STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Clifton Newman, Circuit Court Judge

Opinion No. 2015-UP-365 (S.C. Ct. App. filed 7/22/2015)

11-GS-40-04656

THE STATE,

RESPONDENT,

V.

AHMAD JAMAL WILKINS,

PETITIONER

Appellate Case No. 2015-001968

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on August 19, 2015. App. 26-27.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in holding that a jailhouse snitch's testimony about Petitioner's alleged admission to a prior bad act involving the deceased was admissible as an admission for the charged offenses?

II. Did the Court of Appeals err in finding the trial judge's refusal to allow Petitioner to present the testimony of witnesses in his case-in-chief to challenge the integrity of the police investigation in violation of Petitioner's state and federal constitutional rights to present a defense as unpreserved where the record demonstrated the issue was raised to and ruled upon by the trial judge and raised accordingly in the brief?

III. Did the Court of Appeals err in finding the trial judge's erroneous denial of Petitioner's ability to call witnesses in surreply was unpreserved for review where the issue was raised to and ruled upon by the trial judge and accordingly presented in the brief?

IV. Did the Court of Appeals err in finding Petitioner had failed to demonstrate the suppressed evidence was material to his guilt or punishment and therefore, he was not entitled to a mistrial where the prosecution suppressed evidence that a police officer had been implicated as the murderer and an internal investigation ensued?

STATEMENT OF THE CASE

Procedural history

A Richland County grand jury indicted Petitioner for murder on October 5, 2011 (2011-GS-40-4656). R. 1208. The prosecution, represented by Kathryn Luck Campbell, Meghan Walker, and Nicole Simpson, called the case for trial on April 9, 2012 before the Honorable Clifton Newman. Brian Shealey, Luke Shealey, and James May represented Petitioner. R. 1. The jury found Petitioner guilty of murder. R. 1090, ll. 14-17. Judge Newman sentenced Petitioner to life imprisonment. R. 1099, ll. 6-7; R. 1210. By a written motion filed April 20, 2012, Petitioner moved for a new trial. R. 1196. Judge Newman presided over a hearing on the motion on June 1, 2012. R. 1101. Ultimately, Judge Newman denied the motion. R.1181, l. 23 – R. 1184, l. 2.

Petitioner filed a timely notice of appeal. Petitioner filed his brief with the South Carolina Court of Appeals in June 2014. After an oral argument on May 6, 2015, the Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion. App. 1-4; State v. Wilkins, Op. No. 2015-UP-365 (S.C. Ct. App. filed July 22, 2015). On July 31, 2015, Petitioner filed his petition for rehearing. App. 1-25. The Court of Appeals denied the petition for rehearing on August 19, 2015. App. 26-27. Petitioner now seeks a writ of certiorari.

Facts Material to Consideration of the Questions Presented

On February 3, 2009, the Bethel Bishop Apartments staff found the body of Ebony Williams, the deceased, in her apartment. R. 92, ll. 12 – 24; R. 95, l. 9 – R. 100, l. 2; R. 109, ll. 15-20; R. 111, l. 3 – R. 112, l. 16. There were no signs of forced entry, and the apartment staff had to

use a key to gain entry. R. 106, l. 21 – R. 107, l. 7; R. 114, ll. 12-14. During the botched[1] investigation that followed, the police obtained the deceased's phone records, which showed phone calls between the deceased and Petitioner shortly before her death. R. 149, l. 16 – R. 150, l. 14. Despite the existence of multiple promising leads and an initial claim of following *every* lead, police investigators admitted to focusing *solely* on Petitioner after learning of the phone records. R. 606, ll. 4-5; R. 607, ll. 10-12.

Although the apartment clearly had burned by fire, the state's expert found no ignitable liquids. R. 159, ll. 11-13. Nevertheless, the chief fire investigator for the City of Columbia concluded the fire was "the direct result of human hands." R. 180, ll. 4-17. The state's pathologist, Dr. Bradley Marcus, determined the cause of death was asphyxia by ligature strangulation. R. 571, ll. 19-24. However, he was unable to determine a time of death. R. 590, ll. 4-7. Dr. Marcus found no signs of sexual assault. R. 580, ll. 3-11.[2] Dr. Marcus concluded the deceased had died before the fire started. R. 582, l. 1 – R. 583, l. 5. The toxicology report revealed the deceased had not ingested alcohol, but she had recently ingested cocaine and was a chronic user of cocaine. R. 588, ll. 1-20.

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[1] Although the Columbia Police Department (CPD) lost the sexual assault kit for several months, they *incredibly* found the kit after the DNA analyst with Richland County Sheriff's Office (RCSO) repeatedly requested the kit for testing. Although RCSO placed the kit into a sealed box and delivered it to the CPD and the box was returned to RCSO sealed, the kit was not in the box. Clearly, the seal on the box had been broken, the kit removed, and the box re-sealed. R. 517, l. 18 – R. 518, l. 1; R. 539, l. 20 – R. 542, l. 20. Despite the obvious tampering with evidence, CPD denied any tampering or even that the kit had been lost. Rather, the explanation offered was that "occasionally," there are "times when this might happen, that an individual piece doesn't make it into a box." R. 457, l. 20 – R. 458, l. 21.

