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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Sumter County
Court of General Sessions

The Honorable R. Kirk Griffin, Circuit Court Judge

THE STATE,

Respondent,

v.

DIONTRAE TRAVON EPPS,

Appellant.

Appellate Case No. 2023-001586

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit
215 N. Harvin St.
Sumter, S.C. 29150
(803) 436-2185

ATTORNEYS FOR RESPONDENT

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I. The trial court did not abuse its discretion in allowing a short continuance (from August to September) to explore Appellant's allegations that failure to disclose discovery issues existed even though Appellant was ready to go to trial and opposed a continuance because the trial court correctly reasoned it should allow investigation and receive information concerning the alleged discovery violation to protect Appellant's right to a fair trial and "ensure that a miscarriage of justice d[id] not occur." *See United States v. Bagley,* 473 U.S. 667, 675 (1985).
[Part One of Appellant's Issue I]

II. The trial court did not abuse its discretion in denying Appellant's motion to dismiss the charges of murder and possession of a weapon during the commission of a violent crime based on the assertion of untimely but ultimately unused disclosure of information previously known to Appellant because Appellant's motion misconstrues the due process protections at issue and his position would encourage a "miscarriage of justice" rather than prevent one.
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[Appellant's Issues II, III and IV].

STATEMENT OF THE CASE

A Sumter County grand jury indicted Appellant Diontrae Travon Epps at a July 2020 term of general sessions for murder and possession of a weapon during the commission of a violent crime (Indictment No. 2020-GS-43-0622). (R. p. 939). Shaun Kent, Esq., with the assistance of Jack Furse, Esq., represented Appellant on the charges. The case was first called to trial on August 14, 2023, but the trial judge continued the matter until the next term of court the following month. A jury trial was held September 25-29, 2023, before the Honorable R. Kirk Griffin. The jury convicted Appellant as indicted. (R. 902). Judge Griffin sentenced him to life imprisonment for murder, with no sentence imposed on the weapons charge consistent with S.C. Code Ann.§16-23-0490. (R. 911).

This direct appeal follows.

RESPONDENT'S STATEMENT OF THE FACTS

In the late evening hours of September 8, 2019, the victim, "Killa Mike" Rodgers, had planned to go to a club with a cousin, Timothy Scarborough, and two others. (R. 378, line 5- p. 382, line 25). The victim had been uneasy and had stayed closed to his home for several weeks prior to the murder according to his girlfriend and had alluded to a fear of encountering difficulties because "[e]very time he went out, it was something." (R. 626, lines 1-15). His decision to go out on September 8, 2019 proved to be a fatal one.

The four rode together in one car and on the way to their destination pulled into a gas station across the street from the club. It was a crowded scene with multiple individuals in their vehicles or standing by vehicles, playing music and "chilling." Many of those individuals were carrying guns. (R. 383, lines 3-18; p. 401, lines 7-8). Timothy Scarborough testified that when they arrived at the station, he saw an individual with the nickname "Bean" and went to confront him about a matter, but that resolved without a fight. (R. 384, line 19 – p. 387, line 20). However, when Mr. Scarborough "looked to the left" he saw Appellant. (R. 387, lines 18-21; p. 388, lines 2-15). Appellant had made it known that he wanted to confront the victim by stating his intention in a Facebook video rap-like song routine. He is the primary figure and singer and indicates that he was going to confront, and/or have others confront, the victim. (R. 630, lines 9-23; State's Exhibit 1). Aware of the potential for conflict from Appellant toward the victim, Mr. Scarborough attempted to "diffuse" the situation at the station. (R. 388, lines 13-18; p. 397, lines 16-23).

A video from the gas station cameras, and a cell phone video, showed multiple individuals on the scene, including Mr. Scarborough. Mr. Scarborough could point to the images from the recordings in his trial testimony to explain the shooting as it unfolded. (*See* R. 386, lines 9-16; 391, line 10- 395, line 11; p. 406, line 4 – 408, line 2). Mr. Scarborough testified that Appellant

approached the victim, threw a punch with his left hand, then with his right hand "upped the gun" and shot the victim. (R. 398, line 4 – p. 400, line 12).[1] Mr. Scarborough testified that the victim never attempted to hit Appellant and that he never saw the victim fire his gun but added that at that point he had turned and ran across the street. (R. 400, lines 2-4; p. 401, lines 11-20). When Mr. Scarborough ran from the scene he did not know that either the victim or Appellant had been shot. (R. 403, lines 5-10).

Forensic pathologist Dr. Nicholas Batalis testified that he conducted the autopsy on the victim. He concluded that the cause of death "was a gunshot wound to the trunk." He found two wounds. The gunshot wound to the chest, the fatal wound, entered on the right side and traveled between two ribs, through the right lung and along the spine, and had caused "massive bleeding ... due to the lung injury." The other wound was located "on the upper right side of the back,

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[1] During cross-examination, defense counsel made reference to "prior testimony." Though the jury was unaware of the specifics, the testimony referenced was apparently from the prior Joquell Meyers trial. Meyers, Appellant's half-brother, was part of the shootout. He was convicted before Appellant after a jury trial beginning September 26, 2022, and concluding October 4, 2022. This Court is also considering an appeal from his convictions for the attempted murder of another individual at the gas station and his weapon charges in Appellate Case No. 2022-001428. As far as the shootout, Myers testified in his trial that he was outside of his car "talking and laughing" when shots were fired and did not see who fired initially. According to his testimony in his trial regarding the shooting of this victim, he only saw that Appellant had apparently been shot. (Appellate Case No. 2022-001428, Amended ROA at 497).

Appellant attempted to impeach Mr. Scarborough with portions of his prior testimony. Appellant apparently believed certain isolated responses indicated that Mr. Scarborough, in fact, had not seen the "swing" toward the victim here; however, Mr. Scarborough relied on the video recordings and the police report and his prior statement in the investigation, all of which were consistent with his testimony. (*See* R. 411, line 13 – 415, line 14; 417, line 21 – 419, line 12). And, though not necessary to the resolution of this appeal, Respondent notes that his testimony was also consistent with his testimony in the Myer's trial. (Appellate Case No. 2022-001428, Amended ROA, App. 147-148, Scarborough cross-examination, "I saw Trae - - but I didn't even - - at - - from my angle it didn't look like he retreat, but from the video it looked like he retreat, if I'm being honest. But from my angle that night, he swang [sic] on him and upped the gun and shoot. That's my opinion....").

kind of between the neck and the back of [the] shoulder." While the bullet in the fatal wound passed through the body, the bullet from the second was recovered. (R. 423, lines 4-5; 424, line 2 – 425, line 14). Dr. Batalis testified that he reviewed the gas station video showing the victim "in the parking lot area in a confrontation and then falling to the concrete some seconds later," and, having observed the relative positions of the individuals (the victim and Appellant), opined "the pathway of the injuries in this decedent would be consistent with the relationship that they were in the video. (R. 428, line 23 – 429, line 15). He reviewed "several different camera angles," and noted the movement displayed in the video after the shot. (R. 436, lines 12-19). Dr. Batalis also explained that the bullet did not sever the victim's spinal cord, but damaged it, so that limited movement was possible after the shot as demonstrated on the video. (R. 436, line 6- p. 437, line 10).[2]

All in all, multiple guns were fired at the gas station that night causing injury to several individuals. The investigation netted multiple shell casings that, upon examination, confirmed they were fired by multiple guns. (*See* R. 464, lines 1-11; 470, line 11-479, line 23; 488, lines 2-

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[2] Though clearly not an issue that was for the jury to resolve, the defense alluded to discovery violations in front of the jury during several portions of the testimony. During Dr. Batalis's testimony, for instance, the defense expressed a "concern" about "a chart created a week ago," noting that the case was four years old at that time. (R. 435, lines 13-15). The doctor easily explained that the "chart" referenced was simply a "cleaned-up diagram" which is not a part of the autopsy itself. The diagram he used reflected "scribbles and stuff that" would be "distracting." (R. 435, lines 16-20). He found it "pretty typical" to have a cleaned-up diagram prepared for trial. (R. 435, lines 20-22). The defense, having received that solid explanation, asked no follow up questions. Again, this type of questioning appeared in other areas. (*See, for example,* R. p. 686, asking a detective about the FBI providing the Sumter Police Department information on "potential self-defense claims" and asking "when you turned over those anonymous tips to the defense to look into to see if he thought they were valid." (R. 686, lines 19-23). The objections to these attempts were sustained. *Id.* (*See also* R. p. 683, lines 15-21, sustaining objection to comment about untimely disclosures in advance of trial).

6).[3] One gun, a Taurus, was also collected from the scene. (R. 470, lines 2-9; 517, lines 16-24). That was the victim's gun. (R. 520, lines 17-19). SLED ballistics expert Paul Greer could match seven shells as being filed by that Taurus. (R. 537, lines 9-11). The remaining casings submitted indicated nine different weapons were fired. (R. 539, line 6-540, line 21). He testified that while he could determine the markings on other recovered casings would show groups of casings coming from the same gun, he did not have a gun to compare for a possible match. (R. 540, line 22 – p. 541, lines 10). Agent Greer also received the bullet recovered at the autopsy, and could opine it was most consistent with being 9mm; however, there is no a way for SLED to match a bullet to a shell case. (R. 543, line 19 – p. 544, line 17).

Appellant was shot at the scene. Hospital recordings showed that Appellant was accompanied by Joquell Myers and Jay McBride in going to the hospital. (R. 502, line 1 – p. 503, line 3; 667, lines 1-20; p. 668, lines 2-15; p. 672, lines 12-20). Both Myers and McBride had been in the Facebook video with Appellant where Appellant threatened the victim, and both Myers and McBride were at the shoot-out. (R. 672, lines 18-20). Appellant had sustained a gunshot to his abdomen, but the bullet could not be removed without risking further damage thus could not be compared to any weapon for identification. (R. 666, lines 5-15).

Sumter County Police Department Detectives Willie McFadden and Irene Culick investigated the mass shooting with Detective McFadden taking lead and having primary responsibility. (R. 559, line 13 – p. 560, line 3). The detectives, after providing Miranda warnings, interviewed Appellant at his mother's home on September 15, 2019. (R. 561, lines 6-23; 564, line

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[3] Moreover, a SLED ballistics expert's testimony supported that other guns could have been fired such as revolvers that typically do not leave casings. (*See* R. 551, line 22 – p. 552, line 9). As Mr. Scarborough testified, "there was a lot guns out there" that night. (R. 401, lines 7-8).

