw anyone other than Appellant drive the red Challenger, and knew of only Appellant driving it on the night of the murder. (R. p. 340-341).

Regarding the actual shooting, Jimmy testified that the order of the vehicles at the scene of the crime had the truck in front, followed by the red Challenger, then his blue Charger, and the white car last. *He conceded that they were there looking for Boogie*, but denied any intention of committing a shooting. (R. p. 356). He testified that as he pulled up he started hearing gunshots. He was attempting to leave the scene when KB hopped out. At that point Jimmy testified that he heard more gunshots that were in closer proximity to his car; he would later testify that he believed KB was shooting. (R. p. 344-345; p. 357; p. 376). Jimmy read aloud his prior statement to police, wherein he states: "I really don't know who was shooting, but I seen someone get out the – get back into the red Challenger. It could have been Mike. . .". (R. p. 374). Jimmy testified further that the following day he met up with Appellant at the Enterprise rental to drop off the car. He saw Appellant "*wiping the car down*". Jimmy told Appellant that "I hope you ain't got me in – I hope you didn't do nothing that you ain't supposed to be doing. I hope you ain't got me in no trouble or nothing." Jimmy testified that Appellant responded: "*nah, you're good, we good.*" Jimmy then dropped him off at the hotel for his bus pickup.[7] (R. p. 359, lines 11-22).

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[5] Jimmy refers to Appellant as "Mike Mike" and "Mikey" in the transcript.
[6] Jimmy also confirmed the presence of Doc Smith's truck that night. (R. p. 343).
[7] Jimmy was likewise charged with Victim's murder. Though the specifics are not discernable from the record, the record indicates that Jimmy's testimony deviated from what he had told the prosecution during the investigation and that he "could not remember" if he had agreed to a deal for a reduced charge of accessory after the fact for testifying truthfully at trial. (R. p. 360; p. 364).

The forensic investigation from the scene led to the discovery of five shell casings and three fired projectiles. The State's expert testified that one of the fired projectiles from the scene was a .380 caliber bullet. The second fired projectile was a 9 millimeter caliber bullet. (R. p. 238). The third fired projectile was recovered from Victim's body and was also determined to be a 9 millimeter caliber bullet. However, the two 9 millimeter projectiles were damaged and analysis was inconclusive as to whether they were fired by the same firearm. (R. p. 239-240). Additionally, the five shell casings were determined to all be .380 caliber ammunition and were all fired from the same firearm. (R. p. 237). However, the fired .380 projectile could not be matched to the .380 shell casings. (R. p. 240).

ARGUMENT

I. The trial court did not abuse its discretion in denying Appellant's motion for dismissal on the basis of violations of *Brady v. Maryland*, as all but one of Appellant's discovery disputes were resolved in advance of trial, and Appellant has failed to demonstrate the materiality of the camera footage from Officer Miles as it pertains to his defense. Moreover, the trial court did not abuse its discretion in denying the motion for dismissal and the request for a spoliation charge regarding that same evidence as the record is completely devoid of any facts supporting those requests.

Issues I & IV

Summary of Argument

Appellant has failed to demonstrate an abuse of discretion by the trial court in addressing and ruling upon the various discovery matters presented prior to and during trial. The trial court was essentially presented with three separate discovery matters. The first was a pretrial supplemental motion for discovery and continuance. Therein, Appellant asserted that that the State had failed to expediently provide certain materials and requested an itemized list of additional discovery productions. The trial court convened a hearing on the matter, addressed each item in turn, rendered rulings on the propriety of the requests, and resolved the motion with instruction on

what outstanding productions should be given. Continuance on the basis of "voluminous discovery" was denied in light of the fact that nearly all of Appellant's supplemental requests had already been provided or were improper under *Brady* and Rule 5. Appellant has failed to demonstrate that the court abused its discretion in denying a continuance at the time, or in resolving the discovery disputes as it did.

The second discovery matter was presented by way of a pretrial motion for dismissal of the case due to the late disclosure of Captain Strickland's body-camera footage from the night of the crime. This evidence was not previously made known to Solicitor Clements so that he could include it in production of Rule 5 discovery materials. The trial court found that the video footage should have been produced, admonished the entire police department for their neglect, granted a three month continuance to defense counsel and a new bond hearing for Appellant. However, the Court denied the motion for dismissal, noting that defense counsel's case law did not support such a remedy under the circumstances of the case. Appellant has failed to demonstrate an abuse of discretion on the part of the trial court in reaching its ruling.

The third discovery matter was a renewed motion for dismissal with a new list of seven materials allegedly not provided to the defense or purged by law enforcement. In the brief discussion of the matter, the court was informed that six of the seven requested items never existed, and one, Officer Miles' body-cam and in-car camera footage, was purged. No other information was provided by Appellant at the time and the motion was noted for the record. During the course of trial, defense counsel asked only a few questions regarding the purged video footage. The elicited facts from these questions showed *only* that Officer Miles was the first responding police officer to the scene, that he was no longer employed with Timmonsville PD, that the video footage

had been "kicked out" or "purged out" by the police department's system, and that it was not accessible for trial.

Preceding his decision to rest without presenting a case-in-chief, Appellant renewed his various motions and sought a spoliation of evidence jury charge. In consideration of the spoliated evidence issue, the trial court considered the *State v. Cheeseboro* elements of 1) bad-faith and 2) exculpatory value of the evidence not obtainable through other comparable evidence. In considering the limited facts presented regarding the spoliation of evidence issue, the trial court found that Appellant had not satisfied either element under *Cheeseboro* and Appellant offered no further evidence or arguments. As such, the trial court denied Appellant's request for a spoliation charge and denied Appellant's renewed motion for dismissal. (R. p. 495-496; p. 508). Moreover, a review of existing law in South Carolina demonstrates that spoliation charges have been limited to civil cases and are generally considered improper in a criminal trial setting. In consideration of the facts and law presented, Appellant has failed to demonstrate an abuse of discretion by the trial court in reaching its rulings.

Standard of Review

The trial court's review of alleged *Brady* violations and corresponding motion for dismissal are subject to an abuse of discretion standard. *State v. Bryant*, 372 S.C. 305, 316, 642 S.E.2d 582, 588 (2007); *State v. Durant*, 430 S.C. 98, 110, 844 S.E.2d 49, 55 (2020). "In criminal cases, this court reviews errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. Thus, on review, the court is limited to determining whether the trial court abused its discretion." *State v. McBride*, 416 S.C. 379, 385, 786 S.E.2d 435, 438 (Ct. App. 2016) (citing *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009)) (internal citations omitted). "An abuse of discretion occurs when the trial court's ruling is based upon an error of law,

such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious." *Id.* "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281 (1988).

Issues as they were presented at trial

May 11-12 Motion for Continuance & Bond Hearing

A pretrial supplemental discovery motion was taken up before Judge Brown on May 11 & 12, 2021. Trial counsel for Appellant (herein "Counsel") argued before the court that she had discovered certain missing materials during a prearranged open file review at the Solicitor's office on March 29, 2021. According to Counsel's arguments to the court, these included 16 pages of law enforcement reports, supplemental reports, and witness statements. That same day, the Solicitor's Office sent an email to Counsel to ensure she possessed the included SLED reports from the firearms department, the trace evidence department, and the toxicology department, totaling seven pages. Counsel claimed that she only possessed the toxicology report at that time. In light of these events, Counsel filed a supplemental motion for discovery on April 12, 2021. In response to that motion, Counsel received on April 22, 2021, a disk containing the Florence County Sheriff's Office case report and case photos. (May 11th hearing R., p. 5-6). Though she conceded that evidence is often presented at varying times, she believed this evidence warranted a continuance and a new bond hearing for Appellant since the case had recently been listed as the back-up trial for the late May term of court. (May 11th hearing R., p. 7).

