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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
Appeal from Dillon County
Honorable Paul M. Burch, Circuit Court Judge
Appellate Case No. 2026-000950

THE STATE,

Respondent,

vs.

MARC YASIN MCKEIVER,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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I.

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II.

Did the Court of Appeals correctly hold 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 Mckeiver's post-trial claim of jury misconduct when no credible evidence was presented to support the claim and the claim was not timely raised at Mckeiver's first opportunity to do so as was necessary for it to conceivably be a valid one?

STATEMENT OF THE CASE

Procedural History

In September of 2019, Petitioner 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. In November of 2019, the Dillon County Grand Jury indicted Mckeiver for trafficking in methamphetamine. 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.[1] 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 motion. Mckeiver then timely filed a notice of appeal.

While the matter was pending on appeal, Mckeiver—through appellate counsel—submitted a motion in June of 2025 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. The State filed a return opposing the motion, and Mckeiver followed that by submitting an affidavit from himself. Ultimately, upon considering the matter, the Court of Appeals issued an order denying Mckeiver's motion. Mckeiver then attempted to petition for rehearing from that ruling, but the

[1] By the time of his trial on the trafficking in methamphetamine charge, Mckeiver —in total— had nine pending charges in Dillon County stemming from four distinct incidents, and he was facing a potential sentence of up to 135 years as a result of those charges. (App'x pp. 33-34; p. 112; p. 369).

Court of Appeals declined to act on that petition pursuant to Rule 221(c) of the South Carolina Appellate Court Rules.

Thereafter, on appeal, the Court of Appeals—following briefing and oral argument—issued an unpublished opinion in which it unanimously affirmed Mckeiver's conviction and sentence. State v. McKeiver, Op. No. 2026-UP-066 (S.C. Ct. App. filed Feb. 11, 2026). Thereafter, Mckeiver petitioned the Court of Appeals for rehearing, and the petition was denied. Mckeiver then filed a petition for a writ of certiorari in the Supreme Court.

Factual History

Over the course of several months in 2019, Agent James Martin of the South Carolina State Law Enforcement Division ("SLED") spearheaded a drug investigation targeting Mckeiver, who was suspected of being a drug dealer, in conjunction with a number of other law enforcement entities.[2] (App'x pp. 99-100; p. 108; pp. 111-112; pp. 145-146). As part of that investigation, Agent Martin decided to attempt to surreptitiously purchase narcotics from Mckeiver with the assistance of a cooperating informant. (App'x pp. 146-147; p. 210).

In carrying out that plan, Agent Martin met up on September 9, 2019, with both SLED Agent Alex Blake, who was working in an undercover role, and the confidential informant at an arranged location. (App'x p. 99; p. 147; p. 150; p. 210; p. 217). Upon meeting together there, Agent Blake—in Agent Martin's presence—searched the informant and verified he was not in possession of any concealed drugs, weapons, or money. (App'x pp. 148-149; pp. 171-172; pp. 211-213; p. 221). Agent Martin then equipped the informant with a hidden camera to record the transaction along with a separate device designed to allow the transaction to be live-monitored,

[2] Specifically, in addition to SLED, the United States Drug Enforcement Administration, the Dillon Police Department, and the Dillon County Sheriff's Office were all involved in the investigation. (App'x p. 146).

and he also gave the informant $700 in pre-recorded government funds. (App'x p. 149). Following that, the informant got into Agent Blake's vehicle, and the two set out to conduct the controlled narcotics buy. (App'x p. 99; p. 149).

Along the way, the informant called a particular phone number he identified as Mckeiver's—whom he referred to both by name and as "Duke"—and, with Agent Blake listening in, Mckeiver responded by inviting the informant to come to a particular address. (App'x pp. 100-101; p. 104; p. 113; p. 163; pp. 213-215; p. 219). Agent Blake then drove the informant to that address, which was the address of a double-wide trailer home located in Hamer, South Carolina. (App'x p. 108; pp. 213-216; State's Ex. # 1 (Transaction Recording)).