4 – p. 565, line 19).[4] Appellant indicated that he was using his phone in the car in the parking lot at the gas station, and "rolling a blunt," when "he heard a commotion and saw a group of people that were at the front corner of the store" then heard shots. (R. 576, line 16 – p. 577, line 16). Though he initially stated that he was in the car, he told the detectives that he left the car and "took off running" and was hit by gunfire, though he "didn't see who did what." (R. 577, lines 12 – 21; p. 654, line 2 – p. 655, line 10). When asked if he had prior difficulties with the victim, he admitted "that he made a comment on Facebook after Killa Mike was jumped in a club," but then stated, "That didn't have nothing to do with it." (R. 578, lines 14-19; 657, lines 2-4). Notably, that was the first time the detectives had any knowledge about the threatening Facebook video. (R. 657, lines 9-18). Appellant also clearly stated to the officers that "he did not fire a gun that night." (T. 578, line 25 – p. 579, line 2; p. 655, lines 11-14). He declined to give details or names of anyone who could aid in the investigation. (R. 579, lines 3 – 19; p. 654, lines 17-19).

When asked what people were telling him, he responded: "I'm going to feel like people telling me Killa Mike shot me. I say, How Killa Mike shot me, I didn't even see him?" (R. 579, line 25 – p. 580, line 2; p. 656, lines 17-21). When "asked why would people say Killa Mike shot him, he stated he didn't remember anything else." (R. 580, lines 2-4). Appellant eventually confirmed one name of an individual at the shootout ("Polo"), but "went on to say" he, Appellant, "was in the wrong place, wrong time." (R. 580, lines 20-24). "Polo" is Sheldon Benjamin and was with Appellant as he arrived at the hospital. (R. 668, lines 2-8).

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[4] Though Appellant had been in the hospital for his injury, he was responsive to questioning and gave no indication of physical or mental impairment. The defense placed on the record during pre-trial motions that there was no "valid challenge to" the voluntariness of the statement taken on September 15, 2019. (R. 562, lines 9-24; p. 351, lines 15-17).

The detectives had a "second contact" with Appellant on September 17, 2019, when Appellant went to the police department to meet with a victim's advocate. (R. 581, lines 18-25). At that time, Appellant was attempting to obtain "victim's assistance funds" for his hospital costs. (R. 582, lines 1-3). The detectives asked for a DNA sample, and Appellant agreed. (R. 582, lines 4-8). They also asked to interview him again, but he declined. (R. 582, lines 8-13). Detective McFadden then served Appellant with a warrant for his arrest. (R. 582, lines 16-25). When he was being read the basis for murder and gun charges, Appellant spontaneously asserted that he "never had a gun ... never shot no gun." (R. 582, line 23 – p. 583, line 2; p. 659, line 19 – p. 660, line 11). He also spontaneously asserted that "he never punched Rodgers and" that the police "don't have [him] on video," but then he was advised the detectives were not referencing "a female's video" from the scene, but the "store footage video." (R. 583, lines 3-8; 585, lines 20-24; p. 660, lines 14-22). The detectives had not shared that there was store video available prior to that point, and "[w]hen he was advised about the video from the store, he sat back in the chair and just [started] pouring sweat." (R. p. 586, lines 4-12; p. 660, line 19 – p. 661, line 7). Appellant repeated that he did not have a gun and did not shoot anyone. (R. 661, lines 7-9).

Appellant admitted that he "did swing on" Rodgers and further asserted that "Killa Mike pulled out a gun and he took off running," yet maintained that he would not give names of others at the shoot-out and that he did not know who shot him, or who shot the victim. (R. 583, lines 9-13; 586, lines 12-13). Then, as he was being taken to a car for transport to the detention center, Appellant not only asserted that he "did swing on Killa Mike" but also demonstrated the punch, and further asserted "that Killa Mike came up to him aggressively and did, like, a chest bump and that's when he swung on him." (R. 583, lines 19-24). Appellant asked to speak with Detective McFadden alone. (R. 584, lines 1-2). He admitted taking a "swing" at the victim and asserted that

the victim "pulled a gun out on him, but he said when he saw that, he said" he pulled his own gun and began "firing behind him trying to get away and take cover." (R. 663, line 24 – p. 664, line 5). After describing that version of events, Appellant asked if he could "still get charged for murder for that," and the detective informed him that he could. (R. 664, lines 2-6).

Detective McFadden testified that after he obtained the store video, he began comparing statements and the visual evidence obviously in the video. (R. 643, lines 7-22). The video reflected, in part, that Appellant, "Diontrae Eppes ... swung on" the victim "then pulled out a firearm and fired numerous times at" the victim. (R. 647, line 16- p. 649, line 9).

The defense presented an officer qualified to give expert testimony on crime scene reconstruction, Kenneth Kinsey. Mr. Kinsey slowed the videos and considered each frame, and also reviewed autopsy findings and the incident reports, along with visiting the crime scene. (R. 738, line 21 – p. 739, line 5). He opined that Appellant could not have fired the shots inflicted on the victim who was retreating away from Appellant and turning. (R. p. 740, line 19- p. 471, line 4). Part of his opinion was based on a belief that the fatal shot that "exited his spine" would cause the victim to immediately drop. (R. 755, lines 17-19). He also opined that the victim's gun was in the victim's hand before he is shown on the video falling, though he could not tell when the victim pulled the gun since Appellant's arm was in the way. (R. p. 763, lines 5-24; p. 783, lines 7-14). Mr. Kinsey candidly admitted the video showed the Appellant shot multiple times, and there was no muzzle flash from victim's gun. (R. p. 781, line 23 – p. 782, line 13). He also admitted that Appellant's story that he never shot a gun at the scene was plainly refuted by the video. (R. p. 794, lines 17-19). Additionally, he admitted that Appellant's story that the victim approached him and "chest bumped" him was not on the video. (R. p. 780, lines 4-22).

After the close of testimony, the defense placed the basis for its directed verdict motion on the record. (R. 804, lines 5-21). In denying the motion for a directed verdict, the trial judge noted "... in this case, the video tells the story." (R. 806, line 18). He noted that the video showed Appellant "swing on the victim, at least, once then we see these shots fired," and that was direct evidence to submit the charges to the jury. (R. 806, lines 18-22). He also noted ample "circumstantial evidence that the shots fired by the Defendant were the shots that - - or the shot that fatally wounded the victim, Michael Rodgers." (R. 806, line 22 – p. 807, line 2).

At the charge conference, the State objected to a self-defense charge, and the judge noted that even Appellant's expert was claiming the fatal shot did not come from Appellant's weapon, so there would be no basis for acting in self-defense; the one portion of one statement that indicated aggressive approach, and a chest bump was not supported by the video. (R. 811, line 15 – p. 817, line 7). Because the judge acknowledged the video does not show the aggression by the victim that Appellant claimed, he struggled with the correctness of giving a self-defense charge; however, he ultimately resolved the jury should decide between the video and Appellant's contrary statement, thus charged the jury on the elements of self- defense. (R. 817, line 9-p. 819, line 1; p. 880, line 20 – p. 882, line 25).

The jury found that the State carried its burden of proof of showing guilt beyond a reasonable doubt and returned a guilty verdict on both charges.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001) (citing *State v. Cutter*, 261 S.C. 140, 199 S.E.2d 61, 65 (1973)). " 'The general rule in this State is that the conduct of a criminal trial is left largely to the sound discretion of the presiding judge and this Court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way.' " *State v. Commander*, 396 S.C. 254, 262, 721 S.E.2d 413, 417 (2011) (quoting *State v. Bridges,* 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982) (citations omitted)).

ARGUMENT

The trial court did not abuse its discretion in allowing a short continuance (from August to September) to explore Appellant's allegations that failure to disclose discovery issues existed even though Appellant was ready to go to trial and opposed a continuance because the trial court correctly reasoned it should allow investigation and receive information concerning the alleged discovery violation to protect Appellant's right to a fair trial and "ensure that a miscarriage of justice d[id] not occur." *See United States v. Bagley,* 473 U.S. 667, 675 (1985).
[Part One of Appellant's Issue I]

SUMMARY OF THE ARGUMENT:

Appellant essentially alleges that the trial judge abused his discretion by allowing a continuance to determine if there was a *Brady* violation and if non-disclosed, material evidence needed to be turned over. Appellant's argument should be quickly rejected as that is precisely the type of relief contemplated for an alleged discovery issue. *See, e.g., Earley v. State*, 418 S.C. 255, 272, 792 S.E.2d 226, 235 (2016) (in rejecting that mistrial was not automatically warranted for nondisclosure when the trial court could fashion "appropriate redress, if any" would be needed); *State v. Geer*, 391 S.C. 179, 192, 705 S.E.2d 441, 448 (Ct. App. 2010) (goal is to ensure the defendant has the information 'in time for its effective use at trial'") (quoting *United States v. Smith Grading & Paving, Inc.,* 760 F.2d 527, 532 (4th Cir.1985)). Moreover, because it was Appellant who raised the issue that necessitated the continuance, Appellant cannot complain of the grant of the continuance. *See State v. Needs*, 333 S.C. 134, 152 n.11, 508 S.E.2d 857, 866 n.11 (1998) (a party may not complain about an error induced by the party's own conduct (citing *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984); *State v. Epes*, 209 S.C. 246, 271, 39 S.E.2d 769, 780 (1946)).

RELEVANT FACTS:

Appellant's case was called to trial on August 14, 2023. After selection of the jury, but before the jury was sworn, Appellant relayed to the trial judge that the previous night he had

received a tip from another defense attorney that the federal government may have "potential exculpatory information." (R. 39, lines 8-18). He asked for confirmation which defense counsel advised was received. Defense counsel contacted the assistant attorney for the government mentioned in the information relayed to defense counsel that an attempt was made to give a federal investigation form to an assistant solicitor who he claimed the assistant solicitor "did not want to have this information" pertaining to possible self-defense. (R. 39, line 10 – p. 40, line 25).[5] Regardless, though defense counsel expressed hesitation in even determining "whether or not it was necessary to turn this information in" at all, defense counsel advised the trial court of these matters. (R. 41). Even so, defense counsel asserted "that we still would be willing and ready and wanted to go forward with the trial" at that time. (R. 41, lines 2-10).