Solicitor Clements informed the court that he was surprised by the situation, as he had in front of him the entirety of what he considered to be the Rule 5 discovery of the case, measuring less than 50 pages total, and commenting that forensic offices will take innumerable photographs at the scene, with only a few ever becoming evidence for trial. He further testified that his office had called Counsel with an open-ended invitation to their office to look through their file – which was ultimately done in this case. Solicitor Clements identified only one issue he was aware of that he believed would constitute impactful evidence for preparation of the case: a fired bullet that had not been initially transported by the Timmonsville Police Department to SLED for analysis. This bullet was retrieved from Victim's autopsy, and was consistent with being a 9 millimeter round of ammunition. (May 11th hearing R., p. 8; 10). The hearing proceeded further due to the dispute between Solicitor Clements and Counsel as to the propriety of the outstanding supplemental discovery requests. (May 11th hearing R., p. 6-7).

Solicitor Clements continued by noting that some of counsel's requests were not relevant and not part of the State's case-in-chief, but were provided to counsel essentially out of courtesy for what he argued was otherwise beyond Rule 5 obligations. (May 11th hearing R., p. 9). In addressing the listed issues in turn, the primary dispute under number 1 was the desire to receive the SLED worksheets for weapons (none were recovered during investigation), bullets, and GSR testing performed on Cedric Young (Boogie) in connection with a different crime separate from the shooting of victim. (May 11th hearing R., p. 9, lines 22-23; p. 27-33). Solicitor Clements noted that Counsel's supplemental request for SLED materials under number 1 requested all materials, worksheets, and/*or* reports. Solicitor Clements testified that he believed the provision of the SLED reports satisfied the request, as the worksheets are something he never requests from SLED, and maintained that such does not have to come through his office for provision – in contradiction to

what Counsel may have been told by SLED. (May 11th hearing R., p. 9; 17). Nevertheless, the Solicitor did put into motion the steps necessary to have the worksheets compiled and produced. (May 11th hearing R., p. 26; p. 33). Solicitor Clements testified that supplemental discovery requests Numbers 2, 3, 4, and 5 were for "lists" that did not exist, thus constituting a request for the solicitor's office to create and produce work-product documentation for Counsel. Solicitor Clements testified that Numbers 6 and 7 had been complied with already and Number 8 was satisfied for lack of any other documentation not covered by Number 7.[8] (May 11th hearing R., p. 11-13). Number 9 requested copies of Victim's medical records, which Counsel voluntarily withdrew in consideration of HIPAA limitations. (May 11th hearing R., p. 13; p. 17). Number 10 was already satisfied, despite Solicitor Clements noting that much of the request was beyond the case-in-chief, and that his office had already provided the search warrant for the red Challenger. (May 11th hearing R., p. 13, lines 18-24; p. 14). Solicitor Clements reiterated that, with exception to the bullet and ballistics which were provided late because of the late analysis, the requests before him did not involve relevant, probative materials that would be in their case-in-chief. He further argued that his office does not provide materials they do not have, and they do not create lists for opposing counsel. (May 11th hearing R., p. 14-15; p. 24). Counsel disagreed, arguing instead that anything in possession of the solicitor or law enforcement is discoverable if material, and the Solicitor cannot determine what the defense believes will be material. (May 11th hearing R., p. 15).

Solicitor Clements then provided the court with his office's ledger for both initial Rule 5 disclosures and additional Rule 5 disclosures, and later noted that much of the requests were

[8] The Solicitor does not clearly identify numbers 5 and 6, but they appear to be "a list of all law enforcement vehicles that were present on the scene" and "copies of all photographs and recordings", respectively. (May 11th hearing, R., p. 12).

satisfied by discovery productions in February. (May 11th hearing R., p. 18-20). The court considered that document and the matters before it, noting that there appears to be issues by both parties as supplemental requests to support bond and continuance being filed extremely late, and that discovery likewise being provided late. (May 11th hearing R., p. 19-22). The court noted that he would not reconsider bond based on what he had thus far heard, but would reconvene to discuss continuance. Seemingly due to time constraints, the court adjourned for the day and the matter was reconvened the following afternoon. (May 11th hearing R., p. 26-27).

At the outset of the following day's reconvening of the motion hearing, Judge Brown noted on the record that he had met with the Solicitor and Counsel in chambers to further discuss the issues concerning the motion. He summarized for the record those discussions and the various facts and evidentiary matters pertinent to the case. (May 11th hearing R., p. 28-31). *The court then commented that in consideration of the additional discovery requests, he could not identify any prejudice to Appellant, because none of the requested materials would link Appellant to the crime.* (May 11th hearing R., p. 31, lines 8-19). The court further noted that while *Brady* requires the State to turn over evidence that's material to the defendant's guilt or punishment, the matters concerning the GSR "worksheets" from SLED involve a separate crime believed to have been committed by Cedric Young, and would not be material to Appellant's guilt for the crime charged. Nevertheless, the court reiterated that the State was already taking efforts to produce the worksheets for the defense, therefore resolving the dispute. (May 11th hearing R., p. 31, line 22 through p. 33, line 22).

The court then began to itemize his rulings as to the various discovery issues raised by Counsel's motion. The court concluded that the requested lists run afoul of work product protections. Thus, the court resolved Numbers 2, 3, 4, and 5 of the motion as improper. (May 11th

hearing R., p. 33-34). The court confirmed that Numbers 6, 7, and 8 had already been turned over to the extent they existed. (May 11th hearing R., p. 34-35). The health records issue (number 9) was likewise resolved, and both Counsel and Solicitor Clements confirmed that Number 10 and the search warrant had been provided. (May 11th hearing R., p. 35-36). *As a result, Counsel conceded that the supplemental motion for discovery had been addressed in full.* (May 11th hearing R., p. 36, lines 17-19). The court concluded that in light of the resolution of the motion, there was no prejudice to Appellant that would warrant a continuance. (May 11th hearing R., p. 37).

At the end of the hearing, Counsel wanted assurances that there would be no other discovery issues prior to trial. Solicitor Clements, predictably, could not make promises for unknown future events, but reiterated that they would continue to look high and low to ensure Appellant received all the materials for which he is entitled. The court agreed, referencing *State v. Bryant*, that late disclosure is not ideal, but not unheard of. (May 11th hearing R., p. 37-38). [9]

[9] In relation to the May 11-12th hearing, Appellant raises certain arguments and representations of fact in his brief that are not fairly or accurately supported by the record. Though the record speaks for itself, Respondent feels these assertions demand clarification and response. (1) In an effort to disparage the Solicitor, Appellant uses on multiple occasions a quote from Solicitor Clements that he "just wasn't going to do that extra work." (See Initial Brief of Appellant, p. 4; p. 12). However, Appellant fails to ever provide the context in which that statement was offered. That statement was specific to the issue of obtaining Victim's general medical records, which would require subpoena and release under HIPAA limitations. Even Counsel acknowledged that the Solicitor had no obligation to take such efforts on behalf of the defense and voluntarily withdrew the demand. (May 11th hearing R., p. 13). The insinuation that this quote from the Solicitor was universally applicable to his attitude for discovery obligations is disingenuous. (2) Similarly, Appellant references the Solicitor's discussion of not turning over work product resulting from interviews with witnesses that even the court acknowledged was not required under the rule, citing only the quote from the Solicitor that such decisions can "[depend] on how we get treated, I guess, as to how we respond." (See Initial Brief of Appellant, p. 6; p. 12). Again, Appellant's argument attempts to take commentary out of context and suggest that the Solicitor is actively and purposefully violating discovery rules on materials he is not required to provide.

