VOLUME II OF II

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DILLON COUNTY
Court of General Sessions

Paul M. Burch, Circuit Court Judge

Appellate Case No. 2022-000324

The State,

Respondent,

Marc Yasin Mckeiver,

Petitioner.

APPENDIX

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informant."); State v. Vanderford, 980 S.W.2d 390, 401 (Tenn. Crim. App. 1997) ("When the suspect permits a confidential informant into his residence, and he freely and voluntarily talks to the confidential informant, the suspect has no expectation of privacy regarding the conversation."). Second, if the individual did have an actual expectation of privacy, it must be determined whether that expectation was one society is prepared to recognize as reasonable. Bond, 592 U.S. at 338; see Minnesota v. Olsen, 495 U.S. 91, 95-96 (1990) (instructing a subjective expectation of privacy can be considered legitimate only if it is one society accepts and recognizes as reasonable). In making such a determination, "the test of legitimacy is not whether the individual chooses to conceal assertedly private activity, but instead whether the government's intrusion infringes upon [constitutionally-protected] personal and societal values[.]" California v. Ciraolo, 476 U.S. 207, 212 (1986). Significantly, societal values do not afford constitutional protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." United States v. White, 401 U.S. 745, 749 (1971) (citation and internal quotations omitted).

In the case at hand, Appellant invited the informant to travel to and enter a constitutionally-protected space—a private residence—for the purpose of conducting a drug transaction involving the sale of a large quantity of methamphetamine. Due to the consent afforded by Appellant's invitation, the informant's presence inside the residence to discuss and complete the transaction was entirely constitutionally proper, and Appellant voluntarily relinquished any expectation of privacy he may have had in anything the informant heard or saw while the informant was inside the residence with his express permission. See Lewis v. United States, 385 U.S. 206, 211 (1966) ("A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes

contemplated by the occupant."); cf. United States v. Brathwaite, 458 F.3d 376, 381 (5th Cir. 2006) (explaining an individual relinquished any constitutionally-recognized expectation of privacy he may have otherwise had in things he allowed a confidential informant to hear or see after he invited that informant into his home).

Meanwhile, since Appellant necessarily relinquished any subjective privacy expectations he may have had inside the home by choosing to allow the informant inside and, thus, revealing to him the contents of that up-until-then private space, no *legitimate* or *reasonable* expectation of privacy was or could have been violated merely because the informant, who obviously had eyes and ears, was—unbeknownst to Appellant—also outfitted with hidden electronic monitoring and recording equipment at that time.[16] See White, 401 U.S. at 751 ("If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks."); cf. Lopez v. United States, 373 U.S. 427, 439 (1963) ("[T]he device was not planted by means of an unlawful physical invasion of petitioner's premises under circumstances which would violate the Fourth Amendment. It was carried in and out by an agent who was there with petitioner's assent,

[16] Notably, through legislation enacted by our state's elected representatives, South Carolina's citizens have recognized and endorsed the reasonableness of a conversation being intercepted and recorded so long as the intercepting individual is a party to the conversation or just *one* of the people involved in the conversation has consented to its interception. See S.C. Code Ann. § 17-30-30(B) ("It is lawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where the person is a party to the communication or one of the parties to the communication has given prior consent to the interception."); cf. Whitner, 399 S.C. at 558, 732 S.E.2d at 866-867 ("Appellant . . . contends the interception of the phone conversation was an unreasonable invasion of privacy under the additional protections afforded by our state's constitution. . . . Because the Wiretap Act provides for vicarious consent of a minor child, Appellant's constitutional argument *must be rejected*." (emphasis added and citation omitted)).

and it neither saw nor heard more than the agent himself."). Accordingly, since the South Carolina Constitution only prohibits *unreasonable* invasions of privacy, Appellant's constitutional rights pursuant to our state's constitution were not violated merely because his trust in the confidential informant to keep their illegal dealings between the two of them proved to be misplaced. See White, 401 U.S. at 749 ("No warrant to search and seize is required . . . when the Government sends to defendant's home a secret agent who conceals his identity and makes a purchase of narcotics from the accused . . . or when the same agent, unbeknown to the defendant, carries electronic equipment to record the defendant's words and the evidence so gathered is later offered in evidence." (citation and internal quotations omitted)); cf. United States v. Thompson, 811 F.3d 944, 949 (7th Cir. 2016) (rejecting as "frivolous" Thompson's argument he had a reasonable expectation of privacy in information captured by a recording device equipped to a confidential informant invited into his apartment for a drug transaction).

Under such circumstances, there were and are no legitimate reasons for the evidence uncovered by the informant to be suppressed, and, therefore, the trial judge properly declined to suppress the evidence obtained from the informant's consensual entry into the residence. See White, 401 U.S. at 753 (explaining courts should *not* "be too ready to erect constitutional barriers to relevant and probative evidence which is also accurate and reliable"); cf. Lopez, 373 U.S. at 439 ("We think the risk that petitioner took in offering a bribe to Davis fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording."); On Lee v. United States, 343 U.S. 747, 756 (1952) ("No good reason of public policy occurs to us why the Government should be deprived on the benefit of On Lee's admissions because he made them to a confidante of shady character."). Appellant's conviction should be affirmed.

IV.

The trial judge did not abuse his broad discretion or otherwise err by denying the new trial motion and by declining to grant an additional evidentiary hearing in response to Appellant's post-trial claim of jury misconduct because no credible evidence was presented to support the claim and the claim was not timely raised at Appellant's first opportunity to do so as was necessary for it to conceivably be a valid one.

Appellant maintains the trial judge reversibly erred by declining to grant the post-trial new trial motion and by failing to grant an additional evidentiary hearing on his claim of jury misconduct. As support for that contention, Appellant maintains the seven "affidavits" presented to the trial judge established two jurors intentionally concealed material information during voir dire and would have been struck from the jury but for their failures to provide truthful responses. To the contrary and just as the trial judge concluded, Appellant failed to present any *credible* evidence to support his claim of jury misconduct and, instead, relied solely upon sketchy unsworn "affidavits" prepared by his friends that—because they were unsworn—were not truly affidavits at all. Furthermore, under the circumstances involved, the alleged jury misconduct discussed in the "affidavits" was not brought forth at Appellant's first opportunity to do so, which constituted a waiver of Appellant's ability to raise a valid jury misconduct claim. Accordingly, the trial judge did not abuse his broad discretion by denying the new trial motion and by declining to conduct any further evidentiary hearings on the matter since he was not presented with any credible or admissible evidence that would have necessitated either of those actions. Appellant's conviction should be affirmed.

Relevant Facts

At the outset of Appellant's trial, the trial judge conducted voir dire of the prospective jurors. (R. pp. 6-15). During voir dire, the trial judge asked the prospective jurors—amongst other things—if any of them: (1) were related by blood or marriage or had "any business, social,

religious, or fraternal relationship" with Appellant—who was personally present for trial and stood for the jury panel—or any of the potential witnesses, including one identified as Winter Bennett; (2) had any personal knowledge or had developed an opinion about the case; (3) had an opinion, bias, or prejudice toward Appellant that would prevent them from being fair and impartial; and (4) knew of any reasons why they should not serve on the jury. (R. pp. 6-7; pp. 9-10). Notably, neither Juror # 6 nor Juror # 53 responded to any of those questions, and both were ultimately seated on the jury that convicted Appellant as indicted at the conclusion of trial. (R. pp. 6-10; pp. 17-18; p. 25; pp. 79-80; p. 91; pp. 352-356).

Shortly after Appellant was convicted, defense counsel filed a motion seeking a new trial. (R. pp. 384-396). As support for that motion, defense counsel maintained Juror # 6 and Juror # 53 intentionally concealed information during voir dire concerning their knowledge and bias toward Appellant, which he maintained entitled Appellant to a grant of a new trial due to jury misconduct. (R. pp. 384-396).

To bolster his claims, defense counsel included seven "affidavits"—none of which contained any statements indicating the affiant was sworn or the affiant attested to the information contained within under oath—from a variety of individuals. (R. pp. 384-396). In one dated just three days after the verdict, an individual identified as Treasury Smith claimed Juror # 6 knew who Appellant was, had at some point in the past found him with Winter Bennett, responded to that by telling him he needed to get tested for sexually-transmitted diseases because "Duke" had given Bennett one she could not "get rid of," spoke with him at some unspecified point on the preceding week, advised him she knew her verdict was going to be guilty due to her knowledge of Appellant, and indicated her close friend's family wanted her to find Appellant guilty. (R. pp. 384-396). In another dated a single day after the verdict, an individual named

Terrell McBride claimed Juror # 53 was his neighbor, both Juror # 53 and Appellant had been to his home, and the two "might" have spoken there. (R. pp. 384-396). In one notarized *the same day as the verdict*, a different individual claimed Juror # 53 was aware of Appellant and sometimes looked at him "with a face of disgust." (R. pp. 384-396). In another dated one day after the verdict, an individual identified as Davonte Ladson claimed Juror # 53 greeted Appellant at McBride's house, knew Appellant, "would acknowledge" Appellant, and constantly made social media posts about the trial. (R. pp. 384-396). In yet another dated a day after the trial's end, Winter Bennett claimed Juror # 53 had spoken to her and Appellant numerous times and had "even" shaken Appellant's hand. (R. pp. 384-396). In an unnotarized one dated five days after the trial, an individual identified as Demetris Johnson claimed he was present in support of Appellant throughout trial and believed Juror # 53 should not have served on the jury because he "saw and shook" Appellant's hand numerous times and knew Appellant well. (R. pp. 384-396). Finally, in one dated seven days after the verdict, an individual named Christopher Stackhouse-Bey claimed he was present for some of the trial, thought he recognized Juror # 53 during jury polling, and alleged Juror # 53 seemed upset one day after a purported fight involving Appellant that Stackhouse-Bey admittedly did not personally witness. (R. pp. 384-396). Likewise, Stackhouse-Bey further claimed Juror # 6 was a classmate of his, she was "very close" with the deceased informant's family, people in the community had reached out to him "stating things as if [Juror # 6] was biased in her vote as a juror," and Appellant had arguments with Juror # 6's child's father. (R. pp. 384-396).

In response to the motion and accompanying "affidavit," the trial judge convened a hearing on the matter. (R. p. 398). During that hearing, defense counsel—relying solely on the "affidavits"—repeated his assertion Juror # 6 and Juror # 53 had intentionally concealed

information during voir dire. (R. pp. 398-409). Based on that, defense counsel contended the trial judge should grant Appellant a new trial or, in the alternative, conduct an evidentiary hearing on the matter. (R. pp. 411-412). In rebuttal, the solicitor noted all the "affidavits" were written by Appellant's friends while many of the affiants were present in the courtroom for some or all of Appellant's trial, which he maintained rendered the "affidavits" suspect since those individuals only came forward with their claims *after* being disappointed in the verdict. (R. p. 413; pp. 417-418). Moreover, since the jurors were not asked during voir dire if they simply knew who Appellant was, the solicitor questioned whether the contents of the "affidavits"—even if true—actually established the jurors intentionally concealed any information sought by the specific voir dire questions posed.[17] (R. pp. 414-416; p. 419).

