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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Letitia H. Verdin, Circuit Court Judge

Appellate Case Number: 2014-001150

The State,
Respondent,

v.

Walter Jacob Merka,
Appellant,

APPELLANT'S FINAL BRIEF

Counsel for Respondent:

Mr. Alan McCrory Wilson
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

Mr. David Spenser
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211

Mr. Walter Wilkins, Solicitor
Thirteenth Judicial Circuit
305 E. North Street
Greenville, SC 29601

Counsel for Appellant:

William G. Yarborough, III
522 N. Church Street
Greenville, SC 29601

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S MOTION FOR A NEW TRIAL BASED ON THE STATE'S FAILURE TO PROVIDE THE DEFENDANT WITH THE VICTIM'S STATEMENTS BEFORE HIS GUILTY PLEA, DESPITE THE DEFENDANT'S REQUEST PURSUANT TO *BRADY v. MARYLAND* FOR ALL INFORMATION THAT MAY HAVE BEEN FAVORABLE TO THE DEFENDANT WITH REGARD TO THE OFFENSES CHARGED AGAINST HIM?

2. DID THE TRIAL JUDGE ERR IN NOT QUESTIONING THE DEFENDANT, MR. MERKA, ABOUT HIS MENTAL HISTORY?

STATEMENT OF THE CASE

This is a criminal appeal arising from the trial and conviction of Mr. Walter Jacob Merka in the Greenville County Court of General Sessions. On August 11, 2013, the defendant Walter Jacob Merka was charged with kidnapping, assault and battery, and carjacking (R. p. 117-119). On December 11, 2013, Mr. Merka waived his indictment and pled guilty to Carjacking and Assault and Battery of a High and Aggravated Nature in a hearing before the Circuit Court (R. p.55, lines 4-9). The Circuit Court then sentenced Mr. Merka to eight (8) years in prison.

On December 12, 2013 Mr. Merka filed a Motion to Reconsider or in the Alternative to Vacate the Sentence (hereinafter abbreviated to Motion to Reconsider), based on newly discovered evidence (R. pg. 45, lines 6-14).

After Mr. Merka's guilty plea hearing, Mr. Merka's undersigned counsel discovered evidence that Mr. Merka had a long history of mental illness (R. p. 46, lines 18-22). On January 9, 2014, the Circuit Court held on a hearing on the Motion to Reconsider, which was then framed as a Motion for New Trial (R. p. 77, lines 2-14 and R. p. 2).

After the January 9, 2014 motion hearing, Mr. Merka submitted a Proposed Order for a New Trial, with Exhibits A-G (R. p. 7). Pursuant to the Circuit Court's request, the exhibits of the proposed order contained evidence to support Mr. Merka's claim of mental illness.

On May 15 2014, The Circuit Court denied Mr. Merka's motion for a new trial (R. p. 5, line 22). On May 27, 2014, Mr. Merka filed a Notice of Appeal. (R. p. 47). Mr. Merka filed an amended notice of appeal on June 9, 2014, amending the appeal to reflect the indictment number rather than the warrant numbers (R. p. 49).

STATEMENT OF THE FACTS

On August 11, 2013, the defendant Walter Jacob Merka was charged with kidnapping, assault and battery, and carjacking (R. p. 117-119). According to the Greer Police Department Incident Report, witnesses reported that the defendant Merka ("Mr. Merka") and the victim Stephanie Brewer ("Ms. Brewer"), who had been in a romantic relationship for a period of time, and were both employees at Home Depot, began to argue at Home Depot (R. p. 120-124, hereinafter ("Incident Report")). Witnesses reported that Mr. Merka and Ms. Brewer argued in the parking lot and that Mr. Merka got into Ms. Brewer's car, driving away with Ms. Brewer allegedly hanging out of the passenger door (R. p. 123, lines 1-6). Thereafter, Mr. Merka was informed via cellular phone that the police were called, and so he returned to Home Depot and was arrested (R. p. 123, lines 1-8).

On August 20, 2013, Greenville County Family Court issued Brewer an order of protection against Mr. Merka (R. p.111, lines 1-5).