May 20 Motion to Dismiss Hearing

Solicitor Clements' and the court's wariness of "promises" unfortunately turned prophetic. A second hearing was held before Judge Brown on May 20, 2021, to address the late disclosure of Captain Strickland's body-camera footage from the crime scene on the night of the crime, and Appellant's motion to dismiss the case entirely. Counsel informed the court that she learned of the body-camera footage through her own office's investigator on May 18th. (May 20th hearing R., p. 46-47). Counsel informed the court that she confirmed this with Solicitor Clements and Chief McFadden. Counsel informed the court that Solicitor Clements apologized and immediately sent the video footage to her, noting explicitly that he had not yet viewed it. (May 20th hearing R., p. 48; 55). She argued to the court that the video footage does not mention Appellant, and suggested it is evidence that points to Jimmy, KB, and John Hampton, and that the claim against Appellant was conspiratorially orchestrated by Jimmy Lee Hampton, Sr. to protect his son. She also argued that the evidence presented a problem of counsel seeing multiple unknown individuals that would need to be identified and spoken to. (May 20th hearing R., p. 48-52).

Counsel provided the court with a number of cases in support of her motion, but conceded that all of these cases dealt with evidence being withheld and discovered after conviction. The Solicitor noted further that most of these cases also did not result in an overturned conviction. (May 20th hearing R., p. 54-55; p. 66). She instead used these cases to argue a "pattern" of discovery violations. (May 20th hearing R., p. 55).

In response, Solicitor Clements informed the court that he had no idea the body-camera footage existed, and only discovered it because he and Chief McFadden were at the Timmonsville Police Department speaking with witnesses in preparation for the case on May 18th, just two days prior to the convened hearing. He informed the court that Captain Strickland walked up to them

and asked if they wanted his body-camera footage. Both he and McFadden were "flabbergasted", because they had asked Captain Strickland numerous times to give over everything he had concerning the case, a point that was reiterated after the slow handling of the bullet from Victim's autopsy. The body-camera footage was not provided and it was not notated on any of Captain Strickland's reports. (May 20th hearing R., p. 55-56). They immediately began efforts to obtain, copy, and produce this footage to Counsel. (May 20th hearing R., p. 57). It was for that reason Solicitor Clement had not yet viewed the contents of the footage, as he had not been in possession of it but for the day prior. Solicitor Clement also voluntarily acknowledged that "if he were in the court's shoes" *he would suppress the portions of video footage that might provide probative evidence useful to the State.* (May 20th hearing R., p. 57; p. 59; p. 67, line 19 through p. 68, line 5). Later in his arguments, Solicitor Clements acknowledged that while it was not his personal mistake, and that there certainly was no design or purpose to this oversight, the errors are imputed to him. (May 20th hearing R., p. 71-72).

Solicitor Clement argued against dismissal, as the video content cannot be viewed outside the context of the other evidence the State possessed against Appellant. (May 20th hearing R., p. 58-59). In contrast, Counsel argued that this issue is akin to the suppression of drugs, regardless of quantity, due to their seizure coming from a dirty traffic stop. (May 20th hearing R., p. 61).

In response, the court demanded that the officers responsible appear and explain what happened to create this situation. (May 20th hearing R., p. 63-64). Chief McFadden testified that he could assist in identifying the unknown individuals from the video content. (May 20th hearing R., p. 72). Captain Strickland responded to the court's questions but could only provide an explanation that the body-cam footage had been "overlooked"; he thought he had released it, but apparently had not. (May 20th hearing R., p. 74).

The court noted that there is no excuse for this type of failure and admonished the entire police department. [10] (May 20th hearing R., p. 76). However, the court did not find that dismissal of the defendant's case to be an appropriate remedy under the circumstances. In support of its ruling the court gave a brief summary of each of the cases provided by counsel, which included: *Strickler v. Greene*, 527 U.S. 263; *Monroe v. Angelone*, 323 F.3d 286; *State v. Kennerly*, 331 S.C. 442; and in most detail, *State v. Moses*, 390 S.C. 502. However, the court's summaries of these cases demonstrate their incongruence with the circumstances presented in the case, and largely the ruling of those courts finding no *Brady* violation.[11] (May 20th hearing R., p. 76-79). Instead, the trial court reconsidered counsel's motion for continuance *which was not contested by the State upon reconsideration.* The court granted the motion for continuance and set a date certain for trial on August 23, 2021. (May 20th hearing R., p. 81). The court also granted Appellant a new bond hearing.[12] [13] (May 20th hearing R., p. 80).

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[10] Captain Strickland was not unscathed as a result of this oversight. He was demoted because of this error – a fact made known to the jury. (R. p. 261).

[11] Only the Fourth Circuit case of *Monroe v. Angelone* addressed the suppression of evidence deemed exculpatory and material that remained undiscovered until defendant sought federal habeas relief from his convictions in Virginia.

[12] The trial record demonstrates that Appellant received release on bond. (R. p. 290-291).

[13] Concerning the May 20th hearing, Appellant again raises certain arguments and representations of fact in his brief that are not fairly or accurately supported by the record. (1) Appellant argues that Solicitor Clements was somehow personally neglectful in not discovering Captain Strickland's video footage sooner. (See Initial Brief of Appellant, p. 12). The record demonstrates that any error lies with Captain Strickland and the police department. (2) Appellant statement of facts suggests that the Solicitor "believed the judge should suppress it due to the late disclosure." (See Initial Brief of Appellant, p. 6). The record clearly demonstrates that the Solicitor was voluntarily suggesting that any favorable evidence *for the State* be suppressed, so as to not gain any advantage from the delayed disclosure.

Renewed Motion to Dismiss and Request for Spoliation Charge

Immediately prior to the start of trial, Counsel renewed her motion for dismissal and asserted that there remained outstanding discovery from the State. Counsel then listed the following items as the basis for her renewed motion:

1. FCSO Deputy Marlon Mack's in-car camera footage;
2. FCSO Deputy Michel McFadden's in-car camera footage;
3. S.C. Highway Patrol officer Jordan Smith's body-worn camera footage, in-car camera footage, and reports pertaining to his response to the scene;
4. Timmonsville PD Officer Christopher Miles' body-worn camera footage and in-car camera footage;
5. Timmonsville PD Officer Mark Strickland's in-car camera footage;
6. Timmonsville PD Chief Billy Brown's body-worn camera footage, in-car camera footage, and reports; and
7. Any other in-car camera footage from law enforcement vehicles on the night of the crime.

(R. p. 86-87). Solicitor Clements responded by informing the court that items 1, 2, 3, 5, 6, and 7 never existed. The only item that did exist was number 4: the body-camera and in-car footage from Timmonsville PD Officer Christopher Miles. Mr. Clements explained that he understood that footage to have been purged. (R. p. 87). No other facts were provided, Counsel offered no other arguments, the court noted the motion for the record, but the court did not render a ruling at that time. (R. p. 87).

