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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chesterfield County
The Honorable Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

MICHAEL LAMONT WATTS,

APPELLANT.

Appellate Case No. 2024-000461

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APPELLANT'S QUESTION PRESENTED

Did the circuit court err in denying Watts' motion for a new trial because the evidence produced at the hearing showed the State withheld material exculpatory and impeaching evidence from the defense which, had it been timely produced to counsel, and used at trial, would have undermined Watts' conviction?

RESPONDENT'S QUESTION PRESENTED

Did Judge Burch abuse his discretion in denying the Rule 29, SCRCrim.P, motion for a new trial based on after-discovered evidence, where the motion was untimely, the State did not commit a Brady violation in failing to disclose a letter from a police officer's employment file, the letter was not material, was at most cumulative or impeaching, would not have changed the result where there was overwhelming evidence of Watts' guilt, and does not undermine confidence in the verdict?

STATEMENT OF THE CASE

On November 28, 2004, in Chesterfield County, appellant, Michael Lamont Watts ("Watts") murdered Clifton Funderburk, Jr. with a firearm and shot David Evans and grazed Kevin Johnson. Watts was arrested at the scene immediately after the crimes. Watts was indicted by the Chesterfield County grand jury for murder (2005-GS-13-0471), 2 counts of assault and battery with intent to kill (ABWIK) (2005 GS-13-473, 474), possession of a firearm in a public building (2005-GS-13-0477), discharging a firearm into a building (2005-GS-13-476), escape (2005-GS-13-477), and possession of a weapon during a violent crime (2006-GS-13-499). He was represented by James P. Rogers, Esquire, deceased. From July 30 – August 1, 2007, Watts was tried by a Chesterfield County jury before the Honorable Paul M. Burch. At the directed verdict stage, 2 indictments, 1 count of ABWIK [victim Johnson] and 1 count of possession of a firearm in a public building were dismissed. At the conclusion of the trial, Watts was found guilty of murder, ABWIK, discharging a firearm into a building, escape, and possession of a weapon during a violent crime. Judge Burch, sentenced Watts to life for murder, 20 years for ABWIK, 10 years for discharging a firearm into a building, 1 year for escape, and 5 years for possession of a weapon during the commission of a violent crime. Watts appealed, and his direct appeal was ultimately dismissed by this Court in an unpublished opinion. State v. Watts, Opinion No. 2010-UP-019 (Ct. App. filed January 25, 2010).

Watts then filed a PCR application on July 2, 2010. An evidentiary hearing was held on July 16, 2013. Watts was represented by Tara D. Shurling. On October 23, 2013, the Honorable Ferrell Cothran, Jr., Circuit Court Judge ("the PCR court") dismissed the application. Watts appealed. The South Carolina Supreme Court denied certiorari on February 19, 2015.

Watts then filed a Rule 29(b), SCRCrim.P, motion for a new trial based on after-discovered evidence on June 3, 2022 that is the subject of this appeal. A hearing was held before Judge Burch,

the trial judge, on April 26, 2023. (April, 26, 2023 Tr. 1-22). Judge Burch denied the motion for a new trial on March 11, 2024. (Order, March 11, 2024). Watts appeals Judge Burch's denial of his Rule 29 motion for a new trial based on after discovered evidence. (IBOA). This is the Initial Brief of Respondent.

RESPONDENT'S STATEMENT OF FACTS

Brief Statement of the Crime

On November 28, 2004, appellant Michael Lamont Watts ("Watts") killed Clifton Funderburk, Jr. ("Victim") at the Matrix nightclub in Pageland, S.C. The murder was precipitated by an altercation which arose on the dance floor of the club. During the altercation, Watts was punched in the head or jaw. Watts left the nightclub and went to the car he came to the club in, retrieved a .45 caliber pistol, loaded it, re-entered the nightclub, whereupon he shot Victim killing him. Victim was not involved in the earlier altercation. Watts also wounded 2 other victims as a result of other shots he fired inside and outside the nightclub. The murder and subsequent shootings were witnessed by multiple witnesses including off duty police officers or security personnel working security at the nightclub that night. (Tr. 43-75; 77-114; 126-67; 177-228). Watts was immediately apprehended at the scene, the murder weapon recovered, and Watts' distinctive green jacket was seized. (Tr. 50-51: 183-228).

The evidence presented at trial

In addition to other evidence, the State called multiple eye-witnesses to the shooting: Tameka Austin, David Evans (an ABWIK victim), Kevin Johnson (another alleged victim), Angelo Mason, Charles Miller, Dewayne Miller, Latoya Miller, Tyrone Miller, Michael Tresdale, and Sargeant/Investigator Larry Brown. (R. 164-67: 43-75; 126-41; 153-64; 101-14; 141-53; 77-100; 177-83: 183-228). These witnesses testified to their perception of the events that took place at the Matrix nightclub that night, but each agreed an earlier altercation occurred on the dance floor, Watts left the club and obtained a firearm and re-entered the club, whereupon Watts shot Victim. According to all witnesses, Victim was innocent as he was not involved in the earlier altercation.

Testimony was also provided by Investigator Danny Bennett, who took Watts' statement after his arrest. (R. 170-77; see also State's Ex. 1). Watts admitted in his statement that he was in the initial altercation on the dance floor, retrieved a gun from his vehicle, re-entered the club, and claimed he only fired his semi-automatic pistol up in the air. He then admitted he exited a side door, turned and fired several shots into the ground, where David Evans testified he was shot. (R. 170-77; State's Ex. 1; R. 43-75). Expert testimony was introduced from Jennifer Stoner from SLED who testified to the gunshot residue (GSR) components found on Watts' distinctive green jacket. (R. 233-42). Similarly, Dan Defreese testified as a firearms identification expert that the shell casing found near Victim's body was fired by the .45 pistol Watts fired inside the club and the other fired shell casings recovered at the scene were also fired by the .45 pistol Watts fired. (R. 242-53). Finally, Dr. Janice Ross, an expert in forensic pathology, testified to Victim's autopsy and detailed her findings for the jury including Victim was shot with a large caliber weapon, possibly a .45 caliber pistol. (R. 259-68.)

