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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Oconee County
Honorable Gerald C. Smoak, Trial Judge
Honorable Alexander S. Macaulay, Post-Conviction Relief Judge

Appellate Case No. 2023-000368

DANIEL LEWIS CROWE, SCDC # 358878,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI

- I. Did the PCR judge err in refusing to grant a new trial based on newly discovered evidence in the form of a statement from Misty Heaton Price, the daughter of the deceased, Eddie Heaton, indicating that on the night of the fatal shooting, Sherry Heaton, the wife of the deceased, and her brothers drugged Petitioner?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON CERTIORARI

- I. Did post-conviction relief court properly deny Crowe a new trial based on newly or after discovered evidence where the post-conviction relief court found Misty Heaton Price's letter failed the first factor of the Clark test and the post-conviction relief court made credibility findings concerning the evidence and testimony presented at the evidentiary hearing and found the probative value of the letter was minimal?

RESPONDENT'S STATEMENT OF THE CASE

Petitioner Daniel L. Crowe ("Crowe") is presently confined in the South Carolina Department of Corrections pursuant to the Oconee County Clerk of Court orders of commitment. Crowe was indicted during the July 1997 term of the Oconee County Grand Jury for murder (1997-GS-37-702). On June 23, 1998, Crowe proceeded to a jury trial before the Honorable Gerald C. Smoak. N. Gruber Sires, Jr., Esquire ("Trial Counsel"), represented Crowe. Deputy Solicitor Susan S. Reese¹ ("Solicitor Reese") prosecuted the case. On June 25, 1998, the jury found Crowe guilty as indicted. Judge Smoak sentenced Crowe to life without parole ("LWOP") pursuant to S.C. Code Ann. § 17-25-45 based on a prior voluntary manslaughter conviction in 1993. (App. p. 419).

Crowe filed a timely notice of appeal. Crowe's appeal was perfected by Deputy Chief Appellate Defender Joseph L. Savitz, III, Esquire. Following briefing, the South Carolina Supreme Court affirmed Crowe's conviction and sentence by memorandum opinion. Crowe v. State, 2000-MO-102 (S.C. Sup. Ct. filed July 20, 2000). The Remittitur was returned to the circuit court on August 7, 2000.

First Post-Conviction Relief Action: 2001-CP-37-0446

On August 21, 2001, Crowe filed his first post-conviction relief action alleging ineffective assistance of counsel for failing to object to improper evidence and failing to make pre-trial motions. The State moved to summarily dismiss the application as barred by the statute of limitations. On October 25, 2004, the Court convened a hearing into the matter before the Honorable Alexander S. Macaulay.² Crowe was present at the hearing and represented by Richard

¹ At the time of trial, Deputy Solicitor Reese's last name was Chappell.

² Because this action was not appealed, there is no record of this action except for Judge Macaulay's November 17, 2004, Order of Dismissal. Additionally, the transcript was unavailable to order. See

H. Warder. Assistant Attorney General Christopher L. Newton appeared on behalf of the State. On November 17, 2004, Judge Macaulay issued an order denying and dismissing the application with prejudice. Crowe did not appeal.

Second Post-Conviction Relief Action: 2005-CP-37-0356 and Subsequent Appeal

On April 26, 2005, Crowe filed his second post-conviction relief action, alleging newly discovered evidence that Crowe was involuntarily intoxicated at the time of the crime. The State moved to summarily dismiss the action as barred by the statute of limitations and successive to his previous post-conviction relief action. The Honorable J.C. Nicholson, Jr., acting in his capacity as Chief Administrative Judge, issued a conditional order of dismissal on October 4, 2005. Crowe filed a timely response to the conditional order of dismissal, stating that since the hearing and denial of his 2001 application, Crowe's son "learned of witnesses who know that he was given involuntary drugs which rendered him under the influence at the time of the alleged crime." Crowe further stated that after the hearing on the 2001 post-conviction relief application, he "learned of an additional witness who is in the prison system, who was a witness to the events resulting in his involuntary intoxication and the attempt upon his life wherein he reacted in self-defense." Judge Nicholson issued the final order of dismissal on November 2, 2005, denying and dismissing the application with prejudice.

Crowe filed a timely notice of appeal. Richard Warder, Esquire, perfected Crowe's appeal by filing a petition for writ of certiorari with the Supreme Court. Following the State's return to the petition, the Court issued an order denying Crowe's petition. Crowe v. State, S.C. Sup. Ct. Order dated Jan. 4, 2007. The Remittitur was returned to the circuit court on January 23, 2007.

