THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
General Sessions Court
Robert J. Bonds, Circuit Court Judge

Appellate Court Case No.: 2024-000432

State of South Carolina, ... Respondent

v.

Antwan McMillan, ... Appellant

FINAL REPLY BRIEF OF APPELLANT

James A. Brown, Jr.

Law Offices of Jim Brown, P.A.
1600 Burnside St, Suite 100
P.O. Box 592
Beaufort, SC 29901
(843) 470-0003

ATTORNEY FOR APPELLANT

ALAN WILSON
Attorney General

MARK FARTHING
Senior Assistant Deputy Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ISAAC McDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE ISSUE ON APPEAL

The trial court erred by not granting a new trial in light of newly discovered evidence of a previously undisclosed plea deal between the State and the sole cooperating co-defendant.

ARGUMENT IN REPLY

The prosecution violated appellant's due process rights by failing to correct false testimony concerning a previously undisclosed "wink wink" plea deal between the State and the sole cooperating co-defendant.

Despite this violation, the trial court's order erroneously denied Appellant McMillan relief on his claim that the State allowed false testimony, from a cooperating co-defendant (James Davis or Davis) denying a wink-wink deal, to go uncorrected. The primary error in this order concerns a misstatement of law and the order should be reversed on this ground alone. Further, the order erroneously relies upon the motion hearing testimony from Davis despite the fact Davis was allowed to invoke his right to remain silent when being examined by undersigned counsel, and for this reason, the order should be reversed or this Court should remand the matter to resume examination of Davis disallowing the invocation of his right against self-incrimination.[1]

In its response, the State argued that the trial court correctly applied the law concerning witness recantations despite the fact that the primary focus of Appellant McMillan's motion

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[1]The State characterizes this request as an un-preserved issue on appeal; however, this is a request for relief related to Appellant's Motion for a New Trial. See *State v. Hinson*, 361 S.E.2d 120 (1987)(dissent as to proper relief of either remand to develop the record or reversal and remand for a new trial. This relief would be intermediate to the requested new trial. The error in allowing Davis to assert his right against self-incrimination was raised by Appellant McMillan to the trial court who overruled this claim of error. The trial court could not remand an inquiry to itself.

concerned a *Napue*[2] claim. Further, the State's response minimized the unfairness of Davis' invocation of his right against self incrimination or the inference which such an invocation suggested. Finally, the State's response ignored the law of the case concerning the weakness of the evidence introduced at trial against Appellant McMillan.

Related to the analysis below, after Appellant McMillan filed his motion, a hearing was convened and testimony taken concerning the motion. This indicated that McMillan had made a "requisite" "*prima facie*" showing to argue his after discovered evidence claim. At this hearing, Appellant McMillan presented evidence proving a previously undisclosed wink-wink deal providing Davis a dismissal (and obvious immunity) for his actions in exchange for his testimony. Further, the Court of Appeals had previously vacated a prior circuit court's finding that there was overwhelming evidence of guilt against Appellant; thus, the *Napue* violation was material in light of the weakness of the trial testimony inculpating McMillan.

Erroneous Application of Law Concerning Motions for New Trial

The State's response erroneously urged this Court to apply the five part test required as a *prima facie* showing as the test for when a new trial should actually be granted. This argument is wrong. Good law for more than a quarter of a century provides that the five factor test for new trial motions under Rule 29(b) is only required as a "*prima facie* showing" "[i]n order to obtain leave to seek a new trial based upon after-discovered evidence" *State v. Prince*, 447 S.E.2d 177, 184 (SC 1993).

Likewise, *State v. Caskey*, 256 SE2d 737, 738-739 (SC 1979), relied upon by the State, indicates that only a showing of the five factors must be made. *Caskey* does not require any level

[2]*Napue v. Illinois*, 360 US 264, 269 (1959)

of proof beyond the showing. This interpretation of *Prince* and *Caskey* is consistent with the treatment of this issue in *State v. Dean* wherein the South Carolina Court of Appeals found the five factor test to be a "requisite showing." *State v. Dean*, 828 S.E.2d 243, 249 (SC Ct. App. 2019)(citing *Caskey*).