Upon arriving there, the informant exited Agent Blake's vehicle, approached the home, and announced his presence. (App'x p. 215; State's Ex. # 1). Seconds later, Mckeiver greeted the informant at the door, allowed him inside, and escorted him to a back room. (App'x p. 227; State's Ex. # 1). The two briefly conversed in that location, and, as they did, the informant's recording equipment captured images of Mckeiver with a plastic bag in the palm of his hand. (App'x p. 233; State's Ex. # 1). Following that, the informant quickly left the residence and returned to Agent Blake's vehicle, and, as he was doing so, Agent Blake personally observed Mckeiver peer out from the residence and look in their direction. (App'x pp. 108-109; p. 216).

Once he was safely back inside the vehicle, the informant confirmed to Agent Blake he had successfully been able to purchase two bags containing $500 worth of uniquely-shaped multi-colored pills from Mckeiver.[3] (App'x p. 109; pp. 200-201; pp. 216-217; pp. 243-245; pp.

[3] Regarding their shapes, some of the pills were shaped like skulls, some were shaped like mushrooms, some were shaped like the Batman logo, some were shaped like a "mud flap girl," and some were shaped like the ghost from the Snapchat logo. (App'x pp. 200-201; pp. 206-207; pp. 216-217; pp. 243-245).

216-217; State's Ex. # 6 (Photograph)). The two then drove away from the scene and met back up with Agent Martin. (App'x p. 217). When they did, Agent Martin took possession of and secured two plastic bags containing approximately 500 pills along with the remaining $200 in government funds. (App'x p. 154; p. 177; pp. 217-218). Likewise, the confidential informant was again searched, and, at that time, he was not in possession of anything. (App'x p. 219).

A few days later, Mckeiver was arrested for selling the pills to the confidential informant. (App'x p. 430). Subsequent to that, Mckeiver was indicted for trafficking in methamphetamine, and he elected to proceed forward to trial. (App'x p. 10; pp. 431-432).

During the course of Mckeiver's trial, Agent Martin and Agent Blake recounted the details of the controlled buy and confirmed the informant—who was carefully searched prior to the transaction—returned with two bags of distinctively-shaped multi-colored pills after meeting up with Mckeiver as had been arranged.[4] (App'x pp. 145-189; pp. 196-233). In addition to that, a recording of the transaction was admitted into evidence over objection and played for the jury.[5] (App'x pp. 158-159). On that recording, the informant was depicted entering a residence after being greeted at the door by Mckeiver, following Mckeiver—who had a plastic bag in his hand consistent with what was ultimately purchased from him—to a back room, conferring briefly with Mckeiver, and then promptly leaving the residence within less than two minutes of his arrival. (App'x pp. 158-161; p. 177; p. 216; p. 233; State's Ex. # 1). Furthermore, a few photographs depicting both Mckeiver and bags of pills identical in shape to the ones purchased

[4] By the time of trial, Agent Blake was working for the Federal Bureau of Investigation. (App'x p. 99).

[5] Significantly, the recording was played for the jury without sound because the informant was murdered at some point after the incident date and, thus, was obviously not present for trial. (App'x p. 147; p. 159).

by the informant were admitted into evidence over objection and identified as having been obtained from a Snapchat account associated with the same phone number used to call Mckeiver prior to the transaction. (App'x pp. 162-163; pp. 165-166; pp. 196-201; pp. 213-214). Beyond that evidence, Maribeth McCormack, a forensic chemist at SLED, testified about her analysis of the pills purchased during the controlled buy and confirmed they constituted at least 108.69 grams of methamphetamine.[6] (App'x pp. 237-241; p. 246; pp. 251-252; pp. 376-379).

Following the presentation of all that evidence, the parties rested their cases, and the case was ultimately submitted to the jury. (App'x p. 278; p. 288; p. 350). After deliberating on the matter for a little over two hours, the jury convicted Mckeiver as indicted. (App'x pp. 356-357).

[6] McCormack conducted her analysis by separating pills from each of the two plastic bags into like groups based on color and shape and then testing a representative sample from each like group. (App'x pp. 243-245; p. 249; p. 259). Pursuant to policy, McCormack stopped her analysis once she reached a total threshold weight exceeding 100 grams. (App'x p. 245). However, her preliminary testing prior to reaching the threshold weight suggested the remaining untested pills were indicative of methamphetamine. (App'x p. 247).