David Evans [ABWIK victim] worked security at the Matrix nightclub in Pageland on November 28, 2004. Evans testified there was an alteration that occurred on the dance floor that night. (R. 44). Evans saw Watts that night in the club and Watts was intoxicated. Evans described Watts as wearing a green army jacket, and Watts was carrying a pistol. (R. 45-47). Evans testified that Watts walked towards the dance floor, and Evans testified he witnessed Watts firing his weapon. Evans testified to witnessing Watts discharge the firearm inside the club, after Watts looked around and mumbled something to himself, and raised the gun up sideways. (R. 47-49, 63-67, 72). Evans testified Watts, "fired one shot" which struck Victim, who hit the night-club wall, slid down and onto the floor, moved for several moments and then stopped. (R. 47-49, 63- 67, 72). Evans told the jury that Watts shot at him, Evans, when Evans confronted Watts just outside the

club after the initial shooting inside. At this time, Evans turned and ran back in the club, but Watts was able to hit Evans in the leg with 1 bullet. (R. 47-49). Watts was captured immediately after the shootings by off-duty officers who were working security at the club. (R. 50-51). The murder weapon was recovered and so was Watts' green army jacket that later tested positive for the components of GSR.

Latoya Miller, a patron of the club, witnessed the fight on the dance floor inside the club on the night in question. LaToya testified she then saw a man with a green jacket [Watts] and he had a gun in his hand. Initially it was pointed down. LaToya testified she saw this man shooting inside the night club. He was shooting in the direction of Victim. (R. 89-91). She also testified she heard a clicking noise around the time of the shooting. (R. 84-86, 90).

Tamka Austin was behind the D.J. booth in the club. She first witnessed a fight between Watts and a man named Dewayne. Security took Watts outside the club and then Watts entered back into the club. Watts was wearing a green trench coat. As soon as Watts came back in the club gunshots started going off. Austin hid behind some speakers until the shooting stopped. (R. 165-67).

Tyrone Miller, also a patron, was present at the club on the night of November 28, 2004. (R. 93-94). Tyrone testified he witnessed the fight in the club on the dance floor. His cousins Charles Miller and Kevin Johnson were involved. Tyrone testified that he saw Watts in the club, and he was wearing a green jacket. Later, Watts came back in the club armed with a gun and pointed the gun at Tyrone and asked: "who hit him?" Tyrone went in the men's bathroom and heard a shot and then fled into the ladies' bathroom then heard more gunshots being fired. (R. 94-95; 145).

Dwayne Miller testified he was involved in the altercation on the dance floor with Watts. Watts was escorted out of the club but returned with a firearm. Watts pointed the firearm at his cousin Tyrone Miller and asked Tyrone where was the person that hit him. Tyrone said I don't know what you are talking about. As Watts turned away, Dwayne jumped over the bar and hid and heard 1 gunshot. Dwayne fled to the kitchen area and heard a couple of more shots. (R. 142-53).

Charles Miller testified he was involved in the initial altercation on the dance floor. The altercation was over a belt-buckle and several people were involved. He testified that the altercation was broken up by security guards and Watts was escorted from the building. Then a few minutes later Watts came back in carrying a gun, and Charles saw Watts fire 1 shot with the gun. Watts was wearing a green jacket. Charles fled when he saw and heard Watts fire the first shot. Charles saw fire come out the end of the barrel of Watts' gun. As he was fleeing, Charles immediately heard more shots being fired by Watts. Charles testified Watts was shooting a black semi-automatic pistol. (R. 101-114).

Michael Tresdale, the club owner, and Sgt. Larry Brown each reported seeing Watts obtain a gun from a vehicle and "cock" it, and then reenter the club. (R. 180, 189-90, 199-200, 209). Tresdale testified Watts stated: "F-this" before reentering the club through a side door. Tresdale fled across the street from the club knowing what was about to happen. (Id.).

Kevin Johnson, Tyrone's cousin, also testified the initial altercation on the dance floor was over a belt-buckle. Watts was escorted out of the club. Johnson was outside the club and witnessed Watts get the gun out of the car. Johnson went back inside to the dance floor. Johnson then witnessed Watts come back in the club with the gun. He also testified Watts "shot the door and came in shooting," (Tr. 128-30, 133-34, 140). He did see Watts on or near the dance floor shooting. Watts was wearing a green Army fatigue jacket or something similar and fired multiple shots on

the dance floor. Johnson also testified that he was "grazed" or "burnt" in his "lower right leg" by a shot fired inside the club by Watts. (R. 131, 139-40). Johnson fled the club, and eventually saw Watts handcuffed outside. Johnson received medical attention from an ambulance outside. (R. 131, 139-40).

After the shooting in the club, David Evans reported he ran into Watts outside a side-door to the club. Watts accused Evans of swinging on him earlier inside the club. Evans testified he told Watts he did not swing at him, and Watts "raised his weapon and fired four or five times," striking the ground, and then shooting the glass out of the door, which thereafter struck Evans in his right leg. (R. 47-49, 63-70, 72). He described being in the doorway of the building when shot – both inside and outside the club. (R. 70-71, 73-74). Evans was treated at the hospital for the gunshot wound to his leg. (R. 51, 70- 71).

Angelo Mason, who was working security at the club, testified to the altercation on the dance floor and Watts was escorted out of the front door of the building. Mason testified that 15 to 20 minutes later Watts went by the bar then Mason heard a shot, and somebody said "he's got a gun." Mason heard the firing of the weapon an unknown number of times and seeing Watts approaching the exit of the club. (R. 156-157). Mason testified he personally witnessed Watts fire the weapon as he was approaching the door, "walking backwards out the club." (R. 156, 160-62). He also described Watts shooting the "glass out" and the bottom of the door. (R. 161-62). Watts kept firing as he backed out of the club until the gun stopped shooting. Mason testified Watts was shooting at, "another person inside," whom he assumed to be Evans. (R. 161).

Sgt. Larry Brown was still outside the club after Watts had re-entered the club with the pistol. Brown testified he saw Watts, after the murder and after he exited the club, shooting "about four times" outside of the club, "swinging the gun," in "a wild state," and disobeying police orders

to drop the weapon and get on the ground, resulting in a bullet breaking the glass door. (R. 191-92, 195, 209-11). He did not believe Watts was shooting at anyone in particular, just "firing at anybody." (R. 211-12). Brown testified Watts was being protected by 2 of his friends, in an attempt to prevent his apprehension; they made it to the car they came in, a white Bonneville, where they were apprehended and handcuffed, and the gun was retrieved from inside the vehicle. (R. 192). Evans also reported witnessing Watts being apprehended and then handcuffed. (R. 50, 65, 72-73). Someone then *reported* hearing small arms fire from behind the club, which Evans and Brown did not hear, and Sgt. Brown and others responded to investigate. Evans then witnessed Watts running away while handcuffed, causing Evans to "tackle" Watts, hence the charge of escape. (R. 50-51).