As the trial progressed the testimony demonstrated that Officer Miles was the first responding officer to the scene (R. p. 452), and that he prepared the incident report (R. p. 260). Counsel elicited further testimony from Chief McFadden that Officer Miles had worn a body-camera that night, but that "the system kicked his out", or that it was otherwise "purged out". Counsel confirmed that neither the body-camera nor the in-car camera footage was available for the jury. (R. p. 452-453). Counsel did not pose any further questions regarding Officer Miles' video footage, or the circumstances in which it was purged.

After the close of evidence (for which Appellant chose not to present a case-in-chief), the question of a spoliation charge was raised to the court. The court cited to *State v. Cheeseboro* and noted that:

> [T]he State does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant. . . . It says to establish a due process violation, the defendant must demonstrate, one, that the State destroyed the evidence in bad faith, which there's been no such evidence in this case, or, two, that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means.

(R. p. 495, line 19 through p. 496, line 10). The trial court concluded that there was no evidence provided demonstrating bad-faith on the part of the State, and there was no evidence demonstrating the body-worn camera footage "possessed any exculpatory value apparent – that was apparent before the evidence was destroyed." The trial court then denied the request for a spoliation charge, noting that Appellant had not satisfied either prong under *Cheeseboro* and Appellant had therefore not demonstrated a basis for such a charge.[14] (R. p. 496, lines 11-20). Counsel offered no further argument or facts on the issue.

Discussion

Appellant fails to demonstrate an abuse of discretion on the part of the trial court in denying his motions for dismissal and in denying his request for a spoliation charge. Mistakes were undeniably made by the State in this case, but they were all properly addressed by the court. The facts of this case demonstrate that the delayed disclosure evidence raised as a basis for dismissal

[14] The trial court appears to make a speaking error in referencing this issue as one that concerns the body-worn camera of Officer McDaniel (as opposed to Officer Miles). Counsel mistakenly agreed with the Court's reference to Officer McDaniel and failed to note the wrongly named officer for the issue. However, from the record as a whole, it is clear that the disputed evidence was Officer Miles' video footage, and the wrongly named officer does not appear to have had any impact on the consideration of the issue.

during pretrial discovery motions was ultimately *not suppressed*, and Appellant received a continuance to ensure he had an opportunity to review it for purposes of preparation and use at trial. That evidence is legally insufficient to satisfy the elements of suppression and materiality under *Brady* for finding of a due process violation and the trial court was within its discretion to deny dismissal. Likewise, the trial court did not abuse its discretion in finding that the limited purged evidence failed to satisfy the *Cheeseboro* elements for a violation of due process or consideration of a spoliation charge, given the severely underdeveloped record facts brought out by Appellant during his opportunity for cross-examination on the issue.[15] Moreover, Supreme Court precedent demonstrates that a spoliation charge in criminal cases has been limited to civil actions under South Carolina law, and case law squarely doubts the propriety of giving such a charge. Appellant's case rests on the argument that these matters constitute a "pattern" of violations, while neglecting to acknowledge that a pattern cannot be established *by only one instance* of unavailable evidence. Appellant does not fairly or clearly present the legal issues in this case. More importantly, Appellant fails to present evidence that any of his allegations resulted in prejudice, or that the trial court abused its discretion in reaching its respective rulings. This Court should affirm the decisions of the trial court.

Analysis of Brady Claims

First, a *Brady* claim is based upon due process requirements, and "such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999)

[15] United State Supreme Court precedent in *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281 (1988) requires a showing of bad-faith on the part of the State in finding a due process violation for unpreserved evidence.

(citing *Kyles v. Whitley*, 514 U.S. 419, 432–42, 115 S.Ct. 1555, 1565–69, 131 L.Ed.2d 490, 505–10 (1995); *Brady v. Maryland*, 373 U.S. at 87, 83 S.Ct. at 1196, 10 L.Ed.2d at 218; *State v. Von Dohlen*, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996). This rule applies to both exculpatory evidence and impeachment evidence. *Id.* (citing *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481, 490 (1985)). "Evidence is material ... 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.'" *State v. Cain*, 297 S.C. 497, 503, 377 S.E.2d 556, 559 (1988), citing *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985). For purposes of *Brady*, in determining the materiality of nondisclosed evidence, an appellate court must consider the evidence in the context of the entire record. *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342.

A *Brady* violation requires a showing of prejudice by the accused. In *State v. Gather*, our Supreme Court ruled that a failure to disclose information only warrants a reversal if prejudice stemmed from the nondisclosure such that it deprived the defendant of a fair trial. *Id.*, 295 S.C. 476, 481-82, 369 S.E.2d 140, 143 (1988), aff'd, 490 U.S. 805, 109 S. Ct. 2207, 104 L. Ed. 2d 876 (1989) (citing *State v. Osborn*, 291 S.C. 265, 353 S.E.2d 276 (1987)). Similarly, an alleged violation of Rule 5 is not reversible absent a showing of prejudice. See *State v. Trotter*, 317 S.C. 411, 453 S.E.2d 905 (Ct.App.1995) aff'd in result 322 S.C. 537, 473 S.E.2d 452 (1996) (violation of Rule 5 not reversible where no prejudice); *State v. Hughes*, 336 S.C. 585, 593, 521 S.E.2d 500, 504 (1999). To the extent Appellant minimally argues that dismissal should have been granted under Rule 5, as empowering a trial court to "enter such other order[s] as it deems just under the circumstances" (See Initial Brief of Appellant, p. 11), Appellant fails to recognize such is again a

discretionary power of the court. Appellant further fails to demonstrate how the trial court abused its discretion in this matter and fails to support his argument with South Carolina authority.

Addressing first the motion hearing from May 11-12, 2021, the various discovery disputes were addressed in full by the court in advance of trial. Most of the disputes the court properly found to be either outside the scope of *Brady* and Rule 5 or simply improper requests for work product (issues 2, 3, 4, 5, 9, & 1). (May 11th hearing R., p. 37). The remaining matters were found to be already produced (issues 6, 7, 8, & 10). Moreover, even though the court found that disputed portions of number 1 (SLED worksheets for GSR and weapons) do not fall under *Brady* and Rule 5, the record shows that the Solicitor acquiesced to arranging production of those materials as well. (May 11th hearing R., p. 33).

Ultimately, each of the issues raised in the first hearing were addressed. Counsel even confirmed for the court that the supplemental motion for discovery had been resolved in full (May 11th hearing R., p. 36, lines 17-19), and at no time has Appellant claimed that matters taken up during the May 11th hearing remained unresolved during or after trial. Appellant cannot demonstrate an abuse of discretion regarding the May 11th hearing regarding supplemental discovery. Appellant's discussion of the first hearing is raised solely in the hope that listing numerous failed arguments will somehow bolster his other arguments on appeal.

Addressing second the delayed disclosure and production of Captain Strickland's body-camera footage, such is legally insufficient under *Brady* to constitute a due process violation and the trial court therefore did not abuse its discretion in denying Appellant's motion for dismissal due to the delayed disclosure. "In a *Brady* analysis, information is not deemed "material" ***if the defense discovers the information in time to adequately use it at trial.***" *State v. Kennerly*, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (S.C. Ct. App. 1998), *aff'd,* 337 S.C. 617, 524 S.E.2d 837 (S.C.