ARGUMENT

I.

The Court of Appeals correctly rejected Mckeiver's motion seeking for his appeal to be held in abeyance so he could pursue the grant of a new trial based on after-discovered evidence because, just as the Court of Appeals wisely recognized, the information Mckeiver provided in support of his abeyance motion could not have established what was necessary for Mckeiver to be entitled to a new trial based on after-discovered evidence even if accepted as true.

Mckeiver contends the Court of Appeals reversibly erred by denying his motion to hold his appeal in abeyance and remand for a hearing on a motion for a new trial based on after-discovered evidence. In support of that contention, Mckeiver maintains the most-recent affidavits he submitted on appeal purportedly satisfied each and every one of the elements necessary for him to be entitled to a new trial based on after-discovered evidence.[7] To the contrary, the information contained in Mckeiver's submitted affidavits—even if true—was not sufficient to make even a prima facie showing of the factors Mckeiver would have to prove to be entitled to a new trial based on after-discovered evidence. Therefore, the Court of Appeals correctly rejected Mckeiver's abeyance motion and properly continued forward with the appellate process. Mckeiver's petition for a writ of certiorari should be denied.

[7] Beyond that, Mckeiver faults the Court of Appeals for failing to provide any specific basis for the denial of his motion by merely citing to the decision in State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993), in its order. (Pet. for Cert. pp. 13-14). Notwithstanding the fact the reference to Prince leaves little doubt as to why the Court of Appeals rejected Mckeiver's motion, Mckeiver has failed to identify any authority of any kind to support his claim of error in that regard, and, thus, that particular argument should be rejected as abandoned. See Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691-692 (Ct. App. 2001) (holding an argument raised on appeal in a conclusory fashion without citation to authority was abandoned for appellate purposes and noting "South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review"); see also Rule 220(b), SCACR (permitting memorandum decisions from appellate courts in South Carolina and further instructing an appellate court "need not address a point which is manifestly without merit").

Relevant Facts

A little over three years after his last new trial motion proved to be unsuccessful and while his appeal remained pending, Mckeiver submitted a motion on June 6, 2025, asking the Court of Appeals to hold his appeal in abeyance and remand the matter 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. (App'x pp. 517-525). Along with that motion, Mckeiver submitted three affidavits: (1) one from Winter Bennett, which was dated June 20, 2024; (2) one from his defense counsel from trial, which was dated May 20, 2025;[8] and (3) one from his appellate counsel, which was dated June 6, 2025. (App'x pp. 526-533).

In her affidavit, Bennett stated as follows:

> 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 thats how 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. Caine came to Asia'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 Caine came he could*

[8] In his affidavit, defense counsel indicated Bennett "presented to [his] office" and prepared her handwritten statement 334 days before the date of his own affidavit, and he attested he first became aware of what Bennett disclosed in her statement on the date it was prepared. (App'x p. 530). Furthermore, defense counsel offered his "professional opinion" the "facts and evidence disclosed by Bennett" were relevant to Mckeiver's guilt. (App'x p. 530).

> *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 so for a long time I wanted to hate duke and believe the rumors but I know it not true and so after his sentencing I then only mentioned[9] 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 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 am 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.

(App'x pp. 527-528) (emphasis added).

As support for that request, Mckeiver pointed primarily to Bennett's sworn affidavit dated June 20, 2024, while claiming its contents supposedly constituted 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. (App'x pp. 517-525). More specifically, Mckeiver pointed to the portions of Bennett's affidavit claiming: (1) her brother was the confidential informant involved in Mckeiver's case;[10] (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

[9] Mckeiver's June 2025 new trial motion constituted the second time he submitted and relied upon a post-trial statement from Bennett in an effort to obtain a new trial. (App'x p. 397).

[10] That fact was in no way newly-discovered and had already been brought out during trial by Mckeiver's sister, who testified as the lone witness for the defense. (App'x p. 279; p. 281).

time, and she did so; and (4) she and her brother had access to Mckeiver's "social media." (App'x pp. 522-525).