On September 16, 2013, Mr. Merka filed a motion pursuant to *Brady v. Maryland* et al, that the Greenville County Solicitor's Office supply to Mr. Merka "...all information in the custody, possession, control, or knowledge of the State, private parties retained by the State, or any law enforcement agency involved in the investigation of the above-captioned case which may be favorable to the defendant with regard to the offense with which he has been charged" (R. p. 114). Pursuant to this motion, the State provided discovery to Mr. Merka, including a statement by Brewer of what she alleged to have transpired the day of Mr. Merka's Arrest (R. p. 125-127).

On December 11, 2013, Mr. Merka waived his indictment and pled guilty to Carjacking and Assault and Battery of a High and Aggravated Nature in a hearing before the Circuit Court (R. p. 55, lines 4-9). The Court questioned Mr. Merka if he understood the following: the possible sentence terms for Carjacking and Assault and Battery of High and Aggravated Nature; the designation of these offenses as most serious and serious, respectively; and the designation of these offenses as violent offenses that usually required more active jail time than non-violent offenses (R. p. 56, lines 10-12, 14-16, 18-22, 24-25, - p. 57, line 2). Mr. Merka testified that he understood the above-noted (R. p. 56, lines 17, 23, and p. 57, line 3). The Court also asked if Mr. Merka had discussed the charges with his attorney and if he was happy with what his attorney had done, to which he replied "yes" (R. p. 58, lines 5-7, and, lines 16-18). The Court also asked if Mr. Merka had any complaints against law enforcement, his attorney, or the Solicitor's Office; if he was under the influence of drugs and alcohol; and if anyone had forced him to plead guilty, to which Mr. Merka responded "no" (R. p. 59, lines 2-6, 15-17, and, p. 60, lines 1-4). The Court then questioned Mr. Merka if he understood through his guilty plea he was giving up his rights to remain silent and his right to a jury trial; and that he was pleading guilty to charges against which he was not indicted,

to all of which Mr. Merka responded "yes" (R. p. 60, lines 13-17, and R. p. 61, lines 1-8 and 17-22).

The victim Ms. Brewer also testified at the hearing, stating:

> Uh, it was recommended that I speak on how it affected -- how this has affected me. It's hard to say. You know, I didn't ask for any of this. I didn't ask for the fear and the memories and the nightmares and the depression that's never going to go away. It's hard to say. I don't know what should happen. This is something I'm stuck with for the rest of my life. It's not something that anybody should ever have to deal with. The fear of never being able to see my child again is stuck with me. I'll never forget being put through that (R. p. 65, lines 12-22).

The State argued for a ten-year sentence (R. p. 64, lines 23-24). Appropriately, defense counsel then stated that Mr. Merka had been "going to AA meetings" after getting out of jail, had been working on "some anger management issues;" was working and supporting his two-year old child, and had refrained from contacting the victim (R. p. 67, lines 1-9, and R. p. 68, lines 1-3). Mr. Merka's Alcoholics Anonymous sponsor, Mr. Derrick Cox, also testified that Mr. Merka was sincere about the program and was on the "right path," and the mother of Mr. Merka's child, Stacy Inman, testified that Mr. Merka had been taking care of his child since his arrest and working a full-time job (R. p. 69, lines 3-10, and 19-25). Mr. Merka also testified that he was looking into more anger management classes, was trying to improve his life, and was extremely sorry about what had happened (R. p. 70, lines 9-19). The Circuit Court then sentenced Mr. Merka to eight (8) years in prison. (R. p. 72, lines 1-4).

On December 12, 2013 Mr. Merka filed a Motion to Reconsider or in the Alternative to Vacate the Sentence (hereinafter abbreviated to Motion to Reconsider), based on newly discovered evidence (R. p. 45-46).

Undersigned counsel discovered evidence after Mr. Merka's guilty plea hearing that Mr. Merka had a long history of mental illness (R. p. 45-46). The Motion also stated that Mr. Merka had discovered evidence that Brewer had told the Greenville County Solicitor's Office that she did not want Mr. Merka to have jail time (R. p. 45). Mr. Merka attached two exhibits to his Motion to Reconsider, one documenting a text message apparently sent from a friend of the victim to Mr. Merka, stating that the victim had said that she wanted Mr. Merka to undergo counseling in lieu of jail time (R. p. 45-46). As stated in the Motion to Reconsider, Mr. Merka through undersigned counsel discovered the victim had stated to employees and/or agents of the Solicitor's Office that she had preferred that Mr. Merka receive counseling instead of jail time (R. p. 45-46).