Sgt. Brown seized a .45 caliber firearm from the white Pontiac Bonneville that Watts was apprehended in, "still cocked back," and "on the passenger side seat between the seat and the console". He also seized the green army jacket Watts was wearing during the shootings. (R. 199-203; see also State's Ex. 4 (jacket), 3 (photograph), 13 and 39 (gun and clip). Evans identified State's Ex. 5 through 8 as photos of the Pontiac Bonneville Watts and his associates arrived in earlier in the night. (R. 51-52). Sgt. Brown also testified Watts and his group arrived at the club before the crimes in a Bonneville. (R. 185-86). Brown and Tresdale, the owner, had witnessed them arrive at the club earlier.

David Evans and Latoya Miller each identified State's Ex. 4, the green jacket, as similar to the jacket they saw Watts wearing on the night of the shooting. (R. 47, 60, 78-79). Austin, Brown, Charles, Johnson, and Mason also agreed on the jacket's description. (R. 105-06, 113-14, 129, 133-34, 141, 156, 166, 189, 199-200). The green jacket was later tested for and returned results consistent with GSR. (R. 238-40).

Brown collected several fired shell casings, including 4 or 5 near the middle door to the club and about 2 to 3 feet from the doorway, and 1 unfired bullet also in that area, as well as 1 fired bullet roughly 5 feet from Victim's body. (R. 194-99, 222- 23; see State's Ex. 19 & 23 (spent casings), 17 (bullet) and 18 (spent round). All of the ammo collected was .45 automatic. (R. 217, 225). Brown further testified to personally checking the building for "any other bullets in the walls," and not finding any. (R. 216-217, 226).

The firearm was identified by Dan Defreese as a .45 auto caliber pistol and the magazine was described as fitting that pistol and capable of holding 8 rounds. (R. 243-44, 250). The shell casings found at the scene were examined by Agent Defreese, who testified the casings State's Ex. 18 - 23 were fired through Watts' firearm, and the fired bullet State's Ex. 17 as being incapable of being identified as having been or not been in the firearm. (R. 244, 248-49). He found State's Ex. 18, the fired casing found near Victim, was fired by Watts' weapon recovered from the Bonneville. (R. 252). Defreese's report of his findings was introduced as State's Exhibit 41. (R. 249-50).

Dr. Ross, who conducted the autopsy, testified to the "entrance wound" to Victim being in his mid to left chest, an "oval" measuring ".45 by .46 inches," and entering at a downward angle. (R. 266-67). It traveled through his lung, heart and left kidney before exiting the middle of his left side, exiting slightly towards the right and resulting in a ".4 ... by .65 inches" exit wound. (R 266-67, 269). The cause of death was bleeding to death caused by the gunshot wound to the chest and resulting perforation of internal organs. (R 265). These findings were detailed in her autopsy report. (R. 265; State's Ex. 42). Dr. Ross could not definitively identify the caliber of bullet causing the wound but found it consistent with a .45-caliber bullet. (R. 267-68).

Watts testified at trial. He testified he was involved in the altercation on the dance floor where he was jumped on by several men and eventually left the club. He admitted he armed

himself with a handgun from the car he came in and re-entered the club to look for his friends and girlfriend. He admitted he racked the gun but claimed it was just to scare the men near the bar. He claimed he fired a shot up in the air because he saw a shiny object which he thought was a gun. He ran outside. He claimed he heard other shots being fired inside the club, so he fired several shots in the ground to scare that person off. He claimed he did not shoot Victim or intend to shoot Evans. (R. 302-41). Watts girlfriend testified and admitted she did not witness the shooting. She claimed that she heard shots being fired inside the club, and then she ran outside and saw Watts handcuffed and then she heard more shots that sounded like they came from the inside. A responding officer claimed after Watts was hand-cuffed, over the loud noise outside, he thought he heard small arms gunfire from the eastside of the club. A search was made but no shell casings were recovered in that area. (R. 283-399).

ARGUMENT

Judge Burch did not abuse his discretion in denying the Rule 29, SCRCrim.P, motion for a new trial based on after-discovered evidence, where the motion was untimely, the State did not commit a Brady violation in failing to disclose a letter from a police officer's employment file, the letter was not material, was at most cumulative or impeaching, would not have changed the result where there was overwhelming evidence of Watts' guilt, and does not undermine confidence in the verdict.

What occurred below

On June 3, 2022, through retained counsel Elizabeth Franklin-Best, Watts filed a *motion for a new trial* based on after-discovered evidence in the Circuit Court of General Sessions. Watts had retained a private investigator, Brian Setree, in 2021 who made a Freedom of Information Act (FOIA) request on October 13, 2021, on the City of Pageland, S.C. for the employee personnel file of Sergeant/Investigator Larry Brown. As previously stated, Brown was a witness in this case, arrested Watts at the scene, and became the chief investigator. The response to the FOIA request was received on November 6, 2021. As part of the response, Setree received a letter dated December 4, 2004, from the Pageland Chief of Police to Sargeant/Investigator Brown. It stated as follows:

> Dear Sgt. Brown:
>
> This conversation shall confirm a conversation we had on **December 02** (emphasis in original), regarding the Matrix Club on E. McGregor Street.
>
> I had addressed an issue of you working private security at that location without my authorization or knowledge which was in violation of department policy. You in turn advised me that you had informed me of such which I disagreed. At that point you ask [sic] me didn't I remember you telling me a couple of weeks back that the week after second and third shift worked the club until it closed on a Saturday night that you were going to help them out at the Matrix this weekend. This is when I responded that I did remember that but I thought that you meant that you were going to help second and third shift again as you had several weeks ago.
>
> With the above being clarified, we will close with the topic of the rest of our conversation. You will do no security work at the Matrix in the future. There

are liability issues on your part and the Town's part in which both parties could be potential losers and the business not lose a thing.

Be reminded that the department policy with regard to off duty employment will be follows [sic].
Respectfully,
John W. Sowell, Jr.
Chief.

(Defense Ex. 1, April 26, 2023 hearing, p. 8).