[2] The DNA analyst opined that the kit was negative for semen, and therefore, the analyst performed no more testing initially. R. 519, ll. 15-17. When the analyst tested the kit that was mysteriously found by the CPD, the analyst found no male profile. R. 520, ll. 1-13. Notably, the DNA analyst failed to test the kit for the deceased's DNA to ensure that the mysteriously found kit was indeed the kit used to collect samples from the deceased.

The state's DNA expert from the Richland County Sheriff's Office (RCSO), Rachel Grant, claimed she found a mixture of DNA from at least three contributors on a glove found in the deceased's apartment. R. 502, ll. 15-24. Grant further claimed that Petitioner's DNA could not be excluded from the mixture. R. 505, ll. 3-8. In direct contradiction to her report and to accepted practices, Grant testified that this meant Petitioner's DNA "was included in this mixture." R. 505, ll. 9-11; R. 511, ll. 1-12; R. 525, l. 16 – R. 526, l. 6; R. 527, ll. 3-21; R. 558, l. 21 – R. 559, l. 16. Grant was forced to clarify that due to the type of DNA testing she was conducting, the DNA results could not exclude Petitioner *or any of his paternally related relatives*, including his brother, who was employed as a maintenance man at the apartment where the deceased died. R. 512, ll. 1-7. On the cloth material that was used as a ligature, Grant found a mixture of DNA from at least four male contributors. Although she testified that Petitioner's DNA "was included in the mixture," which was in direct contradiction to her report and accepted practices, she was forced to admit the testing actually revealed that Petitioner or any paternally related male *could not be excluded* as a contributor to the mixture. R. 513, ll. 8-20.

ARGUMENT

I. The Court of Appeals erred in holding that a jailhouse snitch's testimony about Petitioner's alleged admission to a prior bad act involving the deceased was admissible as an admission for the charged offenses.

The Court of Appeals held that "[d]espite [Patruan] Hare's testimony that Wilkins admitted to choking the victim but claimed it was not on the night of the victim's death, the record is clear Hare's testimony pertained to the murder of the victim and was not prior bad act evidence." This conclusion conflicts with the record. Although the state attempted to treat Hare's testimony as an admission by Petitioner, the testimony was clear – it was an alleged **prior** bad act. A detailed review of the record is required to demonstrate how the Court's opinion misapprehended the evidence presented.

Before trial, Petitioner moved to exclude the testimony of Hare, a jailhouse snitch, pursuant to Rules 401, 403, and 404(b) of the South Carolina Rules of Evidence. R. 143, ll. 1-8. Hare had provided a statement to law enforcement claiming to be Petitioner's confidante while the two were housed together at the jail. Petitioner explained that Hare's statement could be summarized as follows: "'They started to argue. He choked the bitch but said it wasn't the same night that she ended up dead.'" R. 61, ll. 14-21. Thus, the proposed testimony by Hare would be that Petitioner had choked the deceased on some unknown night *prior* to the night of her death. R. 61, l. 22 – R. 62, l. 2.

The prosecutor made clear that the evidence was being offered to show character and conformity therewith, when the prosecutor stated:

> The fact that he made [an] admission of choking her is specifically pretty significant in this case because she died as a result of that. There's nothing unusual at all in my experience - - Your Honor, I'm sure you've had more experience than I have - - for a

defendant to minimize their involvement but to make certain admissions to underlying bad acts.

R. 63, l. 5; R. 65, l. 21 – R. 66, l. 3. The judge ruled: "As far as he choked her but she didn't die that night, the evidence the state has is that the death occurred between some hour and some other hour when her body was discovered the next day. All of that would be up to the jury to kind of listen and figure out the extent to which this may implicate this defendant or not." R. 66, ll. 8-17.

While the two were incarcerated, Hare questioned Petitioner about his pending case and took notes of their conversations. R. 376, ll. 2-4. Hare contended that Petitioner said he went to the deceased's house to drink and smoke. When Petitioner indicated he wanted sex with the deceased, she "wasn't with it." R. 380, ll. 7-14. Then, they argued. Petitioner said "he choked the bitch." **However, this was not the same night that she died.** R. 380, l. 21 – R. 381, l. 1.

Very confusingly, and exemplifying why Hare should have never been allowed to testify, Hare claimed that Petitioner said he had strangled the deceased with a bathrobe and burned the deceased. R. 381, ll. 7-10. After objections were made, Hare corrected himself to say that Petitioner explained the deceased had died as a result of strangulation. R. 381, ll. 23-24. Additionally, **Petitioner never told Hare that he killed the deceased**. R. 399, l. 14 – R. 400, l. 2.