Rule 607(i), SCACR ("[A] court reporter shall retain the primary and backup tapes of a proceeding for a period of at least five (5) years after the date of the proceeding, and the court reporter may reuse or destroy the tapes after the expiration of that period.").

Third Post-Conviction Relief Action: 2012-CP-37-0335

On April 9, 2012, Crowe filed his third post-conviction relief action alleging ineffective assistance of post-conviction relief counsel for failing to timely file the application for post-conviction relief, denied the appeal of the first post-conviction relief action, and did not receive a full bite at the apple. The State moved to summarily dismiss the application as barred by the statute of limitations, successive, and for failing to state a cognizable claim. Judge Macaulay, acting in his capacity as Chief Administrative Judge, issued a conditional order of dismissal on September 30, 2013. Crowe submitted a *pro se* memorandum in response. The Honorable R. Lawton McIntosh, acting in his capacity as Chief Administrative Judge, subsequently issued a final order of dismissal on November 25, 2014, denying and dismissing the application with prejudice. Crowe did not appeal.

Federal Habeas Corpus Action: 1:14-3831-BHH-SVH

On December 5, 2014, Crowe filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of South Carolina. See Crowe v. Warden of Perry Corr. Inst., No. 1:14-3831-BHH-SVH. Crowe raised multiple claims, including involuntary intoxication. Respondent filed a return and motion for summary judgment on April 13, 2015. On April 14, 2015, the Honorable Shiva H. Hodges, United States Magistrate Judge, issued a Roseboro Order. On August 10, 2015, Crowe filed a response in opposition to Respondent's motion for summary judgment. Judge Hodges subsequently issued a report and recommendation ("R&R") that Respondent's motion for summary judgment be granted and the petition be dismissed with prejudice. Crowe filed timely objections to the R&R on October 13, 2015. On February 5, 2016, the Honorable Bruce Howe Hendricks, United States District Judge, issued an order adopting and incorporating the R&R by reference, granting Respondent's motion

for summary judgment, dismissing the petition with prejudice, and denying a certificate of appealability. Crowe v. Warden of Perry Corr. Inst., No. CV 1:14-3831-BHH-SVH (D.S.C. Feb. 5, 2016).

Crowe filed a *pro se* notice of appeal in the United States Court of Appeals for the Fourth Circuit. On June 1, 2016, the Court issued an unpublished *per curiam* opinion denying Crowe's request for a certificate of appealability and dismissing the appeal. Crowe v. Warden of Perry Corr. Inst., 651 F. App'x 193 (4th Cir. 2016).

Crowe then filed a petition for a writ of certiorari in the United States Supreme Court. The Court denied Crowe's petition on November 28, 2016. Crowe v. Lewis, 137 S. Ct. 514 (2016).

Common Law Petitioner for *Writ of Certiorari*: 2021-000697

On July 27, 2021, Crowe filed a common law petition for a writ of certiorari, asking the South Carolina Supreme Court to remand his case for an evidentiary hearing on his allegation that the solicitor withheld exculpatory and impeaching information in violation of Brady v. Maryland, 373 U.S. 83 (1963). Specifically, Crowe asserted that the withheld information could have supported a defense of involuntary intoxication.³ (App. pp. 420-440). The State made its return to the petition on August 16, 2021. (App. pp. 459-462). Crowe then filed a reply to the State's return on August 22, 2021. On September 22, 2021, the Court granted the common law petition for writ of certiorari. (App. p. 463).

Fourth Post-Conviction Relief Action: 2021-CP-37-0663

On September 28, 2021, Crowe filed his fourth post-conviction relief action alleging he is entitled to relief in the form of a new trial based on his sole allegation that the State committed

³ Notably, Crowe raised this claim in the context of newly discovered evidence in his 2005 and 2012 PCR applications and his 2014 petition for habeas corpus.

prosecutorial misconduct by withholding exculpatory and impeaching information in violation of Brady v. Maryland, 373 U.S. 83 (1963). (App. pp. 464-466). Specifically, he contends the State failed to disclose to defense counsel that it knew of evidence tending to prove that Crowe was involuntarily drugged on the night that he shot and killed Eddie Heaton ("Victim"). That "evidence," according to Crowe, consists of an alleged meeting prior to trial between Misty Heaton Price, her sister, Judge Singleton, and Solicitor Reese, memorialized in a letter dated December 31, 1998. (App. p. 599). Following Judge Maddox's discovery order, the Tenth Circuit Solicitor's Office produced its complete files regarding Crowe's investigation, trial, and conviction. Both parties subsequently examined the contents of the Solicitor's file. The State made its Return and Motion to Dismiss on July 19, 2022, asserting the action should be dismissed because Crowe's Brady violation claim was untimely pursuant to S.C. Code Ann. §§ 17-27-20(A)(4)⁴ and 17-27-45(C)⁵.

