THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
R. Kieth Kelly, Circuit Court Judge

Appellate Case No. 2022-000160

The State, ...Respondent

v.

Johnathan Olin Batchelor,.....Appellant.

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Johnathan Batchelor petitions this Court to rehear this matter, withdraw the opinion dated July 17, 2024, and issue an opinion reversing the trial court. This Court overlooked or misapprehended the matters set forth below.

Failure to Take Judicial Notice of Court Records

The opening paragraph of Question II of Mr. Batchelor's Initial Reply Brief stated:

> The State acknowledges jailhouse informant Dustin Tiller "obviously testified with the hope of a benefit – a downward departure." Brief of Respondent, at 16; *id*, at 17 (acknowledging Tiller hoped for a downward departure). It appears the informant's hope for a downward departure will become a reality. On March 10, 2022, the United States attorney filed a motion "to seal a forthcoming document related to sentencing." *United States v. Tiller*, Case No. 6:16-cr-00707-JMC, ECF No. 1310. The Court granted the motion on the same day. *Id*., ECF No. 1311. On March 11, 2022, the Government filed a sealed motion, which remains pending at the time of this initial reply brief. *Id*., ECF No. 1312. One day, Mr. Batchelor and the state judicial system will know the outcome of the sealed motion—*i.e*. whether Dustin Tiller receives an additional downward departure for his assistance in the prosecution of Mr. Batchelor.

Initial Reply Brief of Appellant, at 5 (footnote omitted). Contemporaneously with filing the reply brief, Mr. Batchelor designated the following to be included in the record on appeal:

1. Government's Motion to Seal Forthcoming Document in *United States v. Tiller*, Case No. 6:16-cr-00707-JMC, ECF No. 1310; and

2. Docket sheet in *United States v. Tiller*, Case No. 6:16-cr-00707-JMC, as pertains to Dustin Tiller.

The State moved to strike the reference to Mr. Tiller's apparent efforts to be resentenced, and this Court granted the motion. As set forth in the Response in Opposition to the Motion to Strike, this Court overlooked its inherent authority to take judicial notice of these documents. *See, e.g., Wise v. Wise*, 394 S.C. 591, 716 S.E.2d 117 (Ct. App. 2011) (the appellate panel could take judicial notice of claimant's prior civil action against employer); *State v. Arnold*, 361 S.C. 386, 390, n. 3, 605 S.E.2d 529, 531, n. 3 (2004) (taking judicial notice of distance between locations); *State v. Hunter*, 82 S.C. 153, 63 S.E. 685 (1909) (a trial court should take judicial notice of the remittitur from the Supreme Court); *S.C. Dep't of Soc. Servs. v. Janice C.*, 383 S.C. 221, 227, 678 S.E.2d 463, 467 (Ct. App. 2009) ("a court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records") (quoting *Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984)); *State v. Johnson*, 213 S.C. 241, 49 S.E.2d 6 (1948) (Supreme Court may take judicial notice of general order signed by presiding judge at conclusion of terms of courts of general sessions) *overruled on other grounds by State v. Jackson*, 301 S.C. 49, 389 S.E.2d 654 (1990).

Significantly, "[o]n March 31, 2022, [Mr. Tiller's] sentence was reduced from 220 months to Time Served based on a motion pursuant to Federal Rule of Criminal Procedure 35(b)." *United States v. Tiller*, Case No. 6:16-cr-00707-TMC, ECF No. 1522 (Ex. A). It

appears this reduction in sentence was sealed. Mr. Batchelor discovered the reduction of sentence when the United States Probation Officer petitioned the District Court revoke Mr. Tiller's probation. *Id*.

This Court should grant this petition for rehearing and take judicial notice of Dustin Tiller's resentencing.

Question I

Did the trial judge err as a matter of law by denying Johnathan Batchelor's motion to dismiss when the law enforcement destroyed the physical evidence in the case without providing Mr. Batchelor with his due process opportunity to independently examine two projectiles to establish that two weapons were used in the assault on his wife, thereby contradicting the State's theory of the case and establishing his actual innocence?

This Court held:

> Appellant did not demonstrate any evidence of bad faith. The Spartanburg County Sheriff's Office (SCSO) believed the case was resolved prior to their destruction of the evidence because the SCSO destroyed the two bullet fragments after the direct appeal time expired from Appellant's Alford plea. In addition, Appellant could obtain evidence of comparable value. The defense was provided with a report detailing the specific features of each projectile and had the opportunity to examine the individual who examined the firearm evidence. Therefore, we find Appellant did not establish a due process violation.

Slip Opinion, at 3 (footnote omitted).

This Court overlooked Mr. Batchelor's argument that any "evidence retention policy" that does not respect the "well-known statues of limitations" for filing a PCR application and a federal petition for writ of habeas corpus "is a bad faith policy."