On January 9, 2014, the Circuit Court held a hearing on the Motion to Reconsider, which was then framed as a Motion for New Trial (R. p. 77, lines 1-6, and R. p. 1). During the hearing, Mr. Merka's defense counsel first noted that although he had been aware of Mr. Merka's "extensive work with AA and trying to get sober," that defense counsel had not learned until two days after sentencing that Mr. Merka "had had a medical diagnosis in the past of bipolar disorder," that Mr. Merka "was still suffering from that," that Mr. Merka had taken Depakote for his bipolar disorder, and that Mr. Merka had subsequently gone off of his medications in approximately 2010 or 2011 because Mr. Merka's father had lost his job (R. p. 78, lines 14-19, and R. p. 79, lines 8-25). Defense counsel also stated that Mr. Merka had a family history of "manic depressive, bipolar" and that Mr. Merka "was not on medication at the time of the incident. He was not on medication at the time of the guilty plea, which is more important" (R. p. 80, lines 3-12).

Defense counsel also noted the presence of Debra Shirley, who had witnessed Mr. Merka several months before his guilty plea trying to obtain mental health medications (R. p. 80, lines 13-24). Defense counsel also stated that he had noticed during his meetings with Mr. Merka that

"he didn't seem to understand exactly what was going on" (R. p. 82, lines 9-10). Further, Defense counsel explained that he had attributed this to "something to do with the alcohol withdrawals or whatever" (R. p. 81, line 25, - p. 82, line 1). Defense counsel also offered as Exhibit 1 the affidavit of his paralegal, who stated that Mr. Merka "...did not appear to grasp the situation..." of "...the charges and penalties that he could be facing," that Mr. Merka exhibited "...grandiose ideas concerning what would actually take place during the course of events leading to trial and after," and that Mr. Merka "...could not stay 'on point...'" during his meetings with Defense counsel, as Mr. Merka exhibited rapid speech and easy distractibility(R. p. 128).

Defense counsel and The Circuit Court then engaged in the following colloquy:

Q. Defense counsel: "In that colloquy of the guilty plea, we didn't ask him during the discussion of his mental health."

A. The Court: "It's okay to say I didn't ask him" (R. p. 82, lines 17-21).

Thereafter, defense counsel stated to the Circuit Court

Q. "you didn't ask him,"

A. and The Circuit Court responded, "You're right. I did not" (R. p. 83, lines 1-2).

Mr. Merka's father, Mike Merka, also testified about Mr. Merka' history of mental illness, testifying that he had been diagnosed with "ADD" and subsequently "bipolar" and that Mike Merka believed Mr. Merka had self-medicated with alcohol and/or drugs after Mike Merka had a job change (R. p. 87, line 1, and R. p. 80, lines 1-25, - p. 81, line, 25, and. p. 92, lines 1-25, - p. 94, line, 25). Mike Merka also testified that Mr. Merka had taken Depakote, Celexa, and/or Lexapro for his bipolar/depression and Concerta for his "ADHD" (R. p. 65, lines 3-8). The Circuit Court then took the issue of mental illness under advisement until the defendant could produce more evidence of mental illness (R. p. 90, lines 1-5).

Subsequently, defense counsel raised the issue detailed in the Motion to Reconsider regarding the Solicitor Office's alleged *Brady* violation. It was stated:

> I am also aware that, uh, Stephanie Brewer went to the Solicitor's Office and had communications with- The State doesn't disagree with they had communications with the Solicitor prior to the sentencing that she thought that the recommendation was too much. I get it that The State put on the record that the communication, that this was the Solicitor's recommendation as to sentencing. But at no point was I made aware of a, uh, communication between the victim and The State about these sentencing issues. And if you go to a litany of cases that have recently been handed down as early as 2012, uh, *State versus Hyman*. *Brady* disclosure rules require the prosecution to provide Mr. Merka any evidence the prosecution may possess that may be favorable to the accused and material to guilt or punishment (R. p. 93, lines 1-25, - p. 94, line 25).

A. The Circuit Court then responded:

> I don't think that- I don't think that-I just don't think—my interpretation of the case law in this state does not cover the fact that the victim might have some apprehension about Mr. Merka getting some sort of sentence." The Circuit Court also stated that although she "understood that she [Brewer] had apprehension" about the sentencing, The Circuit Court "did not get the impression in any way that you wanted him-that you had any opinion on what the sentence ought to be and that you did not necessarily want him to go to jail for this, you know. I didn't want you to feel like it was something that you did. But your concern about that is noted (R. p. 94, lines 1-25, - p. 95, line, 25).