Following those remarks from counsel, the trial judge confirmed he had reviewed defense counsel's motion, the "affidavits" included along with it, and the questions asked during voir dire. (R. p. 422). In light of his review, the trial judge explained he had "great concern" about the fact many of the affiants were present during trial, supposedly possessed important information about the two jurors "to the degree" now alleged, and yet nonetheless remained silent throughout the entirety of the multi-day trial. (R. p. 423). Ultimately, the trial judge concluded neither the "affidavits" nor anything presented had "enough credibility" to warrant either a grant of a new trial or any further action on the part of the court. (R. p. 423).

[17] Supporting the solicitor's argument in that regard, the information in the "affidavits" about handshakes and acknowledgements did *not* suggest Juror # 53 had a "social relationship" with Appellant. Cf. State v. Guillebeaux, 362 S.C. 270, 275-276, 607 S.E.2d 99, 102 (Ct. App. 2004) ("Juror's knowledge of who Smith was and the rare exchange of greetings with him in her community did not constitute a 'social relationship.' Juror answered the questions posed to her during voir dire honestly, her failure to reveal her knowledge of Smith was a reasonable response to the question posed, and her failure to respond did not amount to intentional concealment.").

Accordingly, the trial judge denied the new trial motion and declined the alternative request for an additional evidentiary hearing on the matter. (R. pp. 423-424).

Standard of Review

On appeal, an appellate court will review a ruling on a new trial motion predicated upon alleged juror concealment solely for an abuse of discretion. State v. Eubanks, 437 S.C. 458, 484, 878 S.E.2d 335, 349 (Ct. App. 2022). Relatedly, due to the broad discretion afforded to trial judge as to how to handle a claim of jury misconduct, an appellate court will also review a ruling on whether to hold an evidentiary hearing in response to a new trial motion for an abuse of discretion. See State v. Tucker, 423 S.C. 403, 414, 815 S.E.2d 467, 472 (Ct. App. 2018) ("The trial judge may consider affidavits and, *if it finds them credible*, should convene an evidentiary hearing." (emphasis added)); see also United States v. Willis, 277 F.3d 1026, 1034 (8th Cir. 2002) ("The trial court has broad discretion in handling allegations of juror misconduct."); United States v. Anderson, 76 F.3d 685, 692 (6th Cir. 1996) ("The question of whether to hold an evidentiary hearing before deciding a motion for a new trial is in the discretion of the trial court."); cf. State v. Emory, 178 S.C. 461, __, 183 S.E. 323, 330 (1936) ("[T]he method adopted by the trial judge in ascertaining the truth regarding the fitness of the two jurors in question was largely a matter of discretion on his honor's part. It was not incumbent upon his honor to examine the affiants who made the affidavits in question, even if they were present, if his honor thought that course unnecessary. We see no abuse of discretion on the part of his honor in following the course his honor adopted."). "An abuse of discretion occurs when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling

does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious." State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006).

Argument

In every criminal case tried in South Carolina, a defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). That right guarantees to a defendant a trial by a panel of impartial, indifferent jurors. State v. Parker, 381 S.C. 68, 96, 671 S.E.2d 619, 633 (Ct. App. 2008); see State v. Harris, 340 S.C. 595, 627, 30 S.E.2d 62, 63 (2000) ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). Significantly, a juror's intentional concealment of material information during voir dire can jeopardize a defendant's right to fair trial and, therefore, may justify the grant of a new trial under certain circumstances. Woods, 345 S.C. at 587-588, 550 S.E.2d at 284; see State v. Zeigler, 364 S.C. 94, 108, 610 S.E.2d 859, 866 (Ct. App. 2005) ("Unless the misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict.").

When confronted with a new trial motion based upon purported juror concealment, the trial judge should look to several factors to determine if the juror's failure to disclose the identified information could have affected the impartiality of the jury. State v. Coaxum, 410 S.C. 320, 328-329, 764 S.E.2d 242, 246 (2014); cf. State v. Sparkman, 358 S.C. 491, 496, 596 S.E.2d 375, 377 (2004) ("The Court developed a two-part test to determine whether a juror's failure to disclose a potential bias warranted granting the defendant a new trial."). Specifically, the trial judge should first determine whether the juror intentionally concealed the information, which is significant because a juror's unjustified concealment of material information supports

an inference the juror is not impartial. Coaxum, 410 S.C. at 328-329, 764 S.E.2d at 246; see Woods, 345 S.C. at 587-588, 550 S.E.2d at 284 ("Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial."). Second, if—and only if—a finding of intentional concealment is made, the trial judge should determine if the concealed information would have supported a challenge for cause or would have been a material factor in the use of a party's peremptory challenges. Coaxum, 410 S.C. at 328-329, 764 S.E.2d at 246. Necessarily, that particular analysis involves a "fact intensive determination." Sparkman, 358 S.C. at 496, 596 S.E.2d at 377.

Importantly though, for such an analysis to even be warranted, "a defendant must do more than simply raise the possibility of bias." United States v. Lawrence, 735 F.3d 385, 441 (6th Cir. 2013) (citation and internal quotation omitted); see Billings v. Polk, 441 F.3d 238, 245 (4th Cir. 2006) (explaining a trial judge is *not* "obliged to hold an evidentiary hearing any time that a defendant alleges juror bias"). Due to the important interests at stake, the defendant bears the burden of presenting *credible* evidence of juror misconduct before inquiry into the potential partiality of a juror will be necessary or warranted. Lawrence, 735 F.3d at 441-442; see Tucker, 423 S.C. at 414, 815 S.E.2d at 472 (explaining a trial judge should convene an evidentiary hearing *if* the trial judge finds credible evidence of misconduct has been presented); see also Tanner v. United States, 483 U.S. 107, 120 (1987) ("Allegations of juror misconduct, incompetency, or inattentiveness raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process."). Relatedly, no inquiry is necessary or warranted if a defendant with knowledge during trial of potential juror misconduct waits until after the verdict to raise the matter because such matters are considered waived if not promptly raised at the first opportunity to do so. See Thompson v. O'Rourke, 288 S.C. 13, 14, 339 S.E.2d 505, 506 (1986)

(instructing a party seeking a new trial based on information concerning a juror's qualifications to serve must *not* have known that information prior to the verdict); cf. State v. Aldret, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999) ("In light of Aldret's failure to call the alleged juror misconduct to the trial court's attention at his first opportunity to do so, we hold he is procedurally barred from raising the issue.").

With those principles in mind, the trial judge did not abuse his broad discretion by declining to grant a new trial or an additional evidentiary hearing in response to Appellant's claim of jury misconduct. Initially, that is true because—just as the trial judge found—Appellant did not present *credible* evidence to support his claim. See Tucker, 423 S.C. at 414, 815 S.E.2d at 472 ("Unless the trial judge finds the moving party's affidavits credible, our rules wisely forbid exposing jurors to open-ended inquiries into how they performed their duty."). Instead, Appellant merely presented a number of *unsworn* "affidavits" to the trial judge, and those "affidavits" were not truly affidavits at all since they were unsworn. See McKnight, 291 S.C. at 113, 352 S.E.2d at 472 ("An affidavit is a voluntary ex parte statement reduced to writing *and sworn to or affirmed* before some person legally authorized to administer an oath or affirmation. It differs from an oath in that an affidavit consists of a statement of fact *which is sworn to as the truth*, while an oath is a pledge." (emphasis added and citations omitted)); see also Black's Law Dictionary 66 (9th ed. 2009) (defining "affidavit" as "[a] voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths"). And, because the "affidavits" that constituted the *sole* support for Appellant's new trial motion were not actually affidavits in a legal sense, they did not constitute admissible or credible evidence of any misconduct on the parts of Juror # 6 and Juror # 53 that could have legitimately satisfied Appellant's burden of supporting and proving his claim. See Saro Invs. v. Ocean Holiday

P'ship, 314 S.C. 116, 121, 441 S.E.2d 835, 838 (Ct. App. 1994) ("Of course, post trial motions may be heard on affidavits. However, the facts stated in the affidavits must be admissible evidence." (citations omitted)); Morris v. Jensen, 309 S.C. 153, 157, 420 S.E.2d 710, 712 (Ct. App. 1992) (instructing an unsworn affidavit is *not* evidence); see also State v. Covington, 343 S.C. 157, 163, 539 S.E.2d 67, 70 (Ct. App. 2000) (explaining the defendant bears the burden of proving the alleged misconduct along with resulting prejudice when seeking a new trial on the ground of jury misconduct). Beyond that, any credibility those "affidavits" could have had was further diminished by the fact they were dated just after the trial ended, were rife with hearsay, and were submitted by Appellant's close friends and supporters, who waited until *after* the verdict to come forward with the information despite being present throughout the trial. Cf. Milton v. Sec'y, Dep't of Corr., 347 F. App'x 528, 531 (11th Cir. 2009) (concluding several affidavits were suspect and of questionable reliability because they were written by Milton's friends and family members and contained information the affiants were aware of at the time of trial). Finally, since those "affidavits" alleged misconduct that—if apparent to Juror # 53—would have equally been apparent to Appellant himself, Appellant's decision to wait to come forward with his claim of misconduct until after he learned what the outcome of trial would be constituted a waiver of his ability to validly raise his jury misconduct claim. See United States v. Breit, 712 F.2d 81, 83-84 (4th Cir. 1983) (explaining "[a] defendant who remains silent about known juror misconduct—who, in effect, takes out an insurance policy against an unfavorable verdict—is toying with the court"); cf. Gray v. Hutto, 648 F.2d 210, 211-212 (4th Cir. 1981) (concluding Gray waived any entitlement to a new trial based on jury misconduct despite the existence of evidence establishing one of the jurors told her husband she had already decided Gray was guilty of the charged drug crime even before deliberations began because defense

counsel found about that purported misconduct during trial but the matter was not raised until after the verdict); State v. Ballew, 83 S.C. 82, __, 63 S.E. 688, 690 (1909) ("The defendants with full knowledge of the misconduct of the jury, having chosen not to complain to the court, but rather to take the risk of a verdict in their favor, could not afterwards, because the verdict was against them, have a new trial on this ground.").