Hare's testimony was clear: Petitioner's alleged statement related to events occurring prior to the deceased's death. The determination by the Court of Appeals distorts the record and must be reversed. Although the trial judge should have held Hare's testimony was inadmissible as a prior bad act, the trial judge's ruling to admit the testimony and inability to limit the prosecutor's overzealousness permitted the prosecutor to twist Hare's testimony in such a way to appear that Petitioner had admitted to the crimes, when the *actual* testimony revealed otherwise.

South Carolina precludes the introduction of evidence of a defendant's other crimes, wrongs, or acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) identity, (3) a common scheme or plan, (4) the absence of mistake or accident, or (5) intent. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). In fact "[e]vidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged." State v. Johnson, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987). As explained by this Court in State v. Wesley Smith, 391 S.C. 353, 361, 705 S.E.2d 491,495 (2011), in order to introduce evidence of some other act by the defendant under one of the exceptions, the prosecutor must lay a proper foundation. At the outset, the prosecutor must prove by clear and convincing evidence that the defendant committed the other act, if the defendant was not convicted of the act. Id. (citing State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008)). Next, the prosecutor must articulate the logical connection between the other act and one of the five exceptions listed in Rule 404(b), SCRE. Id. (citing State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006)). This requires a showing of how the evidence of the other act will assist the fact-finder in understanding a material issue in the case related to one of the Rule 404(b), SCRE, exceptions. Id. If the trial judge determines the prosecutor has satisfied both requirements, then the judge must determine whether the probative value outweighs the prejudicial effect pursuant to Rule 403, SCRE. Id. (citing State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009)).

Evidence of other crimes or bad acts is admissible to show a common scheme or plan when there is "a connection between the prior bad act and the present crime." State v. Parker, 315 S.C. 230, 233, 433 S.E.2d 831, 832 (1993)(citing State v. Rivers, 273 S.C. 75, 254 S.E.2d 299 (1979)). The connection "must be more than just a general similarity." Id. (citing State v. Stokes, 279 S.C.

191, 304 S.E.2d 814 (1983)). The prior bad act evidence must have a "close degree of similarity" to the crimes charged. State v. Clasby, 385 S.C. 148, 155, 682 S.E.2d 892, 896 (2009). "The evidence must be logically relevant to the particular purpose or purposes for which it is sought to be introduced." State v. Bell, 302 S.C. 18, 27, 393 S.E.2d 364, 369 (1990).

In the instant matter, the prosecution failed to demonstrate how the incident alleged by Hare was logically relevant to show a common scheme or plan by Petitioner. At best, the evidence showed a general similarity – choking. However, there was no indication that a ligature was used previously or that a fire had been set. Further, there was no temporal connection because Hare provided no time for when the alleged prior bad act occurred except that it was not the night that the deceased died.

Another exception is identity. In State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006), this Court held that a defendant's alleged statement to another that he was fleeing from police because a female had accused him of murdering someone and he was out on bond for that murder charge "in no way" identified the defendant as the person who murdered the victim. Rather, the evidence only illustrated that the defendant knew he had been accused of murder and knew the name of the witness. Id. at 211, 631 S.E.2d at 267. Similarly, Petitioner's alleged statement to Hare that he had choked the deceased at some unknown date in no way identified Petitioner as the person who used a ligature to strangle the deceased and set her apartment afire on February 3, 2009.

Motive and intent are additional exceptions to the rule prohibiting the introduction of prior bad acts. As these exceptions "are closely related," Petitioner will discuss them together. See State v. Fonseca, 383 S.C. 640, 648, 681 S.E.2d 1, 4 (Ct. App. 2009). On this point, this Court has explained that:

> [I]n a prosecution for homicide, evidence of other crimes committed by the defendant which are in time and circumstances so intimately connected with and a part of the crime with which he is being charged as to show a motive for the commission of the homicide or a state of mind indicating a purpose for its commission, is admissible to establish such motive or state of mind.

State v. Grainger, 275 S.C. 417, 421, 272 S.E.2d 175, 176 (1980). In State v. Sweat, 362 S.C. 117, 124-125, 606 S.E.2d 508, 512 (Ct. App. 2004), the Court of Appeals held that a prior criminal domestic violence incident between the defendant and victim in an assault and battery trial was admissible to show intent and motive where the victim had pressed charges against the defendant for the prior incident, the defendant had gone to jail for the incident, and the assault and battery occurred only eleven days after his release from jail.

In State v. Plyler, 275 S.C. 291, 296, 270 S.E.2d 126, 128 (1980), this Court allowed evidence of a verbal altercation between the victim and the defendant three days prior to the killing. This Court explained that "[e]vidence of previous difficulties or ill feelings between the accused and the victim and of facts showing the cause of such difficulties or ill will is admissible on the question of motives *where there is some connection of cause and effect between the evidence and the crime.*" Id. (emphasis added). Only where the prior bad act evidence shows motive on the part of the accused and is not so remote in time as to negate its probative value may the evidence be admitted. Id.

