STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Honorable Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2017-001928

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DEAN NELSON SEAGERS,

PETITIONER.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

The Trial Court erred in permitting the State to introduce the voice identification testimony of Detective Gill where the State failed to present a sufficient foundation for the testimony in question.

II.

The Trial Court erred in permitting the State to introduce the voice identification testimony of Detective Gill where the witness had not been qualified as an expert in voice identification and the jury was likely, on the narrow facts of this case, to view his testimony as deriving from his qualification as an expert.

III.

The trial court erred, and thereby violated Petitioner's right to due process of law, by instructing Petitioner's jury on the law as it relates to accomplice liability where there was no evidence adduced at trial which tended to establish that Petitioner acted in concert with anyone in the crime charged.

STATEMENT OF THE CASE

Petitioner, Dean Seagers, was indicted by the Charleston County Grand Jury during the November, 2012 term for Distribution of Cocaine Base (2012-GS-10-06779). He was represented in the trial court by Cameron L. Marshall, Esquire. The Petitioner proceeded to trial by jury on July 6-9, 2015 before the Honorable Kristi Lea Harrington. The State was represented at trial by J. Whit Sowards, Assistant Solicitor, and Lauren L. Mulkey, Assistant Solicitor. At the conclusion of this trial, the Petitioner was found guilty as charged and was subsequently sentenced on July 9, 2015 to Life without Parole for Distribution of Cocaine Base.

The Petitioner served and filed a timely Notice of Appeal from his judgments and sentences. The South Carolina Court of Appeals subsequently affirmed Petitioner's judgments and sentences. *The State v. Dean Nelson Seagers*, 2017-UP-263 (S.C. Ct. App. Dated June 28, 2017). Petitioner filed his Petition for Rehearing, pursuant to Rule 221(a), SCACR, on July 13, 2017. Said petition was denied by Order filed August 18, 2017. He now asks that the Writ be granted, that this Honorable Court dispense with further briefing and vacate his judgment and sentence. In the alternative, he asks that the Writ be granted and that he be afforded the opportunity to more fully brief the issues summarized herein.

STATEMENT OF FACTS

Petitioner was alleged to have sold a confidential informant crack cocaine on June 20, 2012. The confidential informant, who was subsequently identified as Robert Drayton, was working with Detective Mike Burke. According to Burke's trial testimony, Drayton was being paid to conduct undercover drug buys. Burke ultimately admitted, however, that Drayton had himself been the target of a drug investigation and that his office had ultimately recruited him as a paid CI after determining that he would be more valuable to them as a resource. His testimony clearly establishes that there were charges that would have been brought against Drayton had it not been for his agreement to work with the police. Tr. p. 281, l. 4 – p. 284, l. 12. Burke admitted that at the time he made the decision to offer Drayton money to make buys as a confidential informant he was aware that this individual had a prior conviction for providing false information to law-enforcement. App. p. 267, ll. 11-16.

According to Burke's trial testimony Drayton used his own telephone to set up a purchase from Petitioner. The drug deal that supposedly followed was monitored with audio surveillance and Drayton was outfitted with a camera on his clothing. App. p. 234, l.8 – 236, l. 10. There was no live video feed being monitored by law-enforcement contemporaneous with this alleged drug transaction. Detective Burke testified *in camera* that when the video surveillance feed was subsequently downloaded it did not show Petitioner and, in fact, did not show who had lowered the small quantity of crack cocaine to Drayton from a second-story window. App. p. 30, l. 20 – p. 32, l. 14.

Prior to jury selection, Petitioner made a motion to suppress his identification by Drayton during a pretrial identification procedure and during the trial. App. p. 4A, ll. 16-22. When Drayton was called as a witness for the State during the *in camera* proceeding on that motion,

Drayton invoked his Fifth Amendment rights and declined to answer questions concerning the events of June 20, 2012. He did however acknowledge having known Petitioner for a couple years and indicated that he knew him through his family. He further testified that he knew Petitioner by the nickname Baby Dean. App. p. 12, l. 13 – p. 13, l. 2. Drayton did acknowledge having been shown one photograph by Burke which Drayton acknowledged identifying as Baby Dean. App. p. 14, l. 24 - p. 15, l. 7.