For all those reasons, the trial judge did not abuse his broad discretion or otherwise err by declining to grant a new trial and by refusing to hale Juror # 6 and Juror # 53 into court based solely on the contents of sketchy unsworn "affidavits" alleging information that—if true—could have been brought forth prior to the verdict in Appellant's case, and there are no valid grounds that would justify a reversal of the trial judge's ruling—and accompanying credibility determinations—on appeal. See State v. Mayfield, 235 S.C. 11, 34-35, 109 S.E.2d 716, 729 (1959) ("The credibility of newly-discovered evidence offered in support of a motion for new trial is a matter for determination by the circuit judge to whom it is offered. In him, not this court, resides the power to weigh such evidence; and his judgment thereabout will not be disturbed except for error of law or abuse of discretion."); Tucker, 423 S.C. at 415, 815 S.E.2d at 473 ("We grant 'broad discretion' to the trial judge's credibility conclusions in claims of jury misconduct."); cf. Morris, 309 S.C. at 157, 420 S.E.2d at 712 ("The only allegation of bias was an unsworn juror's statement that in her opinion the forelady was prejudiced and might have influenced some other jurors. In the circumstances, an unsworn statement was not competent evidence."). Appellant's conviction should be affirmed.[18]

[18] Moreover, even if the "affidavits" presented could somehow be deemed sufficient to have warranted further inquiry into the matter and Appellant's failure to promptly raise his jury misconduct claim could be ignored, the appropriate relief on appeal would—at best for Appellant—be to remand the matter for an evidentiary hearing where he could attempt to actually prove his claim of jury misconduct with legitimate admissible evidence. See Smith v.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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June 21, 2023

Phillips, 455 U.S. 209, 215 (1982) (explaining "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias"). Notably though, Appellant has not actually requested such relief on appeal and, instead, solely contends he *must* be granted a reversal of his conviction. (App. Br. pp. 25-26).

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dillon County
Honorable Paul M. Burch, Circuit Court Judge
Appellate Case No. 2022-000324

THE STATE,

Respondent,

vs.

MARC YASIN MCKEIVER,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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ATTORNEYS FOR RESPONDENT

June 21, 2023

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dillon County
Honorable Paul M. Burch, Circuit Court Judge
Appellate Case No. 2022-000324

THE STATE,

Respondent,

vs.

MARC YASIN MCKEIVER,

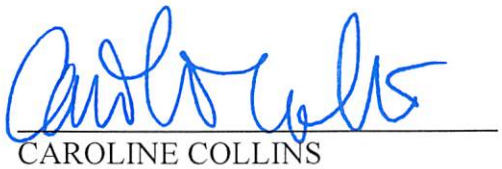
Appellant.

PROOF OF SERVICE

I, Caroline Collins, certify I have served the within Final Brief of Respondent on Appellant by sending an electronic copy via email to the address listed in AIS for the following individual:

Dayne C. Phillips, Esquire
dayne@pricebenowitz.com

I further certify all parties required by Rule to be served have been served.
This 21st day of June, 2023.



CAROLINE COLLINS
Administrative Coordinator
Office of the Attorney General

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of General Sessions

Paul M. Burch, Circuit Court Judge

Appellate Case No. 2022-000324
Trial Court Case No. 2019-GS-16-0996

The State of South Carolina,

Respondent,

v.

Marc Yasin Mckeiver,

Appellant.

Motion to Hold Appeal in Abeyance and to Remand for a Hearing on a Motion for a New Trial Based on After-Discovered Evidence

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Appellant Marc McKeiver respectfully requests that this Court hold his appeal in abeyance and remand for an evidentiary hearing on a motion for a new trial based on after-discovered evidence in the circuit court. *See* Rule 29(b), SCRCrimP. The after-discovered evidence in this case involves an affidavit by Winter Bennett stating that she and her brother, William Clark, "set up" Appellant. (Attachment A: Winter Bennett Affidavit). Specifically, Appellant's former girlfriend, Winter Bennett, confessed to placing drugs in Appellant's "shoe box" to help her brother, William Clark. Ms. Bennett explained that her brother was the confidential informant (CI) in Appellant's case and asked for her help because he was facing life without parole. Ms. Bennett also admitted that her brother (the CI) gave her "the bag of pills" to have Appellant arrested. Ms. Bennett further noted that she and her brother (the CI) had access to Appellant's

social media because Appellant had lived with them since he was sixteen years old.

Procedural History

On March 12, 2020, the Dillon County Grand Jury indicted Appellant, Marc Yasin McKeiver, for Trafficking Methamphetamine, 100 grams or more, but less than 200 grams, first offense (Indictment 2019-GS-17-0996). (R. 427).

On January 10, 2022, Appellant proceeded to trial before the Honorable Paul M. Burch and a jury. (R. 1). Thurmond Brooker represented Appellant, and Assistant Solicitor Shipp Daniel prosecuted the case on behalf of the State. (R. 1). The jury returned a verdict of guilty on January 12, 2022. (R. 352, line 20 – 353, line 1). The Trial Court sentenced Appellant to twenty-five (25) years imprisonment. (R. 368, lines 19-25).

On January 20, 2022, Appellant filed a Motion for a New Trial. (R. 384). The parties appeared before Trial Court and presented their arguments on March 10, 2022. (R. 397). The Trial Court denied the motion at the conclusion of the hearing. (R. 423, lines 18-25). Appellant timely filed a Notice of Appeal on March 16, 2022.

Counsel for Appellant filed the Final Brief of Appellant and Record on Appeal on June 21, 2023. This appeal is currently ready for consideration by this Court.

State's Theory of the Case

During opening statement, the Prosecutor outlined the State's case and addressed the unique factual issue of the State's key witness being deceased prior to trial:

> You're gonna hear from three witnesses. That's it. This ain't gonna [sic] be a long one. Three witnesses. They're all law enforcement agents. You're going to hear from J.T. Martin of [the South Carolina Law Enforcement Division (SLED)], who was overseeing a task force that was investigating the drug trade in Dillon County back in 2019.
>
> . . .
>
> You're going to hear from Alex Blake, who used to be with [SLED], now, works

> for the FBI. You're going to hear about what they did. How they targeted this defendant. You're going to hear how they used a confidential informant, we call them CI's. He was a confidential informant. To go to where [Appellant] was and buy a bunch of pills from him.
>
> . . .
>
> ***You're not going to hear from the confidential informant himself because, unfortunately, he died a while back***, a while, a while ago, in a completely unrelated situation having nothing to do with this defendant. So you can't hear from him. But you will hear from, from these three sled agents. That's it. Plain and simple, straightforward, but very important.

(R. 134, line 25 – 135, line 23) (emphasis added).

During pre-trial, the Prosecutor provided a more detailed explanation of the State's case to the Trial Court in anticipation of Defense Counsel's motions in limine:

> *This [CI] is now dead.* He was murdered in an unrelated situation a while ago. The [CI] met with law enforcement on September 9 at whatever meeting location they had. The [CI] was searched by [SLED] agents. He had to make sure he didn't have any drugs, money, weapons, anything on him. He did not. They outfitted him with a camera. They get in the car. An undercover [SLED] agent drove the under, drove the [CI] to Mr. [Appellant's] house.
>
> . . .
>
> [A]t least two phone calls were placed from [CI's] phone to [Appellant's] phone. [Appellant] answers. They have a conversation that was on speaker phone and the [SLED] agent heard the conversation where the CI was setting up the buy that was to take place shortly, thereafter. [SLED] agent drives confidential informant to the house. Broad daylight. Let's [CI] out in the front yard. [CI] walks up - and you see all this on video - walks up to the door and [Appellant] answers the door. [Appellant] takes the [CI] back to a back bedroom. You see in the, in the video, it's a little blurry, this particular part of it, but you see something that looks like a plastic bag in [Appellant's] hand to CI, has some sort of conversation. *The only - - there's only one other person that is visible in the video and that is the defendant's girlfriend, Winter Bennett . . . [.]*
>
> . . .
>
> [The CI] returns to the [SLED] agent's car. *He's only in the house for, I mean, not even two minutes.* When he returns to [SLED] agent's car he gives the [SLED] agent, two bags of pastel colored oddly shaped pills. These pills were sent to [SLED] and they turned out to be methamphetamine, 134, 136 grams of methamphetamine.

(R. 31, line 2 – 32, line 14) (emphasis added).

Winter Bennett Affidavit

On June 20, 2024, Winter Bennett, Appellant's former girlfriend provided Trial Counsel, Thurmond Brooker, with an affidavit attesting to the following information:

> To Whom it may concern, I, Winter Bennett, is coming forth to speak on the information I have regarding Marc McKeivers case. *My brother, William Clark was the CI in his case but what the courts don't know is it was a setup, and that I helped him.*
>
> *My brother (Caine) came to me telling me that he was facing life w/o the chance of parole and needed my help*, and at the time me and Duke were going through alot in our relationship. Caine told me it wouldn't be a big deal, that he wouldn't be a big deal, that he would get a bond and get right back out, that it would be years before the courts would do anything, and that he would only get 3-5 years if that and that he wouldn't mention my name and that nobody would know I helped him.
>
> *Duke was living with us since he was 16, him and my brother were close and thats how he had access to dukes social media.* They would cover for each other if I ever went through his phone he would just blame it on Caine and I think as we got older Caine started to resent duke more & more because he wanted better for me and my son.
>
> *Caine came to Asla's that night and gave me the bag of pills and I took them in the room we was staying in and put them in Duke shoe box.* It wasn't until the next morning when Caine was calling to come get the pills I told him that he brought them the night before and he payed me to hold them because he didn't want to ride with them and let duke know where they was so when cane came he could give them to him.
>
> When the Judge read duke his sentence, I knew I needed to speak up but I was in distress and scared. Scared of what my family might do or say, scared that duke would hate me and scared I would get into trouble. I am coming forth now because my life has been a mess to say the least, *I feel like God is punishing me for what we did.*
>
> My brothers passing and duke also being accused of helping in his death, *I knew that we set duke up for a long time* I wanted to hate duke and believe the rumors but I know it is not true and so after his sentencing *I then only mentioned the girl in the Jury because I was dealing w/ her boyfriend and I knew in my heart that she held that against him* because of me and when that didn't help I just stayed quiet because I didn't want my family to feel as if I was choosing duke over my brother.
>
> *Today I am and have not spoken to duke*, I am in a relationship and 5 months pregnant and Im scared that bad karma will come back on someone I love or even

> my kids. I am sorry for holding this secret in all these years and I pray not only God forgives me but duke can also find it in his heart to forgive me for what we did to him.

(Attachment A: Winter Bennett Affidavit) (emphasis added).