On August 25, 2022, an evidentiary hearing convened before the Honorable G. D. Morgan, Jr. Crowe was represented by Elizabeth Franklin-Best, Esquire. Assistant Attorney Generals Taylor Z. Smith and Lillian L. Meadows represented the State. On February 23, 2023, Judge Morgan issued an order of dismissal denying relief and dismissing the action with prejudice. Crowe filed a timely notice of appeal on March 7, 2023.

On October 5, 2023, Crowe filed his Petition for Writ of Certiorari. This Return to Petition for Writ of Certiorari follows.

⁴ S.C. Code Ann. § 17-27-20(A)(4) provides that a person may institute a PCR action if "there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice."

⁵ S.C. Code Ann. § 17-27-45(C) provides that the application must be filed within one year after the date of actual discovery of the facts by the Crowe or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

RESPONDENT'S STATEMENT OF THE FACTS

On the afternoon of June 7, 1997, Crowe went to a birthday party at John Smith's ("John") home. Crowe spent the afternoon and evening drinking liquor and beer. (App. p. 312). As the evening progressed, Crowe became belligerent and picked fights with or attacked several other partygoers. (App. pp. 34; 56–58; 82–92; 98–101; 109; 114; 132). Eventually, Crowe made the mistake of calling Victim's wife, Sherry Heaton,⁶ a "bitch." The Victim was a rather large man and a bouncer at a local club. He may have punched Crowe once and knocked him to the ground. Conflicting testimonies were presented on this topic, but in any event, an altercation ensued. (App. pp. 34–35; 58–59; 101; 264–65; 314–15). After this incident, John had tired of Crowe's behavior and told him that he needed to leave the party. John gave Crowe a ride home because Crowe was drunk and could not find his keys. (App. pp. 35–36; 57–58; 85–86; 93; 101; 133; 266; 315). On the way home, Crowe told John he was coming back to kill Victim and would kill John, too, if John testified. (App. p. 60). After making this threat, John testified that Crowe's demeanor and behavior gave credence to the possibility that he may follow through. (App. pp. 60–61).

John returned to the party and attempted to get people to leave because of Crowe's threat. (App. pp. 36; 61; 86; 133). Meanwhile, Crowe dozed off for a while and then asked his wife, Charlotte Crowe, to take him back to the party. However, this time, he was armed with a twenty-gauge shotgun. (App. pp. 293–94; 302–03; 315–21). At trial, Crowe testified that he brought the gun with the intention of scaring the party attendees but claimed he only returned to the party to retrieve his vehicle. (App. p. 333). Crowe also claimed that he never opened the shotgun to check for ammunition and was unaware the gun was loaded. (App. p. 338).

⁶ John Smith, James Smith, and Benjamin Smith—all of whom testified at trial—are Sherry's brothers.

Crowe arrived back at the party in the early morning of June 8, 1997. As he approached the partygoers, Crowe testified that he heard yelling but admitted he could not make out what anyone was actually saying. Crowe testified that he construed the situation as aggression toward him. (App. pp. 320; 333–34). Crowe then pointed the shotgun at the Victim and shot the Victim in the chest at close range.⁷ Crowe then ran away as one of the partygoers fired at him with a pistol. (App. pp. 43; 95; 134; 321–22).

Crowe testified that he cocked the shotgun as he approached and claimed to see Victim reaching across his body. While Crowe claimed to believe that this was an effort by Victim to draw his own firearm,⁸ multiple eyewitnesses testified that Victim had not pulled a weapon out to threaten Crowe and did not have time even to react before Crowe shot him. (App. pp. 38; 87; 133–34; 321; 333–34). Partygoers also testified that Crowe could have reached his vehicle without bothering anyone. (App. pp. 129–30; 134; 138; 270).