1999) (emphasis added); See *State v. McCray*, 413 S.C. 76, 96, 773 S.E.2d 914, 924 (Ct. App. 2015); *State v. Geer*, 391 S.C. 179, 192, 705 S.E.2d 441, 448 (Ct. App. 2010); *United States v. Smith Grading & Paving, Inc.*, 760 F.2d 527, 532 (4th Cir.1985). Though late, Appellant received the evidence in question and the court provided a continuance to Appellant ***that afforded him with three additional months*** to review the video footage. Moreover, the record demonstrates that law enforcement officers were prepared to help identify people in the video footage to assist the defense in identifying unknown individuals. The underlying premise of Appellant's argument on appeal is plainly deficient under the law.

Moreover, though Counsel characterized Appellant's discovery disputes as "*Brady* violations" and a "total pattern of what we believe to be violations of the defendant's fundamental constitutional rights by law enforcement", Counsel failed to articulate how her arguments satisfy the necessary *Brady* elements, or why her relied upon case law is supportive of her arguments. (May 20th hearing, R., p. 55). This is not a unique failure, as Appellant's various listed cases *on appeal* likewise fail to provide holdings and factual circumstances that would support his arguments.

Ultimately, Appellant's arguments during pretrial hearings amount to lip-service to *Brady*, with no real attempt to satisfy the law. In the absence of Appellant arguing as to how the elements of *Brady* were met to satisfy his motion for dismissal, the trial court likewise did not provide an itemized ruling as to each of the *Brady* elements. However, the trial court did find fault on the part of the State for the delayed disclosure of evidence, and in granting a three month continuance the trial court alleviated any *Brady* concern under the law. The trial court was well within its discretion to handle the issue in such a way and to deny the motion for dismissal.

The third issue is the body-cam and car-cam video footage from Officer Chris Miles. The facts derived by Appellant at trial regarding this evidence not only lack merit warranting reversal, but the clarity of Appellant's intended argument is difficult to discern.

Appellant's claim again appears to be a scattershot effort for relief under *Brady*. However, *Brady v. Maryland* specifically requires suppression of material evidence that is in possession of the State. The record concerning Officer Miles' video footage is severely underdeveloped by Appellant and actual "possession" of the evidence to permit discovery production cannot be shown in the record facts. "The Appellant bears the burden of providing a sufficient record on appeal from which this court can make an intelligent review", but here Appellant has failed to do so. *Matter of Est. of Moore*, 435 S.C. 706, 715, 869 S.E.2d 868, 872–73 (Ct. App. 2022), reh'g denied (Mar. 24, 2022); SCACR 210(h) ([T]he appellate court will not consider any fact which does not appear in the Record on Appeal.); *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 215, 493 S.E.2d 826, 834 (1997) (an appellant bears the burden of creating a sufficient record to review his assertions of error.) Critically, the record does not indicate *when* the evidence was "kicked out" by the police system; it could have been kicked out by the system upon Officer Miles' return to the station on the night of the crime, a week later, or a year later. The records simply does not provide the information required for Appellant to prove that the State was in possession of the evidence in such a way as to have actually suppressed it from production.

Appellant also fails to provide the court with facts as to how or why the evidence was purged, nor did he attempt to draw out facts that would provide insight into the contents of the video footage and how it might be favorable and material to his case. Appellant's questioning regarding the video footage established four things: 1) Officer Miles was the first to respond to the crime scene, 2) Officer Miles was no longer employed with the Timmonsville Police Department,

3) the evidence was "kicked out" or purged by the police department's system, and 4) the evidence was not available at trial. (R. p. 86-87; p. 452-453).

Appellant's argument for "materiality" on appeal is both speculative and contrary to existing law. Appellant acknowledges that he does not know the precise content of the evidence in question, a concession that immediately draws into doubt how Appellant can argue the evidence was favorable and exculpatory under *Brady*. However, while not knowing the content of the evidence, Appellant also argues that the evidence is material because it is likely similar to that of the evidence from Captain Strickland's body-cam, as he was also at the crime scene that night. (Initial Brief of Appellant, p. 12). Appellant has essentially conceded that the evidence is cumulative to evidence already in his possession prior to trial. The United States Supreme Court and our South Carolina Supreme Court have noted that cumulative evidence will seldom carry the burden of materiality under *Brady*. *Turner v. United States*, 198 L. Ed. 2d 443, 137 S. Ct. 1885, 1894 (2017) (finding that "with respect to the undisclosed impeachment evidence, the record shows that it was largely cumulative of impeachment evidence petitioner already had and used at trial"); *State v. Von Dohlen*, 322 S.C. 234, 241, 471 S.E.2d 689, 694 (1996), overruled on other grounds by *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019) (noting that cumulative evidence did not satisfy the reasonably probability of differing result standard under *Brady*); *Bowman v. Stirling*, 45 F.4th 740, 755 (4th Cir. 2022) (citing *Johnson v. Folino*, 705 F.3d 117, 129 (3d Cir. 2013)) (parenthetically noting that suppressed evidence cumulative to other evidence will generally not constitute material evidence under *Brady*). Such an argument is applicable here, and without a more established record it is entirely speculative to suggest the contents of the video footage would be favorable and exculpatory such that there is a reasonable probability of a different result at trial had the evidence been available.

Notwithstanding the failures of Appellant's arguments under the law of Brady and its progeny, none of Appellant's arguments concerning the alleged content of Officer Miles' video footage or its potential similarity to that of Captain Strickland's video was ever raised to the trial court. (See generally R., p. 85-87; p. 452-453; p. 492; p. 495-496; p. 508). Nor did Appellant present arguments on how the various *Brady* elements had been met in consideration of the purged evidence. In light of the limited facts presented, and to the extent that Appellant even relied upon *Brady* as his basis for dismissal at trial,[16] the trial court was within its discretion to deny the renewed motion to dismiss.

Analysis of the spoliation of evidence issue

The issue complained of by Appellant regarding Officer Miles' video footage is about due process rights resulting from unpreserved evidence, not suppression of evidence. Despite Appellant's arguments on appeal, *Brady v. Maryland* is not exactly on point. That is why the trial court analyzed the limited facts presented under *State v. Cheeseboro*, instead. The trial court was considering the issue of whether to give a spoliation charge, however Appellant also had his renewed motion for dismissal as an outstanding matter for the court to consider. Thus, the court's consideration of the *Cheeseboro* elements served a dual purpose of finding neither a due process violation, nor a basis for a spoliation charge, and its respective rulings were not an abuse of discretion thereto.

Under *Cheeseboro*, our Supreme Court articulated that, "[t]he State does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant." *State v. Cheeseboro*, 346 S.C. 526, 538, 552 S.E.2d 300, 307 (2001) (citing *Arizona v. Youngblood*, 488

[16] *Brady v. Maryland* is not mentioned or referenced during the entirety of Appellant's trial. Nor is "materiality" or "suppression" ever mentioned within the context of a *Brady* argument.

U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). The Court went on to prescribe that due process is not violated unless the defendant can demonstrate either 1) the State destroyed the evidence in bad faith, or 2) "that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means." *Id.*, (citing *State v. Mabe*, 306 S.C. 355, 412 S.E.2d 386 (1991).