Though the communication began *ex parte* (with notice to and consent of the State), the trial court determined that the solicitor's office should be brought into the conversation based on the allegations.[6] Defense counsel stated that "Solicitor Finney and Solicitor Corbit correctly and properly thought that this information needed to be vetted out and more detail" presented. (R. 41, lines 10-19). Solicitor Finney moved for a continuance "so that these matters can be investigated." (R. 42, lines 9-13). The State anticipated only a 30-day continuance to the next term of court. (R. 42, lines 21-24).

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[5] As it turns out, this information was only a portion of the information concerning the relevant interaction regarding this matter. The entirety of what happened and when, which later indicated that Appellant, in fact, had knowledge of the information before the State did, is more fully developed below along with the steps that the State did take to obtain a statement to disclose after communication with the federal attorney.

[6] The assistant solicitor referenced by the assistant attorney for the government was not representing the State in this trial. As will be explained below, that contact was made in connection with a related case and separate co-defendant tried before Appellant's case was called.

Defense counsel also complained of certain other discovery not being timely disclosed which he found after a review of the Solicitor's file *before the trial.* (R. 44, line 10 – p. 45, line 9). As for a direct complaint, defense counsel specifically objected to "one Facebook video that was given to us on Friday morning," based on "the new chief administrative order" supporting, according to the defense, that it must be assumed if the trial is placed on the roster that all discovery has been provided. (R. 45, lines 10-20). Defense counsel argued that he did not want the State to have an opportunity to cure any potential discovery issue, and have an argument that the late disclosed material was received in time for trial, and requested "this to be a snapshot that the discovery, no matter what was not provided, was on the docket and not provided [until] the Friday before trial." (R. 46, lines 5-11).[7] He asserted that was his "strongest argument," and "[t]he rest of them can wait depending on what the Court" decides on the State's motion. (R. 46, lines 10-11).

The trial court construed that motion as separate from the continuance question. (R. 46, lines 14-15). Given that the trial court only had unsure assertions as to "potentially exculpatory information," the court resolved that "justice requires this case be continued to afford the parties an[] opportunity to investigate these issues to determine whether any of this information is valid" and evaluate potential next "steps to take after the investigation is done." (R. 47, lines 7-14). The

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[7] Once again, as it turns out, this information was only a portion of the information concerning the relevant facts regarding this matter. As is more fully developed below in Issue III, the Facebook clip at issue was *made by Appellant* and Appellant was *the first person to advise* detectives of the existence of the Facebook clip having relevance to prior difficulties. (*See* R. 578, lines 14-19; 657, lines 2-18). There could be little surprise given Appellant's knowledge. The fact that Appellant may have hoped that the State would not ultimately find the clip does not lend itself to some violation of fundamental fairness by the State. *See Earley,* at 271, 792 S.E.2d at 235 (resolving that where a previously undisclosed Facebook posting would undermine a defendant's credibility, that harm "resulted from Respondent's lack of candor on the stand rather than from the State's failure to disclose the existence of the witness intimidation evidence").

court continued the case to September 25th. He added, "in its present stance, this case can't go forward given these issues which have been brought before the Court" and in light of the court's responsibility to "ensure Mr. Epps is" afforded his "right to a fair trial and to ensure that the Court is doing whatever the court can do to ensure that justice is done...." (R. 48, line 15 – 48, line 8).

STANDARD OF REVIEW FOR RULINGS ON A MOTION FOR CONTINUANCE:

An appellate court reviews the trial court's ruling on a motion for continuance under the abuse of discretion standard. *State v. Yarborough,* 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct.App.2005) ("The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion."). Reversal is warranted only where an appellant shows "an error of law or a factual conclusion that is without evidentiary support," and prejudice as a result of the ruling. *Geer*, 391 S.C. at 189–90, 705 S.E.2d at 447 (quoting *State v. Irick,* 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001) and *State v. Preslar,* 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct.App.2005)).

DISCUSSION:

A. Appellant cannot complain on appeal of a continuance granted based on disclosure allegations that he raised at trial.

As demonstrated above, when the case was called for trial and a jury selected in August 2023, it was Appellant, though he asked for no relief, who advised the trial court he felt obligated to advise the court of the existence of "potential exculpatory information that may have been garnered from the federal government" but not turned over to the defense. (R. 39, line 10 – p. 41, line 10). Defense counsel even agreed with the State that the "information ... needed to be vetted out and more detail" obtained. (R. 41, lines 11-19).

However, while the defense expressly did not join in the State's request for a continuance and asserted that the defense was prepared to go forward, (R. 42, line 9 – p. 43, line 4), that did

not address the issue that Appellant opted to raise. Appellant shows no abuse of discretion given the question that Appellant raised called for resolution. *Needs, supra.* And, because Appellant raised the issue of whether there was an improper failure to disclose, he brought about the necessity of the action taken by the court, or stated differently, his actions prompted the need to ascertain the nature of the evidence at issue which, in turn, supported the trial court's grant of the continuance. Therefore, Appellant has no ability to complain that the continuance was granted. *Needs, supra.*

B. Appellant cannot show an abuse of discretion based on an error of law in granting the short continuance given his complaints that the State may have committed a *Brady* violation as a court, once such an allegation is made, is obligated to ensure the proceedings are fair.

"The holding in *Brady v. Maryland* requires disclosure only of evidence that is both favorable to the accused and 'material either to guilt or to punishment.'" *United States v. Bagley*, 473 U.S. 667, 674 (1985) (quoting *Brady v. Maryland,* 373 U.S. 83, 87 (1963)). "The *Brady* rule is based on the requirement of due process." *Id.,* at 675. "Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur." *Id.* The goal: a fair trial. *Id. State v. Kennerly*, 331 S.C. 442, 452, 503 S.E.2d 214, 219–20 (Ct. App. 1998), *aff'd,* 337 S.C. 617, 524 S.E.2d 837 (1999) ("The *Brady* disclosure rule is grounded in the defendant's fundamental right to a fair trial mandated by the Due Process Clause of the Fifth and Fourteenth Amendments."). Simply, the duty to ensure fairness in the trial proceedings, and a reliable result, transcended Appellant's desire to go forward. Appellant cannot show error in the grant of the brief continuance.

Appellant's argument that the defense already had a strategy and wanted no further information, (*see* Appellant's Brief, at 28), does not undermine the proper ruling.[8] Taken at face value, Appellant's argument at the August hearing would have encouraged the court to allow him to make an uninformed strategic decision. Again, that would not protect "the defendant's fundamental right to a fair trial...." *Kennerly,* at 452, 503 S.E.2d at 219-220. The court wisely rejected that offer.

"Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). "When a defendant lacks knowledge of material evidence in the prosecution's possession, the waiver of constitutional rights cannot be deemed knowing and voluntary." *Gibson v. State*, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999). *See also Strickland v. Washington,* 466 U.S. 668, 690–91 (1984) ("strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation"). To accept the defense's position could invite potential error at trial then delay addressing that error. Again, that was rightly rejected.

For these reasons, Appellant has failed to show an abuse of discretion in the trial court's ruling. Appellant's argument to the contrary must be rejected.

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[8] Appellant in briefing makes a substantial leap in arguing that a showing of negligence in disclosure to the defendant prior to trial "proves" a *Brady* violation occurred. (Brief of Appellant, at 28). There are other elements to consider, including the defendant's prior access to and/or knowledge of the material. Even so, Respondent respectfully submits Appellant's cited argument as an example of Appellant's wrong focus in this inquiry, as is more forcefully demonstrated in Appellant's request for dismissal of all charges. As discussed more fully below, Appellant does not agree with allowing any cure to an improper disclosure issue, but the law is against him on this. *See, e.g., State v. Lunsford*, 318 S.C. 241, 244, 456 S.E.2d 918, 920 (Ct. App. 1995) (collecting authority showing no prejudice to a defendant even if material is disclosed during trial where defendant has the fair opportunity to use the matter at trial).

II. The trial court did not abuse its discretion in denying Appellant's motion to dismiss the charges of murder and possession of a weapon during the commission of a violent crime based on the assertion of untimely but ultimately unused disclosure of information previously known to Appellant because Appellant's motion misconstrues the due process protections at issue and his position would encourage a "miscarriage of justice" rather than prevent one.
[Part Two of Appellant's Issue I]

SUMMARY OF THE ARGUMENT:

Appellant failed to show a *Brady* violation below and fails here to show a Constitutional right to avoid the proper criminal charges even had he shown a *Brady* violation. Essentially, he asks too much. Though the evidence supports that no *Brady* violation occurred, if it had, the most Appellant would be entitled to would be a mistrial and/or new trial: "the aim of due process '"is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused.' " *Smith v. Phillips,* 455 U.S. 209, 219 (1982) (quoting *Brady,* 373 U.S. at 87).

In fact, Appellant has arguably waived the right to complain about disclosure violations by his objection to the continuance. That he held a preference not to accept disclosures made (as he believes them to be) too late, (*see* R. 46, lines 5-11), is now moot. Further, it is unworkable. Essentially, his argument is that the State could never update discovery responses – a notation that offends rather than promotes due process. Some errors occur. A process should be in place to allow redress of such errors or simply allow receipt of matters recently discovered. It is, and that process works well to balance the rights and interests of all parties and should be maintained. Moreover, it would be odd indeed to find a murder charge may be avoided on the basis of facts known to the Appellant before disclosure by the State. Here, the evidence supported that Appellant did have knowledge of all materials, particularly the Billups' federal statement and the Facebook clip, items he now complains were not timely disclosed thus entitles him to walk away from his crimes. That cannot and logically should not support a *Brady* violation. He is not arguing for fair proceedings; he is arguing for a windfall. Lastly, it would be even more odd to allow a defendant

to avoid a murder charge when the Billups statement he complains was not properly and/or timely disclosed was not even used or relied upon (by either party). To the extent that a defendant could obtain dismissal, it would not be warranted here. Appellant is due no relief.

RELEVANT FACTS:

A. September 2023 motion to dismiss based on alleged prosecutorial misconduct in failing to comply with *Brady* disclosure.