Thurmond Brooker Affidavit

On May 20, 2024, Trial Counsel, Thurmond Brooker, signed an affidavit stating, in part:

> I was legal counsel for [Appellant] in connection with Indictment No. 2019-GS-17-0996 for trafficking in Methamphetamines in the Court of General Sessions, Dillon County, South Carolina. This is the same action currently pending before the South Carolina Court of Appeals, Case No. 2022-000324.
>
> ...
>
> On June 20, 2024, Winter Bennett ("Bennett") presented to my office at 238 Warley Street, Florence, South Carolina, and prepared a handwritten statement regarding facts and evidence relevant to the investigation and trial of [Appellant] . . .
>
> During my representation of [Appellant], *I was unaware of the facts and evidence Bennett disclosed in Exhibit A, and could not have discovered such facts and evidence through any other means. I first became aware of the facts and evidence Bennett discloses in Exhibit A on June 20, 2024.*
>
> It is my professional opinion that the facts and evidence disclosed by Bennett in Exhibit A are relevant to [Appellant's] guilt, and *had I been aware of these facts and evidence, I would have compelled Bennett's testimony at trial regarding the facts and evidence disclosed in Exhibit A. . . .*

(Attachment B: Thurmond Brooker Affidavit) (emphasis added).

Appellant Counsel's Affidavit

The undersigned Counsel has provided an affidavit to accompany this motion based on the requirements of Rule 29(b) of the South Carolina Rules of Criminal Procedure. (Attachment C: Dayne Phillips Affidavit).

ARGUMENT

Rule 29(b) of the South Carolina Rules of Criminal Procedure provides:

> A motion for a new trial based on after-discovered evidence must be made within one (1) year after the date of actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence. A motion for a new trial based on after-discovered evidence may not be made while the case is on appeal unless the appellate court, upon motion, has suspended the appeal and granted leave to make the motion. Leave of the appellate court is not required if no appeal has been taken or if the appeal has been finally decided in the appellate court.

See Rule 29(b), SCRCrimP.

To prevail on a motion for a new trial based on after-discovered evidence, the moving party must show the evidence: (1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to the trial; (4) is material; and (5) is not merely cumulative or impeaching. *State v. Spann*, 334 S.C. 618, 619-620, 513 S.E.2d 98, 99 (1999).

Would Probably Change the Result of Appellant's Trial

In this case, Winter Bennett's testimony would probably change the result if a new trial were granted because this evidence contradicts the State's evidence that Appellant knowingly possessed the methamphetamine. Specifically, Ms. Bennett admitted that she conspired with her brother (the CI) to "set up" Appellant by planting drugs that were given to her by the CI. (Attachment A: Winter Bennett Affidavit). Ms. Bennett also admitted that brother (the CI) asked for her help to incriminate Appellant because her brother said he was facing life without parole. Notably, Ms. Bennett is visible in the video recording worn by the CI.

The unique facts of this case also support that Ms. Bennett's statement would probably change the outcome of Appellant's trial. Trial Counsel never had an opportunity to cross-examine the CI (Bennett's brother) because he died prior to trial. Bennett is also Appellant's former girlfriend

and had lived with him for years having access to possessions. Preventing Appellant from having an evidentiary hearing based on Bennett's affidavit would constitute "a denial of fundamental fairness shocking to the universal sense of justice." *See Johnson v. Catoe*, 345 S.C. 389, 401, 548 S.E.2d 587, 593 (2001) (Waller and Pleicones, J. , dissenting in separate opinions) (finding "to deny [a defendant] a new trial in the face of a confession by someone who was admittedly present when the murder was committed would constitute "a denial of fundamental fairness shocking to the universal sense of justice") (quoting *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990) (citations and internal quotations omitted)).

Special Agent Alex Blake of the Federal Bureau of Investigation (FBI) testified that he had never spoken to or met with Appellant prior to the alleged drug buy with the CI. (R. 99, line 12 – 100, line 1). Agent Blake also admitted that the only information regarding illegal activity connected to Appellant was provided by the deceased CI and the other Special Agent. (R. 101, lines 15). Notably, Special Agent James Martin of SLED maintained that he did not recall whether the video feed was live when the deceased CI went into Appellant's residence but conceded to the "audio being transmitted live". (R. 113, lines 13-23).

During a pre-trial hearing, Special Agent James Martin of SLED testified that he presented a search warrant for Snapchat and that the magistrate judge signed the warrant. (R. 108, lines 12-25). Agent Martin conceded on cross-examination that he did not subpoena any records from a cell phone provider to identify the account owner of the specific number provided by the deceased CI. (R. 110, lines 12-23). Agent Martin further admitted he had no personal knowledge that the cell phone number was associated with Appellant. (R. 110, line 23 – 111, line 2). Notably, the State never subpoenaed any phone records to substantiate the allegation that the phone number was associated with Appellant and could not prove that Appellant posted pictures on Snapchat.

(R. 106, lines 7-15).

Furthermore, Trial Counsel motion for a new trial filed on March 10, 2022, arguing for a new trial, or in the alternative, an evidentiary hearing regarding two jurors who intentionally concealed information in response to the Court's *voir dire* questions (when Trial Counsel would have struck them had the jurors not concealed the information). (R. 397-425). Juror Number 6 purportedly knew Ms. Bennett, the deceased CI, and did not like Appellant. Notably, Ms. Bennett references this juror in her affidavit.

Discovered since McKeiver's Trial

Ms. Bennett did not disclose this exculpatory statement to Trial Counsel until after Appellant's trial on June 20, 2024.

Could Not in the Exercise of Due Diligence Have Been Discovered Prior to Trial

Neither Appellant nor Trial Counsel could have discovered, in the exercise of due diligence, this statement from Ms. Bennet until she made the decision to confess this information in her affidavit on June 20, 2024. Trial Counsel also had no way of knowing that Ms. Bennett had planted the drugs to her brother (the CI) to conduct an investigation into this issue.

Material to Appellant's Case

Ms. Bennett's statement contradicts the State's evidence and goes directly to the heart of the question presented to the jury–did Appellant knowingly possess 100 grams or more, but less than 200 grams of methamphetamine. Ms. Bennett's statement is highly probative based on the extraordinary facts and circumstances presented in this case.

Not Merely Cumulative or Impeaching Evidence

Ms. Bennett's statement is not cumulative to any of the evidence offered by the State or Appellant at trial because there was no testimony concerning the CI's plan to have Bennett "set

up" Appellant and Bennett did not testify at trial. The primary use of Bennett's statement would not be to challenge the credibility of the State's witnesses because the law enforcement officers did not know of the plan to "set up" Appellant.

CONCLUSION

Based on the foregoing reasons, Counsel for Appellant Marc McKeiver respectfully requests that this Court hold his direct appeal in abeyance and remand this case to the Dillon County Court of General Sessions for an evidentiary hearing on a motion for a new trial based on this after-discovered evidence.

Respectfully Submitted,

s/ Dayne C. Phillips
Dayne C. Phillips, Esq.

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June 6, 2025

ATTACHMENT

A

June 20, 2024

To whom it may concern, I, Winter Bennett, is coming forth to speak on the information I have regarding Marc McKeivers Case. My brother, William Clark was the CI in his case but what the courts don't know is it was a setup, and that I helped him. My brother (caine) came to me telling me that he was facing life W/o the chance of parole and needed my help. and at the time me and duke were going through alot in our relationship. Caine told me it wouldn't be a big deal, that he would get a bond and get right back out, that it would be years before the courts would do anything, and that he would only get 3-5 years if that and that he wouldn't mention my name and that nobody would know I helped him. Duke was living with us since he was 16, him and my brother were close and that? now he had access to dukes social media. They would cover for eachother if I ever went through his phone he would just blame it on caine and I think as we got older caine started to resent duke more & more because he wanted better for me and my son. Kaine came to Astoss that night and gave me the bag of pills and I took them in the room we was staying in and put them in Duke shoe box. It wasn't until the next morning when caine was calling to come get the pills I told him that he brought them the night before and he payed me to hold them because he didn't want to ride with them and let duke know where they was so when caine came he could give them to him. When the Judge read duke his sentence, I knew I needed to speak up but I was in distress and scared. Scared of what my family might do or say, Scared that duke would hate me and scared I would get into trouble. I am coming forth now because my life has been a mess to say the least, I feel like God is punishing me for what we did. My brotherr passing and duke also

WS

being accused of helping in his death, I knew that we set duke up so for a long time I wanted to hate duke and believe the rumors but I knew it not true and so after his sentencing I then only mentioned the girl in the jury because I had dealing w/ her boyfriend and I knew in my heart that she held that against him because of me and when that didint help I just stayed quiet because I didint want my family to feel as if I was choosing duke over my brother. Today I am and have not spoken to duke, I am in a relationship and 5 months pregnant and im scared that bad karma will come back on someone I love or even my kids. I am sorry for holding this secret in all these years and I pray not only God forgives me but duke can also find it in his heart to forgive me for what we did to him.

Sworn to before me this
20th day of June 2024

My Commission Expires

ATTACHMENT

B

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

AFFIDAVIT OF THURMOND BROOKER

I, Thurmond Brooker, Esq., duly sworn and deposed, state the following as my true and lawful statement:

1. I was legal counsel for Marc Yasin McKeiver ("McKeiver") in connection with Indictment No. 2019-GS-17-0996 for trafficking in Methamphetamines in the Court of General Sessions, Dillon County, South Carolina. This is the same action currently pending before the South Carolina Court of Appeals, Case No. 2022-000324.

2. McKeiver's trial began on January 10, 2022, and ended on January 13, 2022, with a jury verdict of guilty.

3. On June 20, 2024, Winter Bennett ("Bennett") presented to my office at 238 Warley Street, Florence, South Carolina, and prepared a handwritten statement regarding facts and evidence relevant to the investigation and trial of McKeiver. A copy of Bennett's statement is attached hereto and incorporated herein as Exhibit A.

4. During my representation of McKeiver, I was unaware of the facts and evidence Bennett disclosed in Exhibit A, and could not have discovered such facts and evidence through any other means. I first became aware of the facts and evidence Bennett discloses in Exhibit A on June 20, 2024.

5. It is my professional opinion that the facts and evidence disclosed by Bennett in Exhibit A are relevant to McKeiver's guilt, and had I been aware of these facts and evidence, I would have compelled Bennett's testimony at trial regarding the facts and evidence disclosed in Exhibit A.

I, Thurmond Brooker, under penalty of perjury, hereby declare and affirm that this statement, to the best of my knowledge and recollection, is true and correct.

Thurmond Brooker, Esq.,

SWORN TO BEFORE ME THIS
20 DAY OF May, 2025

Ruthene Kennedy
NOTARY PUBLIC OF SOUTH CAROLINA
My Commission Expires: Sept 6, 2034

RUTHENE KENNEDY NOTARY PUBLIC MY COMM. EXP. 9/6/2034 SOUTH CAROLINA

ATTACHMENT C

STATE OF SOUTH CAROLINA	)	IN THE SOUTH CAROLINA COURT OF APPEALS
	)	
COUNTY OF DILLON	)	
	)	
THE STATE,	)	
	)	
RESPONDENT,	)	
	)	
V.	)	AFFIDAVIT OF DAYNE C. PHILLIPS
	)	
MARC YASIN MCKEIVER	)	
	)	
APPELLANT.	)	
	)	

Personally appeared before me, Dayne C. Phillips, who duly sworn, deposes and states:

(1) I am over the age of eighteen and a member of the South Carolina Bar.