The trial court articulated the holding of *Cheeseboro* precisely. (R. p. 495-496). The court's recitation of the law clearly demonstrated that *Cheeseboro* is applied toward determining whether a destruction of evidence issue rises to the level of a due process violation. Following its recitation of the law, the trial court then concluded that based on the facts presented, there was no evidence to support a bad faith action on the part of the State, nor was the evidence in question known to carry an exculpatory value prior to its destruction. The trial court noted that neither element under *Cheeseboro* had been satisfied, that Appellant had failed to demonstrate a basis for why a spoliation charge would be warranted in his case, and later maintained its rulings regarding the denial of dismissal. (R. p. 496; p. 508). The trial court's rulings were not an abuse of discretion.

Consideration of due process under *Cheeseboro* is often accompanied by a request for a spoliation charge by the defense. (See *State v. Breeze*, 379 S.C. 538, 545, 665 S.E.2d 247, 251 (Ct. App. 2008); *State v. McBride*, 416 S.C. 379, 786 S.E.2d 435 (Ct. App. 2016). In consideration of whether to give a spoliation charge to the jury, the trial court was again within its discretion to deny the request. There is no precedent establishing such a charge in criminal cases. By Appellant's own admission, the propriety of a spoliation charge for permitting an adverse inference from unavailable evidence in a criminal trial has been consistently deemed improper by South Carolina courts. (See Initial Brief of Appellant, p. 47-48).

This Court's opinion in *State v. McBride* is most instructive. Therein, this Court addressed a due process claim for the destruction of evidence by the State, in tandem with a request for an adverse inference charge to the jury. *Id.* In addressing those claims, this Court first noted that the trial court found that the defendant had not satisfied the *Cheeseboro* elements of either bad-faith destruction, or exculpatory evidence not otherwise obtainable through comparably valuable evidence. As such, no due process violation occurred. *Id.*, at 439. The opinion then pivoted to the question of the court's denial of an adverse inference charge. This Court found no error in the denial of the charge, noting the well-established principles that "'a trial court is required to charge only the current and correct law of South Carolina'" and that the refusal of a requested charge "be both erroneous and prejudicial" to warrant reversal. *Id.*, (quoting *State v. Burkhart*, 350 S.C. 252, 261, 565 S.E.2d 298, 302–03 (2002)). This Court then provided a synopsis of the prior cases concerning the issue, noting that 1) spoliation charges have been limited to civil cases, 2) adverse inference charges of any kind are rarely permissible in criminal cases, 3) the grave doubt as to the propriety of such charges in criminal cases, and 4) that only the most unusual circumstances would ever warrant such a charge. *Id.* (citing *State v. Breeze*, 379 S.C. 538, 545, 665 S.E.2d 247, 251 (Ct. App. 2008); *State v. Batson*, 261 S.C. 128, 138, 198 S.E.2d 517, 522 (1973). Even in *State v. Reaves*, where such a charge was given by the trial court, the Supreme Court set forth by footnote the fact that spoliation charges have been limited to civil cases in South Carolina. 414 S.C. 118, 128, n.5, 777 S.E.2d 213, 218 n.5 (2015).

An abuse of discretion requires either an error of law or a clear error of fact by the trial court, and Appellant can present neither. A trial court is required to charge only the current and correct law of South Carolina. *Brandt*, 713 S.E.2d at 603. No South Carolina law directs the provision of a spoliation of evidence charge, and the facts within the record before the trial court

were woefully insufficient to demonstrate that the State acted in bad faith or that the evidence was somehow exculpatory. The record cannot even demonstrate whether the purged evidence was an actual decision by the Timmonsville Police Department, a simple neglectful oversight, or an unavoidable system error. All that is made known is that "the system" kicked out or purged the evidence in question. Likewise, Appellant offered no facts or arguments that would support a finding that the video evidence had exculpatory value, and as argued above, any usefulness to the video evidence is likely cumulative to that already obtained through Captain Strickland's body-cam footage. The facts fail to support any portion of *Cheeseboro*, and Appellant has offered no sound argument to the contrary on appeal. There was no abuse of discretion by the trial court in finding *Cheeseboro* unmet, in subsequently denying the spoliation charge, and in denying the renewed motion for dismissal.

II. The trial court did not abuse its discretion in instructing the jury on the law of accomplice liability, as the testimony and forensics irrefutably demonstrated that multiple guns were fired during the crime, multiple assailants were utilizing those firearms, and the assailants arrived in unison in retaliation for Boogie's drive-by shooting of their family member's home.

Summary of Argument

The matter is ultimately not preserved for review because Appellant's arguments on appeal differ substantially from those presented to the trial court. To the extent the issue can be deemed preserved and available for appellate review, there is overwhelming evidence supporting the charge of accomplice liability in this matter given the forensic and testimonial evidence offered at trial. The trial court's decision to instruct the jury on the hand of one is the hand of all was entirely proper and Appellant cannot demonstrate an abuse of discretion in this case. Moreover, this case demonstrates the impropriety and peril of marginalizing accomplice liability to that of an

alternative theory of liability. Clarification of the law is necessary to reestablish the fundamental purpose and tenets of accomplice liability law.

Standard of Review

"An appellate court will not reverse the trial judge's decision regarding jury charges absent an abuse of discretion." *State v. Brandt*, 393 S.C. 526, 550, 713 S.E.2d 591, 603 (2011). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. *State v. Wharton*, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009). "[T]he trial court is required to charge only the current and correct law of South Carolina." *Brandt*, 713 S.E.2d at 603. "In reviewing jury charges for error, [an appellate court] must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *Id.* "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *Id.* "A jury charge which is substantially correct and covers the law does not require reversal." *Id.*, (citing *State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996)). 'The law to be charged must be determined from the evidence presented at trial.' *Brandt*, at 549, 713 S.E.2d at 603 (2011) (citing *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "If there is any evidence to support a charge, the trial court should grant the request." *Id.* (citing *State v. Williams*, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005)).

a. Appellant presents an argument unpreserved for appellate review.

Appellant's argument challenging the propriety of the accomplice liability charge is not preserved for appellate review. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal. A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. A

party may not argue one ground at trial and an alternate ground on appeal." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) (internal citations omitted).

On appeal, Appellant's argument against accomplice liability claims that "there was no evidence in the record that anyone other than Appellant fired the fatal shot". (Initial Brief of Appellant, p. 27). However, *that argument,* flawed as it may be (*infra*), is not the argument presented to the trial court in objection to the accomplice liability charge – the arguments of trial counsel are practically the opposite of those raised on appeal. At trial, Appellant argued that 1) the evidence was insufficient to place Appellant at the scene (which is also not part of the accomplice liability formula), 2) that Appellant was merely present on scene at the time of this shooting, 3) that there was no reliable indication that these individuals set out together for "some sort of concert" or conspiracy for a criminal act, 4) that "the defendant was only merely present on the scene and there's no indication that he was connected to the charged crime",[17] and 5) that he does not believe there was any evidence that Appellant established any sort of encouragement for the crime. (R. p. 501-503). Entirely absent from the record is the argument that all of the evidence suggests that only Appellant could have fired the killing shot.

As such, Appellant failed to provide the trial court with an opportunity to rule upon the argument for which he now seeks to assign error. This issue, as presented and argued, cannot be reached on appeal.

[17] The trial court even sought to appease this concern by noting he would give a more thorough and detailed explanation of "mere presence" to the jury, for which Counsel approved. (R. p. 503).

b. The facts of this case easily satisfy the any evidence standard warranting the charge.

The State presented evidence that well satisfied the "any evidence" standard for warranting a jury charge on accomplice liability. The trial court did not abuse its discretion in giving an accomplice liability charge in this case, and, contrary to the arguments of Appellant, the charge cannot simply be avoided because he believes the evidence "only" points to his own guilt.