Next, The State said:

A. [i]t was not my decision and has ever been my understanding that, uh, the victim in this case was in contradiction to the state's recommendation. Now the victim and I had a discussion on October the 28th in which, uh, she specifically with respect to sentencing talked about the fact that ATU was a great idea for this individual because of his alcohol use." The State further stated, "I sent an email to Defense counsel on November 1st, two or three days after the fact in which I said, among other things, I agreed with the victim that a substantial amount of incarceration is appropriate in this case." (R. p. 96, lines 1-18). And, the State also stated, "Never did Ms. Brewer give me a specific sentence. As I told you at the plea in the sentencing, she doesn't want any responsibility whatsoever for causing any kind of injury or whatever to any other person (R. p. 96, lines 17-18).

The Circuit Court then stated:

A. "...it does sound like your conversations from here-there was nothing in those conversations you feel like you need to disclose in any way" (R. p. 96, line 25, - p. 97, line 2).

Defendant then noted that,

A. "[a]t no time-first of all, I was asked not to contact her. I respected that. I never had contacted her. I didn't contact her until she got back with me. I never asked to have communications with her" (R. p. 97, lines 4-12).

A. Defense counsel then reiterated his argument:

> ... [b]ut I do think it was discoverable Brady material. I do think that although I understand where the Court's coming from about that case, I do think those litany of cases after *Human* all go to that same matter, which go to—the State can't just have this great bite of the apple that every time we want to come in here and go full force and say our victims... (R. p. 98, lines 6-13).

A. After which The Circuit Court interjected:

> I don't know that this is the path was want to go down. Let's just stop. Just stop" and concluded "In light of the circumstances of this, I think---I can't see-let me just say that a victim's input is--I hope you don't take this wrong, ma'am—is simply that. It's input that I can choose to follow, ignore, or do anything with. It think it sounds from what The State said like his conversations with her led him to believe that she believed incarceration was appropriate in this case but at the plea, she sounded a little different about that. Maybe didn't come out right and say she didn't think incarceration or she just didn't take a position. So I mean, I think even if, uh-even if this case had contemplated some sort of information like that that is not really relevant to sentencing, even if it did contemplate something like that, this—this situation, The State was just not on notice that there was anything he needed to tell you about (R. p. 98, lines 14-25, - p. 99, line 11).

After this ruling, Defense counsel reiterated:

A. "I got these emails after the fact and I didn't know about it. That's my—and I think the record is clear on that" (R. p. 99, lines 24-25, - p. 100, line 2).

After the January 9, 2014 motion hearing, Mr. Merka submitted a Proposed Order for a New Trial, with Exhibits A-G (R. p. 7-8). Pursuant to the Circuit Court's request, the exhibits of the proposed order contained evidence to support Mr. Merka's claim of mental illness (R. p. 7).

Mike Merka, Mr. Merka's father, averred that Mr. Merka had been diagnosed with Bipolar Disorder and ADHD in elementary school and that he had administered the medications for these conditions "for years," but that due to frequent moves the medical records were lost (R. p. 129). Mary Miller, the mother of Mr. Merka, avowed that Mr. Merka had been diagnosed and was prescribed medications for ADHD and that she would administer the medications when Mr. Merka visited her (R. p. 130-131). Stacy Inman, the mother of Mr. Merka's child, also averred that she had been aware of Mr. Merka's ADHD in 2006, that his medications kept his "ADHD symptoms under control," and that when he was not taking his medications, he was "very irritable and easily angered," would make "irrational decisions," and "tended to have 'mood swings' while he wasn't taking medication" (R. p. 132). Inman also averred that Mr. Merka "was on his medications regularly" during Inman's "7 year time span" with Mr. Merka and that Mr. Merka could not take ADHD medications after he was dropped from his father's insurance and could not afford his own health insurance (R. p. 133).

Finally, Mr. Merka submitted with the Proposed Order prescription records documenting a 2008 prescription for Adderall XR and for Vyvanse, as well as his treating physician's statement

that Mr. Merka had been prescribed Adderall XR in 2007 and Vyvanse in 2009, both for ADHD (R. p. 19).).