Notably, Hare provided no time for when this alleged incident occurred. It could have occurred one week prior to the deceased's death or years prior to her death. Thus, the temporal proximity aspect is completely lacking; therefore, the prosecution failed to show the alleged prior choking was so intimately connected to the deceased's death as to show a motive. There was no evidence the deceased pressed charges against Petitioner for the alleged choking as in Sweat, supra.

The record disclosed absolutely no connection of cause and effect between the prior bad act evidence and the charges against Petitioner.

"Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." Fletcher, 379 S.C. at 24, 664 S.E.2d at 483; see also State v. Pierce, 326 S.C. 176, 178, 485 S.E.2d 913, 914 (1997); State v. Cutro, 332 S.C. 100, 106, 504 S.E.2d 324, 327 (1998).[3]

During the pre-trial hearing on this matter, the prosecution failed to offer *any* evidence to support a finding that Petitioner had choked the deceased on some date prior to her death. The only evidence of the alleged prior choking was from a noted jailhouse snitch, who had lied to police previously and sought a reward for his testimony. Hare offered no personal observations of the alleged choking or any corroborative evidence. He simply made bald allegations in an effort to better his position within the federal prison system.

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[3] This case differed sharply from other cases where the Court of Appeals has found clear and convincing evidence of the prior bad act. See State v. Scott, 405 S.C. 489, 748 S.E.2d 236 (Ct. App. 2013)(finding clear and convincing evidence of a prior bad act where the parties related their positions during a hearing and written motions and a brief, the proffered testimony was very specific and appeared credible); State v. Martucci, 380 S.C. 232, 257, 669 S.E.2d 598, 611 (Ct. App. 2008)(finding clear and convincing evidence where the witness testified about his direct observations of prior incidents and other witnesses testified about bruises and burns in this homicide by child abuse case); State v. Gillian, 373 S.C. 601, 610, 646 S.E.2d 872, 877 (2007)(finding the evidence of the defendant's involvement in a prior residential burglary to be clear and convincing where several witnesses were able to testify to his involvement and he conceded the issue); State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004)(finding clear and convincing evidence where the alleged victim testified that the defendant previously assaulted her, the defendant was arrested and incarcerated, and another witness testified to having seen bruises on the alleged victim's arm following the assault).

Even if this Court were to determine that the proffered evidence satisfied one of the exceptions to Rule 404(b), SCRE and was proven by clear and convincing evidence, the trial judge erred in admitting the evidence as violative of Rule 403, SCRE. Hare's claims regarding Petitioner's alleged statement about choking the deceased at some unknown time in the past was not probative of whether Petitioner had choked the deceased on February 3, 2009 with her bathrobe belt and set her apartment on fire. The only value the evidence offered was to paint Petitioner as a bad person. The danger of unfair prejudice was great as the evidence would lead a jury to conclude that if he had done it before, he would do it again. Further, the danger of unfair prejudice was exacerbated when Hare's testimony was twisted by the prosecution to indicate that Petitioner had admitted to killing the deceased. Obviously, the mischaracterization of the conversation created a high level of unfair prejudice and misled and confused the jury. In balancing the minimal probative value against the significant danger of unfair prejudice and misleading of the jury, the conclusion is obvious – Hare's testimony should have been excluded.

II. The Court of Appeals erred in finding the trial judge's refusal to allow Petitioner to present the testimony of witnesses in his case-in-chief to challenge the integrity of the police investigation in violation of Petitioner's state and federal constitutional rights to present a defense as unpreserved where the record demonstrated the issue was raised to and ruled upon by the trial judge and raised accordingly in the brief.

A.L. Thomas, one of the lead investigators on the case, responded to the fire at the deceased's apartment. R. 595, ll. 7-11. During the investigation, Thomas claimed he "followed up on every name and so forth." R. 606, l. 4-5. When Thomas received the deceased's phone records, the direction of the investigation changed. R. 607, ll. 10-12. The most important thing in the investigation became determining who had exchanged approximately ten calls with the deceased

between 3 a.m. and 4:13 a.m. R. 607, l. 24 – R. 608, l. 16. Thomas soon learned that the number belonged to Petitioner. R. 608, l. 19 – R. 609, l. 19.

On February 20, 2009, Thomas interviewed Petitioner's girlfriend who stated that Petitioner arrived home at 3:55 a.m. on the morning of February 3, 2009. R. 610, l. 14 – R. 611, l. 22. That same day, Thomas interviewed Petitioner, who admitted he was the deceased's drug dealer. He further admitted to delivering cocaine to the deceased during the last portion of January or early part of February. R. 613, ll. 1-21. Two years later, the police arrested Petitioner for the deceased's murder. R. 635, ll. 16-22.

During cross-examination, Petitioner questioned the quality of Thomas' investigation – particularly, his sworn testimony that he followed up on *every* lead. R. 655, ll. 2-10. Thomas admitted that he spoke to Sierra Austin as part of the investigation. Austin provided the names and descriptions of several individuals involved with the deceased. R. 656, l. 13 – R. 660, l. 5.