(2) I have been practicing law in South Carolina since 2011, and I am currently employed as an attorney at Price Benowitz LLP.

(3) I represent Appellant Marc McKeiver for his direct appeal before the South Carolina Court of Appeals (Appellate Case No. 2022-000324).

(4) I filed the Final Brief of Appellant and Record on Appeal in this matter on June 21, 2023.

(5) Appellant is appealing his conviction and sentence imposed by the Honorable Paul M. Burch on January 13, 2022.

(6) Trial Counsel, Thurmond Brooker, filed a motion for a new trial on January 20, 2022, and the trial court denied the motion on March 10, 2022. Trial Counsel timely filed the Notice of Appeal on March 16, 2022.

(7) I received Winter Bennett's and attorney Thurmond Brooker's sworn affidavits on May 22, 2025.

(8) Based on the trial transcript and attorney Brooker's affidavit, the information provided in Ms. Bennett's affidavit constitutes after-discovered evidence within one year after the date

of actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence. *See* Rule 29(b), SCRCrimP.

(9) Counsel for Appellant is filing a motion to hold Appellant Marc McKeiver's appeal in abeyance and remand for an evidentiary hearing on a motion for a new trial based on after-discovered evidence in the circuit court. *See* Rule 29(b), SCRCrimP.

(10) I support this motion.

FURTHER AFFIANT SAYETH NOT.

Dayne Phillips

SUBSCRIBED AND SWORN TO before me
this 6th day of June, 2025.

Kalen Reed (L.S.)
Notary Public for South Carolina
My Commission Expires: 01/26/2034.

RECEIVED
Jun 06 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of General Sessions

Paul M. Burch, Circuit Court Judge

Appellate Case No. 2022-000324
Trial Court Case No. 2019-GS-16-0996

The State of South Carolina, Respondent,

v.

Marc Yasin Mckeiver, Appellant.

CERTIFICATE OF SERVICE

The undersigned Counsel certifies that a true copy of the Motion to Hold Appeal in Abeyance and to Remand for a Hearing on a Motion for a New Trial based on After-Discovered Evidence has been served upon **Mark Farthing, Esquire,** at S.C. Attorney General's Office, PO Box 11549, Columbia, SC 29211, and **The Hon. Marquita Britton, Dillon County Clerk of Court**, PO Box 1220, Dillon, SC 29536, on **June 6, 2025.**

Dayne Phillips
PRICE BENOWITZ LLP
1614 Taylor Street, Ste. D.
Columbia, SC 29201
(803) 807-0234
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me
this 6th day of June, 2025.

Kalen Reed (L.S.)
Notary Public for South Carolina
My Commission Expires: 01/26/2034.

KALEN REED
NOTARY PUBLIC
COMM. EXP. 01-26-2034
SOUTH CAROLINA

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dillon County
Honorable Paul M. Burch, Circuit Court Judge
Appellate Case No. 2022-000324

THE STATE,

Respondent,

vs.

MARC YASIN MCKEIVER,

Appellant.

RETURN IN OPPOSITION TO "MOTION TO HOLD APPEAL IN ABEYANCE AND TO REMAND FOR A HEARING ON A MOTION FOR A NEW TRIAL BASED ON AFTER-DISCOVERED EVIDENCE"

Respondent ("the State"), through its undersigned counsel, would respectfully show unto the Court as follows:

I.

In September of 2019, Appellant Marc Yasin Mckeiver was arrested after he sold a large quantity of methamphetamine to a confidential informant during the course of a controlled drug transaction. Notably, that transaction was recorded on a camera that had been hidden on the confidential informant, and, on the recording—which is currently before this Court—that was covertly captured of the transaction, the plastic baggies containing the methamphetamine appear

to visible in Mckeiver's hands just before the price of the drugs—$500—was discussed.[1] [2] (R. pp. 156-157; State's Ex. # 1 (Recording of Transaction)). In November of 2019, the Dillon County Grand Jury indicted Mckeiver for trafficking in methamphetamine in connection to that particular drug transaction.[3] On January 10, 2022, a jury trial was commenced in the Dillon County Court of General Sessions with the Honorable Paul M. Burch, circuit court judge, presiding. At the conclusion of the three-day trial, the jury convicted Mckeiver as indicted. Following the verdict, the trial judge sentenced Mckeiver to a mandatory twenty-five-year term of imprisonment and $50,000 fine. A few days later, Mckeiver filed a motion seeking a new trial, and, on March 10, 2022, the trial judge conducted a hearing on the matter in the Dillon County Court of General Sessions. At the conclusion of the hearing, the trial judge orally denied the new trial motion. Mckeiver then timely filed a notice of appeal. At present, Mckeiver's appeal is currently pending in this Court, all briefing has been completed, and the matter is fully ready for the Court's consideration.

II.

On June 6, 2025, Mckeiver—through appellate counsel—submitted a motion to this Court asking for his appeal to be held in abeyance and the matter to be remanded to the Dillon County Court of General Sessions for an evidentiary hearing on whether he should be granted a new trial based on after-discovered evidence. As support for that request, Mckeiver points

---

[1] Although the recording contains both video and audio footage, the audio was muted during Mckeiver's trial because the confidential informant was murdered at some point after the transaction. (R. p. 143; pp. 154-155).

[2] After the transaction, the confidential informant was in possession of only $200 of the $700 in government funds that had been provided to him and, thus, $500 was gone. (R. p. 213; p. 215).

[3] According to law enforcement, that was *not* the only controlled drug transaction Mckeiver had been involved in, and, at the time of his trial, he had nine *other* pending charges stemming from four separate incidents. (R. p. 108; p. 366).

primarily to a sworn affidavit from Winter Bennett dated June 20, 2024,[4] while claiming its contents supposedly constitute newly-discovered evidence that would satisfy each and every one of the factors necessary to warrant the grant of a new trial, including the factor requiring the evidence to be something previously unknown that could not have been discovered pre-trial through the exercise of due diligence. More specifically, Mckeiver points to the portions of Bennett's affidavit claiming: (1) her brother was the confidential informant involved in Mckeiver's case;[5] (2) her brother gave her the pills in order to have Mckeiver arrested; (3) her brother convinced her to place the drugs in McKeiver's shoe box because her brother needed help with pending charges he was facing at the time, and she did so; and (4) she and her brother had access to Mckeiver's "social media."

III.

Pursuant to South Carolina law, "[a] motion for a new trial based on after-discovered evidence may not be made while the case is on appeal unless the appellate court, upon motion, has suspended the appeal and granted leave to make the motion." Rule 29(a), SCRCrimP. And, significantly, an appellate court will *not* grant leave for an appellant to seek a new trial at the circuit court level during the pendency of an appeal *unless* the appellant first makes a prima facie showing to it of all the elements that must be established to obtain a new trial based on after-discovered evidence. State v. Prince, 316 S.C. 57, 69, 447 S.E.2d 177, 184 (1993); see State v. Ford, 301 S.C. 485, 491, 392 S.E.2d 781, 784 (1990) ("[I]n order to obtain leave from this Court

[4] Mckeiver's current new trial motion constitutes the second time he has submitted and relied upon a post-trial statement from Bennett in an effort to obtain a new trial. (R. p. 393).

[5] That fact is in no way newly-discovered and was already brought out during Mckeiver's trial by Mckeiver's sister, who testified as the lone witness for the defense. (R. p. 275; p. 277).

to move for a new trial based on after-discovered evidence, an appellant must make a prima facie showing that a new trial is warranted.").

Newly-discovered or after-discovered evidence is "evidence of facts existing at time of trial of which [the] aggrieved party was *excusably ignorant*." State v. Haulcomb, 260 S.C. 260, 270, 195 S.E.2d 601, 606 (1973) (emphasis added). To obtain a new trial based on after-discovered evidence, a party must demonstrate the evidence: (1) would probably change the result of the proceedings if a new trial is granted; (2) was discovered after the trial ended; (3) could not have been discovered prior to trial; (4) was material to the issue of guilt or innocence; and (5) was not merely cumulative or impeaching. State v. Taylor, 333 S.C. 159, 176, 508 S.E.2d 870, 879 (1998). Importantly, the granting of a new trial based on newly-discovered evidence is disfavored in South Carolina, and a party seeking a new trial on such a basis must satisfy a *heavy* burden in order to be entitled to one. State v. Needs, 333 S.C. 134, 158, 508 S.E.2d 857, 869 (1998); see State v. Irvin, 270 S.C. 539, 545, 243 S.E.2d 195, 197-198 (1978) ("The granting of a new trial because of after-discovered is not favored, and this Court will sustain the lower court's denial of such a motion unless there appears an abuse of discretion."); see also United States v. Wilson, 624 F.3d 641, 660 (4th Cir. 2010) (explaining new trials based on newly-discovered evidence should only be granted *sparingly* and in the *rare* circumstance the evidence weighs heavily against the jury's verdict).

IV.

Here, even accepting every single word in Bennett's latest post-trial statement submitted on Mckeiver's behalf as the absolute truth, that information could not and does not satisfy the required elements necessary for Mckeiver to be able to obtain a new trial based upon it. Critically, that is true because, in the affidavit itself, Bennett directly affirmed *she told Mckeiver*

the pills were being stored in his house for money and *alerted Mckeiver of where the pills were hidden so he would know where to retrieve them from when her brother arrived to get them*.[6] Thus, Bennett's affidavit does *not* contain information refuting Mckeiver's knowledge of the methamphetamine pills in his home and does *not* contain information suggesting Mckeiver did not actually retrieve the methamphetamine pills from where they were hidden and hand them over to the confidential informant; instead, it simply contains a claim Mckeiver did not know Bennett and the confidential informant had an ulterior motive concerning those pills. Based on that, Mckeiver—aside from not knowing of Bennett's and the confidential informant's hidden intentions—was aware on the very date of the incident the pills he was accused of selling to the confidential informant actually belonged to the confidential informant, was fully aware they were being stored in his home that day for pay, and was advised of exactly where they were being hidden in the home so he would know where to retrieve them from when the confidential informant came to collect them from him. Simply put, Mckeiver cannot legitimately claim he was "excusably ignorant" until now of things Bennett—who was on the defense's potential witness list from trial—directly told him years ago, and he likewise cannot claim Bennett was previously unavailable to him as a witness since—notwithstanding the fact he already included her on his potential witness list—Bennett did *not* say in her affidavit she would not have testified truthfully about what had supposedly occurred if she had been called as a witness during

[6] Specifically, in her sworn affidavit, Bennett stated: "Caine came to Asia's that night and gave me the bag of pills and I took them in the room he was staying in and put them in Duke shoe box. It wasn't until the next morning when Cain was calling to come get the pills *I told him that he brought them the night before* and he payed me to hold them because he didn't want to ride with them and *let Duke know where they was* so when Caine came *he could give them to him*." (Mckeiver's Latest New Trial Motion -- Attachment A, p. 1) (emphasis added). Significantly, Mckeiver obviously was the "Duke" Bennett was referring to in her most-recent statement submitted on Mckeiver's behalf. (R. p. 100; p. 109; p. 159).