On May 15 2014, The Circuit Court denied Mr. Merka's motion for a new trial (R. p. 6, line 22). The Circuit Court noted in its Order that the limited evidence of Mr. Merka's mental illness was not evidence that might 'reasonably bear on the proper sentence," pursuant to *State v. Hicks*, 377 SC. at 325, 659 SE2d at 500. (R. p. 4). Mr. Merka received the Court's Order on May 19, 2014. On May 27, 2014, Mr. Merka filed a Notice of Appeal. (R. p. 47-48). Mr. Merka filed an amended notice of appeal on June 9, 2014, amending the appeal to reflect the indictment number rather than the warrant numbers (R. p. 49-50).

ARGUMENT OF ISSUES

I. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A NEW TRIAL BASED ON THE STATE'S FAILURE TO PROVIDE THE DEFENDANT WITH THE VICTIM'S STATEMENTS BEFORE HIS GUILTY PLEA, DESPITE THE DEFENDANT'S REQUEST PURSUANT TO *BRADY V. MARYLAND.*

This is a case about a lover's spat that unintentionally became too filled with passion and elevated emotions that unfortunately resulted in erratic behavior. "In criminal cases, an appellate court sits to review only errors of law" (*State v. Anderson*, 407 S.C. 278, 285; 754 S.E.2d 905, 909 (Ct. App. 2014)(citing *State v. McEachern*, 399 S.C. 125, 135, 731 S.E.2d 604, 608 (Ct. App. 2012)). "The admission or exclusion of evidence is left to the sound discretion of the trial [court], whose decision will not be reversed on appeal absent an abuse of discretion'" (*Id.* (citing *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without

evidentiary support" (*Id.*, (citing *State v. Jennings,* 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011)).

With respect to the landmark case *Brady v. Maryland*[1], the prosecution must provide Mr. Merka with any evidence in the prosecution's possession that may be favorable to Mr. Merka and that is material to the guilt or punishment of Mr. Merka (*State v. Anderson*, 407 S.C. 278, 286-287; 754 S.E.2d 905, 911 (Ct. App. 2014)(citing *Hyman v. State,* 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012)). Favorable evidence arises from two categories: evidence that is exculpatory or evidence that can be used for impeachment purposes (*Id.* at 287, 911 (citing *United States v. Bagley,* 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1963)). Materiality of the evidence is judged by the "reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense" (*Id.* (citing *Hyman,* 397 S.C. at 45, 723 S.E.2d at 380)). With respect to materiality of evidence for guilty pleas, a *Brady* violation is material "when there is a reasonable probability that, but for the government's failure to disclose Brady evidence, the outcome of the case would have been more favorable to defendant" (*Gibson v. State*, 34 S.C. 515; 514 S.E.2d 320 (1999)(citing Sanchez v. United States, 50 F.3d at 1454; Banks v. United States, 920 F. Supp. 688, 692 (E.D. Va. 1996)). In the instant case, Mr. Merka would have refused to plead guilty and gone to trial.

The *Gibson* Court emphasized the importance of prosecutorial "fair play," noting:

> [T]he prudent prosecutor will resolve doubtful questions in favor of disclosure. This is as it should be. Such disclosures will serve to justify trust in the prosecutor as the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done. And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations *Gibson,* quoting *Kyles v. Whitley*, 514 U.S. at 439-40, 115 S. Ct. at 1568, 131 L. Ed. 2d at 509 (quotes

[1] 1, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

omitted) (citing *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935)).

Regarding an alleged *Brady* violation, an issue is preserved for review if the *Brady* issue is raised in a motion, and a trial judge denies said motion *State v. Gulledge*, 326 S.C. 220, 227; 487 S.E.2d 590, 593 (1997). In *Gulledge*, the South Carolina Court of Appeals found that petitioner had not preserved the *Brady* issue for appeal because the trial court did not rule on the *Brady* argument (*Id).* The South Carolina Supreme Court found the Court of Appeals' holding to be in error despite noting it "questionable" whether the trial judge ruled on petitioner's motion to suppress based on *Brady* (*Id).* The Supreme Court held: "[h]owever, the issue was clearly used in the motion to reduce sentence and restitution and the trial judge denied the motion. Thus, the issue is preserved for review" (*Id).*