As expected, the case was called again the following month after the continuance and proceedings began again on September 25, 2023. After a jury was selected, the trial court heard the defense's motion to dismiss for prosecutorial misconduct. (R. 109, lines 7-11). Defense counsel complained that the case was four years old, and the State had previously stated at bond hearings that they were prepared for trial and its discovery obligations had been met. (R. 109, lines 12-19). Prior to the August date, counsel discovered that certain items were not received. This was determined by open file review of the Solicitor's file. (R. 110, lines 1-21). However, counsel still affirmed that he was ready for trial in August. (R. 111, lines 8-18). Then, asserting that he spoke to Billips's counsel immediately before trial, he advised the court that he was informed that the federal government may have information based on an interview with Billups.[9] After the continuance, the defense received more discovery. (R. 114 line 24 – 115, line 6). Part of that was the Billups federal form, and a recording of his interview, but also several anonymous

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[9] Tyrell Billups was long known as a potential witness. (Court Exhibit 4, disclosure made May 27, 2020, statement made July 25, 2019, R.925). He apparently knew quite a few of the individuals at the gas station that night. He was aware that that Appellant is a crip and he knew of tensions between Appellant and the victim, but asserted, "I don't know what is going on between Trey and Killa Mike. Don't think a rap song started all that." And he also knew that "some guys jumped" Mike and Mike was "knocked out" at the S&B club previously. (Court Exhibit 4, R.925). As to the event, he, in relevant part, describe it as follows: Trey started walking towards where the action was towards the door. ... I hear a girl name Mani say they about to fight. That is when I hear gunshot" and ran. He asserted multiple shots were fired but he did not see anyone actually fire. He saw Mike on the ground near the store. (Court Exhibit 4, R.925).

tips. (Tr. 115, lines 7-22). At that point, counsel was "most concern[ed]" about receiving the anonymous tips on September 1, 2023, before the September 25th hearing. (R. 115, lines 19-22). Then on September 18th counsel received an autopsy diagram. (R. 116, line 20 – 67, line 3). Counsel made a global argument on discovery disclosures and complained of "[a]ll of this information ... being turned over late and complete opposite regulations of Brady violations." (R. 117, lines 4-9).[10] He argued it was not up to the State to determine how or if he would use information, and also argued:

> ... it doesn't take anyone to see that this is a potential self-defense case. And the fact that the solicitor's office as recently as the Friday before we are scheduled to go for the first trial was making an argument that there is no self-defense because your client pulled the gun first and then, possibly, can only change that theory ***after I was forced to put this information hurts Mr. Epps*** [sic].
>
> That's one of the reasons why the prejudice does exist there. Because if they now change their strategy and say he, by the way, we believe that Mr. Rodgers had a firearm, but that was not what they were going to argue to that jury some time ago. I can put Mr. Furse on the stand because they made it very clear that their theory was Mr. Rodgers only ever pulled a firearm after Mr. Epps fired first.

(R. 118, lines 5-22) (emphasis added).[11]

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[10] Defense counsel also argued if the State "didn't do anything" during the continuance, he wanted to know; if the State found exculpatory information and didn't advise the defense, he wanted to know; if the State spoke to the United States Attorney's Office, he wanted to know why he was not advised of the conversation. (R. 117, lines 10-23).

[11] The nub of the defense position surfaced here. Far from complaining of government suppression that prevented receipt of beneficial evidence, the defense did not want evidence to undermine the defense it crafted. And, though it also appeared the defense was concerned that the State may change strategy, or force a defense change, apart from the fact that *Brady* does not guarantee anything on prosecution strategy, here, the record shows the State consistently asserted this was not case a self-defense, a position they came to after review of the video evidence, and Appellant's own statements and subterfuge. According to the notes taken in a federal proffer, Billups asserted in April 2022 that Appellant "challenge[d] Killer Mike to a fight. Killer Mike said he didn't want to fight, and he then pulled out a gun, pointed it at Trey, and pulled the trigger" but "the gun 'clicked' and didn't fire. Trey then realized that Killer Mike's gun didn't fire. Trey then pulled a gun and shot Killer Mike." (R.922 Court's 3).If credited, that supports the video and other evidence that Appellant was the aggressor.

The defense called Charleston County Public Defender Cameron Blazer, former defense counsel for Billups. She represented Billups on federal charges and had hoped to attain a significant benefit for him if he would provide substantial assistance to law enforcement. (R. 122, lines 1-8; *see also* R. 125, lines 1-22, "It was important that we earn as much credit as we could at this point because, candidly, we had a very, very difficult judge we were going to go in front of and I knew that I needed to earn all the credit I could on the front end from the U.S. Attorney because that was all I was ever going to get" and "You have to demonstrate substantial assistance in the investigation or prosecution of another...."). Ms. Blazer testified that she reached out to Appellant's defense counsel to essentially settle whether Billups would be used at trial[12] as being called to testify would be "very valuable" to Billups. This would have been between the April 2022 interview and June 2022. (R. 143, lines 16-22). Ms. Blazer at that time of her representation of Billups, and as a result of her attempts to secure a reduced sentence for Billups, [13] contacted defense counsel for Appellant who informed Ms. Blazer that he thought there would not be a trial based on the fact that he already had a "good defense" and the prosecutor was a good guy who would likely reach

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12 The Bureau of Prisons Inmate Locator shows Billups is currently in a low security federal prison in Ohio with a presently reported release date of April 6, 2029. His information can be found on the Bureaus' website. *See* Federal Bureau of Prisons, "Find an inmate" page, https://www.bop.gov/inmateloc/. No one called Mr. Billups for assessment of his information during the pretrial proceeding. The records shows a statement that he did not see anyone shoot a gun, (R. p. 916 Court Exhibit 1), and in a later statement to the federal agent (attempting to gain favorable treatment), a statement that the victim tried to shoot, but the gun did not fire, and "Trey then pulled a gun and shot killer Mike." (R. p. 922 Court Exhibit 3). According to the federal agent's notes on the 302 form, "Billups said he witnessed the shooting first hand because he was standing right there." (R. p. 922 Court Exhibit 3).

13 The testimony is not particularly specific as to time. However, the federal interviews are dated April 25, 2022, (R. p. 922 Court Exhibit 3), and PACER shows that the Honorable Terry L. Wooten sentenced Billups to 120 months in prison, and supervised release for 3 years in November 2022. (ECF No. 151, Nov. 15, 2022), and No. 153 (November 22, 2022), Criminal Docket Case No. 3:21-cr-00632-TLW-3).

the "same conclusion" as defense counsel. (R. 129, lines 8-22). Defense counsel did not receive "full details" of Billups's federal information though Ms. Blazer testified, directing her response to defense counsel:

> I feel certain that in some way I indicated that my client's testimony could, potentially, be beneficial to you, but you didn't even - - my recollection is in somewhat classic Shaun Kent fashion, you were focused on the defense you had and you were like I don't - - that does not matter to me because I have a defense.

(R. 130, lines 1-6).

Thus, defense counsel, in 2022, was aware of the arguably "favorable" information that Ms. Blazer was attempting to offer in support of a better deal in federal court. (R. p. 145, lines 1-5). According to Ms. Blazer, her client would not get a benefit because, in defense counsel's opinion, there would be no trial. (R. 144, lines 18-25).

Ms. Blazer testified that she reported that Appellant's defense counsel did not intend to call Billups to the Assistant U.S. Attorney on her case, Ben Garner, who indicated he was "going to call the solicitor, too, just to make sure" because it may affect Billups' credit and Billups could "come back from the federal custody because of the fact that we had arrived at a decision about a kind of plea agreement that would really not entitle him to any more credit after he went to court." (R. 130, lines 8-18). After having contact with state prosecutor John Meadors, Mr. Garner reported to Ms. Blazer that Billups' case needed no "delay ... on the basis of the information received" from the State. (R. 132, lines 4-9). Even so, Ms. Blazer indicated Billups received a benefit of "participation in the investigation of the Sunoco shootout," with Appellant's case mentioned, though he was not going to be called or used at trial. (R. 132, line 12 – p. 133, line 6).

By the time Appellant's case was called to trial in August 2023, and the matter was discussed, Appellant's defense counsel not only advised Ms. Blazer that he did not want a

continuance but also that he was "worried about prejudice to" Appellant if the matter was brought to the attention of the trial court. (R. 134, line 13 – p. 135, line 3). Ms. Blazer, however, testified that she informed counsel that she was "worried about if" counsel lost at trial, what would happen in a PCR against counsel. (R. 135, lines 4-5). Ms. Blazer testified that she believed the report had been improperly withheld since May of 2022. (R. 135, lines 9-14). Though Ms. Blazer admitted that a continuance is a normal remedy if there was a question about receipt of exculpatory evidence, she notably (and rather revealingly) opined, "That is the bane of every defense lawyer's existence ... the general remedy of Brady violations is to give the government more time to be less terrible." (R. 149, lines 8-10).

Though she testified the federal statement information was important, Ms. Blazer also testified that she was unsure whether the federal authorities had the previous signed statement Billups gave to Sumter County investigators in September 2019, and admitted that would be important in the assessment of the credibility of the information they were receiving. (R. 149, line 21-p. 150, line 14). Ms. Blazer also admitted that Billups, who had previously become "sideways with the federal people" otherwise described as having "broken his proffer," was attempting to offer "new stuff" not disclosed previously to attempt to "reengage with the government" for benefit. (R. 145, line 17 – p. 147, line 20). The "new stuff" including new allegations (contrary to his signed statement) that he heard Appellant challenge the victim to a fight and that the victim pulled a gun and attempted to fire toward Appellant though the gun did not fire. (R. p. 922, Court's 3).

The defense also called Assistant U.S. Attorney Ben Garner who testified that simply obtaining information would not necessarily obligate him to reach out to a state prosecutor. (R. 165, lines 15-18). He testified that as a result of having conversations with Ms. Blazer who wished

to obtain a benefit for her client that he reached out to John Meadors as a prosecutor in the matter and, according to his recollection, the following occurred:

> ... I just described the information ... and indicated that based upon my review of the information contained in the 302 [federal form], I believed it could contribute to a self-defense claim and indicated the high nature of that I believed that Mr. Billups indicated that he witnessed the shooting and that the victim had pulled a firearm first and attempted to fire that firearm, at which point, the defendant in the Sunoco murder case discharged his weapon.

(R. 167, lines 6-17).

Mr. Garner continued in his testimony to describe his recollection of Mr. Meadors' response:

> ... he made a statement to me, he said, Who are you? I thought you were calling to help me and this doesn't help me. I then offered to provide him with the 302 containing the statement that Billups had provided during the course of his debriefing with law enforcement.

(R. 167, lines 20-25). He then offered to send a copy of the federal form, but Mr. Meadors, according to Mr. Garner, "indicated that he would reach out to his investigators." (R. 168, lines 1-4; *see also* R. 177, lines 11-20). Mr. Garner further testified that in August 2023, the Solicitor's Office contacted him and soon after he provided a copy of the form. (R. 170, line 18 – p. 171, line 7).