Mckeiver's trial.[7] [8] Haulcomb, 260 S.C. at 270, 195 S.E.2d at 606; cf. United States v. Lofton, 333 F.3d 874, 876 (8th Cir. 2003) ("Lofton . . . argues that his new trial motion was in fact based upon newly discovered evidence because he was not aware of Espinosa's willingness to testify until after the trial. We reject this contention. Before trial, Lofton knew the relevant fact at issue—whether Espinosa had advised Lofton during the course of their travels that Espinosa was carrying illegal drugs in the vehicle. Knowing that fact, Lofton could have called codefendant Espinosa as a defense witness at trial."); United States v. Turns, 198 F.3d 584, 588 (6th Cir. 2000) ("The fact that Turns's sister now claims that she wants to testify for her brother does not mitigate Turns's deliberate choice of omitting her testimony at trial. If the district court's decision was allowed to stand, then other defendants would be encouraged to file motions for new trials based solely upon the existence of previously uncalled witnesses who, after learning of the defendant's conviction, state for the first time that they are willing to testify truthfully on the defendant's behalf. Such a precedent would also encourage defendants to hold a witness or two in reserve, knowing that if they lost at trial, they might get another chance by producing sworn affidavits from their reserve witnesses."); Rivera v. State, 673 S.E.2d 642, 644 (Ga. Ct. App.

[7] In an attempt to avoid that unavoidable reality, Mckeiver contends in his motion "*[t]rial counsel* . . . had no way of knowing that Ms. Bennett had planted the drugs to her brother (the CI) to conduct an investigation into this issue." (Mckeiver's Latest New Trial Motion, p. 8) (emphasis added). But that's not accurate. If what Bennett now claims in her latest post-trial statement was actually true, Mckeiver already knew prior to and at the time of trial the drugs were only being held in the house overnight for pay at the request of the confidential informant, would have known they were not his, and would have known he only retrieved them for—and distributed them to—the confidential informant after Bennett told him where in the house they were being covertly stored on the confidential informant's supposed behalf. (Mckeiver's Latest New Trial Motion -- Attachment A, p. 1). Therefore, all trial counsel had to do to learn of every fact contained in Bennett's affidavit other than Bennett's and the confidential informant's purported hidden motive was talk to his client.

[8] Obviously, Mckeiver was aware of Bennett's existence, and she was directly identified by defense counsel as a potential defense witness toward the outset of trial. (R. p. 10; pp. 277-278; pp. 298-299; pp. 303-304).

2009) ("[T]he proffer that Rivera made shows that the testimony and discovery information were merely newly available, rather than newly discovered, evidence.").

Therefore, Mckeiver has known since the day of the controlled drug transaction that led to his trafficking in methamphetamine charge everything he is alleging he now has only just recently learned through Bennett's latest post-trial statement *except* the purportedly true reason *why* the drugs he distributed to the confidential informant were in his home that day.[9] Cf. Prince, 316 S.C. at 69, 447 S.E.2d at 184 ("Here, Prince has failed to establish that this evidence could not have been discovered by due diligence. He attempted to discuss the handling of the body with the funeral home employees prior to trial; therefore, he obviously had some awareness that the body was mishandled. He made no attempt, however, to proffer the testimony of any of the employees at trial. Moreover, there is no showing that he adequately interrogated these employees prior to trial."). Under such circumstances, Mckeiver simply cannot as a matter of law prove the supposed newly-discovered evidence was previously unknown to him and could not have been discovered before trial through the exercise of due diligence as *required* for it to be possible for him to obtain a new trial based on that after-discovered evidence under long-standing South Carolina law.[10] See State v. Pierce, 263 S.C. 23, 32, 207 S.E.2d 414, 419 (1974)

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[9] Tellingly, along with his motion, Mckeiver did *not* include an affidavit from himself indicating when he learned of the information he is now relying upon as support for his latest new trial motion. See State v. DeAngelis, 256 S.C. 364, 371, 182 S.E.2d 732, 735 (1971) ("It is essential to the consideration of a motion for a new trial based on after-discovered evidence that such motion shall be supported by an affidavit of the accused himself. Unless a valid and sufficient reason for the omission to file such an affidavit is shown, the affidavit of the accused must show that he did not know of the existence of such evidence at the time of the trial and that he used due diligence to discover such evidence, or that he could not have discovered it by the exercise of due diligence. An affidavit of the appellant's counsel showing these matters is not sufficient.").

[10] It's also unclear how the version of events contained in Bennett's post-trial affidavit would be material to Mckeiver's guilt or innocence for the charged offense of trafficking in

("State v. Wells, 249 S.C. 249, 153 S.E.2d 904 (1967), sets forth the well established *requirements* as to what the movant must show in order to obtain a new trial based upon after-discovered evidence." (emphasis added)). As a result, Mckeiver has failed to make even a prima facie showing of entitlement to a new trial based on after-discovered evidence as was and is necessary for him to be able to properly obtain leave to suspend his appeal and pursue a new trial motion at the circuit court level, and, therefore, his motion should and must be denied. Cf. Prince, 316 S.C. at 69, 447 S.E.2d at 184 (denying Prince's motion for leave to move before the circuit court for a new trial based on after-discovered evidence because Prince could not make the requisite prima facie showing since he failed to established the supposedly newly-discovered evidence could not have been discovered prior to trial through the exercise of due diligence); State v. Jennings, 40 S.C. 553, __, 18 S.E. 932, 932 (1894) ("The defendant in this case, having been convicted of murder, and having perfected his appeal from the judgment of the circuit court, now moves to suspend the appeal for the purpose of enabling him to move for a new trial in the circuit court upon the ground of after-discovered evidence. Under the well-settled practice of this court it is necessary that the appellant should make such a prima facie showing as would

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methamphetamine since—assuming that version of events was true—Mckeiver knew the confidential informant had stored pills in his home *for pay* to avoid having to have that contraband in his own vehicle and McKeiver apparently had no issues with that unlawful arrangement since he subsequently distributed the pills to the confidential informant from the location where he had been told they had been concealed when the confidential informant came over to collect them. See S.C. Code Ann. § 44-53-375(C) (defining trafficking in methamphetamine as—amongst other things—knowingly *delivering* ten grams or more of methamphetamine, knowingly *aiding or abetting* someone in connection to that amount of methamphetamine, or knowingly attempting to possess or *possessing* that amount of methamphetamine either actually or constructively). And, had that information truly been critical to the issue of whether Mckeiver was guilty or innocent of the crime for which he is currently incarcerated, it remains entirely unclear why—upon learning of it—Mckeiver's former trial counsel waited just over *eleven months* to reveal it to Mckeiver's current counsel. (Mckeiver's Latest New Trial Motion -- Attachment B, p. 1; Mckeiver's Latest New Trial Motion -- Attachment C, p. 1).

satisfy this court that this was a proper case for the granting of the motion submitted by the appellant. After a careful consideration of the affidavits upon which the motion is made, we cannot say that such a showing has been made. It is therefore ordered that the motion be refused.").

WHEREFORE, Respondent prays this Court will deny Mckeiver's "Motion to Hold Appeal in Abeyance and to Remand for a Hearing on a Motion for New Trial Based on After-Discovered Evidence"; decline to hold the appeal in abeyance; decline to remand the matter to the Dillon County Court of General Sessions to afford Mckeiver an unnecessary opportunity to pursue a meritless new trial motion; continue forward with its consideration of Mckeiver's appeal in the normal course without needless interruption; and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Deputy Attorney General

By:_____
Mark R. Farthing
S.C. Bar Number 76901

June 16, 2025

RECEIVED
Jun 16 2025
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dillon County
Honorable Paul M. Burch, Circuit Court Judge
Appellate Case No. 2022-000324

THE STATE,

Respondent,

vs.

MARC YASIN MCKEIVER,

Appellant.

PROOF OF SERVICE

I, Caroline Collins, certify I have served the within Return in Opposition to "Motion to Hold Appeal in Abeyance and to Remand for a Hearing on a Motion for New Trial Based on After-Discovered Evidence" by sending an electronic copy via email to the address listed in AIS for the following individual:

Dayne C. Phillips, Esquire
dayne@pricebenowitz.com

I further certify all parties required by Rule to be served have been served.
This 16th day of June, 2025.

CAROLINE COLLINS
Administrative Coordinator

PRICE BENOWITZ LLP

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FAIRFAX, VA 22030

July 7, 2025

The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: **State v. Marc Yasin Mckeiver**
APPELLANT'S AFFIDAVIT
Appellate Case No.: **2022-000324**

Dear Ms. Kitchings:

I have enclosed a copy of Appellant's affidavit in support of the motion for a new trial.

If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

s/ Dayne Phillips

Dayne C. Phillips, Esq.
SC Bar No. 77712
(803) 807-0234

cc: **Marc Yasin Mckeiver**
Mark Farthing, Esq.

I, Marc Mckeiver, being duly sworn depose and state the following:

My name is Marc Mckeiver, and I am the defendant in the above referenced criminal matter currently under appeal.

I make this affidavit in response to the courts request regarding the motion to hold appeal in abeyance based on newly discovered evidence.

Base on the newly discovered evidence, I was not aware that the confidential informant William Clark brought drugs to the residence for his sister Winter Bennett to hold at any time prior to or during trial nor did I post a picture of the pills

The living witness Winter Bennett is mistaken in that part of her affidavit, as I was not aware of any such information that Ms. Clark gave her drugs to store in the home and later retrieve nor did I have knowledge of the confidential informant posting the pills that morning of the alleged control buy.

I became aware of this information when Ms. Bennett submitted her affidavit and my appeal lawyer mailed a copy to the institution.

I was not involved in the control buy and did not participate in any hand to hand drug transaction connected to the charge for which I was convicted.

The confidential informant William Clark regularly visited the residence and had access to it whenever he pleased.

This was not unusual given our family history. I was in a relationship with Mr. Clark sister and we all lived together at various points throughout our history.

His presence at the home did not raise concern and was unremarkable due to the long standing nature of our relationship.

I make this affidavit in good faith and request that the court consider it in support of the motion to hold the appeal in abeyance so that this newly discovered evidence may be fully evaluated.