In the instant case, the defendant Walter J. Merka ("Mr. Merka") respectfully submits that the trial court committed an error of law in finding that the prosecution did not violate the *Brady* rule and its interpretation under South Carolina law. As noted above, Mr. Merka and defense counsel discovered, after Mr. Merka's guilty plea, evidence that the victim Brewer had informed the prosecution that she did not want Mr. Merka to undergo jail time; this evidence is supported by the exhibit in Mr. Merka's Motion to Reconsider documenting a text message apparently sent from a friend of the victim to Mr. Merka, stating that the victim had said that she wanted Mr. Merka to undergo counseling in lieu of jail time (R. p. 45, lines 6-10). The evidence of the victim's doubt in the prosecution of Mr. Merka is also supported by the State's statement that Brewer had expressed that she would like Mr. Merka to undergo alcohol counseling (R. p. 95, lines 15-20). Admittedly, the evidence regarding the exact nature of the victim Brewer's statements to the prosecution is limited; however, the evidence is limited because Mr. Merka was deprived of this information before his guilty plea and therefore could not pursue investigation of these statements,

which is the exact breakdown of prosecutorial disclosure that *Brady* contemplates and that *Gibson* underscores: the breakdown of the criminal prosecution as a justice-seeker and of the criminal trial as the chosen forum for ascertaining the truth about criminal accusations.

While the exact nature of the statements is of dispute [the State stated on the record that Brewer was in agreement with him that "a substantial amount of incarceration" would be appropriate] (R. p. 95, lines 23-25, - p. 96, line 2), there is no dispute that Brewer had made statements to the State and possibly other agents of the Solicitor's Office. As such, these statements were in possession of the prosecution, thus satisfying the prosecutorial possession requirement under *Anderson*.

With respect to the requirement that the evidence requested pursuant to *Brady* be favorable, any evidence that the prosecution had in its possession that Brewer did not want Mr. Merka to go to jail would be favorable to Mr. Merka. Brewer's statements that she did not want Mr. Merka to go to jail could have been exculpatory and used for impeachment purposes. The evidence that Brewer did not want Mr. Merka to go to jail would have provided Mr. Merka with the opportunity to ascertain the truth about Brewer's view of his punishment and thus logically Brewer's recollection of the events that transpired leading up to Mr. Merka's arrest.

For example, Mr. Merka's defense counsel could have inquired of Brewer why she was doubtful about Mr. Merka's punishment and could have further explored why Brewer was having doubts about the punishment for the crimes against her with which Mr. Merka, her ex-boyfriend, had been charged. Because Mr. Merka was under the above-noted no-contact order, knowledge that the victim Brewer was doubting a punishment of jail-time for Mr. Merka could have been explored with the prosecution present, but Mr. Merka could not have known to pursue this option because he did not know what the prosecution may have known: i.e., that Brewer did not want Mr.

Merka to go to jail for the crimes against her. For example, at Mr. Merka's guilty plea hearing, Brewer's equivocation reflected in her statement "I don't know what should happen" would have taken on new meaning that Mr. Merka through counsel could have explored (R. p. 65, lines 17-18).

Further, evidence that Brewer stated to the prosecution that she did not want Mr. Merka to go to jail could have been reasonably used to impeach Ms. Brewer, if Mr. Merka were able to ascertain that her doubt about Mr. Merka's punishment arose from changing her perspective on the events of the carjacking and assault and battery.

Finally, Mr. Merka submits that the *Brady* issue was preserved for review under the standard set by *Gulledge*. Although the Circuit Court did not specifically address Mr. Merka's argument presented in his Motion to Reconsider in her Order Denying Defendant's Motion for a New Trial, Mr. Merka argued the *Brady* violation in his Motion to Reconsider and he renewed this motion numerous times at the January 9, 2014 hearing.