This Court also overstated the information contained in the ballistics' report. The report does not contain enough information for an independent expert to form an opinion. Mr. Batchelor was prejudiced by not having the opportunity to conduct an independent examination.

Question II

Did the trial court err by failing to exclude the testimony of Dustin Tiller, a jailhouse informant, serving a federal court sentence for conspiracy to traffic methamphetamine, when the trial judge operated under the mistaken impression that the court lacked the authority to evaluate the reliability of the informant's testimony?

This Court held, "[T]he trial court did not have the discretion to evaluate Tiller's credibility and exclude his testimony based on a lack of credibility." Slip Opinion, at 4. This holding overlooks the larger due process concerns surrounding testimony of jailhouse informants. A wealth of research documents due process concerns surrounding jailhouse informant testimony that results in wrongful convictions. *See, e.g.,* Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55 (2008); Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U. L. Rev. 107, 112 (2006); Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. Cin. L. Rev. 645 (2004); Ian Weinstein, *Regulating the Market for Snitches*, 47 Buff. L. Rev. 563, 577 (1999).

This Court acknowledged but dismissed other instances where trial courts have to determine the reliability of evidence before admitting that evidence for jurors to determine the weight and credibility of the evidence. *See, e.g., State v. Cope*, 405 S.C. 317, 341, 748 S.E.2d 194, 206 (2013) ("[E]vidence of third-party guilt that only tends to raise a conjectural inference that the third party, rather than the defendant, committed the crime should be excluded."); *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) ("[T]he trial court must evaluate the substance of the [expert] testimony and determine whether it is reliable."); *State v. Tutton*, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct. App. 2003) ("To be admissible, a prior bad act must first be established by clear and convincing evidence.").

This Court also held, "Tiller was a fact witness whose testimony the State presented to prove Appellant's guilt; therefore, these cases [cited in the previous paragraph] are not applicable to the present issue." Slip Opinion, at 2. This holding is inconsistent with this Court's holding in *State v. Adams*, 430 S.C. 420, 428, 845 S.E.2d 217, 221 (Ct. App. 2020) ("reliability concerns Adams raises . . . were satisfied here by the witness competency standard and within the framework of § 17-23-175, which in essence requires a pre-trial taint hearing").

Question III

Did the trial court err by limiting Johnathan Batchelor's cross-examination of Dustin Tiller—in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution—by prohibiting Mr. Batchelor from questioning Mr. Tiller about his conversation with his plea counsel after waiving the attorney-client privilege by testifying about those conversations, prohibiting Mr. Batchelor from questioning Mr. Tiller about the Solicitor speaking in favor of Mr. Tiller at his federal court sentencing hearing, and limiting Mr. Batchelor's questioning of Mr. Tiller regarding the twenty-month reduction in his federal that he already received for his cooperation in Mr. Batchelor's prosecution?

This Court incorrectly held, "On direct, although Tiller acknowledged that his plea counsel reviewed the plea agreement with him before he signed it, that he understood what it meant, and he explained what he thought the agreement meant, *Tiller never said what his plea counsel actually told him.*" Slip Opinion, at 5 (emphasis added). This Court overlooked the cross-examining during the proffer of Mr. Tiller's proposed testimony, where he testified about the advice he received from his attorney:

> Q Did you and Jim Bannister talk about how it would be helpful if you could provide information against people that weren't in your own case?
>
> A It, it came up when I told him that, you know, I might have some information about a murder weapon. And he said well, if you have information then it could help you.
>
> Q Okay. Well, when did that come up between you and Jim Bannister?

A When, after the conversation with me and Batchelor.

Q Did you and Jim Bannister talk about how it would be helpful if you could provide information against people that weren't in your own case?

A It, it came up when I told him that, you know, I might have some information about a murder weapon. And he said well, if you have information then it could help you.

Q Okay. Well, when did that come up between you and Jim Bannister?

A When, after the conversation with me and Batchelor.

R. 486-87. Mr. Tiller, accordingly, waived his attorney client privilege. *See, e.g.*, *Floyd v. Floyd*, 365 S.C. 56, 90, 615 S.E.2d 465, 483 (Ct. App. 2005) ("Any voluntary disclosure by a client to a third party waives the attorney-client privilege not only as to the specific communication disclosed, but also to all communications between the same attorney and the same client on the same subject.").

This Court also held, "[W]hile the trial court may have erred in its other limitations of Appellant's cross-examination of Tiller, these errors do not warrant reversal." Slip Opinion, at 5. This Court reasoned Mr. Batchelor "thoroughly cross-examined Tiller about the charges Tiller faced, his agreement to provide information about crimes, the benefits he had received from providing information, and his anticipation that his testimony at Appellant's trial would result in the solicitor speaking on his behalf and a further reduction of his sentence" and "was able to accomplish his primary objective by demonstrating Tiller's possible bias." *Id*., at 6. During the cross-examination during the proffer, Mr. Batchelor wanted to know what sentence Mr. Tiller hoped he would get in exchange for his cooperation in this case. Mr. Tiller evaded answering that questions. *See, e.g*., R. 491-93. As seen above, we know now that Mr. Tiller hoped for a time served sentence.