Thomas admitted that the video obtained from the apartment complex was time stamped incorrectly. Thomas claimed the video was four hours slow. R. 700, ll. 18-20. However, Petitioner demonstrated irrefutably that the video footage was three hours and seventeen minutes slow. Therefore, the video showed the suspect walking up the hill in the vicinity of the deceased's apartment at 3:37 a.m., not 4:20 a.m., as Thomas claimed to the jury and in the warrants he requested. Further, the video showed the suspect walking down the hill at 4:13 a.m., not 4:56 a.m., as Thomas claimed to the jury and in the warrants he requested. R. 705, l. 4 – R. 713, l. 9.

The video also showed a police car arrive at the apartment complex at 4:30 a.m. The car idled in the parking lot until 4:57 a.m. This was hours before the report of the death. R. 714, l. 8 – R. 716, l. 6. Thomas admitted that hours later, when the police were at the scene, a narcotics officer

– Melron Kelly – located bedding in a dumpster where the police car sat idling that morning. R. 682, ll. 13-25.

Kevin Reese, the other lead investigator on the case, spoke to a group of women at the scene as part of his investigation. R. 756, l. 21 – R. 757, l. 1. Although Reese did not recall speaking with Tasha Praylow, he admitted he "could have." R. 757, ll. 2-8. Petitioner probed:

> Q. Do you remember Tasha Praylow asking you or telling you that you-all need to look at [Melron] Kelly on this case?
>
> A. I think she might have told somebody else that because I heard something about that, but I don't know what she was - - no one ever told me that.
>
> Q. Okay. You heard something about it?
>
> A. Uh-huh.
>
> Q. Okay. Where is this in your notes?
>
> A. I don't have notes.
>
> Q. Okay. But you remember hearing something, "You need to check out Kelly," and as a lead investigator, what did you do to investigate Melron Kelly as a suspect in this case?
>
> A. Probably about as much as I would have done if somebody would have told me you need to check out Jim May.

R. 757, l. 13 – R. 758, l. 2. Petitioner continued with this questioning by clarifying that Reese and other investigators had heard that the police needed to investigate Kelly concerning the murder. Reese responded, "Yeah, one time or so and I heard Melron talking about it and everybody thought it was a joke." R. 765, ll. 6-11. Despite learning of possible criminal activity by Kelly, Reese did nothing. R. 765, ll.12-18. When Petitioner asked if Reese was aware of a rumor that Kelly had impregnated the deceased, the prosecution objected and the judge sustained the objection and instructed the jury to disregard it. R. 765, ll. 19-24.

Petitioner proffered the testimony of three witnesses: Tasha Praylow, Sierra Austin, and Dawn Davis Young. Austin lived next door to the deceased. R. 828, ll. 15-17. The deceased told Austin that she was pregnant by Melron Kelly. R. 831, ll. 1-5. The deceased asked Young about "messing basically around with an officer." R. 839, ll. 11-17. Young informed the deceased that she would not mess around with an officer. R. 839, ll. 17-18.

The prosecution objected to the testimony of all three witnesses as hearsay and third-party guilt. R. 844, ll. 3-11. Petitioner countered that the proffered testimony attacked the integrity of the investigation. R. 845, l. 22 – R. 846, l. 9. Judge Newman ruled that Petitioner's first proffered witness could testify because the testimony was an exception to hearsay in that it went to the deceased's state of mind that she was fearful that Officer Kelly was going to kill her. However, the judge excluded the testimony of Austin and Young **without further elaboration**. R. 851, ll. 1-8.

Thereafter, Praylow testified before the jury that she lived in Bethel Bishop Apartments and saw the deceased at 11:30 on the night of her death. The deceased confided in Praylow that she was scared because Kelly, a police officer, was coming to kill her. R. 855, l. 5 – R. 856, l. 1; R. 857, ll. 8-9. Although Praylow did not tell Reese about her encounter with the deceased, she did ask Reese if Kelly was being investigated. Reese quickly informed Praylow that Kelly was not a suspect. R. 856, ll. 2-9.

The Court of Appeals held that the lower court excluded the proffered testimony as hearsay and that Petitioner had failed to challenge the hearsay ruling on appeal. Petitioner respectfully disagrees with the Court's construction of the objection and ruling. Judge Newman ruled that Petitioner's first proffered witness could testify because the testimony was an exception to hearsay in that it went to the deceased's state of mind that she was fearful that Officer Kelly was going to kill her. However, the judge excluded the testimony of Austin and Young *with no explanation.*

Specifically, the judge stated "So based on all of that, it's my ruling that the statement of the first witness, Praylow, is admissible based on the state-of-mind exception, that she was fearful that Officer Kelly was coming to kill her. The statements of these other witnesses about the victim being pregnant or the victim being in a relationship and wants to know, figure out how to get out of the platonic relationship, those things are excluded. I'm excluding the second, two and three, and admitting No. 1." R. 851, ll. 1-10.