In response to the motion, the State swiftly submitted a return arguing it should be denied. (App'x pp. 535-543). As to why, the State noted the information contained in Bennett's affidavit—even if true—could not satisfy the requirements necessary for Mckeiver to be entitled to a new trial for multiple reasons. (App'x pp. 535-543).

Following that, Mckeiver did not submit a reply to the State's return. (App'x p. 548). Instead, he submitted his own affidavit and, through it, conveniently claimed all the portions of Bennett's affidavit were true and new to him *except* the portions the State relied upon to oppose his motion. (App'x pp. 546-547). Mckeiver claimed Bennett was "mistaken" as to those unhelpful portions. (App'x p. 546).

Upon "careful[ly]" considering the matter, the Court of Appeals—relying on State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993)—issued an order denying the motion. (App'x p. 548). Mckeiver then attempted to petition for rehearing. (App'x pp. 550-553). However, in a manner fully consistent with South Carolina law, the Court of Appeals correctly declined to consider that petition at that time. (App'x p. 554).

Standard of Review

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).

Analysis

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).

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 did not satisfy the required elements necessary for Mckeiver to be able to obtain a new trial based upon it. Critically, that was 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*. Thus, Bennett's affidavit did *not* contain information refuting Mckeiver's knowledge of the methamphetamine pills in his home and did *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 could not 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 could not 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 Mckeiver's trial.[11] 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

[11] 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. (App'x p. 14; pp. 281-282; pp. 302-303; pp. 307-308).

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. 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 had known since the day of the controlled drug transaction that led to his trafficking in methamphetamine charge everything he was 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. 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 could not 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.[12] See State v. Pierce, 263 S.C. 23, 32, 207 S.E.2d 414, 419 (1974) ("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 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, the Court of Appeals correctly denied his abeyance motion. 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 establish the

[12] 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 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. (App'x p. 530; pp. 532-533).

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 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."). Mckeiver's petition for a writ of certiorari should be denied.

II.

The Court of Appeals correctly held 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 Mckeiver'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 Mckeiver's first opportunity to do so as was necessary for it to conceivably be a valid one.

Mckeiver maintains the Court of Appeals erred by failing to find the trial judge abused his discretion 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, Mckeiver maintains the seven "affidavits" presented to the trial judge "required an evidentiary hearing" in which the affiants and the two jurors identified by the affiants could be questioned. To the contrary and just as the trial judge concluded, Mckeiver 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 Mckeiver's first opportunity to do so, which constituted a waiver of Mckeiver'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, and the Court of Appeals correctly affirmed on appeal. Mckeiver's petition for a writ of certiorari should be denied.

Relevant Facts

At the outset of Mckeiver's trial, the trial judge conducted voir dire of the prospective jurors. (App'x pp. 10-19). 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 Mckeiver—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 Mckeiver that would prevent them from being fair and impartial; and (4) knew of any reasons why they should not serve on the jury. (App'x pp. 10-11; pp. 13-14). Notably, neither Juror # 6 nor Juror # 53 responded to any of those questions, and both were ultimately seated on the jury that convicted Mckeiver as indicted at the conclusion of trial. (App'x pp. 10-11; pp. 21-22; p. 29; pp. 83-84; p. 95; pp. 356-360).

Shortly after Mckeiver was convicted, defense counsel filed a motion seeking a new trial. (App'x pp. 388-400). 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 Mckeiver, which he maintained entitled Mckeiver to a grant of a new trial due to jury misconduct. (App'x pp. 388-400).