As noted above, defense counsel stated at the Motion to Reconsider hearing, "Brady disclosure rules require the prosecution to provide Mr. Merka any evidence the prosecution may possess that may be favorable to the accused and material to guilt or punishment" (R. p. 94, lines 3-7), and defense counsel reiterated that "[b]ut I do think it was discoverable Brady material" *Id.* Moreover, the Circuit Court's statements in response, i.e., "my interpretation of the case law in this state does not cover the fact that the victim might have some apprehension about Mr. Merka getting some sort of sentence" and "it does sound like your conversations from here-there was nothing in those conversations you feel like you need to disclose in any way" serve as an effective ruling that the Circuit Court did not find that the prosecution committed a *Brady* violation. Defense counsel, however, asserts that the State did in fact commit a *Brady* violation. Likewise,

a trial judge has sound discretion to grant a motion for a new trial based on after-discovered evidence *State v. Mayfield*, 235 S.C. 11, 33, 109 S.E.2d 716, 728 (1959) (citing *State v. Clamp*), 225 S.C. 89, 80 S.E.2d 918) (1954). "A motion for a new trial should be granted if the following is satisfied:

> When the after-discovered evidence '(1) is such as would probably change the result if a new trial is had; (2) has been discovered since the trial; (3) could not by the exercise of due diligence have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching.'"

Id. at 33, 728-729, (quoting *State v. Strickland*, 201 S.C. 170, 22 S.E.2d 417; *State v. Clamp*, supra; *State v. Wright*, 228 S.C. 432, 90 S.E.2d 492).

Thus, the State should have provided all *Brady* material to Mr. Merka, including statements made by Ms. Brewer. This was a constitutional violation and the State's lack of *Brady* disclosure deprived Mr. Merka of the right to a fair trial, as well as his ability to make his plea "knowingly and voluntarily." Accordingly, the Court should have granted a mistrial and its failure to do so constitutes reversible error.

II. THE TRIAL JUDGE ERRED IN NOT QUESTIONING MR. MERKA ABOUT HIS MENTAL HISTORY

As noted above, the appellate court standard for criminal appeals is abuse of discretion, and the appellate court will only review errors of law *State v. Anderson*, 407 S.C. 278, 285; 754 S.E.2d 905, 909 (Ct. App. 2014)(citing *State v. McEachern,* 399 S.C. 125, 135, 731 S.E.2d 604, 608 (Ct. App. 2012; *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012)).

With respect to sentencing, the trial judge has "wide discretion" and can conduct a broad and "largely unlimited" inquiry into the type of information that might "reasonably bear" on the proper sentence for a defendant *State v. Franklin,* 267 S.C. 240, 245; 226 S.E.2d 896, 897 (1976) (citing *U.S. v. Magliano*, 336 F. (2d) 817 (4thCir. 1964); *North Carolina v. Pearce*, 395 U.S. 711,

89 S. Ct. 2072, 23 L. Ed. (2d) 656 (1969)); *State v. Hicks*, 77 S.C. 322, 324; 659 S.E.2d 499, 500 (Ct. App. 2008).

In regards to evidence of mental illness in criminal trials, the South Carolina Supreme Court recognize that "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems may be less culpable than defendants who have no such excuse" *Council v. State*, 380 S.C. 159, 175 (2008) (quoting *Penry v. Lynaugh,* 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989)(quoting *California v. Brown*, 479 U.S. 538, 545, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987)(O'Connor, J., concurring)).

In this case, Mr. Merka asked the Circuit Court to reconsider his sentencing in light of evidence of mental illness discovered after his guilty plea (Motion to Reconsider, page 2). Specifically, Mr. Merka's family was not present at the sentencing, and the family could have testified to Mr. Merka's history of diagnoses of bipolar disorder and attention deficit disorder ("ADD") attention deficit hyperactivity disorder ("ADHD").

At the hearing for the Motion to Reconsider/Motion for a New Trial, defense counsel noted that although defense counsel had been aware at the time of the guilty plea of Mr. Merka's history of alcohol abuse and attempt to get sober, defense counsel did not discover until after the guilty plea Mr. Merka's history of mental illness. (R. p. 77, lines 22-25, - p. 78, line 19). As noted above, Mr. Merka's father Mike Merka testified that Mr. Merka had been diagnosed as a child with ADD/ADHD and bipolar disorder for which Mr. Merka had been taking medications including Depakote, Celexa and/or Lexapro, and Concerta until the father lost his job. Also as noted, the defendant submitted post-hearing in his Proposed Order medical records documenting statements

by the defendant's parents and mother of his child that he had suffered from bipolar disorder (noted by his father) and ADD/ADHD (noted by his father, mother, and his child's mother). Further, the defendant's physician noted that the defendant had been prescribed medications for ADD.