Mr. Batchelor should have been allowed to question Mr. Tiller about the 20-month sentence reduction he already received for his cooperation in this case, the Solicitor's participation in that sentence reduction hearing, and his hope to get out of federal prison in consideration of his testifying in Mr. Batchelor's case. *See, e.g., State v. Sims*, 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002) ("Because of the number of charges pending against [the witness] and the severity of the potential sentences, we find the evidence was probative on the issue of bias and should have been admitted."); *State v. Mizzell*, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002) ("We believe the defendant's Sixth Amendment right to effective cross-examination in this case outweighs the right of the State to shield the jury from knowledge of the possible sentence for a defendant who faces the same charges as a witness against him.").

Question IV

Did the trial court err as a matter of law by ordering a uniformed deputy, wearing body armor, and visibly carrying two sets of handcuffs, to escort Johnathan Batchelor to the witness stand, stand next to Mr. Batchelor during his testimony, and escort Mr. Batchelor back to the defense table, without conducting a hearing required by the Fourteenth Amendment to determine whether these unusual and enhanced security measures were necessary under the specific circumstances of this case and specific characteristics of Mr. Batchelor?

This Court's opinion misstates the question presented by referring to "the number of law enforcement officers in the courtroom was not excessive." Slip Opinion, at 6. The question presented is directed at the trial judge's decision to have a uniformed law enforcement shadow Mr. Batchelor while he testified, without first conducting a hearing to determine whether this extreme security measure was warranted. *Deck v. Missouri*, 544 U.S. 622 (2005). Once this Court focuses on the precise questioned presented, the need to reverse becomes apparent.

This Court's opinion also stated the issue was not preserved for appeal, even though the State never raised error preservation at trial, during the new trial motion hearing, or on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court." *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004). *See State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) ("[A]ll this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court."). These requirements are satisfied regarding this question on appeal.

Question V

Did the trial judge err as a matter of law by not limiting the State's presentation of evidence about Johnathan Batchelor's extra-material affair with Sydney Allen, when the probative value of this excessive amount of cumulative evidence was substantially outweighed by the danger of unfair prejudice, confused the issues, mislead the jurors an created an unfair risk that the jurors would decide the case based on evidence other than proof of the elements of the crime?

This Court merely held, "[T]he trial court did not err in admitting the photographs and text messages as their probative value outweighed the risk of prejudice." Slip Opinion, at 7. In doing so, this Court did not address Mr. Batchelor's full argument. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. Even though evidence is admissible, the quantity of evidence can be prejudicial. *See, e.g., State v. Gillian*, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007) ("The amount of evidence regarding the specifics of the [separate] burglary was unnecessary."); *State v. James*, 355 S.C. 25, 583 S.E.2d 745 (2003) (Pursuant to statute providing that person is guilty of burglary in the first degree if person enters dwelling

without consent and with intent to commit crime in the dwelling and the burglary is committed by person with prior record of two or more convictions for burglary, probative value of all seven of defendant's prior burglary convictions was outweighed by the very great potential for prejudice to defendant). This Court never addressed the excessive amount of evidence the trial court allowed the State to introduce.

Question VI

Did the trial judge err as a matter of law by not excluding photographs (State's Exhibits No. 31 and 38) that included the image of confederate flags when the probative value of the confederate flags was substantially outweighed by the danger of unfair prejudice to Johnathan Batchelor?

This Court held:

> Appellant argues the trial court erred in admitting photographs that included the confederate flag. He asserts the danger of unfair prejudice substantially outweighed the probative value of the photographs. We disagree. The photographs were admitted to help the jury visualize the scene of law enforcement's search and the objects they took into evidence. The State did nothing to emphasize the flag images. We hold the trial court did not err in admitting the photographs as their probative value outweighed the risk of prejudice from the confederate flag objects in the background of the photographs.

Slip Opinion, at 8. This cursory analysis overlooks the fact that ***no*** evidence was collected from Mr. Batchelor's workshop. *See* State Ex. 38. Nor does it consider that the photograph from Mr. Batchelor's truck should have been cropped, allowing the same evidence to be presented in a non-prejudicial manner. *See* State's Ex. 31.

Question VII

Did the trial court err—contrary to Sixth Amendment of the United States Constitution, Article I, Section 14 of the South Carolina Constitution, and S.C. Code Ann. § 14-7-1020—by not asking Johnathon Batchelor's request for voir dire numbers four and six inquiring whether there was anything about evidence of serious bodily injuries or hearing profanity that might cause the jurors not to be fair and impartial, when, as anticipated prior to trial, the jurors heard received evidence about serious bodily injuries and profanity?