At the hearing on the Rule 29(b) motion, Watts argued that this letter had never been provided to the defense, and if it had, it would have been used by defense counsel to challenge the investigation of the case and would have undermined the jury's faith in the investigation that resulted in Watts' arrest, and as a result Watts was entitled to a new trial. (BOA, p. 66 & April 26, 2023 Tr. 1-22).[1] Watts conceded he was not alleging the State intentionally suppressed the letter or acted in bad faith, but that the letter was imputed to the State and was not disclosed. (April 26, 2023 Tr. p. 11, ll. 13-25). The Solicitor responded that the State never had the letter; if it had the letter, the State turned it over; and, the letter itself revealed there was a simple misunderstanding or a difference of opinion between the Chief and Sgt. Brown whether he could work off duty at the establishment on the night in question as Sgt. Brown specifically told the Chief he was working that evening but the Chief thought Brown meant something different. (Defense Ex. 1, April 26, 2023 Tr. 1-22). Regardless, the letter was not material based on all of the evidence of Watts' guilt introduced at trial and would not have changed the outcome even if the letter was introduced. (April 26, 2023, Tr. 1-22). Judge Burch stated he intended to review all of the materials regarding the case and this issue and asked both sides to submit proposed orders. (April 26, 2023, Tr. 21). On March 11, 2024, Judge Burch denied the motion for a new trial by written Order. (Order, March

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[1] At the hearing on the Motion for a New Trial, Watts also introduced other materials from Sgt. Brown's file. He has abandoned those matters on appeal and now argues only the letter as a basis for a new trial. (April, 26, 2023 Tr. 1-22; IBOA).

11, 2024). Watts now appeals Judge Burch's denial of his Rule 29(b), SCRCrim.P. motion for a new trial arguing 2 basis for the grant of a new trial based on the letter discussed above: (1) a Brady[2] violation, and (2) after-discovered evidence.

Standard of Review

Generally, the appellate courts of this State do not look with favor upon applications for a new trial based on after discovered evidence; however, there are obviously cases where such motions should be entertained and granted in order that wrongs done be remedied. State v. Irvin, 270 S.C. 539, 243 S.E.2d 195 (1978); State v. Pierce, 263 S.C. 23, 207 S.E.2d 414 (1974); State v. DeAngelis, 256 S.C. 364, 182 S.E.2d 732 (1971); State v. Jones, 89 S.C. 41, 71 S.E. 291 (1911); State v. Rhodes, 44 S.C. 325, 327, 21 S.E. 807 (1895). As with most motions, a motion for a new trial is left to the sound discretion of the trial judge. State v. Johnson, 187 S.C. 439, 198 S.E. 1 (1938). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. State v. Smith, 372 S.C. 404, 642 S.E.2d 627 (Ct. App. 2007). The question whether the trial court's discretion was erroneously exercised in denying a motion for a new trial on the ground of after-discovered evidence, must be determined, not only on the testimony heard on the motion, but also on the testimony introduced at the trial. State v. Bigham, 123 S.C. 411, 117 S.E. 57 (1923). In a motion for a new trial based upon after discovered evidence, it is the circuit judge, as a matter of law, that determines all of the issues of fact. Unless his findings of fact were influenced or controlled by error of law, or unless his conclusion based thereon was so illogical and unreasonable as to amount to a manifest abuse of discretion, his action is final and may not be overruled by the appellate court. Bigham, 123 S.C. 411, 117 S.E. 57. The credibility of newly discovered evidence offered in support of a motion for a new trial is a matter for

[2] Brady v. Maryland, 373 U.S. 83 (1963)

determination by the circuit judge, who has the power to weigh such evidence, and his judgment will not be disturbed except for error of law or abuse of discretion. State v. Corn, 224 S.C. 74, 77 S.E.2d 354 (1953). The determination of whether a Brady violation has occurred is also reviewed for an abuse of discretion. State v. Durant, 430 S.C. 98, 110, 844 S.E.2d 449 (2020); State v. Bryant, 372 S.C. 305, 316, 642 S.E.2d 582, 588 (2007) (reviewing a Brady violation for an abuse of discretion).

Law/Analysis

The 29(b) Motion is Untimely

Rule 29(b), SCRCrim.P provides that a motion for a new trial based on after-discovered evidence must be made within 1 year after the date of the actual discovery of the evidence or after the date when the evidence could have been ascertained by the exercise of due diligence. As an additional sustaining ground, Respondent submits the motion below was untimely. This letter could have been obtained by due diligence long before 2021.

The letter in question was written in **December of 2004**. Watts was convicted in 2007. The letter was obtained in 2021, approximately 16 years after it was written. It was obtained with a simple FOIA request in 2021. It could have been obtained with a FOIA request or by subpoena long before 2021. It could have been obtained at any time after it was written including pre-trial by subpoena, FOIA request, or motion to the trial court for *in camera* examination of Brown's personnel file. In fact, Watts filed a PCR action on *July 2, 2010*, and could have obtained this letter by subpoena or FOIA request at that time, simply directing the same to the City of Pageland. But he failed to do so. This letter has been in Brown's personnel file since *December of 2004.* Respondent submits this Rule 29 motion is untimely and the appeal should be dismissed for this reason.

As Judge Burch found, the new trial motion lacks merit

Was there a Brady violation?

First, Watts alleges that the State committed a Brady violation by not providing the letter from Brown's employment file to him prior to trial. Watts is wrong.

Brady requires the prosecution to disclose exculpatory evidence or evidence favorable to a defendant including impeachment material. Id.; Kyles v. Whitley, 514 U.S. 419, 438 (1995); (quoting Giglio v. United States, 405 U.S. 150, 154 (1972). Brady has been expanded to include the duty that the prosecutor must ferret out information favorable to the defendant contained in the police investigative files. Kyles v. Whitley, 514 U.S. at 438. Thus, in criminal prosecutions, the State must disclose to the accused any evidence that is favorable and "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. While this rule applies equally to exculpatory and impeachment evidence, *see* Giglio, 405 U.S. at 154, "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial[.]", 473 U.S. 667, 675 (1985) (citation omitted). Our Supreme Court has not required the prosecution to go on a fishing expedition to discover exculpatory or impeaching evidence. Durant, 430 S.C. at 109, 844 S.E.2d 449 (finding running an accurate rap sheet on State's witnesses hardly constituted a fishing expedition for exculpatory or impeachment evidence).