The South Carolina Supreme Court in *State v. Mattison* provided a thorough explanation of the law and circumstance for instructing a jury as to accomplice liability under the hand of one is the hand of all charge. Therein, the Court stated:

> "It is well settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." *State v. Dickman*, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000). Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct.App.2002). "Under accomplice liability theory, 'a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.' " *State v. Langley*, 334 S.C. 643, 648–49, 515 S.E.2d 98, 101 (1999) (quoting *Austin*, 299 S.C. at 459, 385 S.E.2d at 832). "In order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct." *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987); see *Wilson v. Wilson*, 319 S.C. 370, 373, 461 S.E.2d 816, 817 (1995) ("Prior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of the crime."). "Mere presence at the scene is not sufficient to establish guilt as an aider or abettor." *Leonard*, 292 S.C. at 137, 355 S.E.2d at 272; *State v. Barroso*, 328 S.C. 268, 272, 493 S.E.2d 854, 856 (1997) (stating that mere association with admitted members of a conspiracy is insufficient to tie other persons to the conspiracy). However, "presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principle." *State v. Hill*, 268 S.C. 390, 395–96, 234 S.E.2d 219, 221 (1977). "Any person who is present at a homicide, aiding and abetting, is guilty of the homicide as a principal, even though

> another does the killing." *State v. Zeigler*, 364 S.C. 94, 103, 610 S.E.2d 859, 864 (Ct.App.2005).

State v. Mattison, 388 S.C. 469, 479–80, 697 S.E.2d 578, 584 (2010). The application of the law as laid out by the Court in *Mattison* can lead to no conclusion other than the accomplice liability charge was warranted at trial. The evidence satisfying that standard is as follows.

First, forensic evidence demonstrates that there were five .380 caliber shell casings, one .380 caliber bullet (projectile), and two 9 millimeter caliber bullets (projectiles) left at the scene. One of the 9 millimeter bullets was the cause of Victim's death. (R. p. 237-240; p. 381-382). This is irrefutable evidence that *at least* two guns were used. Second, numerous witnesses testified to shooting coming from two separate sources (R. p. 123; p. 152; p. 205): one source being a suspect standing near the red Challenger (R. p. 188; p. 196) and another source being a suspect standing near Jimmy's blue Charger. (R. p. 169-172; p. 183). This is strong direct evidence that two separate shooters were present, and in further support, the State even offered testimonial evidence that none of the bystander victims were shooting back at these cars. (R. p. 175). Third, the witnesses consistently testified that at least three separate cars arrived at the crime scene in unison immediately prior to the shooting taking place. (R. p. 127; p. 153; p. 160; p. 169). Fourth, these cars were coming from the scene of a recent drive-by shooting against the home of their shared family member, with the crime believed to have been committed by Boogie. (R. p. 204; p. 256; p. 259; p. 382). Fifth, the testimony demonstrated that upon arrival at the Ms. Gee's the assailants demanded to know where Boogie was and then opened fire on the home and bystanders. (R. p. 198-199; p. 123; p. 152; p. 205). Such is clear circumstantial evidence of a common scheme and conspiratorial purpose to retaliate for the drive-by shooting. Sixth, Victim was shot as a direct result of these individuals' concerted actions that night.

The above facts are more than enough to warrant the charge under the law. These facts

demonstrate two or more people joining together for an illegal purpose, wherein one of those individuals committed murder that is imputable to each of the confederates. The State need not prove which of the confederates shot the killing bullet, nor must the State forfeit the charge because the evidence clearly indicates the defendant on trial was the principal of the crime. However, to address certain arguments by Appellant that distort the proper legal analysis for warranting an accomplice liability charge, Respondent would provide a few additional facts and inferences (or *absence* of facts and inferences) that should also be taken into consideration from the record.

First, while the evidence would demonstrate that all 5 of the .380 shell casings were fired from the same weapon, forensic analysis has no method for determining whether the recovered .380 projectile was fired by the same gun that fired the shell casings. (R. p. 240). Also, no shell casings were found for a 9 millimeter firearm at all, which is easily explained if the gun used was a revolver, instead of a semi-automatic. Further still, the two recovered 9 millimeter projectiles could not be conclusively stated to have been fired by the same gun, due to damage to the projectile. (R. p. 240). All of this is offered to prove a simple point: *Appellant vastly overstates the proposition that there is only one interpretation of evidence in this case*. There is nothing in the record that would conclusively contradict the possibility that the suspect at the blue Charger had both a 9 millimeter revolver ***and*** a .380 semi-automatic that night.[18] That being the case, it is not impossible that the suspect at the blue Charger fired and missed with a .380, but struck Victim with a 9 millimeter firearm. In conjunction with that possibility, there is no evidence negating the further possibility that the suspect at the red Challenger was wielding a different 9 millimeter revolver that night, but failed to strike Victim. In further argument, there is nothing within the

[18] Co-defendant Jimmy Hampton Jr. testified that he never "saw" KB with a gun. However, his testimony does not negate the inference that KB was shooting that night and Jimmy Jr. even conceded that he believes KB was shooting that night.

record disproving that one or more of the other individuals from the three cars also participated in the shooting, and used a 9 millimeter firearm. No witness was able to identify the gun or gun(s) used by any of the assailants. To suggest otherwise and deny an accomplice liability charge would force the jury into unnecessary conclusions that it may not believe can be refuted by the evidence, thus the *necessity* for the charge. For the above stated reasons, the trial court did not abuse its discretion in giving an accomplice liability instruction.

c. The state of the law concerning accomplice liability

The argument before this Court is not that the State fell short of the evidence necessary to support an accomplice liability charge. Instead, Appellant essentially concedes the existence of a concerted illegal purpose with multiple participants, but argues (mistakenly) that because the evidence would *only* show the suspect near the red Challenger to be the principal of the crime (the suspect who actually shot Victim), as opposed to an accomplice to KB and Jimmy (some other shooter with poor aim), that such evidence ***exceeds*** the evidence threshold for charging accomplice liability. Such an argument offends the purpose and law of accomplice liability. Such an argument is also factually flawed as it applies to this case because of the various equivocal evidentiary possibilities that the State's case cannot account for. (*Supra, at p. 34-36*).

Much of the confusion and the misdirected legal arguments regarding accomplice liability stem from *dicta* in *Barber v. State*, 393 S.C. 232, 236-37, 712 S.E.2d 436, 438-39 (2011). The Supreme Court in *Barber* stated that "an alternate theory of liability may ... be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact." *Barber*, 393 S.C. at 236, 712 S.E.2d at 439. The reference to an accomplice liability, or the hand one is the hand of all instruction as "an alternate theory of liability" was first used by the Court in *Barber* and later adopted by the

Court of Appeals in *Wilds*. The phrase is not found in earlier precedent, it is not part of a jury charge given to jurors, and it should not be perpetuated further.