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. (App'x pp. 388-400). In one dated just three days after the verdict, an individual identified as Treasury Smith claimed Juror # 6 knew who Mckeiver 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 Mckeiver, and indicated her close friend's family wanted her to find Mckeiver

guilty. (App'x pp. 388-400). In another dated a single day after the verdict, an individual named Terrell McBride claimed Juror # 53 was his neighbor, both Juror # 53 and Mckeiver had been to his home, and the two "might" have spoken there. (App'x pp. 388-400). In one notarized *the same day as the verdict*, a different individual claimed Juror # 53 was aware of Mckeiver and sometimes looked at him "with a face of disgust." (App'x pp. 388-400). In another dated one day after the verdict, an individual identified as Davonte Ladson claimed Juror # 53 greeted Mckeiver at McBride's house, knew Mckeiver, "would acknowledge" Mckeiver, and constantly made social media posts about the trial. (App'x pp. 388-400). In yet another dated a day after the trial's end, Winter Bennett claimed Juror # 53 had spoken to her and Mckeiver numerous times and had "even" shaken Mckeiver's hand. (App'x pp. 388-400). In an unnotarized one dated five days after the trial, an individual identified as Demetris Johnson claimed he was present in support of Mckeiver throughout trial and believed Juror # 53 should not have served on the jury because he "saw and shook" Mckeiver's hand numerous times and knew Mckeiver well. (App'x pp. 388-400). 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 Mckeiver that Stackhouse-Bey admittedly did not personally witness. (App'x pp. 388-400). 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 Mckeiver had arguments with Juror # 6's child's father. (App'x pp. 388-400).

In response to the motion and accompanying "affidavits," the trial judge convened a hearing on the matter. (App'x p. 402). 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. (App'x pp. 402-413). Based on that, defense counsel contended the trial judge should grant Mckeiver a new trial or, in the alternative, conduct an evidentiary hearing on the matter. (App'x pp. 415-416). In rebuttal, the solicitor noted all the "affidavits" were written by Mckeiver's friends while many of the affiants were present in the courtroom for some or all of Mckeiver's trial, which he maintained rendered the "affidavits" suspect since those individuals only came forward with their claims *after* being disappointed in the verdict. (App'x p. 417; pp. 421-422). Moreover, since the jurors were not asked during voir dire if they simply knew who Mckeiver 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.[13] (App'x pp. 418-420; p. 423).

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. (App'x p. 426). 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. (App'x p. 427). 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. (App'x p. 427).

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[13] 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 Mckeiver. 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. (App'x pp. 427-428).

Subsequent to that, Mckeiver appealed, arguing—in part—the trial judge reversibly erred by failing to grant a new trial or an evidentiary hearing based on the post-trial "affidavits" that contained claims of jury misconduct. (App'x pp. 455-461). The Court of Appeals affirmed. (App'x pp. 559-560). In affirming, the Court of Appeals found the trial judge did not abuse his discretion by denying the request for a new trial since he conducted a hearing on the matter, the reliability and credibility of the "affidavits" was called into question during that hearing, and Mckeiver had ample opportunity during trial to notify both defense counsel and the court of potential juror biases. (App'x pp. 559-560).

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 a 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.").

Analysis

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). Significantly, a juror's 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.").

Subsequent to Mckeiver's trial, the test for evaluating a claim of juror concealment was revised. See State v. Rowell, 444 S.C. 109, 115, 906 S.E.2d 554, 557 (2024) ("We believe the time has come to abandon the intentional versus unintentional distinction."). Pursuant to that revised test, "when a juror untruthfully answers or fails to answer a material voir dire question, the juror's bias may not be presumed, and a new trial may be ordered only when prejudice is proven by showing the concealed information reveals a potential for bias *and* would have made an objectively material difference in the moving party's use of a peremptory strike or resulted in a successful challenge for cause." Id. at 115-116, 906 S.E.2d at 557.

Importantly though, for 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).

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 Mckeiver's claim of jury misconduct. Initially, that is true because—just as the trial judge found—Mckeiver 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,

Mckeiver 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)). And, because the "affidavits" that constituted the *sole* support for Mckeiver'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 Mckeiver'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). 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 Mckeiver'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 Mckeiver himself, Mckeiver'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. 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 Mckeiver's case, and, just as the Court of Appeals correctly found, there were and 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."). Mckeiver's petition for a writ of certiorari should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the petition for a writ of certiorari should be denied.

Respectfully submitted,

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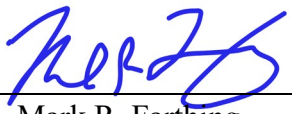
BY: 
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