As the opinions in both *Dean* and the later South Carolina Supreme Court case *State v. Brown* indicate, the proper framework to analyze a claim of false testimony related to an undisclosed deal not discovered until after trial is that pronounced by the Supreme Court of the United States. *Dean*, 249 and *State v. Brown*, 894 SE2d 525, 531 (SC 2023). In *Napue v. Illinois*, the Supreme Court indicated that the failure to correct false testimony violated due process. To establish such a violation, one needed to show that the prosecution knowingly allowed false testimony "to go uncorrected when it appear[ed]." *Napue v. Illinois*, 360 US 264, 269 (1959).

A new trial is warranted upon a showing that "the false testimony 'may have had an effect on the outcome of the trial' " or if it " 'in any reasonable likelihood [could] have affected the judgment of the jury,' " *Glossip v. Oklahoma*, No. 22-7466, 2025 WL 594736, at *10 (U.S. Feb. 25, 2025)(internal citations omitted). Strikingly, Appellant's issue raised here is the same issue raised in *Dean* and *Brown* and is raised in the same procedural posture. While *Napue* was raised in a post conviction setting, this issue was reached by the *Napue* Court 21 years after his conviction - a procedural scenario not available to Appellant given the current statute of limitation on PCR claims.[3]

[3]It may be that there are other avenues which were available to Appellant to present his claim but that does not mean the SCRCrimP Rule 29(b) motion is the wrong avenue. This rule mimics the purpose behind the Writ of Coram Nobis.

Finally, the appellate courts have consistently held that a promise of immunity constituted a deal which must be disclosed. See *State v. Hinson*, 361 S.E.2d 120, 121 (SC 1987). Further, this case is different from the facts presented in *State v Johnson* because here Davis' actions clearly established criminal liability for assisting co-defendant David Jakes flee the scene of the crime.[4] *State v Johnson*, 410 SE2d 547 (SC 1991).

Sustaining Cooperating Witness' Invocation of the Right Against Self-incrimination Violated Due Process in this Case

In its brief, the State argued that Davis testified there was no deal but minimized the issues presented when Davis invoked his right against self-incrimination. The trial court's reliance upon Davis' motion hearing testimony while at the same time limiting Appellant McMillan's ability to examine this testimony violated due process. The State can not benefit from the testimony of a witness then hide behind the witness' invocation of his right against self-incrimination to suppress adverse evidence sought through examination by the adverse party. It is the unique position of the State as the prosecutor of Davis' transgressions which gave rise to this unfair advantage and the trial court erred in sustaining Davis' invocation of this right.

Courts have found it unfair to allow one side to benefit from a witness' testimony when a trial court allowed that same witness to remain silent during examination by the opposing party. See *Fuller v. Superior Court of CA*, 104 Cal. Rptr. 2d 525 (CA Ct App, 2nd Dist, Div. 3d 2001) ("A litigant cannot be permitted to blow hot and cold in this manner.")(internal citation omitted).

Instead, the trial court should have addressed the tension between Appellant's right to due process and Davis' right against self incrimination by inferring from the invocation that a deal

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[4]See *Ex parte Mudd*, 17 F. Cas. 954 (S.D. FL. 1868).

existed. Appellate courts have found there to be no due process violation from an adverse inference arising from the invocation of the right against self-incrimination when the person asserting the right is not facing criminal prosecution in the matter before the tribunal. See *Baxter v. Palmigiano,* 425 U.S. 308 (1976)(upholding an adverse inference drawn from an assertion of the right against self incrimination).