In order for this Court to find a Brady violation, Watts must establish that (1) the suppressed evidence is favorable to him, "either because it is exculpatory, or because it is impeaching"; (2) was in the possession of or known to the prosecution; (3) the evidence was suppressed by the State, "either willfully or inadvertently"; and (4) that "prejudice * * * ensued," i.e. it was material to guilt or punishment. Kyles, 514 U.S. at 432-42; Strickler v. Greene, 527 U.S. 263, 281-282 (1999);

Brady v. Maryland, 373 U,S. at 87. Exculpatory or impeachment 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. Durant, *supra* ("Durant cannot demonstrate the evidence was material because there was not a reasonable probability the result of the proceedings would have been different."); State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996) *overruled on other grounds by* State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019)(inference of malice from a deadly weapon is no longer valid). "[F]avorable evidence is material, and constitutional error results from its suppression by the government, 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." Kyles, 514 U.S. at 433, quoting United States v. Bagley, 473 U.S. 667, 682, (1985). The defendant bears the burden of proving that a Brady violation rises to the level of a denial of due process. Id.

First, Respondent submits that this letter is not information that is "favorable" to Watts, i.e. exculpatory *or* impeachment evidence. Strickler, *supra* (the defendant must first show the evidence in question is favorable to him, "either because it is exculpatory, or because it is impeaching"). There is nothing in the letter that is exculpatory to Watts, i.e. that shows Watts did not commit the crime, that Watts committed a lesser crime, or mitigates Watts' punishment. Brady, *supra*. The letter deals solely with Sgt. Brown. (Def. Ex. 1, Motion Hearing). The letter is not impeaching either. The letter merely shows there was a misunderstanding between Brown and the Chief of Police about whether Brown was supposed to be working at the club that night for the club, but that in the future, Brown could not work at the club without violating department policy. The letter in no way criticizes Brown's conduct of the investigation of the crimes Watts committed but speaks in terms of liability exposure of Brown and the City of Pageland if Watts were to

continue to work after hours at and for the Matrix nightclub. (Defendant's Ex. 1, April 26, 2023, Motion Hearing). There is nothing in the letter that goes to the truthfulness or veracity of Sgt. Brown. In fact, in the letter, the Chief admits Brown had told him he was going to be working security at the club on the night in question, but the Chief was confused about the nature of the work. (Def. Ex. 1, April 26 hearing). Nor does anything in the letter go to bias of Sgt. Brown. In fact, Sgt. Brown admitted at trial that he was off duty and working security for the club at the time of the incident. This Court has previously held alleged misconduct contained in a police officer's personnel or employment file, absent evidence of untruthfulness or bias, is inadmissible as impeachment evidence. State v. Davis, 438 S.C. 444, 884 S.E.2d 185 (Ct. App. 2022); State v. Dial, 405 S.C. 247, 255-57, 74 S.E.2d 495 (Ct. App. 2013); State v. Burgess, 393 S.C. 396, 404-06, 712 S.E.2d 1 (Ct. App. 2011). As a result, Watts has not met his burden to prove the first element of a Brady violation. *See* State v. Lett, 222 N.E.3d 95 (Ohio Ct. App. 8th Dist. Cuyahoga County 2023)(Defendant failed to establish that detective's administrative sanction was impeaching of his credibility on cross-examination in defendant's trial for offenses including murder, kidnapping, and burglary, and thus, state's withholding of the information was not a Brady violation warranting postconviction relief for alleged denial of defendant's right to due process, where the incident was not clearly probative of detective's truthfulness or untruthfulness in defendant's case).

Second, Respondent submits that it is questionable whether Watts can prove the second or third elements of a Brady violation, i.e. the letter was in possession of or known by the prosecution and was suppressed by the prosecution, because this State has not extended the Brady requirement to employment or personnel files of a police officer absent a specific request by defense counsel or knowledge of exculpatory or impeachment material in such a file by the prosecutor. In fact,

there is a split of authority at both the state and federal level, whether the State has to search in or discover what is in an employment or personnel file of a police officer absent the state knowing of the information ahead of time.[3] *See* Jonathan Abel, Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team, 67 Stan. L. Rev. 743, 770 (2015)(recognizing the split of authority). In Von Dohlen, the South Carolina Supreme Court held as follows;

> We find no basis upon which to impute Consumer Affairs' suspicion to the solicitor's office. Although information known to investigative or prosecutorial agencies may, under certain circumstances, be imputable to the State, *see* United States v. Auten, 632 F.2d 478 (5th Cir.1980) (holding criminal records and convictions of its witnesses are imputable to government), the government has no "affirmative duty to take action to discover information which it does not possess.... The prosecutor has no duty to undertake a fishing expedition ... in an effort to find impeaching evidence." United States v. Jones, 34 F.3d 596, 599 (8th Cir.1994). Those cases which find such knowledge imputable to the prosecutor involve prior convictions and/or pending charges against a witness. In contrast, the allegedly impeaching evidence in this case is Consumer Affairs' suspicion of possible alteration of documents, by an unknown individual, on which charges were never filed. We hold this information was not imputable to the solicitor's office.

Von Dohlen, 322 S.C. at 240–41, 471 S.E.2d at 693. Consistent with Von Dohlen, in State v. Durant, 430 S.C. 93, 844 S.E.2d 49 (2020), the Court held that criminal records of a prosecution witness contained in the NCIC database were in the possession of the State and required to be searched for and disclosed). Other case law has recognized the Solicitor here did not have a duty to ask Sgt. Brown if he had any previous warnings or allegations of violating City policy against

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[3] Obviously, if the Solicitor *knows* of exculpatory or impeachment evidence in an officer's employment or personnel file, he must disclose that evidence to the defense. Additionally, if there is a Giglio, *supra*, request such information must be searched for and disclosed or turned over to the Court for *in camera* inspection. However, there is no evidence this occurred in this case. Watts did not introduce his Rule 5 and Brady motion/request at the motion hearing and make it part of the record. (R. April 26, 2023, Tr. 1-22)

him of which the Solicitor was unaware: "While prosecutors should not be discouraged from asking their police witnesses about potential misconduct, if they feel such a conversation would be prudent, they are not required to make this inquiry to fulfill their Brady obligations." People v. Garrett, 18 N.E.3d 722, 732 (N.Y. 2014) (discussing evidence known to the officer but not to the prosecutor).