This Court held, "[T]rial court did not abuse its discretion in finding its voir dire sufficiently ensured Appellant had a fair and impartial jury." Slip Opinion, at 8. The two cases primarily relied upon by the Court—*State v. Wise*, 359 S.C. 14, 596 S.E.2d 475 (2004) and *State v. Stanko*, 376 S.C. 571, 658 S.E.2d 94(2008)—are capital cases where the trial judge and counsel for the parties conduct extensive voir dire. The other two cases relied upon by the Court—*State v. Coaxum,* 410 S.C. 320, 327, 764 S.E.2d 242, 245 (2014) and *State v. Woods,* 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001)—involve jurors concealing information during voir dire. These cases taken together illustrate the necessity for trial courts to ask voir dire questions to elicit bias of jurors. *See Smith v. Phillips*, 455 U.S. 209, 221-2 (1982) (O'Connor, J., concurring) (recognizing that jurors may be incapable of acknowledging their own bias); *Crawford v. United States*, 212 U.S. 183, 196 (1909) ("Bias or prejudice is . . . an elusive condition of the mind . . . and it might exist in the mind of one . . . who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence"); *United States v. Burr*, 25 F. Cas. 49, 50 (D.Va.1807) (a person under the influence of personal prejudice "is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony" for such person may declare that "notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him").

Question VIII

Did the trial court err—in violation of the Sixth Amendment to the United States Construction, Article I, Section 14 of the South Carolina Constitution, and statutory law, by not ordering disclose of counseling records of Stephanie Batchelor when Johnathan Batchelor moved for disclosure of these records in order to be able to confront and cross-examine Ms. Batchelor?

This Court held, "Having reviewed the sealed records, we find the trial court accurately summarized Victim's therapy records and the records do not contain any exculpatory evidence or any evidence relevant to Victim's credibility." Slip Opinion, at 9. Without having reviewed the records, Mr. Batchelor is not in a position to respond to this holding. Nonetheless, in order to preserve this issue for pestilential review by the Supreme Court, Mr. Batchelor respectfully request this Court reconsider this holding.

Question IX

Did the trial court err by imposing a sentence of thirty years imprisonment, which is the maximum sentence allowed for attempted murder, when both the Solicitor and the Court of General Sessions previously agreed that a sentence of eighteen years in the Department of Corrections was sufficient, when the sentence imposed following trial punished Johnathan Batchelor for exercising his rights to seek post-conviction relief and a jury trial?

This Court held, "[T]he trial court did not abuse its discretion in sentencing Appellant to thirty years' imprisonment and denying his motion to reconsider the sentence." Slip Opinion, at 10. In reaching this conclusion, this Court reasoned "the State did not bring any additional charges against Appellant and Appellant's sentence falls within the statutorily-prescribed sentencing limits." *Id*., at 9. As our Supreme Court observed:

> In the landmark decision of *North Carolina v. Pearce,*[1] the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment prevented a trial court from penalizing a defendant for choosing to exercise his right to appeal. In order for the presumption of prosecutorial retaliation (or the "*Pearce* presumption") to apply, Petitioner must show there is a "reasonable likelihood" that retaliation was a motive behind bringing the additional charges. *Alabama v. Smith,* 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989); *State v. Fletcher,* 322 S.C. 256, 471 S.E.2d 702 (Ct.App.1996). Where no such "reasonable likelihood" exists, the defendant has the burden to prove actual retaliation. *Alabama v. Smith,* 490 U.S. at 800, 109 S.Ct. at 2205. In the instant case, there is a

[1] *North Carolina v. Pearce*, 395 U.S. 711 (1969), *modified by Alabama v. Smith*, 490 U.S. 794 (1989).

> "reasonable likelihood" retaliation was a motive, and therefore Petitioner was entitled to the presumption.

Patrick v. State, 349 S.C. 203, 209, 562 S.E.2d 609, 612 (2002).

Here, "there is a 'reasonable likelihood' retaliation was a motive, and therefore Petitioner was entitled to the presumption." *Id.* In bond hearings in this case, the State noted its displeasure that the Attorney General's office consented to the PCR court granting Mr. Batchelor a new trial. R. 22-29. Two post-PCR court orders denying bond reference Mr. Batchelor's prior *Alford* plea. R. 140-43. The State did not present any evidence that was not available to it prior to the *Alford* plea.

CONCLUSION

For the reasons set forth in the Final Brief of Appellant, Final Reply Brief of Appellant, and this petition, this Court should rehear this matter, withdraw the opinion dates July 17, 2024, and reverse the trial court.

IT IS SO MOVED.

Respectfully Submitted,

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Certificate of Service

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August 16, 2024
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