South Carolina law does not recognize a distinction between liability as a principal in the first degree and liability as a principal in the second degree, and because an accused indicted as a principal may be convicted under accomplice principles, the submission of a jury charge on accomplice liability cannot legally or logically create an alternative theory of liability. Likewise, the person inflicting the mortal wound cannot be prejudiced by the trial court giving the instruction – which is to say, in the case at hand, where the evidence *supposedly* can point to no other culprit as principal other than Appellant, he cannot be prejudiced by the jury knowing that accomplices share equally in guilt regardless of the manner in which they contribute to the crime. Nor should the jury be precluded from resolving all of the evidence for itself. See *Weiler*, 323 U.S. at 611; *Hutul*, 416 F.2d at 620. It is the jury's province to determine what testimony and evidence they deem credible, it is the jury's province to determine the facts that can be clearly taken from direct evidence, and it is the jury's province to determine the facts they believe can be fairly inferred from circumstantial evidence. All that need be shown to warrant an accomplice liability charge to the jury is: 1) any evidence tending to demonstrate that two or more individuals conspired to accomplish an illegal purpose, 2) any evidence that those individuals participated in furthering the illegal purpose, and 3) that the shared criminal liability emanating from the actions of one or more of the participants was incidental to the execution of the conspired illegal purpose. See *State v. Langley*, 334 S.C. 643, 648–49, 515 S.E.2d 98, 101 (1999) (citing *Austin*, 299 S.C. at 459, 385 S.E.2d at 832). The State cannot over satisfy that threshold to the detriment of the propriety of an accomplice liability charge.

The proper understanding for the application of accomplice liability is apparent in current

and controlling law cited for most all accomplice liability cases in South Carolina. "*Under accomplice liability theory, 'a person must personally commit the crime* ***or*** be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.'" *Id.* (emphasis added).[19] *Langley* and *Austin* have not been overruled, by *Barber* or any other case. If the law of accomplice liability were to exist in such a way that ***only*** the aiding and abetting party can be criminally liable for the actions of his confederate principal, the entire first twelve words of the quote from *Langley* would not exist. Stated another way, if only the aiding and abetting party could be criminally liable for the actions of his confederate principal, the instruction to juries would have to be called "The hand of the principal is the hand of the abettor", and its instruction would have to inform the jury that an abettor who joins with another to accomplish an illegal purpose is liable criminally for everything done by the principal actor. But, the quote from *Langley* says precisely what it does because it is an accurate statement of law; the instruction is aptly titled "the hand of one is the hand of all", because the law does not distinguish the degree of guilt; and our instructions to juries do not define or distinguish the terms "principal" and "accomplice", because under the law it is not a relevant distinction for guilt. It is not the State's burden to prove which of two or more concerted shooters actually caused Victim's death. Cf. *State v. Young*, 429 S.C. 155, 162, 838 S.E.2d 516, 520 (2020) (quoting favorably to *People v. Russell*, which held the "the State 'was not required to prove which defendant fired the fatal shot when the evidence was sufficient to establish that each defendant acted with the mental culpability required for the commission of depraved [-] indifference murder, and each defendant 'intentionally aided' the defendant who fired the fatal shot.'").

[19] Despite Appellant's efforts to distort the application of accomplice liability, even Appellant uses the same *Langley* quote in his recitation of the law.

This analysis does not contradict the recent holding of *State v. Washington*, which represents an exceedingly rare confluence of evidence and facts. Moreover, Appellant misconstrues the holding in *Washington*. Appellant argues that "the South Carolina Supreme Court held a trial judge erred by instructing the jury regarding accomplice liability where there was no evidence that anyone other than the defendant shot decedent." That explanation is incomplete; the complete explanation is that based upon the evidence before the Court there was no one who could have been the shooter who *could also have been* an accomplice to Washington. *State v. Washington* is a factual anomaly where the Court was able to conclude beyond any competing inference that the evidence of who could be the shooter did not align with who could be an accomplice. *State v. Washington*, 431 S.C. 619, 848 S.E.2d 794 (Ct. App. 2020). Though it has troublesome language that need not be perpetuated, it is not a departure from bedrock legal analysis.

For the above stated reasons, if this Court were to reach the merits of Appellant's argument on accomplice liability, this Court should affirm the decision of the trial court for lack of abuse of discretion. This Court should also endeavor to set straight the application of accomplice liability as requiring only the three elements from *Langley,* and not construe it as an alternate theory of liability.

III. The trial court did not abuse its discretion in excluding a jury charge on voluntary manslaughter. Such an issue was not preserved for review and the facts of this case would not satisfy the law requiring legal provocation to emanate from an action of the victim.

Standard of Review

"An appellate court will not reverse the trial judge's decision regarding jury charges absent an abuse of discretion." *State v. Brandt*, 393 S.C. 526, 550, 713 S.E.2d 591, 603 (2011). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. *State v. Wharton*, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009).

"[T]he trial court is required to charge only the current and correct law of South Carolina." *Brandt*, 713 S.E.2d at 603. "In reviewing jury charges for error, [an appellate court] must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *Id.* "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *Id.* "A jury charge which is substantially correct and covers the law does not require reversal." *Id.*, (citing *State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996)). 'The law to be charged must be determined from the evidence presented at trial.' *Brandt*, at 549, 713 S.E.2d at 603 (2011) (citing *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "If there is any evidence to support a charge, the trial court should grant the request." *Id.* (citing *State v. Williams*, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005)).

Discussion

The trial court did not abuse its discretion in not giving a voluntary manslaughter charge to the jury in this matter. Such a charge was not requested by Counsel at trial and Counsel did not object to the trial court's decision to exclude the charge. Therefore, issue three is not preserved for review. In any case, the law for voluntary manslaughter requires the sufficient legal provocation come by an overt act of the deceased, and not a third party. The charge is not applicable to the circumstances of this case.

To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court. *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). A defendant waives appellate review of an issue concerning jury charges when he neglects to request a desired charge. See *State v. Rios*, 388 S.C. 335, 341, 696 S.E.2d 608, 612 (Ct. App. 2010) (holding issue of court's failure to give involuntary manslaughter charge unpreserved wherein counsel considered the charge, but ultimately abandoned a request for the charge after conference with co-counsel.).

"Provocation necessary to support a voluntary manslaughter charge must come from some act of or related to the victim in order to constitute sufficient legal provocation." *State v. Locklair*, 341 S.C. 352, 362, 535 S.E.2d 420, 425 (2000) (citing *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996)); *State v. Childers*, 373 S.C. 367, 374, 645 S.E.2d 233, 236 (2007).

The facts are clear in this case: on the decision of whether to charge voluntary manslaughter, Appellant left the issue to the discretion of the trial court. Appellant did not request the charge and did not object to the court's indication that it would not give the charge. (R. p. 490; p. 497-499; p. 553-554). As such the issue has not been preserved for appellate review.

In the alternative, even if the issue is preserved, the facts of this case in no way support the law for when a voluntary manslaughter charge is warranted. The facts here demonstrate that Appellant, KB, and others arrived at the scene of the crime with a desire to find Boogie and opened fire thereafter. The facts also support that their actions were in retaliation for a drive-by shooting of their relative's home. In application to the law, and dispositive to the issue, there is no connection between the assailants and twelve-year-old victim, Fantasia Jackson. She was merely a bystander to the location where the assailants believed Boogie to be, and their decision to fire multiple rounds into the crowd was connected only to Boogie. As such, there is no overt act *by the Victim* which caused the sufficient legal provocation element for the crime. The charge is inapplicable, and the trial court was within its discretion to not charge the jury on the law of voluntary manslaughter.

Appellant has failed preserve its argument for appeal and has otherwise failed to demonstrate that the trial court abused its discretion in this matter. The decision of the trial court should be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Florence County
The Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

MICHAEL CHRISTIAN BARCLAY,

APPELLANT.

Appellate Case No. 2021-000976

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 2nd day of May, 2023.

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