This Court has previously recognized that police officer personnel files, with some privacy exceptions, are public records. Burton v. York Cnty. Sheriff's Dep't, 358 S.C. 339, 352, 594 S.E.2d 888, 895 (Ct. App. 2004) ("[W]e find the manner in which the employees of the Sheriff's Department prosecute their duties to be a large and vital public interest that outweighs their desire to remain out of the public eye."). Watts could have subpoenaed Sgt. Brown's personnel file before the trial or made a Freedom of Information Act (FOIA) request upon the City of Pageland and obtained the letter. Or he could have made a specific request to go into Brown's personnel file in his discovery [Rule 5, SCRCrim.P, and Brady] request or moved for an order for the same from the trial court and *in camera* inspection of the personnel file of Sgt. Brown. He simply did not do any of these things. *See* United States v. Henthorn, 931 F.2d 29, 31 (9th Cir.1991) ("[T]he government has a duty to examine personnel files upon a defendant's request for their production."). *See also* United States v. Brooks, 966 F.2d 1500, 1503 (D.C.Cir.1992) (finding it highly relevant that defense counsel pinpointed files that can be searched without difficulty); Snowden v. State, 672 A.2d 1017, 1023 (Del. 1996)(collecting cases); Dempsey v. State, 615 S.E.2d 522, 525 (Ga. 2005) (ruling that the defendant has the "burden of showing that the personnel files were not the subject of a fishing expedition, but were relevant to...guilt, innocence or appropriate penalty"); *see* Rodgers v. State, 547 S.W.2d 419, 429 (Ark. 1977) (en banc) ("But, in the exercise of discretion, the necessity for a defendant's searching confidential matter must be

weighed against the public policy of confidentiality or secrecy. This, the trial court may do by an *in camera* inspection of the material sought." (citations omitted)). *See also* Davis, 438 S.C. 444, 884 S.E.2d 185 (Ct. App. 2022)(reviewing police officer's personnel file *in camera* for Brady material, denying disclosure, which was upheld on appeal); Dial, 405 S.C. 247, 255-57, 74 S.E.2d 495 (similar): Burgess, 393 S.C. 396, 404-06, 712 S.E.2d 1; *But see* Durant, *supra* (refusing to impose a duty on the defendant to search for and obtain accurate criminal records of a State's witness even though defendant could have done so with more difficulty where the State had direct access to the NCIC database, ran witness' criminal record, and affirmatively represented witness had no criminal record).

Finally, regardless of the above discussion of elements two and three of Brady, Watts cannot meet his burden to prove the fourth and final element of a Brady violation. Durant, 430 S.C. 98, 844 S.E.2d 49 ("...the jury had ample evidence supporting its verdict. Accordingly, Durant cannot demonstrate the evidence was material because there was not a reasonable probability the result of the proceedings would have been different." *citing* Bagley, 473 U.S. at 682 ("A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."). There was no Brady violation here because the letter was not material, i.e. there is no reasonable probability of a different result if the letter from Brown's employment file had been disclosed. Brady, *supra*; Von Dohlen, 322 S.C. at 241, 471 S.E.2d at 693 (impeachment or exculpatory 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)(*citing* Bagley, 473 U.S. 667); *See* Donald v. Commissioner of Correction, 284 A.3d 665 (Conn. App. 2022), citing 21A Am. Jur. 2d Criminal Law § 1160 (Finally, there was no Brady violation here because there was no reasonable probability of a different result, as would be required for relief based on a Brady due

process violation in prosecution relating to robbery of grocery store, if state had disclosed impeachment evidence in personnel file of lead detective who testified to defendant's confession, i.e., detective had disciplinary record involving excessive use of force, making false statements, and abuse of power, where overwhelming evidence supported defendant's convictions, including video of defendant committing the crimes and accomplice's testimony against defendant. U.S. Const. Amend. 14.).

Here, the evidence of Watts' guilt was overwhelming. Durant, *supra*. Multiple witnesses, including Watts, testified or stated that Watts was present at the night club and got in an altercation with several individuals on the dance floor and Watts was assaulted on the dance floor and then went to the vehicle he came in and retrieved a .45 caliber pistol and loaded it. **(R. 177-83; 183-93; 92-100; 141-53; State's Ex. 1).** The owner of the nightclub, who knew Watts because Watts hung around with the owner's cousin, testified he witnessed Watts retrieve the weapon from the vehicle, rack the gun to load it, and Watts stated" "F this". Watts then entered the club through a side door. **(R. 177-183).** The owner knew what was about to happen and fled across the street. **(R. 177-83).** The altercation on the dance floor established Watts' motive for the shooting. Whether he shot the correct person was a completely different issue, but multiple witnesses testified he retrieved a loaded semi-automatic pistol from a vehicle and re-entered the night club angry about being punched earlier. Multiple witnesses testified he was visibly carrying or pointing the handgun and asking where the individual or individuals were that attacked him or punched him on the dance floor, or he was accusing certain individuals of being the person who struck him earlier. **(R. 92-100; 141-53; 177-83; 183-93).** Multiple witnesses testified to seeing him point the gun and fire the gun when Victim was struck and killed. **(R. 43-75; 77-91; 101-14; 126-41; 141-53).** Even Watts himself admitted discharging the gun inside the club and then stepping outside a side door

and firing multiple more shots in the ground, 1 of which struck another victim, Evans, in the leg. **(State's Ex. 1 [Defendant's statement]).** Other witnesses saw Watts shoot multiple times in David Evans' direction when Evans was shot. **(R. 153-64; 43-75).** Still another witness saw Watts shooting wildly outside the nightclub until the gun was out of bullets. **(R. 183-93).** Watts was then apprehended still at the club by off-duty police officers or security. **(R. 183-93; 43-75).** Watts was in constructive possession of the murder weapon after he got into the car he came in, in an attempt to flee the scene. **(R. 183-93).** The murder weapon was also recovered along with Watts' distinctive green jacket he was wearing at the time of the crimes. **(R. 183-93).**

The letter to Sgt. Brown from his Chief does not change the fact that Brown was present at the club and was a witness to the shooting. **(R. 183-93).** It does not change the fact that Brown was involved in breaking up the initial altercation, which was the motive for the shooting, or that Brown witnessed Watts retrieving the firearm from a vehicle and re-entering the nightclub. **(R. 183-93).**

The letter does not change what numerous lay witnesses and security guards testified to, that it was Watts who shot and killed Victim and wounded Evans. It also does not change the fact that the fired shell casing found near Victim's body matches the gun carried, pointed, and fired by Watts. **(R. 242-52).** The letter also does not change the fact that Brown and other officers were able to respond immediately and apprehend Watts and his associates immediately after the shooting preventing further loss of life. **(R. 183-93; 43-75).** The letter does not change the fact that Watts was arrested with the murder weapon and police also recovered his distinctive green jacket that tested positive for gunshot residue. **(R. 242-52; 233-42).** At most, the letter shows a misunderstanding between the Chief and Sgt. Brown about whether Brown had permission to work security at the club, for the club, that night. (Defense Ex. 1, Motion hearing). Watts cannot show with the letter, based on this record, there is a reasonable probability the result of the trial would

have been different undermining confidence in the outcome. Strickler v. Greene, 527 U.S. 263 (1999); Wood v. Bartholomew, 516 U.S. 1 (1995); Von Dohlen, 322 S.C. at 241, 471 S.E.2d at 693 (*citing* United States v. Bagley)(finding impeachment evidence would not change the result at trial therefore there was no Brady violation).