On cross-examination, Mr. Garner conceded the federal gun charge Billups plead guilty to pertained to the gun "relative to the Sumter Hop-In Sunoco murder," and other gun charges were dismissed. (R. 174, lines 8-19). He also admitted that he was neither aware of nor had seen the 2019 Billups statement given in the Sumter County investigation when he spoke to Mr. Meadors. (R. 175, lines 3-11). Mr. Garner's statement to Mr. Meadors was based solely on that statement as reflected on the form, not an investigation of the assertion. (*See* R. 175, line 17-176, line 14).

The defense then recalled Ms. Blazer to relate her impression that when Mr. Garner contacted her after his communication with Mr. Meadors, he appeared "distressed" or "deeply concerned" which she assessed as part of his being "a little naïve." (R. 183, line 7 – p. 184, line 16).

The defense also presented its team paralegal, Summer Roberts, who identified a listing of discovery received by the defense which was identified as Court's 4. That listing included the 302 federal form and "the CD" that the prosecution "stumbled upon ... in their file." (R. 193, lines 10-25). Ms. Roberts candidly admitted they were allowed to review the solicitor's file prior to trial and that "open file" review resulted in finding information they did not have a record of having received, including the Billups disc and anonymous tips information. (R. 194, lines 5-9).

At the conclusion of the defense presentation, the State argued that what the facts demonstrated presented no relief in the form of dismissal could be due:

> The May '22 interview was recorded. That officer put it on a disc and put it in the case file and that's what Mr. Meadors called and found out was available and turned over to the defense team that was working on the Joquell Myers case. When Mr. Meadors left the office, he did not know that we needed to turn that same disc over on the Epps case. That's where the disconnect happened. When Mr. Corbett found out that the disc had not been turned over, we turned it over. And as soon as I got the 302 in written form, we provided that.

(R. 199, lines 3-12).

The State then called John Meadors to further support that no relief was due.

Mr. Meadors testified that he tried the related Joquell Myers case and subsequently left the Sumter Solicitor's Office in 2022. (R. 201, lines 9-23). He was neither responsible for the discovery in Appellant's case nor knew the "state of discovery" in Appellant's case when he left the office. (R. 201, line 21- p. 202, line 4). He recalled receiving a telephone call from Assistant

U.S. Attorney Garner about Billups, but also recalled asking if Mr. Garner had viewed the recording of the shooting. (R. 202, line 20 – p. 203, line 2; p. 203, line 24-p. 204, line 2; 210, lines 3-4). He also recalled stating that he would get the information through the local officer who was present at the Billups federal questioning. (R. 203, lines 3-13; p. 204, lines 3-21; p. 205, line 11-p. 206, line 1). He recalled that even though it was the Myers case[14] that was going forward at the time of the call, he requested that that federal interview information provided to Appellant's defense counsel (Shaun Kent)[15] Mr. Meadors also testified that it is not uncommon to have continuing discovery as the trial approaches. (R. 208, lines 12-21). However, Mr. Meadors was clear that it was his understanding that his local officer obtained the information, and it was provided in the Myers case, underscoring again that he was not present for the "second process," *i.e.,* Appellant's trial and discovery. (R. 208, line 18 – p. 209, line 2). He noted that Appellant's defense counsel did not contact him to discuss any potential issue. (R. 209, lines 2-4).

Mr. Meadors did not recall the conversation with Mr. Garner in the same manner as Mr. Garner did, but candidly admitted that he thought the federal attorney should have looked at the video; it appeared he had not, given Mr. Garner's impressions as conveyed to Mr. Meadors. Though he testified that lack of critical consideration of the information the federal prosecutor had received led to "frustration," which Mr. Meadors admitted, Mr. Meadors was clear that as a result of the conversation with the federal prosecutor that he reached out to his local officer and did obtain the information to share. (R. 210, lines 8- p. 211, line 18; p. 212, lines 2-13; p. 215, lines 15-19).

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[14] *See* n. 1, *supra.*

[15] Appellant's defense counsel, Mr. Kent, was representing a victim in the Myers litigation, Michael Lucas, as well as representing Appellant for his charges. (R. 207, lines 9-19).

Appellant's defense counsel conceded that it would not be fair to ask Mr. Meadors about discovery in Appellant's case because Mr. Meadors had left the office before Appellant's trial. (R. 211, lines 19-22). Even so, he continued to question Mr. Meadors about disclosures for Appellant's trial, and Mr. Meadors testified:

> My answer is I know the substance of what was in the 302, it's my understanding, was in the audio recording, which said the same thing the 302 said. So that was turned over to Mr. Myers. Whether you got that prior to the continuance, I don't know.

(R. 213, lines 10-14).

Mr. Meadors also testified that Appellant's defense counsel could have called about the issue at any time, especially since Appellant's defense counsel represented Mr. Lucas and others in the shootout and their existing relationship would indicated he would be open to any discussion. (R. 213, line 25 – 214, line 9; p. 215, line 20- p. 216, line 2).

The State also called Detective Willie McFadden who was the lead investigator for the Sonoco shoot-out. (R. p. 217, lines 12-18). He was familiar with Billups, who was not charged, and Myers and Epps, who were. (R. p. 217, line 19 – p. 218, line 13). Det. McFadden testified that he helped to obtain copies of discovery materials for both the Myers and Epps trials. (R. 218, lines 14-19). He testified he was not aware of the Billups interview(s) until August 2023, but had learned that another officer, Michael Roberson, had attended and recorded a May 2022 Billups federal interview. (R. 218, line 20 – p. 219, line 13). That recording was provided to the defense in Myers but Det. McFadden was unsure if it was provided to Appellant's defense team. (R. 219, line 18 – p. 220, line 4). Specifically, he recalled that he provided the Billups interview CD "to the solicitor's office and they provided everything to Joquell Myers' attorney." (R. 225, lines 2-5). While he worked with Mr. Meadors in the Myers prosecution, since Mr. Meadors had left the office, he had been working with Assistant Solicitor Corbett and Solicitor Finney in preparation

for Appellant's trial. (R. 220, lines 12 – 25). In cross-examination, defense counsel asked the detective if, when he spoke to Mr. Meadors, that they discussed the federal form 302, which he did not recall, but did recall speaking about the recorded interview. (R. 222, lines 1-7). He plainly denied defense counsel's suggestion that "Mr. Meadors said the federal government is looking into this case, I'm upset they're interviewing witnesses." (R. 224, lines 13-15). Defense counsel also asked if the detective recalled Ms. Blazer's testimony in the instant hearing "that the United States of America said they looked at the video and there was some allegation that they saw Mike Rodgers with a gun..." which drew not only an objection given "that Ms. Blazer never said [anything] about looking at a video," but also a "I don't recall" answer. (R. 227, line 23 – p. 228, line 17).

Defense counsel argued that the Billups statement was "favorable to our client" and "support[s] a self-defense argument." (R. p. 229, line 22 – p. 230, line 6). He also argued that form 302 with the statement summary was "refused," and suppressed by the prosecution. (R. 230, line 17 – p. 231, line 4). Finally, the defense argued it was "material to guilt or punishment" as "one of the biggest and most important defenses to a murder case is that of self-defense." (R. p. 231, lines 12-18). In making the suppression argument, the defense urged the court to finding that Mr. Meadors "refused" the information, finding it to be "harmful," and the defense "never got it." He argued though a Brady violation does not hinge on the intent of the prosecutor, he urged the court to find intentional concealment. (R. 232, lines 4-12). He concluded that the only remedy of value to Appellant was dismissal of the charges. (R. 232, line 13- p. 23, line 4).

The State argued there was no *Brady* violation considering that the defense never wanted the continuance and was prepared to go to trial in August, "so having it labeled as favorable when he didn't need it to proceed to trial is now a sham argument." (R. p. 233, lines 10-15). The State also noted that "favorable" was not an appropriate adjective when the later assertion was

inconsistent with both the signed statement given and the video. (R. 233, lines 16-23). The State agreed they had the statement (*i.e.*, the recording) and took steps to turn that over in the Myers case, and also admitted that not all the discovery was "pushed out" but it certainly was not deliberately suppressed as the defense had argued. (R. 235, lines 2-12). The State firmly disagreed with the defense suggesting that Mr. Meadors simply did not like the information and suppressed the information, especially in light of the logical testimony that Mr. Meadors' frustration was not with the evidence but with

> ... the information that he was being given from the federal [government] that day on the phone call because it didn't match with what he already knew in the case on video. So that was the only reason he may have felt some disgust about it because he had worked the case and was aware of the status of the case. And here's a guy saying something to the feds and the feds haven't checked it out. His own lawyer hadn't even read the [signed] statement [... Billups ...] gave to the State. The federal prosecutor hadn't read it. Nobody had seen the video.

(R. 236, lines 5-14).

The court took the matter under advisement and recessed overnight. (R. 236, line 24 – p. 237, line 13). The defense added it was not just the statement but delayed discovery generally, citing the "anonymous tips and the other stuff ... we just got this week." (R. 237, lines 19-20).

On Tuesday, September 26, 2023, the court reconvened. At the beginning of the hearing, the defense offered Myers' attorney Mr. Warr, to testify that upon request, he reviewed the discovery in that case and did not locate a recording of the Billups federal statement. (R. 240, line 21 – p. 242, line 20). On cross-examination, Mr. Warr did confirm that he received "some discs" prior to trial, and that those were left in an area behind the office, but maintained that he did not see the federal interview. (R. 243, line 23 – p. 244, line 23). He testified that there were several discs, and he could not recall the exact number of discs received that day but "[i]n total, we have

probably five or six discs that came from that trial. I want to say that particular day - - this is very fuzzy, but I believe it was two or three disks." (R. p. 247, line 22 – p. 248, line 4). He firmly testified that he did receive the store video that showed Appellant delivering a punch, and the victim pulling a gun after. (R. 250, line 21 – p. 251, line 9).

B. The trial court's ruling denying the motion:

The court considered the four prong *Brady* test.[16] As to favorable evidence, the court acknowledged the Billips statements "are opposite," but the later one given during the federal interview "at least, could be considered exculpatory...." (R. p.252, line 16 – 253, line 4). Further, it was "known to the prosecution given the fact that a representative of he Sumter Police Department was at the interview" when the statement was recorded. (R. 253, lines 6-15). As to suppression, the testimony could support "it was suppressed at some point in time, but, ultimately, it was provided to the Defense in the form of the 302 and the recorded statement that was given here in Sumter in 2022." (R. 253, lines 16-20). Turning to material to guilt or innocence, the court found:

> ... a violation is material when there is a reasonable probability that had the evidence been disclosed to the Defense, the result of the proceeding would have been different. In other words, the government's evidentiary suppression is so serious as to undermine the confidence in the trial's outcome. Brady information applies to both impeachment and exculpatory evidence. And whether the prosecution acted in good faith or bad faith is irrelevant....
>
> ...
>
> ... This situation is different because the Defense has the evidence in his head, adequate time to review the evidence and make a determination as to whether they will seek to use the evidence at trial. ...