Meanwhile, Crowe returned to John's house, went inside, and threatened to kill those inside with the shotgun. A scuffle erupted, but the remaining partygoers managed to subdue Crowe until the police arrived. (App. pp. 63–66; 73–74; 88–91; 96; 103–04).

Forensics revealed that the gunshot residue testing of the Victim's hands was consistent with presenting a defensive posture to a weapon fired by another individual. (App. p. 234). Forensics also revealed that Victim's blood tested negative for the presence of drugs or alcohol. (App. p. 194).

⁷ James Smith testified that the distance between Crowe and Victim was approximately ten feet. (App. p. 138). Victim's autopsy demonstrated that the shotgun's wadding was lodged into his gunshot wounds. (App. pp. 206–210).

⁸ Crowe testified that he had seen Victim with a gun earlier that day. (App. p. 321).

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the post-conviction relief court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

- I. **The post-conviction relief court properly denied Crowe a new trial based on newly or after-discovered evidence where the post-conviction relief court found Misty Heaton Price's letter failed the first factor of the Clark test and the post-conviction relief court made credibility findings concerning the evidence and testimony presented at the evidentiary hearing and found the probative value of the letter was minimal.**

On appeal, Crowe contends the post-conviction relief court erred in denying his application for post-conviction relief and granting him a new trial based on purported newly or after-discovered evidence. Specifically, Crowe argues that a letter written by Misty Heaton Price ("Price") on December 31, 1998, suggests the Victim's wife and her brothers drugged Crowe on the night of the Victim's murder. Crowe avers the post-conviction relief court erred as the findings of the court pertained primarily to the Brady⁹ claim, and the court failed to make the required findings to determine whether the letter constituted newly or after-discovered evidence.¹⁰ However, Crowe's argument is based on an erroneous understanding of the post-conviction relief court's findings and the law, as the court clearly found Crowe failed to meet the first prong of the Clark¹¹ test, taking into consideration the credibility of the witnesses and evidence at the evidentiary hearing, the evidence and testimony from Crowe's trial, and the probative value of the letter. Accordingly, the post-conviction relief court properly denied Crowe post-conviction relief based on newly or after-discovered evidence, and this Court should deny certiorari.

To obtain a new trial based on newly or after-discovered evidence under section 17-27-20(A)(4), a post-conviction relief Crowe must show the evidence:

- (1) would probably change the result if a new trial is had;

⁹ Brady v. Maryland, 373 U.S. 83 (1963).

¹⁰ Notably, Crowe is not appealing the post-conviction relief courts findings concerning the Brady violation.

¹¹ Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993).

- (2) has been discovered since the trial;
- (3) could not have been discovered before trial;
- (4) is material to the issue of guilt or innocence; and
- (5) is not merely cumulative or impeaching.

Clark, 315 S.C. 385, 434 S.E.2d 266 (1993); see Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (setting forth the five factors to be analyzed when considering a newly-discovered evidence claim) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979)); see also, e.g., United States v. Connolly, 504 F.3d 206, 212 (1st Cir. 2007) ("Every element of this test . . . is essential, and a failure to establish any one element will defeat the motion.")).

The "credibility of newly discovered evidence . . . is a matter for determination by the circuit judge to whom it is offered." State v. Mayfield, 235 S.C. 11, 34, 109 S.E.2d 716, 729 (1959); State v. Harris, 391 S.C. 539, 544–45, 706 S.E.2d 526, 529 ("The credibility of newly-discovered evidence is for the trial court to determine."); see e.g., State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) ("In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment.")).

It is a "fixed rule that the credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for determination by the circuit judge to whom it is offered." State v. Parker, 249 S.C. 139, 141, 153 S.E.2d 183, 184 (1967); see, e.g., State v. Deese, 266 S.C. 534, 538, 225 S.E.2d 175, 176 (1976) (reiterating that "[wh]en testimony is in direct conflict and depends largely on the credibility of the new evidence, the trial judge is charged with the duty of assessing the evidence."); cf. Clemons v. Mississippi, 494 U.S. 738, 766 (1990) (Blackmun, J., concurring in part and dissenting in part) ("The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire."); State v. Corn, 224 S.C. 74, 81, 77 S.E.2d 354, 357 (1953), citing State v. Griffin, 100 S.C. 331, 84 S.E.

876 (1915) ("In an appeal from an order denying a motion for a new trial, it is settled by numerous cases that this Court may not nicely weigh the testimony upon which such a motion is based; that power rests in the Circuit Court, for it has at hand the instrumentalities with which to exercise the power, and that Court's settled judgment ought not to be impeached except for errors of law, or for an abuse of its discretion.")).