I swear or affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Marc L McKeiver
Marc Y. McKeiver

JACQUELINE MURRELL
Notary Public
South Carolina
My Comm. Expires April 27, 2026

Jacqueline Murrell

The South Carolina Court of Appeals

The State, Respondent,

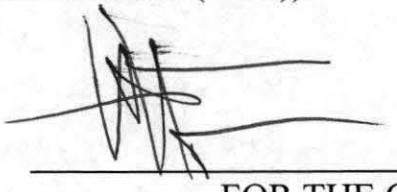
v.

Marc Yasin Mckeiver, Appellant.

Appellate Case No. 2022-000324

ORDER

On June 6, 2025, Appellant filed a motion to hold the appeal in abeyance and remand for a hearing on a motion for a new trial based on after-discovered evidence. Respondent filed a return, opposing the motion. Appellant did not file a reply but filed an additional affidavit of Appellant. After careful consideration, Appellant's motion to hold the appeal in abeyance and remand for a hearing on a motion for a new trial based on after-discovered evidence is denied. *See State v. Prince*, 316 S.C. 57, 69, 447 S.E.2d 177, 184 (1993) ("In order to obtain leave to seek a new trial based upon after-discovered evidence, an appellant must make a *prima facie* showing before this Court of the following elements: '(1) the evidence is such as will probably change the result if a new trial is granted; (2) the evidence has been discovered since the trial; (3) the evidence could not have been discovered prior to trial by the exercise of due diligence; (4) the evidence is material; and (5) the evidence is not merely cumulative or impeaching.'" (quoting *State v. Ford,* 301 S.C. 485, 392 S.E.2d 781 (1990)).



FOR THE COURT

Columbia, South Carolina

FILED
Jul 23 2025

cc:
Alan McCrory Wilson, Esquire
Dayne C. Phillips, Esquire
Mark Reynolds Farthing, Esquire
William Benjamin Rogers, Jr., Esquire

RECEIVED
Aug 04 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of General Sessions

Paul M. Burch, Circuit Court Judge

Appellate Case No. 2022-000324

Order filed on July 23, 2025

The State of South Carolina,

Respondent,

v.

Marc Yasin Mckeiver,

Appellant.

PETITION FOR REHEARING

Appellant Marc Mckeiver respectfully petitions for rehearing pursuant to Rule 221(a), SCACR, on the basis that this Court overlooked and misapprehended material facts and principles of law in denying Appellant's Motion to Hold Appeal in Abeyance and to Remand for a Hearing on a Motion for a New Trial Based on After-Discovered Evidence. Specifically, Appellant is requesting that this Court rehear the motion based on the following reasons:

(1) This Court did not provide any specific basis for denying the motion in the Order except for citing *State v. Prince*, 316 S.C. 57, 69, 447 S.E.2d 177, 184 (1993) (providing the five-factor test for seeking a new trial based on after-discovered evidence). Appellant requests a specific ruling to preserve this issue for appellate review because all five elements of the after-discovered evidence test are satisfied based on the affidavits of Winter Bennett, Appellant, and

Trial Counsel Thurmond Brooker.

(2) Ms. Bennett did not testify, and her affidavit presents an entirely different factual scenario regarding the origin and nature of the alleged drug transaction that contradicts the State's theory of the case (i.e., Appellant's alleged knowledge and participation in the drug transaction with the CI). Notably, Trial Counsel stated in his affidavit, "had I been aware of these facts and evidence [Bennett's affidavit], I would have compelled Bennett's testimony at trial regarding the facts and evidence disclosed in Exhibit A [Bennett's affidavit]." Therefore, this evidence would probably have changed the result if a new trial were granted.

(3) Trial Counsel also stated in his affidavit that he did not become aware of this information until after Ms. Bennett provided her affidavit on June 20, 2024. Appellant confirmed in his affidavit that he "became aware of this information when Ms. Bennett submitted her affidavit and [his] lawyer mailed a copy to the institution." Therefore, this evidence has been discovered since the trial.

(4) Ms. Bennett also stated in her affidavit that she was scared and had been keeping this information secret for years. In his affidavit, Appellant denied any having knowledge of the drugs or involvement in the drug transaction with the CI. Therefore, Trial Counsel could not have discovered this evidence in the exercise of due diligence prior to the trial.

(5) Ms. Bennett further stated in her affidavit that she planted the drugs in Appellant's shoe box to get a better deal for her brother (who was the confidential informant) because he was facing life without the possibility of parole. Ms. Bennett is visible in the video recording worn by the CI, and Trial Counsel never had an opportunity to cross-examine the CI because he died prior to trial. Therefore, the after-discovered evidence is material to the jury's determination of Appellant's guilt.

(6) At trial, the State and Appellant did not present any evidence or cross-examination related to the after-discovered evidence. Notably, Ms. Bennett and the CI did not testify at trial. Therefore, the after-discovered evidence is not cumulative or impeaching to any evidence offered by the State or Appellant. *Cf Johnston v. Belk-McKnight Co. of Newberry*, 188 S.C. 149, 158, 198 S.E. 395, 399 (1938) (finding "[c]umulative evidence . . . supplements that which has already been testified"); *see also State v. South*, 310 S.C. 504, 427 S.E.2d 666 (1993) (holding after-discovered evidence must reflect upon the defendant's innocence).

CONCLUSION

Based on the foregoing reasons, the Appellant respectfully requests that this Court grant the Petition for Rehearing, grant the motion to hold the appeal in abeyance, and remand the case for an evidentiary hearing on the motion for a new trial based on after-discovered evidence.

Dayne Phillips
S.C. Bar No. 77712

PRICE BENOWITZ LLP
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Attorney for Appellant

August 4, 2025

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Aug 04 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of General Sessions

Paul M. Burch, Circuit Court Judge

Appellate Case No. 2022-000324

Order filed on July 23, 2025

The State of South Carolina, Respondent,

v.

Marc Yasin Mckeiver, Appellant.

CERTIFICATE OF SERVICE

The undersigned Counsel certifies that a true copy of the Petition for Rehearing has been served upon **Mark Farthing, Esquire,** at S.C. Attorney General's Office, PO Box 11549, Columbia, SC 29211, on **August 4, 2025.**

Dayne Phillips
PRICE BENOWITZ LLP
1614 Taylor Street, Ste. D.
Columbia, SC 29201
(803) 807-0234
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me
this 4th day of August, 2025.

Courtney Powers (L.S.)
Notary Public for South Carolina
My Commission Expires: May 2, 2027

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

CATHERINE S. HARRISON
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August 08, 2025

Mr. Dayne C. Phillips, Esquire
1614 Taylor Street
Suite D
Columbia SC 29201

Re: The State v. Marc Y. Mckeiver
Appellate Case No. 2022-000324

Dear Counsel:

The Court is returning your petition for rehearing, received by the Court on August 04, 2025, without action pursuant to Rule 221(c), SCACR.

Very truly yours,

Catherine S. Harrison, deputy

CLERK

cc: Alan McCrory Wilson, Esquire
Mark Reynolds Farthing, Esquire
William Benjamin Rogers, Jr., Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Marc Y. Mckeiver, Appellant.

Appellate Case No. 2022-000324

Appeal From Dillon County
Paul M. Burch, Circuit Court Judge

Unpublished Opinion No. 2026-UP-066
Heard December 8, 2025 – Filed February 11, 2026

AFFIRMED

Dayne C. Phillips, of Price Benowitz, LLP, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Attorney General Mark Reynolds Farthing, of Columbia; and Solicitor William Benjamin Rogers, Jr., of Bennettsville, all for Respondent.

PER CURIAM: Marc Y. Mckeiver (Appellant) was convicted of trafficking in methamphetamine 100 grams or more, but less than 200 grams and sentenced to a twenty-five-year term of imprisonment and ordered to pay a $50,000 fine. On

appeal, Appellant argues the trial court erred by (1) refusing to suppress photographs obtained from Snapchat when the magistrate did not have the jurisdictional authority; (2) admitting photographs obtained from Snapchat when the evidence was not properly authenticated; (3) refusing to suppress the deceased confidential informant's (CI) live-feed video recording inside Appellant's home in violation of Article 1, Section 10 of the South Carolina Constitution; and (4) failing to grant a new trial or an evidentiary hearing following post-trial allegations of juror concealment. We affirm.

1. Appellant argues the photographs obtained from Snapchat should have been excluded because the magistrate who issued the search warrant did not have the authority to issue a warrant to an out-of-state entity for records that were not physically located in the state. We disagree.

At trial, defense counsel argued the Snapchat photographs should not be admitted because the search warrant signed by the magistrate was invalid. Snapchat is not incorporated in Dillon County, defense counsel argued; therefore, the warrant was null and void because it was outside of the jurisdictional authority.[1] The court orally denied the motion to suppress the evidence obtained from Snapchat. Importantly, when making a ruling as to the jurisdictional issue, the court did not deny suppression based upon the invalidity of the search warrant, but rather it denied the motion based on the court's independent conclusions: (1) the investigating officers acted in good faith in obtaining and relying upon the judicially-issued search warrant because their actions were consistent with common practices in South Carolina at that time and (2) Appellant had no expectation of privacy in the information obtained from the search warrant because Appellant's public posting to "a mass of people" was analogous to placing an ad in a newspaper. The court found suppression was not warranted in Appellant's case *despite the purported invalidity of the warrant* because the good faith exception to the exclusionary rule was applicable and because Appellant did not have a legitimate expectation of privacy in the publicly posted photographs. On appeal, Appellant challenges neither the court's finding of good faith nor the lack of a

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[1] In a case that was pending at the time of trial, our supreme court rejected this argument. *See State v. Warner*, 436 S.C. 395, 403-04, 872 S.E.2d 638, 642 (2022) (upholding the authority of a county magistrate to issue a warrant to an out-of-state cell phone service provider for cell-site location information records stored in New Jersey and holding the warrant was not invalid solely because the records were stored out-of-state).

reasonable expectation of privacy in his public posts. Rather, he focuses solely on the argument that the search warrant was invalid based on the out-of-state records.[2] As such, the unappealed, independent conclusions of the circuit court became the law of the case and we affirm. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case"); *Weeks v. McMillan*, 291 S.C. 287, 292, 353 S.E.2d 289, 292 (Ct. App. 1987) ("Where a decision is based on alternative grounds, either of which independent of the other is sufficient to support it, the decision will not be reversed even if one of the grounds is erroneous").

2. Appellant argues the photographs obtained from Snapchat should have been excluded because the photographs were not properly authenticated pursuant to Rule 901 of the South Carolina Rules of Evidence, by personal knowledge, distinctive characteristics, or testimony of a records custodian. We disagree.