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[16] To show a violation, there must be evidence 1) favorable to the defendant; 2) known to the prosecution; 3) not disclosed, and 4) material to guilt or punishment. *See Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999).

> Obviously, in this case, the discovery process was messy and the records that were kept when discovery was produced were potentially - - I guess one could view them as deficient, but, ultimately, the Defense has the information. And I understand it got the information on the eve of the first time this case was called for trial and that the Defense was in a unique position given how the evidence was discovered, but, ultimately, they have the evidence and they could use - - they can do with that evidence whatever they see fit.

(R. p. 253, line 22 – 255, line 6). He did not find the situation "rises to the level of a due process violation" and could not support dismissal. (R. p. 255, line 25 – p. 256, line 1).

Consequently, the court denied the motion. (R. p. 255, lines 7-11). The court noted that discovery in the case could be considered "negligent" or "sloppy" because "there ought to be an accompanying document which states what is presented, in what format and by whom" to avoid the contest such as the one presented in this matter. (R. 255, lines 12-24). The court reiterated that it did not find a "due process violation [] which would require dismissal of the charge...." (R. 255, line 25 – p. 256, line 3).

C. The defense presses further for specific rulings on witness credibility:

After the ruling, the defense requested "a finding as to the credibility of the witnesses who testified" in the hearing. (R p. 256, lines 4-6). The court noted

> ... there's obvious discrepancies in Mr. Meadors' memory of these transactions and Mr. Warr's memory of these transactions. I think both witnesses that testified on this issue, neither of their memories were a hundred percent accurate. Mr. Warr couldn't remember exactly how these things went down either. So they have different recollections of the way this discovery was transmitted. I don't think there's been conclusive proof - - at least, not in my mind conclusive proof that one side was more credible than the other.

(R. 256, lines 7-16).

The defense pressed further still for rulings as to Mr. Garner and Ms. Blazer. (R. p. 256, lines 17-22). The court noted some similarities, *i.e.,* that the phone call to Mr. Meadors occurred,

"[a]nd then Mr. Meadors' statement that we'll get this information through law enforcement would, at least, in regards to the recorded audio statement of Mr. Billups, that absolutely happened, so that lends credibility to his statement." (R. p. 256, line 23 – p. 257, line 4). The court considered perhaps a perception problem as part of Mr. Garner's recollection of the communication "sounded like an off-handed comment," but Mr. Meadors followed the path in which is ordinarily followed, which is to obtain the information though law enforcement for discovery disclosure to the defense. (R. 257, lines 5-16). The court declined to go further, given the similarities of note, and otherwise provided that, "the record will speak for itself." (R. 257, lines 17-25).

D. The defense case at trial: Defendant maintained he was not the person who shot the victim, and neither called Billups nor used the Billips statement.

Appellant did not call Billups. Appellant did not show that he shot at the victim in self-defense. He, in fact, argued that he did not shoot at the victim, but fired wildly as he was running away. The defense summarized the position offered to the jury:

> Why is it not a self-defense case? The rest of the story. He didn't do it. It can't be self-defense if you're not the one who shot the person....

(R. p. 373, lines 12-14). (*See also* R. p. 859, "I don't think that they've proven that he actually shot. That's not guilty.").

STANDARD OF REVIEW FOR BRADY MOTIONS:

An appellate court reviews the lower court ruling on *Brady* issues for abuse of discretion. *State v. Durant*, 430 S.C. 98, 110, 844 S.E.2d 49, 55 (2020) (citing *State v. Bryant*, 372 S.C. 305, 316, 642 S.E.2d 582, 588 (2007)).

"Due process requires the prosecution to disclose evidence that is favorable to the accused and material to guilt or punishment." *State v. Cheeseboro*, 346 S.C. 526, 553, 552 S.E.2d 300, 314 (2001) (citing *United States v. Bagley*, 473 U.S. 667 (1985); *Brady v. Maryland*, 373 U.S. 83

(1963)). "In determining the materiality of nondisclosed evidence, the reviewing court's function is to determine whether the appellant's right to a fair trial has been impaired." *Id.,* (citing *Kyles v. Whitley,* 514 U.S. 419 (1995); *State v. Taylor,* 333 S.C. 159, 508 S.E.2d 870 (1998)).

In review of *Brady* claims, to evaluate materiality, "an appellate court must consider the evidence in the context of the entire record." *Taylor*, at 177, 508 S.E.2d at 879 (citing *United States v. Agurs,* 427 U.S. 97 (1976)). "However, the court should not consider the sufficiency of the evidence" rather, the court should "determine whether the appellant's right to a fair trial has been impaired." *Id.,* (citing *State v. Osborne,* 291 S.C. 265, 353 S.E.2d 276 (1987); *State v. Goodson,* 276 S.C. 243, 277 S.E.2d 602 (1981)). "One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. at 435.

"Evidence is not considered 'material' if the defense discovers the information in time to adequately use it at trial." *State v. Moses*, 390 S.C. 502, 517, 702 S.E.2d 395, 403 (Ct. App. 2010). The trial court has broad discretion in fashioning a remedy when considering a *Brady* violation. *See Earley v. State*, 418 S.C. 255, 271, 792 S.E.2d 226, 234 (2016) (rejecting a finding that "mistrial was the *only* remedy available to cure the prejudice resulting from the State's nondisclosure").

DISCUSSION:

"A *Brady* violation occurs when the evidence at issue is: 1) favorable to the accused; 2) in the possession of or known to the prosecution; 3) suppressed by the prosecution; and 4) material to the defendant's guilt or punishment." *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). "Evidence is material under *Brady* if there is a 'reasonable probability' that the result of the proceeding would have been different had the information been disclosed." *Riddle v. Ozmint*,

369 S.C. 39, 44-45, 631 S.E.2d 70, 73 (2006). "Because *Brady* is founded upon a sense of fairness and justice, the focus in a *Brady* analysis should not be on the misconduct of the prosecutor, but rather on the fairness of the procedure." *Moses*, at, 516, 702 S.E.2d at 402. Here, defense counsel simply argued that there should be no cure to either a failure to disclose or late disclosure. The law does not support such an assertion. The *Brady* line of cases is specific to preserving the right to a fair trial, not to avoid one.

Further, the defense *objected* to the continuance, and repeatedly argued late disclosure equated to no disclosure. "However, the acquisition of requested documents at the last minute is not uncommon in the practice of law" though the courts do not "condone" late disclosures, especially if prejudice to the defense is shown. *State v. Bryant*, 372 S.C. 305, 316, 642 S.E.2d 582, 588 (2007).[17] Yet the defense's position does play a pivotal role in review: a defendant's "acknowledgment to the trial court that the absence of certain documents would not be prejudicial to the defense goes squarely against" his later request for relief on appeal. *Id.*, at 315-316, 642 S.E.2d at 588. In such a case, where the defendant "conceded that the court's ruling was not prejudicial, he may not later assert that ruling denied him a fair trial." *Id.*, at 316, 642 S.E.2d at 588.

Appellant was not surprised by the State's disclosure of the Billups federal interview – he knew that from communication with Billups' defense counsel sometime in the summer of 2022, (R. 143, lines 16-22; *see also* R. p. 145, lines 1-5), that some "favorable" evidence may have been available, but the nature of which may "prejudice" his client. (R. 134, line 13 – p. 135, line 3). See *United States v. Smith Grading & Paving, Inc.*, 760 F.2d 527, 532 n. 6 (4th Cir. 1985) ("the

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[17] Even Appellant is constrained to admit our Criminal Procedure Rules expressly include a provision for "a continuing duty to disclose" either prior or even during trial. (Brief of Appellant, at 26).

fact that disclosure came from a source other than the prosecutor is of no consequence. When determining the constitutional validity of a belated *Brady* disclosure, the relevant inquiry is solely whether the defendant was able to effectively use the exculpatory information."). (*See also* R. p. 254, the trial court's ruling in this case noting, "the Defense has the evidence in his head, adequate time to review the evidence and make a determination as to whether they will seek to use the evidence at trial," and R. p. 255, lines 2-4, "the Defense was in a unique position given how the evidence was discovered..."). He did not want any further information. (R. 130, lines 1-6). Over a year later, Appellant's defense counsel did not move for a continuance or request the federal form (which reflected an investigator's notes) but accused the State of violating *Brady* for withholding information. He asked for no relief at all, rather, he insisted he was prepared and wished to go forward. Carefully considered, the argument offered was that he wanted to accuse the State of a violation, but did not wish to use the information at trial (and ultimately did not use the information). The Billups statement was directly contrary to the statement Appellant gave and wanted to rely upon at trial. This was straightforward strategy, not surprise and the defense clearly did not want to use the information. Again, no relief is due, and Appellant is barred from claiming relief is due on appeal. *Bryant, supra.*

Further, our Supreme Court also recognizes a logical corollary to the *Brady* line of cases: that the evidence must be unavailable to the defense. "[W]e think it is implicit that the Brady rule applies only to favorable evidence which the prosecution has but which is unavailable to the defendant." *Anderson v. Leeke*, 271 S.C. 435, 438, 248 S.E.2d 120, 122 (1978). *See also State v.*

Penland, 275 S.C. 537, 540, 273 S.E.2d 765, 766–67 (1981) (applying *Anderson*).[18] The entire concept in this corollary is to avoid windfall for a technical failure to disclose that caused no prejudice to the defense or undermined the fairness of the proceedings. It should be applied here where not only was defense counsel aware of the statement before the State was but also attempted to create an issue in his favor by intentionally foregoing acceptance of the material. To be clear, the State acknowledges the material, though thought to be delivered, was not delivered until the weeks just prior to the September trial. But it is difficult to maintain an allegation of error when the materials (both the Billups statement and the Facebook clip) were delivered before trial, and that much of the complained of material generally was obtained in August based on an "open file" review in the Solicitor's office. Simply, it may not have been a pretty process, but it was an effective one that ensured that there was no danger of an unfair trial.