In State v. Harris, Harris moved for a new trial based on newly discovered evidence of an affidavit by his co-defendant stating his testimony against Harris was coerced by the solicitor. 391 S.C. 539, 542-43, 706 S.E.2d 526, 528 (Ct. App. 2011). Harris, his co-defendant, and the solicitor testified at the hearing. Id., 391 S.C. at 543-44, 706 S. E.2d at 528-29. The trial court found the solicitor's testimony credible, and further found the circumstances surrounding the co-defendant's recantation combined with his testimony at trial made the recantation unreliable. Id. at 544, 706 S.E.2d at 529. The Court of Appeals affirmed the trial court's ruling, applying the Clark factors and finding:

This issue comes down to a matter of the *credibility of the witnesses*, which we leave to the trial court's discretion... The record supports the trial court's assessment. Accordingly, the trial court did not abuse its discretion in denying Harris's motion for a new trial.

Id. at 545-46, 706 S.E.2d at 529 (emphasis added); see also United States v. Wilson, 624 F.3d 640 (4th Cir. 2010) (Finding "the district court is required to make a credibility determination as part of its probability-of-acquittal determination...if the district court does not find a witness credible, it follows that the district court would not find the witness sufficiently persuasive to enable the district court to conclude that witness testimony would probably produce an acquittal at a new trial.") (internal quotations omitted).

Similar to Harris, the post-conviction relief court assessed the credibility of the witnesses, considering their testimony in light of the evidence and testimony presented at Crowe's trial. The

post-conviction relief court found that "[Crowe] failed to meet the first prong of the Clark test for newly discovered evidence because the testimony of Misty Heaton Price lacks sufficient credibility to determine that it would have changed the outcome." (App. p. 650). The post-conviction relief court based its finding on the inconsistencies within Price's testimony as compared to the letter, its assessment of Deputy Solicitor Reese's and Judge Singleton's credible testimony, and the credibility of the allegations in the letter as compared to the facts presented at trial. See State v. Wright, 269 S.C. 414, 420–21, 237 S.E.2d 764, 767–68 (1977) (finding the record supported the trial court's determination the recanted testimony of one of the witnesses was not believable, noting the other witness against the appellant had not recanted) see also Goss v. State, 425 S.C. 101, 108, 820 S.E.2d 373, 376 (2018) ("When a factfinder evaluates the credibility of witnesses, the mental process employed often requires the credibility evaluations to be based upon a consideration of all the evidence, not simply the parts the factfinder chooses to see and hear first-hand.").

Concerning Price's testimony, the post-conviction relief court highlighted Price's apparent inability to recall the details concerning the claims she made in the letter at the evidentiary hearing. (App. pp. 518–19). Additionally, the post-conviction relief court noted Price's claims in the letter about her conversations with Deputy Solicitor Reese and Judge Singleton differed, further contributing to the post-conviction relief court's finding that Price's testimony was not credible. (App. p. 599; App. pp. 508; 513, 28). These findings go directly to the credibility of the claims contained in the letter and ultimately to the post-conviction relief court's determination of whether the letter constitutes newly discovered evidence. Crowe avers the post-conviction relief court's findings pertain primarily to the Brady violation. While the findings the post-conviction relief court made are relevant to the Brady violation, the post-conviction relief court clearly made credibility findings based on the claims Price made within the letter to assess whether it would have

changed the outcome of the trial. The post-conviction relief court's findings that the testimony of Deputy Solicitor Reese and Judge Singleton that they could not recall these conversations were credible went directly to disprove the claims in the letter.

Moreover, the post-conviction relief court found "the probative value of the purported evidence at issue is minimal because the alleged statements made by Sherry Heaton according to Ms. Price constitute inadmissible hearsay." (App. p. 647). Sherry Heaton, who Price claims made the alleged exculpatory statement, was not at the post-conviction relief hearing to testify to the truth of her statements. See, e.g., Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (collecting cases) ("This Court has repeatedly held a PCR applicant *must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial."). Without her testimony, the letter merely constitutes inadmissible hearsay, having no effect on the outcome at a new trial.