Quite simply, the testimony of the other two witnesses was not being offered for the truth of the matter asserted – that the deceased was pregnant or that the deceased questioned how to end a relationship. In fact, the medical testimony was dispositive on the pregnancy aspect – the deceased was *not* pregnant. Therefore, Petitioner could not offer the testimony to prove the truth of the matter asserted. Rather, the evidence was not being offered to prove its veracity, it was being offered to impugn the integrity of the investigation. Petitioner respectfully requests this Court review the ruling made by the trial judge, find this issue preserved for review and properly raised on appeal, and decide the issue on the merits.

The United States Constitution guarantees a criminal defendant the right to present a complete defense through the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment. Crane v. Kentucky, 476 U.S. 683, 690 (1986); State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986)(holding the Sixth Amendment "constitutionalizes" the right to present a defense in a criminal trial). "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane, 476 U.S. 683, 690 (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)). South Carolina's Constitution provides similarly: "Any person charged with an offense shall enjoy the right ... to be fully heard in his defense...." S.C.

Const. art. I, § 14; see also S.C. Code Ann. § 17-23-60 ("Every person accused shall, at his trial, be allowed ... to produce witnesses and proofs in his favor....").

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." Taylor v. Illinois, 484 U.S. 400, 408 (1988)(citing Chambers v. Mississippi, 410 U.S. 284, 302 (1973)). "'The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.'" Id. at 408-409 (quoting United States v. Nixon, 418 U.S. 683, 709 (1974)). "'The right to offer the testimony of witnesses ... is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.'" Id. at 409 (quoting Washington v. Texas, 388 U.S. 14, 19 (1967)). The United States Supreme Court declared "'[t]his right is a fundamental element of due process of law.'" Id. Undermining the "ostensible integrity of the investigation" is one method by which a defendant may present a defense. See Kyles v. Whitley, 514 U.S. 419, 448 (1995).

"Evidence is relevant if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears." Schmidt, 288 S.C. at 303, 342 S.E.2d at 403; see also Rule 401, SCRE. Further, "[e]vidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." Id. (citing Toole v. Salter, 249 S.C. 354, 154 S.E.2d 434 (1967)); see also Rule 402, SCRE. In State v. Page, 406 S.C. 272, 287, 750 S.E.2d 623, 631 (Ct. App. 2013), the Court of Appeals held the trial judge abused his discretion by finding the proffered testimony offered by the defendant was not relevant. Page sought to introduce a text message and testimony by a witness that the alleged victim had admitted to the witness that she had lied to the police. Id. at 288, 750 S.E.2d at 632.

The trial judge erred in refusing Petitioner's request to present the testimony of Davis and Austin in his case-in-chief because the evidence indicated the police had failed to follow-up on leads concerning "one of their own" – Melron Kelly. Davis and Austin would have provided the link between the testimony of Praylow concerning the deceased's fear of Kelly, the appearance of a police officer's car on the video outside of the deceased's apartment at the time of her murder, the appearance of Kelly at the scene the following day, and the unexplained loss of a key piece of evidence – the rape kit – by the Columbia Police Department (CPD). This denial of the presentation of witnesses denied Petitioner the most fundamental of his rights - to present a complete defense. Petitioner's case-in-chief sought to cast doubt on CPD's investigation and to show a motivation for such shoddy work - allegations of improprieties between a fellow officer and the deceased and the potential murder of the deceased by that officer. This denied Petitioner his right to present his version of the facts to the jury so it may decide where the truth lay.

III. The Court of Appeals erred in finding the trial judge's erroneous denial of Petitioner's ability to call witnesses in surreply was unpreserved for review where the issue was raised to and ruled upon by the trial judge and accordingly presented in the brief.

The Court of Appeals held Petitioner's failure to challenge the trial court's purported ruling that the proffered testimony to be used in surreply was hearsay rendered the issue not cognizable on appeal. Respectfully, the trial judge's refusal to permit surreply had nothing to do with any concern about the testimony being hearsay. As demonstrated supra, the testimony was not being offered for the truth of the matter asserted. Petitioner respectfully requests this Court examine the ruling made by the trial judge, find this issue preserved for review and properly raised on appeal, and decide the issue on the merits.

Petitioner incorporates the discussion of relevant facts contained in Issue II, supra. After Praylow testified for the defense, the prosecution presented Reese as a reply witness, who claimed he had no contact with Praylow "whatsoever." R. 945, ll. 11-19. Additionally, the prosecution called Melron Kelly as a reply witness. Kelly admitted that he knew the deceased because she lived in the neighborhood where he was a residential officer at the start of his career. R. 950, ll. 6-14. Kelly further admitted that he was at the crime scene on February 3, 2009 "to assist the on-scene investigators." R. 951, ll. 10-14. Kelly denied threatening the deceased at any time prior to her death. R. 951, ll. 22-24. He further denied any contact with the deceased on February 2 or February 3. R. 951, l. 25 – R. 952, l. 3. He flatly denied knowing the deceased in any personal capacity or having any personal contact with her. R. 952, ll. 10-11. He had no dealings with the deceased other than "[j]ust knowing her as a juvenile growing up in the neighborhood." R. 952, ll. 18-21. He unequivocally denied threatening to kill her. R. 952, ll. 12-17.