Moreover, there could be no actual *Brady* violation because defense counsel already had the knowledge *and* the State obtained the very information and disclosed it. When advised of the separate federal investigation and the 2022 changed Billups statement, the State *did* obtain the record (the actual statement by Billups) to disclose.[19] Again, the record shows, and the trial court found that a change in prosecutors and a rather "sloppy" disclosure process (one that could not be easily verified) was evident, but it does not show a lack of disclosure or prejudice to the defense.

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[18] Respondent notes that this corollary was observed but not applied in *Early v. State* with the Court explaining that, in stark contrast to the facts in this record, there was no evidence whether the defendant had access to the posting at issue, thus no basis for which to consider the *Anderson* corollary. *Id.*, at 269, 792 S.E.2d 226, 233 (2016). Further, the Court declined to apply the concept in a case involving an error on NCIC search information, noting that the State had "exclusive access to the NCIC database." *State v. Durant,* 430 S.C. 98, 110, 844 S.E.2d 49, 55 (2020). Inescapably, the record here shows that Appellant had access to the information – Billups counsel contacted him about it. The corollary rule should apply in full force.

[19] The defense repeatedly referenced the federal investigation form, another person's notes of the interview; yet the recorded interview was the best record of the statement.

When the September trial was at hand, Appellant could not complain of a lack of disclosure. Further, the requested relief of dismissal was untethered to the Constitutional guarantees of disclosure at issue. He was due no relief and appropriately received none.[20]

A dismissal of the charges is not contemplated in the plain provisions of *Brady*. Thus, the Constitution does not support such dismissal. The Fourth Circuit came to that same conclusion in considering a district court's dismissal based on a protracted discovery process that was infirmed.

In a multi-defendant case involving public correction, one defendant, after a remand for additional proceedings in the district court, moved to dismiss the indictment against him based on an allegation "of discovery violations and other alleged prosecutorial misconduct." *United States v. Derrick*, 163 F.3d 799, 803 (4th Cir. 1998). The government began a new round of disclosures. Thereafter, another defendant made similar allegations. *Id.* An investigation by the Department of Justice's Office of Professional Responsibility resolved that there had been no intentional misconduct. *Id.* Through discovery orders, the district court ultimately conducted *in camera* reviews of documents, and ordered a portion disclosed, and concluded dismissal was warranted under the court's "supervisory power." *Id.*, at 804-806. The Fourth Circuit reversed.

Finding "dismissal of the defendants' indictments without a finding of prejudice is directly contrary not only to the precedent of this court, but also to clear and well-established Supreme Court precedent." *Id.*, at 806 (citing *United States v. Hasting*, 461 U.S. 499 (1983)). The Fourth Circuit noted the Supreme Court does not allow a district court to exercise "supervisory powers"

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20 The defense appeared to have lost sight of the ultimate goal of Brady, to ensure that he had material evidence for his defense. Not only did the defense elicit testimony that continuances allow the State to be "less terrible," and indicated that the U.S. attorney was naïve to believe ill of state prosecutors, he pressed for credibility rulings which would, of course, not be used in any challenge to the actual receipt of the materials. The defense maintained the wrong focus throughout the lengthy pre-trial hearing.

in an effort "to evade the harmless error rule for constitutional violations" given the "interest of the victims in seeing the defendants brought to justice and the public's interest in" prosecution under the law. *Id. See also id.*, at 807 ("The dismissal of an indictment altogether clearly thwarts the public's interest in the enforcement of its criminal laws..."). Our courts have also adhered to this principle generally.

In *State v. Wilkins*, this Court acknowledged appellant's argument that "the trial court erred in not dismissing the charges against him because the State failed to satisfy timely the requirements of *Brady* ... ." 310 S.C. 81, 84–85, 425 S.E.2d 68, 70 (Ct. App. 1992). Notably, in discussing the argument, this Court considered only whether "untimely disclosure of the reports warrants *reversal in this case* under *Brady*." *Id.*, at 85, 425 S.E.2d at 70. The matter was then resolved on the finding that appellant failed to show a *Brady* violation. *Id,* at 85, 425 S.E.2d at 70. This Court observed that where '"there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial.'" *Id.* (quoting *Agurs*, at 109-110).

Moreover, our courts have never established that a criminal defendant will not have to face trial for his crimes based on misconduct of the solicitor even when there is a finding of intentional misconduct. In a case involving intrusion into privileged attorney-client conversation, even though our Supreme Court found "deliberate prosecutorial misconduct," and resolved that such conduct "raise[d] an irrebuttable presumption of prejudice," the Court ordered a new trial, not dismissal. *State v. Quattlebaum*, 338 S.C. 441, 449, 527 S.E.2d 105, 109 (2000). *Accord State v. Inman*, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011) (mistrial not warranted even where prosecutor's actions constituted witness intimidation and misconduct, mistrial was not warranted for lack of

prejudice).[21] Appellant seeks extraordinary relief – relief not supported in fact or law as it would be greatly out of step with the limited new trial relief described in other cases with specific, deliberate misconduct.

Consequently, for these reasons, Appellant is not entitled to any relief. His argument to the contrary should be rejected.

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[21] Respondent notes that Appellant relies in part on the administrative docket order for the circuit. (*See* Brief of Appellant, at 26). It follows that where Appellant fails to show relief is due under *Brady,* the reliance on the discovery provisions as referenced in the administrative order will not aid his argument. Further, he provides no interpretation of that order that affects whether a trial court must suppress evidence or dismiss the case if a discovery issue arises after the case is on the roster. Since that would be contrary to precedent, it is doubtful that such an interpretation would stand.

III. The trial court did not abuse its discretion in admitting a Facebook clip disclosed in discovery prior to trial that was directly relevant to establish Appellant's prior animosity toward the victim when Appellant created the clip, was the first individual to reference the clip in the investigation, and the witnesses describing the clip at trial identified Appellant as the individual in the clip and that the clip was from a "Facebook Live" segment that played a few weeks prior to the murder and contains threats toward the victim. [Appellant's Issues II, III and IV].

SUMMARY OF THE ARGUMENT:

In his first complaint against the admission of the Facebook clip, Appellant largely repeats his argument that the clip, which was provided before the August proceeding, was not timely disclosed which denied him a fair trial. (Brief of Appellant, at 29). He alleges the State's "unjust behavior" will continue until "the State suffers the appropriate consequences...." (Brief of Appellant, at 31). He omits the fact that Appellant was the first person to identify the Facebook post to detectives. Appellant shows no error in the disclosure of material – that he was aware of – prior to the initial August proceedings in advance of his September trial.

In his second complaint, Appellant challenges the authentication of the evidence as the clip was identified by someone who did not "create the video" or "know when the video was recorded," and "did not receive the video from the person who created it, or "know the individuals in the video," and "agreed that it was not the complete video recording." (Brief of Appellant, at 32). However, authentication merely means that the item is what it purports to be. Since Appellant created it, was in it, referenced it during the investigation, and apparently does not contest that he made the video in which he expressly threatened the murder victim mere weeks before killing him, his complaints are insufficient to show a lack of authentication, and also insufficient to show "unfair prejudice." (Brief of Appellant, at 33).

In his third, and last, complaint regarding the video clip's admission, Appellant argues because the video was not "complete" the admission of any part of it caused a "misleading

impression" and absent the remainder of the video, that "misleading impression" could not be addressed. (Brief of Appellant, at 34). While the defense asked questions of the witness who identified the video, whether there was "a lot more," there was no indication that anything was ever seen by the murder victim or his girlfriend other than the express threats made by Appellant. (*See* R. p. 287, lines 1-16). Even so, the clip shows the song which repeats the victim's nickname and the threats for approximately one minute and thirty-six seconds. (State's Exhibit 1). Another individual in the clip makes a gun motion. (State's Exhibit 1 at approx. 1:19 on the clips timer).

All in all, Appellant's arguments are insufficient to show an abuse of discretion in admission of the relevant, telling, and timely video.

RELEVANT FACTS:

When objecting to the continuance of the August 2023 trial, defense counsel specifically objected to "one Facebook video that was given to us on Friday morning," based on his assertion that "the new chief administrative order" supported that it must be assumed if the trial is placed on the roster that all discovery has been provided. (R. 45, lines 10-20). Defense counsel argued that he did not want the State to have an opportunity to cure any potential discovery issue, and, thus, have an argument that the late disclosed material was received in time for trial. As such, he requested that "this to be a snapshot that the discovery, no matter what was not provided, was on the docket and not provided [until] the Friday before trial." (R. 46, lines 5-11). He also asserted that was his "strongest argument," and "[t]he rest of them can wait depending on what the Court" decides on the State's motion. (R. 46, lines 10-11). The court deferred ruling until after the continuance as addressed. (R. 46, lines 14-15).

During the motion to dismiss the charges heard on September 25th, counsel renewed his complaints about late discovery, but underscored that he was ready, willing, and prepared to go to

trial on August 14, 2023. Defense counsel argued that he was concerned "that a continuance would do nothing more than hurt Mr. Epps' case...." (R. 109, line 7 – p. 114, line 6). After a lengthy presentation concerning the Billups federal statement, defense counsel added, in summary fashion, "please understand that" in addition to the Billups statement, Appellant was "complaining about the delayed discovery, also." (R. 237, lines 14-17). The next day the trial judge ruled on the motion to dismiss, finding no prejudice to Appellant where

> ... the Defense has the evidence in his head, adequate time to review the evidence and make a determination as to whether they will seek to use the evidence at trial. ...
>
> Obviously, in this case, the discovery process was messy and the records that were kept when discovery was produced were potentially - - I guess one could view them as deficient, but, ultimately, the Defense has the information. And I understand it got the information on the eve of the first time this case was called for trial and that the Defense was in a unique position given how the evidence was discovered, but, ultimately, they have the evidence and they could use - - they can do with that evidence whatever they see fit.

(R. p. 254, line 13 – 255, line 6). He did not find the situation "rises to the level of a due process violation" and could not support dismissal. (R. p. 255, line 25 – p. 256, line 1).