Admittedly, the defendant's evidence of a history of mental illness is limited, due in part to his family's moving frequently during his childhood; and the defendant does not argue that the evidence of mental illness supports a finding of defendant incompetency. However, the principle noted above in *Council* regarding the degree of criminal culpability for defendants with backgrounds of disadvantage and emotional and mental problems is relevant to the defendant's case with respect to his sentencing. As noted in the defendant's 'Proposed Order,' *Council's* law is broader than the facts of the Council case, because the long-recognized relevance of a defendant's "background" and "emotional and mental problems" attaches to "criminal acts" generally. (R. p. 1).

Further, with respect to sentencing, although the Circuit Court found that the defendant's claims that he suffered from Bipolar Disorder, and the documentation of defendant's ADHD diagnosis and treatment, is "too far removed in time to 'reasonably bear' on the Court's decision to impose a sentence; Mr. Merka respectfully submits that the volume of evidence is both substantial and consistent throughout his life" (R. p. 5) (*citing Hicks,* 377 S.C. at 325, 659, S.E.2d at 500). Particularly, Mr. Merka was not being treated for his mental health conditions at the time that he committed the offenses to which he pled, but most importantly, Mr. Merka was not currently taking his prescribed medications for both ADHD and Bipolar Disorder on the day that he made his plea.

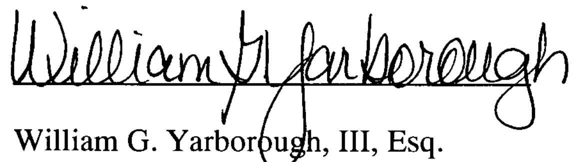
Thus, given the lack of evidence regarding the defendant's mental condition before his sentencing; the medical evidence regarding past treatment for ADHD; and the statements of the

defendant's parents regarding his history of ADHD and bipolar disorder, the Appellant respectfully submits to the court that the current sentence should be vacated and a new trial ordered consistent with the now discovered evidence of Mr. Merka's mental health conditions. Particularly, Appellant urges the court to consider the new evidence of his mental health history as it pertains to his sentencing.

CONCLUSION

For all of the foregoing reasons, Mr. Merka respectfully requests this Court reverse his conviction and remand his case to the Circuit Court for a new trial.

Respectfully Submitted,



William G. Yarborough, III, Esq.
Law Office of William G. Yarborough, III
Attorney for Appellant
522 North Church Street
Greenville, South Carolina 29601
(864) 331.1612

Greenville, South Carolina
November 24, 2015

CERTIFICATE OF COUNCIL

I, William G. Yarborough, III, certify that on this date November 24th, 2015 I served a Final Brief in this action upon: (1) Mr. Alan McCrory Wilson at the S.C. Attorney General's Office; (2) Mr. David Spenser at the S.C. Attorney General's Office and (3) Mr. Walter Wilkins, Solicitor, Greenville County, Thirteenth Judicial Circuit Court, by mailing it to the Government Agents at their work addresses, by certified mail; depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

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SC Court of Appeals

Mr. Alan McCrory Wilson
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

Mr. David Spenser
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211

Walter Wilkins, Solicitor
305 E. North Street
Greenville, SC 29601

Sworn to before me this 24th
day of November, 2015
[signature]
Notary Public for South Carolina

My commission expires: 3/20/24

[signature]
William G. Yarborough, III

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Letitia H. Verdin, Circuit Court Judge

Appellate Case Number: 2014-001150

The State,
Respondent,

v.

Walter Jacob Merka,
Appellant,

AFFIDAVIT OF SERVICE VIA US MAIL FOR FINAL BRIEF

I, Traci Trouton-Burr, certify on November 24, 2015, I served a Final Brief in this action on Mr. Alan Wilson, Mr. David Spencer, and W. Walter Wilkins by mailing it to them at their work address, by depositing it in the U.S. Mail, in a package with sufficient postage affixed, addressed as follows:

Honorable Alan Wilson
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

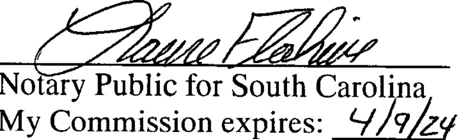
David Spencer
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

W. Walter Wilkins
Thirteenth Judicial Circuit
305 E. North Street
Greenville, SC 29601

Respectfully submitted,

Traci Trouton-Burr
Paralegal to William G. Yarborough, Esquire

SWORN TO before me this 24 Day of November, 2015



Notary Public for South Carolina
My Commission expires: 4/9/24