If the letter would have been disclosed, and if the trial court had ruled it was admissible, Brown would have been shown the letter while testifying, and he would have admitted the contents of the same, and that the letter was written a few days after the murder and ABWIK. The jury would have been aware that the Chief understood Brown to be helping out at the Matrix the night of the shooting, as he had done previously, but believed he was not actually working for the club. Brown would have testified consistent with the contents of the letter, that he had informed the Chief he would be working at the Matrix that night, the Chief had approved the same, but the Chief misunderstood what he told him, that he would be working for the club and being paid to work security. (Def. Ex. 1, April 26, 2023 hearing). At most, the jury would have heard that Brown was *allegedly* working security that night in violation of department policy, but it was based on a misunderstanding between Brown and the Chief. (Def. Ex. 1, April 26, 2023). The letter shows the Chief was actually informing Brown that in the future if he worked security for the club after-hours and he was paid by the club he would be in violation of department policy. The jury would also have known from the letter that the Chief made no complaint about Brown's investigation or work **on this case**, but was concerned about *civil liability* of Brown and the City of Pageland in the future. (Def. Ex. 1, April 26, 2023). The letter would not change the testimony of Brown to what he saw, his investigation, or the testimony of any other witness or the physical evidence and does not undermine confidence in the verdict. Strickler; Brady; Bagley; Giglio; Durant. Therefore, there is no Brady violation

After-discovered Evidence

Watts also claims he is entitled to a new trial based on after-discovered evidence. This claim is based on the same letter from the Chief to Sgt. Brown. In Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993), the Court held that to obtain a new trial based on after-discovered evidence, the party must show the evidence:

> (1) would probably change the result if a new trial is had:
>
> (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.

See also McCoy v. State, 401 S.C. 363 737 S.E.2d 623(2013); State v. Spann, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999). Watts cannot meet this high standard. And, he cannot show Judge Burch abused his discretion in denying the motion for a new trial based on this letter.

Watts cannot meet the first element of the Clark test, i.e. the new evidence would probably change the result if a new trial were had. Id. This letter would not. As previously stated, the evidence that Watts murdered Victim was overwhelming. Multiple lay witnesses, security guards, and off-duty police, including Watts, testified or stated that Watts was present at the night club and got in an altercation with several individuals on the dance floor and Watts was assaulted and then went to the vehicle he came in and retrieved a .45 caliber pistol and loaded it. **(R. 177-83; 183-93; 92-100; 141-53; State's Ex. 1).** This evidence established Watts motive for the shooting. Whether he shot the correct person was a completely different issue, but multiple witnesses testified he retrieved a loaded semi-automatic pistol from a vehicle and re-entered the night club angry about being punched earlier. **(R. 177-83; 183-93; 92-100; 141-53).**

Multiple eyewitnesses testified Watts was openly carrying or pointing the handgun outside and then inside the club and asking where the individual or individuals were that attacked him or on the dance floor, or he was accusing certain individuals of being the person who struck him earlier. **(R. 92-100; 141-53; 177-83; 183-93).** Multiple witnesses testified to seeing him point the gun and fire the gun when Victim was struck and killed. **(R. 43-75; 77-91; 101-14; 126-41; 141-53).** Even Watts himself admitted discharging the gun inside the club and then stepping outside a side door and firing multiple more shots in the ground, 1 of which struck another victim, David Evans, in the leg. **(State's Ex. 1, trial; 43-75).** Other witnesses saw Watts shoot multiple times in David Evans' direction when Evans was shot. **(R. 153-64; 43-75).** Still another witness saw Watts shooting wildly outside until the gun was out of bullets. **(R. 183-93).** Watts was then apprehended while still at the club by off-duty police officers or security. **(R. 183-93; 43-75; 153-64).** Watts was in constructive possession of the murder weapon after he got into the car he came in, in an attempt to flee the scene. **(R. 183-93).** The murder weapon was also recovered and Watts' distinctive green jacket he was wearing at the time of the crimes. **(R. 183-93).** The murder weapon matched a fired shell casing found near Victim's body and the other numerous fired shell casings found just outside the club door. **(R. 242-52).** And the distinctive green jacket tested positive for GSR. **(R. 233-41).** Finally, the second victim who survived, Evans, identified Watts as the person who shot Victim and then shot him, when he confronted Watts outside the club immediately after the murder of Victim. **(R. 43-75).**

The letter to Sgt. Brown from his Chief does not change the fact that Brown was present at the club and was a witness to the shooting. **(R. 183-226; 177-83).** It does not change the fact that Brown was involved in breaking up the initial altercation which was the motive for the shooting or that Brown witnessed Watts retrieving the firearm from a vehicle and re-entering the night club.

(R.183-226; 177-83). The owner of the club was standing next to Brown when this occurred and corroborated Brown's testimony. **(R. 177-83).** The letter does not change what numerous witnesses testified to, that it was Watts who shot and killed Victim, or that the shell casing found near Victim's body matches the gun carried, pointed, and fired by Watts. **(R. 43-75; 77-91; 101-14; 126-41; 141-53).** The letter does not change the fact that Watts was apprehended with the distinctive green jacket that contained GSR. **(R. 233-42).** The letter also does not change the fact that Brown and other officers were able to respond immediately and apprehend Watts and his associates immediately after the shooting preventing further loss of life. **(R. 183-226).** This was corroborated by other witnesses as well. **(R. 43-75; 153-64).** At most, the letter shows a misunderstanding between the Chief and Sgt. Brwon whether he had permission to work security at the club that night for pay from the nightclub. (Defense Ex. 1, Motion hearing). Watts cannot show the letter would probably change the result if a new trial were had. Clark, *supra*; Spann, 334 S.C. at 619-20, 513 S.E.2d at 99.