The pre-trial hearing continued and the State advised the trial judge that Ms. Arkell Eaglin, who was the victim's girlfriend, would authenticate the Facebook Live clip in which Appellant is making threats against the victim approximately one month before the murder. (R. 258, lines 11-19). Ms. Eaglin was called at the pre-trial proceedings. She testified that she had previously testified in the Joquell Myers trial and had also reviewed the Facebook clip for that trial. (R. 276, lines 21 – p. 277, line 4). For background, Ms. Eaglin testified that she saw the clip before the victim but showed the clip to the victim and they discussed it. (R. 279, line 24- p. 280, line 14). Her advice to the victim was "[t]o just stay away and stay inside, stay inside and stay out of the

way." (R. p. 281, lines 1-5). She saw the video right before a birthday beach trip for the victim, and they discussed after they returned. (R. p. 280, line 3 – p. 281, line 8). The victim's birthday was August the 9th and he was killed just a month later on September the 8th. (R. p. 283, lines 18-24). She identified Appellant as the lead singer. (R. 282, lines 7-13). She did not know any of the other men who walked through the video as Appellant was singing. (R. 284, lines 6-13). On cross-examination, she agreed with defense counsel that she had not made the video; did not know who made the video; "cannot testify to the authenticity of who made it or when," did not personally know the individuals in the video; and that there would be more videos, or more to that video. (R. 286, line 6 – p. 288, line 11).

The State also called Detective Willie McFadden. He also recognized the video clip. (R. 289, lines 16-22). The detective testified Appellant as "singing the song and doing most of the talking," and also recognized Jay McBride (deceased) and Joquell Myers. (R. p. 290, lines 13-25). Both McBride and Myers were at the gas station during the shout-out, and, with others, also accompanied Appellant to the hospital. (R. 291, lines 3-25). He testified that during the first interview the detective had with Appellant, when asked about the victim and any problems with the victim, Appellant:

> ... stated that he made a comment on Facebook ... after Killa Mike was jumped in a club, but went on to say that he didn't - - that didn't have nothing to do with it.

(R. 293, lines 3-8).

It was only later that the video clip was provided anonymously by someone in the victim's family. (R. 293, line 9 – p. 298, line 4; p. 299, lines 2-4). He also agreed with defense counsel that it appears the clip is part of a longer video. (R. 298, lines 15-17).

The State argued that the video was "within 30 days" of the murder; and "kind of speaks for itself in terms of the taunting and the unfriendliness of the tone" taken by Appellant. (R. 29, lines 18-25). The State acknowledged there may be more to the recording, but he clip was unmistakably relevant as to motive and animosity. (R. 300, line 1 – p. 301, line 5).

The defense harkened back to his August argument and his position that the video disclosure was late then. (R. 301, line 19- p. 302, line 23). Next the defense argued that the video could not be properly authenticated by a person with personal knowledge. (R. 302, line 24 – p. 304, line 11). Then, counsel argued that the rule of completeness necessitates the State contact Facebook, obtain the full video, and provide it to the defense before it may be admitted. (R. 304, line 12 – 305, line 10). Defense counsel also argued "a confrontation clause problem and a possible hearsay problem," since no one with personal knowledge would testify, (R. 305, lines 11-18), but that argument is not raised in the appeal. Finally, in addition to arguing prejudice from delayed disclosure, and an incomplete clip that goes to motive that need not be proven, defense counsel argued that the time was actually unknown since there was no testimony offered as to when the video was made. (R. 306, line 10- 307, line 12).

The State responded underscoring that the assertions by Appellant captured on the video demonstrated malice, and motive, though not an element, may be "germane" to the case. (R. 307, lines 16-18; p. 307, line 25 – p. 308, line 4). The State responded that the remaining arguments offered by the defense merely went to weight of the evidence and could be argued to the jury. (R. 307, lines 19-25). The State noted the concept of the video being longer does not show support for an argument that whatever the remainder is claimed to be, there is anything in the remainder that would be relevant. (R. 308, lines 5-11).

The trial judge found that Ms. Eaglin's testimony that she received the video as a member of Facebook, and Detective McFadden's personal identification of the individuals supported the authentication requirement was met. (R. 309, line 20 – 310, line 10). Further, the video contains admission which would be admissible under Rule 801 (d)(2), SCRE. (R. 310, lines 11-17). As To completeness, the State turned over the entirety of the recording that it had, thus, Appellant could argue there was more to the jury, but nothing under completeness would prevent its admissibility. (R. 311, lines 7-21). Lastly, the trial judge found the disclosure to be governing by Rule 5, and not exculpatory, but nonetheless discoverable. (R. 311, lines 22-25). Given the defense had the video prior to the August motion, there would be no prejudice or denial of due process, *i.e.*, "the analysis is the same" as that of the other materials. (R. 311, line 25 – p. 312, line 6). Defense counsel objected to the video during the trial. (R. 629, lines 18-25).

Also during trial, Detective McFadden made clear that it was Appellant who first introduced the concept that the Facebook video he made about the victim may be important to the investigation. (*See* R. 578, lines 14-19; p. 657, lines 2-18).

STANDARD OF REVIEW FOR EVIDENTIARY RULINGS:

Evidence rulings are similarly reviewed for abuse of discretion "'and will not be reversed absent an abuse of discretion.'" *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "'An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.'" *Id.* (quoting *Pagan*, 369 S.C. at 208, 631 S.E.2d at 265).

DISCUSSION:

Again, the above facts show the lack of merit to Appellant's allegation of a disclosure issue. Respondent incorporates the prior arguments, as well, in particular waiver of the prejudice

argument where Appellant fails to seek a continuance. *State v. Bryant, supra.* Additionally, the video was even more clearly well-known to the defense than the changed Billups statement. Here, Appellant was the first person to key detectives in on the fact that Appellant made the video about the victim. Further, the defense was involved in the prior Myers trial where the video was played. (*See* R. p. 294, lines 8-15). The video had both Appellant and Myers plainly visible. (R. p. 290, lines 13-25). And it was undoubtedly relevant. Appellant does not contend otherwise.

"In homicide cases, evidence that the accused and the decedent had previous difficulty is admissible. The evidence is admissible to show the animus of the parties and to aid the jury in deciding who was the probable aggressor." *State v. Taylor*, 333 S.C. 159, 168, 508 S.E.2d 870, 874 (1998). Appellant admitted that the evidence was used just for that proper and relevant purpose here, "a key piece of evidence that establishes motive and proves the existence of malice." (Brief of Appellant, at 33). Though, rather than the "unfair" prejudice he claims, the evidence was highly probative and its admission was not in the least "unfair." *See, e,g,, State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) ("'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.'") (quoting *United States v. Bonds,* 12 F.3d 540, 567 (6th Cir.1993)). Further, Appellant fails to show an abuse of discretion in finding the clip adequately authenticated.

"'The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.'" *State v. Brown*, 424 S.C. 479, 488, 818 S.E.2d 735, 740 (2018) (quoting Rule 901(a), SCRE). The defense is always able to argue case-specific facts bearing on th[e] risk" the offered evidence is not accurate or true. *State v. Green*, 427 S.C. 223, 234, 830

S.E.2d 711, 716 (Ct. App. 2019). Here, the trial court did not abuse its discretion in finding that the video was sent via Facebook to Ms. Eaglin, and she identified the clip as reflecting the images that she saw. That supports authentication. *State v. Hall*, 437 S.C. 107, 120, 876 S.E.2d 328, 335 (Ct. App. 2022) (considering authentication of Snapchat messages resolving that the witness offered "received the messages from Elmore; therefore, she could have authenticated the messages with personal knowledge under Rule 901(b)(1), SCRE."); *see also Upson v. State*, 442 S.C. 359, 367, 897 S.E.2d 564, 569 (Ct. App. 2024) (describing the use of Facebook friends listing to identify a defendant). Further, Detective Myers could personally identify the people in the video. *See* Rule 901(b)(1) (authentication by testimony from a witness with knowledge). Lastly, Appellant's reliance on the rule of completeness is misplaced.

"Rule 106, SCRE, stands for the proposition that when a part of a recorded statement is introduced, the opposing party may require the admission of other portions to ensure the partial statements are not taken out of context." *State v. Oglesby*, 384 S.C. 289, 294, 681 S.E.2d 620, 622 (Ct. App. 2009) (citing *State v. Cabrera–Pena,* 361 S.C. 372, 379, 605 S.E.2d 522, 525 (2004)). The right to have the remainder introduced is limited to that which the party can show is relevant to "explain[] or clarif[y]" the admitted portion; that may also be admitted. *Id.* Appellant has never shown that portions of additional video could "explain[] or clarif[y]" the admitted portion. Further, the rule of completeness is not to be used to suppress the relevant matter where the remainder is not available. *Id.*, at 294, 681 S.E.2d at 623. *Accord State v. Moses*, 390 S.C. 502, 519, 702 S.E.2d 395, 404 (Ct. App. 2010) (where remainder of tape not preserved, the defense's speculation that had it been available for the defense to review it may have allowed identification of other witnesses or other favorable evidence was "insufficient" to show a due process violation). And as

And as a final point in this matter, the person in the video is Appellant –he even admitted to the video and its connection to the victim. (*See* R. 578, lines 14-19; 657, lines 2-18).

Appellant has failed to show that the trial judge abused his discretion in admitting the relevant and authenticated video clip. Appellant's arguments to the contrary must be rejected.

CONCLUSION

For all the foregoing reasons, this Court should affirm.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit
215 N. Harvin St.
Sumter, S.C. 29150
(803) 436-2185

s/Melody J. Brown
By:_____
MELODY J. BROWN
S.C. Bar No. 14244
ATTORNEYS FOR RESPONDENT

May 5, 2025

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Sumter County
Court of General Sessions

The Honorable R. Kirk Griffin, Circuit Court Judge

THE STATE,

Respondent,

v.

DIONTRAE TRAVON EPPS,

Appellant.

Appellate Case No. 2023-001586

CERTIFICATE OF SERVICE

I, Angela Brown, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Final Brief of Respondent, and Certificate of Service has been forwarded to Appellant's counsel, Dayne Phillips, Esquire via email today, May 5, 2025 to dayne@pricebenowitz.com.

I further certify that all parties required by Rule to be served have been served.

This 5th day of May, 2025.

s/ Angela Brown

Angela Brown
Legal Assistant to Melody J. Brown
Senior Assistant Deputy Attorney General

Angela Brown

From: Angela Brown
Sent: Monday, May 5, 2025 3:19 PM
To: Dayne Phillips; Courtney Powers
Cc: Melody Brown
Subject: The State v. Diontrae Epps (2023-001586)
Attachments: Epps, Diontrae - Final Brief of Respondent.pdf

Mr. Phillips, please find attached the State's Final Brief of Respondent in referenced to the above appeal. The Brief will be electronically filed with the South Carolina Court of Appeals on today's date.

Thank you,

Angela Bennett Brown, Administrative Coordinator II
Office of the South Carolina Attorney General
Criminal Division | Office 803-734-0368 | Abennett@scag.gov
P.O. Box 11549 | Columbia, SC 29211

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