Further, the federal courts have found it improper for a judgment to rest upon the testimony of a witness who partially refused to answer questions by invoking his right against self incrimination. See *Johnson v. United States*, 418 A.2d 136, 141-42 (D.C. Ct. App. 1980) (remanding for a new trial where the trial court did not strike testimony of a prosecution witness, the complainant, where that witness's invocation of the right to remain silent precluded inquiry concerning her bias or motive to testify falsely).

Here, the trial court erred by not drawing an inference that Davis falsely testified about the lack of a deal during trial from his invocation of his right against self-incrimination during the motion hearing. As stated in the opening brief, Davis faced no criminal exposure if he lied to Appellant's Jakes' investigator but instead faced criminal liability if he lied during trial about the lack of a deal or he lied during the motion hearing about the lack of a deal.

Davis refused to answer questions in the motion hearing about his failure to remain silent in trial when then asked about his involvement helping a co-defendant flee the scene.[5] ROA 95 - 106. This suggested that he was willing to testify at trial because he had immunity. The trial court continued to block questions asked of Davis concerning his criminal actions during the

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[5]The transcript misidentified Davis' attorney during the motion hearing. His attorney was Representative Gil Gatch and not Jonathan Chaplin.

incident, his fear about criminal liability during the motion hearing in light of his exculpatory assertions about his own acts, and his lack of fear about testifying about his own actions during the trial. ROA 95 - 106.

The trial court erred in relying upon Davis's motion hearing testimony in light of his invocation of his right to remain silent and erred in not drawing an adverse inference from Davis' invocation of his right to remain silent.

Finally, the trial court erred by not finding an immunity agreement existed between the State and Davis given the circumstances surrounding the dismissal of his charges. Davis' charges were dismissed[6] shortly after McMillan's trial. The dismissal was a better outcome than the deal Davis let expire - to merely stay out of jail. Further the dismissal was made without any further court proceedings for Davis. See *Hinson*, at 121 (Finney, J. dissenting) ("The solicitor's denial of an agreement in several instances and his perfunctory dismissal of the charges in the next instance cannot be rationalized, justified or tolerated in the judicial process.").

The Trial Court Mischaracterized the Strength of the Trial Evidence Against Appellant McMillan

The trial court's order mischaracterized the strength of the case against Appellant McMillan. Davis was the sole witness against him. Shaquita Bryant was clear in her testimony that she did not see Appellant McMillan that night. ROA 468 - 471.

Further, the South Carolina Court of Appeals previously vacated a finding that the

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[6]In addition to the face of the expungement order, the charges had to be dismissed for Davis to enter the military and possess a gun. State's 1, Expungement Order. Before his trial testimony, Davis was charged with violent felonies which would have prevented him from obtaining a youthful offender sentence or participating in PTI. Further, a YOA expungement would not be a pardon such as to restore his gun possession rights. See 18 USC § 922(g)(prohibiting a felon from possessing a firearm).

evidence against Appellant was overwhelming. ROA 880 - 884. This was not appealed. This is the law of the case and bound the trial court as to the weakness of the evidence against Appellant.

Finally, the fact the jury acquitted Appellant as to the lead charge of attempted murder also demonstrates the weakness of the evidence and the significance of Davis' false testimony.

CONCLUSION

Therefore, the trial court erred in its order denying Appellant McMillan a new trial notwithstanding the States' argument in response and this Court should reverse his conviction and remand for a new trial or, at a minimum, reverse the order and remand for further testimony from cooperating co-defendant Davis without allowing him to invoke his right to remain silent.

Respectfully submitted by,

/s/ James A. Brown, Jr. March 28, 2025
Attorney for Appellant
SC Bar Number: 12213

Law Offices of Jim Brown, PA
1600 Burnside St, Suite 100
PO Box 592
Beaufort, SC 29901
(843) 470-0003
lawoffice@lojbpa.com

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Initial Reply Brief complies with SCACR Rule 211(b).

s/James A. Brown, Jr. March 28, 2025
Attorney for Appellant
SC Bar Number 12213