"Social media messages and content are writings, and evidence law has always viewed the authorship of writings with a skeptical eye." *State v. Green*, 427 S.C. 223, 230, 830 S.E.2d 711, 714 (Ct. App. 2019), *aff'd as modified on other grounds*, 432 S.C. 97, 851 S.E.2d 440 (2020). "The requirement of authentication cannot be met by merely offering the writing on its own. Something more must be set forth connecting the writing to the person the proponent claims the author to be." *Id.* at 231, 830 S.E.2d at 714 (internal citation omitted). "Rule 901(b), SCRE, lists ten non-exclusive methods of authentication." *Id.* at 231, 830 S.E.2d at 715. "Rule 901, SCRE, does not care what form the writing takes, ... All that matters is whether it can be authenticated, for the rule was put in place to deter fraud." *Id.* at 231, 830 S.E.2d at 714. Under Rule 901(b)(1), SCRE, evidence may be authenticated by "having someone with personal knowledge about the writing testify the matter is what it is claimed to be." *Id.* at 231, 830 S.E.2d at 715. "As long as a witness with personal knowledge testifies that an exhibit accurately portrays what it depicts, that should be sufficient to establish its authenticity." 3 Barbara E. Bergman et al., *Wharton's Criminal Evidence* § 14:2 (15th ed. 2021). Alternatively, "[m]ost writings meet the authenticity test through 901(b)(4), SCRE, which enables authentication to be proven by: '[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.'" *Green*, 427 S.C. at 232, 830 S.E.2d at 715 (quoting Rule 901(b)(4)).

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[2] Appellant's counsel conceded to this at oral argument.

We hold the trial court did not err in admitting the Snapchat photographs based on failure to authenticate. At trial, Agent Martin testified that he obtained Snapchat records for the account "duke_ttg" pursuant to a search warrant and identified the account as Appellant's based on posts showing Appellant, Appellant's nickname "Duke," and a phone number linked to Appellant. The records included photos posted on the date of the drug transaction showing Appellant and uniquely shaped, multi-colored pills matching those purchased during the controlled buy. Law enforcement photographs of the purchased pills were introduced and appeared identical to the pills shown on the Snapchat account. We hold both the court and the jury could reasonably and reliably conclude the photographs, which depicted both Appellant himself and what appeared to be identical, highly unique pills he sold to the CI, were what they were purported to be. *See Green*, 427 S.C. at 233, 830 S.E.2d at 715-716 (noting several facts linked messages to the defendant and ruling that "[t]aken together, th[o]se circumstances serve[d] as sufficient authentication to meet the low bar Rule 901(b)(4), SCRE, sets"); *id.* (holding the court was "persuaded the [fraud] risk [surrounding social media] is one Rule 901, SCRE, contemplates and can contain. Lawyers can always argue case-specific facts bearing on this risk and attempt to convince the jury the writing is not genuine"). Additionally, the State argued pretrial that the Snapchat photos were properly authenticated via the certificate of authenticity provided by Snapchat pursuant to Rule 902, SCRE. In addition to the authentication pursuant to Rule 901, we find the photographs were properly authenticated as an "acknowledged document" under Rule 902. Accordingly, we affirm as to this issue. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling . . . upon any ground[ ] appearing in the Record on Appeal.").

3. Appellant argues the trial court erred in refusing to suppress the deceased CI's live-feed video recording made inside Appellant's home in violation of Article 1, Section 10's prohibition against unreasonable invasions of privacy. We find this issue unpreserved for appellate review. Following the pretrial ruling on the matter, defense counsel clarified he was only arguing a "live feed wire" with an officer "watching on the other end" could not be used on a CI who entered a residence, and the State explained it was not seeking to admit any evidence from the "live feed" device. The State indicated the live feed device was malfunctioning at the time of the transaction; therefore, the State only sought to introduce video evidence from the non-live stream device. Based upon our review of the record, oral argument, and in light of defense counsel's clarification at trial, any issue with the recording admitted into evidence was not preserved for appellate review since the recording played at trial did not come from the "live feed" device. *See State v. Bryant*, 372 S.C. 305, 315-316, 642 S.E.2d 582, 588 (2007) (explaining an issue

conceded at trial cannot be asserted later on appeal); *State v. Patterson*, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (instructing an appellant "is limited to the grounds raised at trial").

4. Appellant argues the trial court erred by failing to grant a new trial or an evidentiary hearing, when defense counsel produced affidavits at a post-trial hearing indicating two jurors intentionally concealed information during voir dire. We disagree.

Our state and federal constitutions guarantee a party the right to an impartial jury, and "*voir dire* can be an essential means of protecting this right." *Warger v. Shauers*, 574 U.S. 40, 50 (2014); U.S. Const. amends. VI, XIV; S.C. Const. art. I, § 14. If a party challenges a juror for cause, the trial court must examine the juror to determine if the juror "is sensible of any bias or prejudice" about the case. S.C. Code Ann. § 14-7-1020 (2017). In analyzing a claim of juror bias, our appellate courts have recently abandoned the distinction between intentional versus unintentional concealment. The proper inquiry is now as follows, "Where a party claims a juror has withheld material information in response to a *voir dire* question, the trial court must determine, preferably after a hearing, whether the juror's withholding suggests bias. This will typically turn on the nature of the information withheld, rather than the nature of the juror's state of mind in not disclosing it." *State v. Rowell*, 444 S.C. 109, 115, 906 S.E.2d 554, 557 (2024). Further, evaluating the merits of a juror misconduct claim is a fact-intensive inquiry, which is most appropriately conducted after a hearing. *See State v. Sparkman*, 358 S.C. 491, 496, 596 S.E.2d 375, 377 (2004) ("Whether a juror's failure to respond [during voir dire] is intentional is a fact intensive determination that must be made on a case-by-case basis."); *McCoy v. State*, 401 S.C. 363, 371, 737 S.E.2d 623, 628 (2013) ("[E]valuating the merits of a juror misconduct claim is a fact-intensive inquiry, which is most appropriately conducted after a hearing").

We hold the trial court did not abuse its discretion in denying Appellant's request for a new trial based on juror concealment. Following the motion, the court properly ordered a hearing to evaluate the juror misconduct claims. At the hearing, the reliability and credibility of the affidavits were called into question. The State warned the circuit court of the dangers of overturning convictions based solely on after-produced affidavits from a convicted defendant's group of friends. Further, Appellant had ample opportunity to notify counsel and the court of potential juror biases, and both jurors in question were seated without challenge from either party. Accordingly, we hold the court properly denied Appellant's request for a new trial based on juror concealment during voir dire. *See State v. Tucker*, 423 S.C. 403,

414, 815 S.E.2d 467, 472–73 (Ct. App. 2018) (finding that "[l]eaving credibility determinations in jury misconduct claims to trial judges means respecting their decision that they have enough evidence to weigh it at all, whether the witness' testimony is spoken or written[,]" thus holding that although live testimony may aid credibility assessments, judges can still effectively assess credibility from affidavits by evaluating both content and manner of communication).

Based on the foregoing, Appellant's conviction and sentence are

AFFIRMED.

WILLIAMS, C.J., and THOMAS and CURTIS, JJ., concur.

RECEIVED
Feb 26 2026
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of General Sessions

Paul M. Burch, Circuit Court Judge

Appellate Case No. 2022-000324

The State of South Carolina,

Respondent,

v.

Marc Yasin Mckeiver,

Appellant.

PETITION FOR REHEARING

Appellant Marc Yasin Mckeiver respectfully petitions for rehearing pursuant to Rule 221(a), SCACR, on the basis that this Court overlooked and misapprehended material facts and principles of law in affirming his conviction and sentence. Specifically, Appellant is requesting that this Court rehear the issues raised on appeal based on the following reasons:

(1) As to issue four, this Court failed to properly address the nature of the alleged information withheld by Juror number 6 and Juror number 53, and whether the jurors' concealment of that information suggests bias. *See State v. Rowell*, 444 S.C. 109, 115, 906 S.E.2d 554, 557 (2024) (finding [w]here a party claims a juror has withheld material information in response to a voir dire question, the trial court must determine, preferably after a hearing, whether the juror's withholding suggests bias. This will typically turn on the nature of the information withheld, rather than the nature of the juror's state of mind in not disclosing it.").

(2) This Court's opinion improperly assumed that Appellant was aware of the biases and prejudice against him by Juror number 6 and Juror number 53 without providing any basis for how and when Appellant knew this information and should have notified his Counsel and the Court.

(3) This Court failed to address the Trial Court's denial of Appellant's request for an *evidentiary* hearing to present testimony of the witnesses who provided affidavits in support of the motion for new trial and to potentially question Juror number 6 and Juror number 53 under oath regarding the allegations of their intentional concealment of bias and prejudice against Appellant. In other words, the post-trial hearing was insufficient for the Trial Court to properly assess the reliability and credibility of these allegations based on the affidavits alone. Therefore, a full evidentiary hearing was reasonable and necessary for the Trial Court to properly rule on the motion for a new trial. *See State v. Sparkman*, 358 S.C. 491, 496, 596 S.E.2d 375, 377 (2004) (finding evaluating the merits of a juror misconduct claim is a fact-intensive inquiry, which is most appropriately conducted after a hearing).

(4) This Court also previously denied Appellant's Motion to Hold Appeal in Abeyance and to Remand for a Hearing on a Motion for a New Trial Based on After-Discovered Evidence and Petition for Rehearing during the pendency of this direct appeal. Specifically, this Court did not provide any specific basis for the denial except for citing *State v. Prince*, 316 S.C. 57, 69, 447 S.E.2d 177, 184 (1993) (providing the five-factor test for seeking a new trial based on after-discovered evidence). In the prior petition for rehearing, Appellant requested for the Court to issue a specific ruling to preserve that issue for appellate review because all five elements of the after-discovered evidence test are satisfied based on the affidavits of Winter Bennett, Appellant, and Trial Counsel Thurmond Brooker.

CONCLUSION

Based on the foregoing reasons, the Appellant respectfully requests that this Court grant the Petition for Rehearing.

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February 26, 2026

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Feb 26 2026
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of General Sessions

Paul M. Burch, Circuit Court Judge

Appellate Case No. 2022-000324

Trial Court Case No. 2019-GS-16-0996

The State of South Carolina, Respondent,

v.

Marc Yasin Mckeiver, Appellant.

CERTIFICATE OF SERVICE

The undersigned Counsel certifies that a true copy of the Petition for Rehearing has been served upon **Mark Farthing, Esquire,** at S.C. Attorney General's Office, PO Box 11549, Columbia, SC 29211, on **February 26, 2026.**

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SUBSCRIBED AND SWORN TO before me
this 26th day of February, 2026.

(L.S.)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.

The South Carolina Court of Appeals

The State, Respondent,

v.

Marc Yasin Mckeiver, Appellant.

Appellate Case No. 2022-000324

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

H. Bruce Williams C.J.

Paula C. Thomas J.

Kristi Curtis J.

Columbia, South Carolina

FILED
Mar 17 2026

cc:
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Dayne C. Phillips, Esquire
Mark Reynolds Farthing, Esquire
William Benjamin Rogers, Jr., Esquire