The post-conviction relief court further assessed the probative value and credibility of the letter against the facts presented at trial. At trial, Crowe clearly recounted the events that transpired that night, including driving home, seeing his children, driving back to the party, the exact route he took to the driveway, and firing his shotgun at the victim. (App. pp. 312–22). As Crowe notes, there was evidence presented at trial through one witness, Mark Evans, that Crowe was "foaming at the mouth" and difficult to hold down until law enforcement arrived. (App. pp. 98; 105). At the evidentiary hearing, Jay Phillips testified that, in his expertise, an individual exhibiting these behaviors could support the fact Crowe was high on PCP at the time of the shooting. (App. pp. 541–42). However, on cross-examination, Phillips testified that a person on PCP would not be cogent while on it, and the person's memory would be fragmented at best. (App. pp. 545–46).

Phillips testified someone on PCP would not know who they were, and it would be surprising to him if they had any real memory. (App. p. 547).

Crowe avers the probative value of the evidence was not minimal, as Trial Counsel testified that he would have used the statements to impeach the testimony of Sherry Heaton and John Smith and to support a jury instruction on involuntary intoxication. (App. pp. 528–29). However, Trial Counsel's likelihood of using the evidence at trial is not indicative that the evidence would have been admissible or changed the outcome of Crowe's trial. Rather, the fact Crowe could vividly recall the events leading to and following the shooting, coupled with the failure of Crowe to present testimony from Sherry Heaton or other evidence establishing he was involuntarily drugged, make it highly improbable the letter would change the outcome at a new trial. See Roach v. Martin, 757 F.2d 1463, 1471 (4th Cir. 1985) (rejecting Roach's claim that "contrary to anything that was produced at trial...he was under the influence of phencyclidine (PCP) at the time of the murders...and that the development of this fact might tend to support either an insanity defense or a case in mitigation based on diminished capacity" in part because "the state record clearly supports a finding that Roach vividly recalled the details of the murders and that he was able to distinguish between right and wrong."); DeLong v. Thompson, 985 F.2d 553 (4th Cir. 1993) ("When a defendant recalls the events surrounding a murder "with such conciseness" that a defense of intoxication is implausible, counsel is not ineffective for not pursuing such a defense.").

Contrary to what Crowe contends, the post-conviction relief court's findings directly addressed whether the letter constituted newly discovered evidence, properly assessed the credibility of the letter, and properly denied Crowe a new trial based on the evidence presented and record before the post-conviction relief court. See State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011) ("The granting of a new trial because of after-discovered evidence

is not favored"); see also State v. David, 14 S.C. 428, 432 (1881) ("There can be no doubt that motions of this sort should be received with the utmost caution, because, as it is said by a learned judge, there are but few cases tried in which something new may not be hunted up . . .").

Assuming, *in arguendo*, that the post-conviction relief court failed to make the proper findings, Crowe failed to meet most of the prongs of the Clark test based on the evidence presented at the evidentiary hearing. As presented *supra*, it is improbable the letter would have changed the outcome of a new trial.

Moreover, though the letter had not been discovered until after trial, the information contained in the letter could have been discovered during Crowe's trial. At the evidentiary hearing, Charlotte Crowe, Crowe's wife, testified she was told before Crowe's trial that he had been drugged and that "everybody was bragging about it." (App. p. 525, ll. 19-20). It doesn't stand to reason that "everybody was bragging" about Crowe being drugged, and Crowe's wife knew about this before Crowe's trial, yet Crowe was wholly unaware of the fact and could not present the defense at trial.

Lastly, the letter is merely impeaching evidence. As Crowe stated, Trial Counsel testified he would have used the evidence to impeach the testimony of Sherry Heaton at trial. At Crowe's trial, Heaton testified she had been working at Scooter's Bar and had arrived at the party around 1 AM. (App. p. 33). Heaton testified when she arrived with the Victim, Crowe was on the front porch and acting erratically, telling everyone he would fight them. (App. p. 34). In the letter, Price claims Heaton "had confided to the both of us under secrecy that she and some of her brothers had drugged Sonny the night that he shot my dad." (App. p. 599). This directly contradicts Heaton's testimony Crowe had been acting erratically before she even arrived at the party.

In conclusion, the post-conviction relief court properly found Crowe failed to meet the test for newly or after-discovered evidence. Accordingly, this Court should deny certiorari.

CONCLUSION

For all the foregoing reasons, Respondent requests that this Court deny this Petition for Writ of Certiorari and deny Crowe's request to vacate the first post-conviction relief court's order of dismissal.

Respectfully submitted,

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