As stated above, if a new trial were had, and the trial court admitted the letter, Sgt. Brown would be shown the letter, and he would admit the contents of the same, and that the letter was written a few days after the murder and ABWIKs. The jury would be aware that the Chief understood Brown to be helping out at the Matrix the night of the shooting, but believed he was not actually working for the club. Brown would testify consistent with the contents of the letter, that he had informed the Chief he would be working at the Matrix that night, the Chief had approved the same, but the Chief misunderstood what he told him, that he would be working for the club and being paid to work security. (Def. Ex. 1, April 26, 2023 hearing). At most, the jury would have heard that Brown was working security *allegedly according to the defense* in violation of department policy, but it was based on a misunderstanding between Brown and the Chief. (Def.

Ex. 1, April 26, 2023 hearing). The jury would have heard that Sgt. Brown's was told in that letter that in the future, if he worked security at the club for pay, he would be in violation of department policy. The jury would also be aware, the Chief's main concern was civil liability of the police department and the City of Pageland, not criticizing Brown's work or the investigation of the crimes committed by Watts. The letter would not change the testimony of Brown to what he saw. It would not change the testimony of any of the other numerous witnesses or the physical evidence and does not undermine confidence in the investigation or the outcome of the trial. Clark, *supra.*

Additionally, Watts cannot show that the letter could not have been discovered before trial. Clark, *supra*. Watts does not claim the State intentionally withheld this evidence. The contents of the letter were not in the police investigative file but in Brown's personnel file. As previously stated, trial counsel could have subpoenaed Brown's personnel file before trial. Watts could have made a FOIA request of the City of Pageland for Sgt. Brown's personnel file or made a specific request for the same from the State in his discovery motion or filed a motion before the trial court to review Brown's personnel file *in camera* before trial for any exculpatory or impeachment material. *See* State v. Cates, 253 N.C. App. 408, 799 S.E.2d 279 (2017)(affirming trial courts denial of motion for personnel file of officer after *in camera* review of the same as it contained no Brady material); State v. Raines, 362 N.C. 1, 9, 653 S.E.2d 126, 132 (2007)(Defendant and State requested the Court review the personnel file of Lt. Jerry Rice of the Henderson County Sheriff's Office pursuant to State v. Hardy, 293 N.C. 105, 128, 235 S.E.2d 828, 842 N.C. (1977) and Brady).

Counsel did none of these things so he cannot show that the letter could not have been discovered before trial. Burton v. York Cnty. Sheriff's Dep't, 594 S.E.2d at 895 ("[W]e find the manner in which the employees of the Sheriff's Department prosecute their duties to be a large and vital public interest that outweighs their desire to remain out of the public eye."); *See* State v.

Harreld, 228 S.C. 311, 89 S.E.2d 879 (1955)(motion for a new trial based on after discovered evidence that prosecuting witness for the State was not a duly qualified game warden was available prior to and at the time of trial, and by due diligence could have been discovered before trial; moreover, this fact was not material to defendant's guilt).

Watts cannot show the next element of Clark either, the letter is material to guilt or innocence. Id. As previously stated, the letter itself contains an explanation of what occurred between the Chief and Brown and that there was a misunderstanding about what Brown was relating to the Chief on a previous occasion about working security at the club on the night of the shooting. (Def. Ex. 1, April 26, 2023 hearing). Brown interpreted what he said one way. The Chief interpreted it differently. (Def. Ex. 1, April 26, 2023 hearing). Watts does not dispute that Brown was present and witnessed the shooting. By his own admission, at the hearing on this motion, Watts simply wants to impeach Brown and the investigation of the crimes Watts committed by showing to the jury that Brown could have been or allegedly was in violation of department policy by working as security the night of the shooting. (April 26, 2023 Tr. 1-22; Def. Ex. 1). This is not material to guilt or innocence and proves nothing about the investigation, which was all before the jury.

Watts also claims the letter shows Brown had a motive to shut down the investigation, because he didn't want to be caught by the Chief of Police working security at the club. (IBOA, April 26, 2023, Tr. 1-22). First, this is counter-intuitive to the letter, which reveals Brown believed he had communicated the fact that he was working at the club that night previously to the Chief, but the Chief misunderstood what he was saying. So, the night of the crimes, Brown would have been in no fear of being caught working at the club. (Def. Ex. 1, April 26, 2023 hearing). Second, the record does not show Brown shut down the investigation because he was afraid that he would

be caught working at the club. The off-duty police officers or security, including Brown, captured Watts immediately after Watts shot Victim and then shot another victim in a doorway after firing another volley of shots. The security officers, including Brown, also recovered the murder weapon, and Watts's distinctive army jacket which tested positive for GSR. As stated, Watts cannot show the letter is material to innocence or guilt. Clark.

Finally, Watts cannot show the letter is not merely cumulative or impeaching. McCoy v. State, 401 S.C. 363, 737 S.E.2d 623(2013); Spann, 334 S.C. at 619-20, 513 S.E.2d at 99. As Watts admitted and claimed at the hearing on this motion, the letter would have [allegedly] impeached Brown and Brown's claims about the State's investigation. (April 26, 2023, Tr. pp. 1-22). Watts admitted at the hearing, and also admits in his brief, that he wanted the letter *to impeach* Brown and Brown's claims about the investigation. (R. April 26, 2023, pp. 1-22 & BOA). Further, Watts did that anyway, bringing out that the State did not investigate the person who reportedly had a shotgun [or baseball bat] slung over his shoulder. And, Watts brought out the State *allegedly* did not investigate a witness' claim of hearing small caliber weapon fire from behind the club, which occurred after Watts had been placed into handcuffs, and the State did not search patrons of the club before allowing them to leave the property. **(R. 183-226; 153-64; 43-75).** In fact, Watts called a responding officer who claimed he heard what sounded like small arms fire on the east side of the club after Watts was detained. **(R 293-99).**[4] The letter would have been, at most, just another cumulative attempt to impeach Sgt. Brown about the investigation. Therefore, Watts cannot meet this element of Clark either. Therefore, the motion for a new trial based on after-discovered evidence was appropriately denied by Judge Burch.

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[4] Several other witnesses testified they did not hear any shooting after Watts stopped firing his .45 caliber semi-automatic pistol. (R. 193; 50, 72-73; 130-31; 133; 139; 163-64; 168)

CONCLUSION

For the above stated reasons, Judge Burch's denial of the motion for a new trial based on after-discovered evidence should be affirmed.

Respectfully Submitted,

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