Kelly claimed the residents of Bethel Bishop resented the police and were unhelpful in solving crimes. Further, he claimed it was not uncommon for rumors about police officers to be started there. R. 953, ll. 15-25. During the summer of 2009, Kelly claimed he took time off from work to be with his wife and child. R. 954, ll. 3-17. During that time he "was notified by one of [his] subordinate officers that an informant was telling them that [Kelly] had been arrested for the murder" of the deceased. R. 954, ll. 18-22. Kelly denied being arrested, and claimed he contacted Internal Affairs regarding the allegation. He prepared a written statement and asked the office to investigate. Nothing developed, however. R. 955, ll. 2-12.

On cross-examination, Kelly claimed he never had a sexual relationship with the deceased. R. 958, ll. 21-25. When Petitioner asked, "It wouldn't be good if she claimed that she was pregnant by you either, would it?" the prosecution objected. The judge excused the jury to take up the

prosecution's matter of law. R. 959, l. 25 – R. 960, l. 16. Inexplicably, the prosecution claimed the reply was limited to whether Kelly had threatened the deceased. Petitioner pointed to questions asked by the prosecution on direct examination going beyond Kelly having threatened the deceased to include whether Kelly even had a personal relation with the deceased at all. Of course, Kelly had denied such a relationship. R. 960, l. 19 – R. 961, l. 7. Petitioner noted that he had a witness prepared to testify that the deceased claimed to be pregnant by Kelly. R. 961, l. 13 – R. 962, l. 17.

After the state rested its reply case, Petitioner moved to call Austin and Davis as witnesses. R. 972, ll. 23-25. Petitioner explained that Austin and Davis would be in response to the state's reply witnesses, particularly, Kelly. R. 973, ll. 1-3. The judge asked "what would you call that?" R. 973, ll. 4-9. Petitioner responded, "Sur-reply." R. 973, l. 10. The judge then denied the motion. R. 974, l. 14. He elaborated that the defense could not create issues that compelled the state to reply, and "then call additional witnesses to further extend the trial through sur-rebuttal." He refused to exercise his discretion to permit Petitioner to present the testimony of Austin and Davis. R. 974, ll. 14-24.

Later, the judge cited State v. Watson, 353 S.C. 620, 579 S.E.2d 148 (Ct. App. 2003) to support his ruling. R. 975, ll. 22-23. According to Judge Newman, sur-rebuttal is allowed where "new matter or new facts are injected for the first time in rebuttal, especially where the evidence offered in sur-rebuttal is for the first time made competent by the evidence introduced by plaintiff in rebuttal and could or should have been entered at an earlier time, then it's not new matter." R. 976, l. 24 – R. 977, l. 4. The judge then explained that whether Kelly had anything to do with the death of the deceased was brought up through Petitioner's case, and therefore the proffered testimony was not "new matter." He determined "[t]hese other issues [were] collateral issues" with no bearing on the case. R. 977, ll. 6-15.

As discussed in Issue II, supra, the trial judge's denial of Petitioner's surrebuttal also implicated Petitioner's federal and state constitutional rights to present a defense. "South Carolina courts have approved the use of surrebutal testimony." State v. Watson, 353 S.C. 620, 624, 579 S.E.2d 148, 150 (Ct. App. 2003). In fact, "[a] defendant has a right to respond to **new evidence** given in reply." Camlin v. Bi-Lo, Inc., Store No. 2, 311 S.C. 197, 200, 428 S.E.2d 6, 8 (Ct. App. 1993)(emphasis added)(citing Strait v. City of Rock Hill, 104 S.C. 116, 88 S.E. 469 (1916)). When a party does not inject new evidence, the trial court may allow surrebuttal, but it is not as a matter of right. Bunch v. Charleston & W.C. Ry. Co., 91 S.C. 139, ___, 74 S.E. 363, 365-366 (1912)(stating that "if the plaintiff in reply puts new matter in evidence or makes a new case different from that at first made out, it becomes the right of the defendant to call witnesses in surrebuttal. And it is within the discretion of the court to permit the introduction of evidence in surrebuttal, where the plaintiff in reply has not transgressed the proper bounds of evidence in rebuttal, though in that case the privilege cannot be claimed as a matter of right.").

Petitioner was entitled to surreply as a matter of right because the prosecution injected new evidence – whether Kelly had a personal relationship with the deceased. Despite the prosecutor's blatantly false claim to the trial court that its reply evidence had been limited to a threat, the record is clear the prosecutor's questioning went far beyond a threat. The prosecutor posed questions to Kelly to elicit testimony not only of whether Kelly knew the deceased, but of the nature of their relationship. See R. 952, ll. 10-11; R. 952, ll. 18-21. The prosecution also elicited that Kelly was aware of "rumors" that he had killed the deceased. Kelly allegedly informed Internal Affairs of the "rumors." The evidence that Kelly had no personal relationship with the deceased and that he was aware of rumors of his having killed the deceased was new evidence which granted Petitioner the right to surreply. The trial judge erred in denying Petitioner the opportunity to present two

witnesses who would have contradicted Kelly's testimony concerning the nature of his relationship with the deceased and the "rumors" regarding his involvement in her death.

IV. The Court of Appeals erred in finding Petitioner had failed to demonstrate the suppressed evidence was material to his guilt or punishment and therefore, he was not entitled to a mistrial where the prosecution suppressed evidence that a police officer had been implicated as the murderer and an internal investigation ensued.

As discussed supra, when the prosecution presented Kelly as a reply witness, it was revealed CPD was aware of the allegation that Kelly had been involved in a romantic relationship with the deceased and that he had killed her. Not only was CPD aware of the allegations, but Kelly had prepared a written statement and requested an investigation. R. 955, ll. 2-6. Despite the rumors of Kelly's involvement and the internal investigation, Kelly was never interrogated and never provided DNA samples. R. 970, ll. 19-23.

Petitioner moved for a mistrial based upon the prosecution's withholding of the evidence identifying Kelly as a suspect and having been investigated internally. R. 967, ll. 12-18. The trial judge summarily denied the motion. R. 967, l. 22. The Court of Appeals held Petitioner failed to demonstrate the suppression of evidence was material to his guilt or punishment.[4] The Court of Appeals erred in arriving at this conclusion where the evidence was clearly material to Petitioner's guilt.

[4] The Court of Appeals held Petitioner's argument that disclosure of the evidence would have allowed him to conduct an investigation was not preserved for appeal because it was not raised at the first opportunity but was raised during the motion for new trial. While it is true that Petitioner argued that he should have received the information in a timely manner in order to conduct an investigation during the motion for new trial, such an argument was implicit in his motion for mistrial based on the state's failure to disclose the evidence.

In Brady v. Maryland, 373 U.S. 83 (1963), the United States Supreme Court held that prosecutors must disclose any evidence in the prosecutor's possession that may be favorable to the accused and material to guilt or punishment. See also Kyles v. Whitley, 514 U.S. 419 (1995); Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006). Evidence is favorable to the accused if it is either favorable exculpatory evidence or favorable impeachment evidence. Porter, 368 S.C. at 384, 629 S.E.2d at 356 (citing United States v. Bagley, 473 U.S. 667, 676 (1985)). Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. Id. A reasonable probability is one that undermines confidence in the outcome of the trial. Bagley, 473 U.S. at 678. A defendant need not request Brady evidence; it is incumbent upon the prosecutor to provide such evidence even without a request. United States v. Agurs, 427 U.S. 97, 107 (1976); see also Rule 3.8(d), RPC, Rule 407, SCACR.

In Riddle v. State, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006), this Court confronted a Brady violation arising during post-conviction relief (PCR) proceedings. Days before Riddle's trial, police officer interviewed a key witness in the case who provided a statement inconsistent with his previous statement. The prosecutor failed to disclose this interview to Riddle. The PCR court held the statement was available to Riddle because he could have interviewed the officer who took the statement. This Court disagreed, holding "[n]ot only is it unrealistic to require [Riddle] and his attorneys to reinterview all officers and investigators in the days before the trial, but that is not what Brady requires." As explained by this Court, "[t]he burden is on the solicitor to disclose material evidence which is exculpatory or impeaching." Id.

As early as the summer of 2009, Kelly and CPD was aware of the "rumors" that Kelly had murdered the deceased. Yet, the prosecution failed to disclose any information to Petitioner

of evidence in the possession and control of CPD for such evidence despite numerous and repeated requests for discovery by Petitioner. The very fact that Internal Affairs conducted an investigation should have been disclosed to Petitioner prior to trial to permit him additional investigation. According to Kelly's testimony, Kelly learned of the "rumor" from a subordinate officer, whose name was never disclosed. The subordinate officer learned of the "rumor" from an informant, whose name was never disclosed. Interviewing those individuals and gathering additional information was crucial to Petitioner's defense and his constitutional right to present a complete defense. The trial judge erred in denying Petitioner's motion for a mistrial in light of the prosecution's clear violation of clearly established federal law governing discovery.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 25th day of September, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

SEP 25 2015

SC Court of Appeals

Certiorari to Richland County

Clifton Newman, Circuit Court Judge

Opinion No. 2015-UP-365 (S.C. Ct. App. filed 7/22/2015)
11-GS-40-04656

THE STATE,

RESPONDENT,

V.

AHMAD JAMAL WILKINS,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William Edgar Salter, III, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Ahmad Jamal Wilkins #290911, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, and the S.C. Court of Appeals this 25th day of September, 2015.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 25th day
of September, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

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SEP 25 2015
SC Court of Appeals

September 25, 2015

William Edgar Salter, III, Esquire
Senior Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Re: The State v. Ahmad Jamal Wilkins

Dear Ed:

Enclosed are two copies of the petition for writ of certiorari and the appendix in the above case that I filed with the S.C. Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

SBH/smf

Enclosures

cc: Court of Appeals