As previously noted, during the *in camera* proceeding Drayton denied seeing Petitioner at all on the date this drug sale allegedly took place and expressly denied buying drugs from Petitioner that day. When Drayton subsequently testified before the jury, however, he claimed that the statement he had given to Burke immediately after the transaction was truthful. That statement was introduced into evidence as State's Exhibit No. 2. App. p. 10, ll. 19-24 (marked for ID) and App. 190, ll. 12-20 (introduced). Drayton claimed he had not testified truthfully in the *in camera* proceeding because he had received a threatening phone call from someone that morning before the trial began. He did not claim the call was made by Petitioner. He likewise did not testify that the call was made by anyone he knew to be affiliated with Petitioner. App. p. 229, l. 8 – p. 230, l. 21.

In his trial testimony, however, Drayton claimed that he did not see the person who lowered the drugs down to him, in a cup on a string, from a second floor window. He did claim that he got a quick glimpse of Petitioner through a window after the drugs were delivered to him in the cup. He subsequently admitted, however, that he only saw the person he identified as Petitioner for a split second and that he could have been mistaken about the individual being Petitioner. App. p. 191, l. 12 - p. 193, l. 18. There were other things about the account given by Drayton that were questionable. For example, both law enforcement officers who testified about this operation, Grill and Burke, testified that Drayton was thoroughly searched prior to being sent

out to make this purchase. Grill testified that when he arrived on the scene, Burke was in the process of searching Drayton. He described in detail how thoroughly a CI was always searched before an operation. App. p. 169, l. 8 - 170, l. 11. Burke's testimony described a very thorough search of Drayton's person before the undercover buy. While Drayton confirmed that he was searched by Burke, he vehemently denied that the police searched the crack in his buttocks. App. p. 199, l. 5 – p. 200, l. 24.

The drugs ultimately attributed to this drug transaction were eventually identified by State witness, Renee Hilton, a forensic chemist, as testing positive as crack cocaine, not powder cocaine as Burke had supposedly made arrangements to buy from Petitioner. The drugs in question were said to have weighed only 2.03 grams. App. p. 334, l. 25 – p. 340, l. 25. Thus, the amount of drugs allegedly purchased from Petitioner was extremely small and could easily have been concealed on Drayton's body in intimate areas not searched by Burke prior to the sting operation.

Burke admitted in his *in camera* testimony that he never even printed out his report on Drayton's debriefing and that as of the date of the trial that report was on the hard drive in his police vehicle in his new position in Indianapolis. App. p. 24, l. 21- p. 25, l. 13. In another interesting twist, Burke ultimately admitted that when Drayton was searched and sent out Petitioner was not the individual Drayton was supposed to be buying drugs from on that date. Burke indicated that the intended buy fell apart for some reason and that Drayton then called Petitioner and arranged a different deal. App. p. 232, l. 3- p. 234, l. 3. Burke's testimony indicated that he talked to Drayton twice by phone after he left him. App. p. 284, l.13- p. 285, l. 18. Drayton on the other hand, denied speaking to Burke at all after he was searched and before he returned to where Burke was waiting for him. App. p. 204, ll. 18-21. Drayton did acknowledge that he talked on the telephone while riding the bicycle to the buy location and

indicated that the person he was talking to was his girlfriend. App. p. 203, l. 20 - p. 204, l. 2. Although Drayton was equipped with a camera hidden on the front of his shirt, and a live feed audio device, there were multiple blackouts in the recordings in question resulting in a significant amount of time when it was impossible to know exactly what Drayton was doing. The transcript of Petitioner's trial reveals that neither Burke nor Drayton revealed where the *original* buy was to have taken place or what caused that buy to fall through. In fact, while Burke testified that Petitioner was not the original target that day, Drayton never acknowledged that there was a change in the plan and that he supposedly called Petitioner to set up a buy as a fall back plan when the deal he was supposed to be making fell apart.

At trial the State introduced testimony from Detective Charles Jacob Grill. He was not the case agent in this case; however, according to his testimony, he had some involvement in this case. He was in fact the first witness to be called by the State after the jury was sworn. After a lengthy discussion of his law enforcement experience, he was qualified as an expert in narcotics investigations without objection by the defense. App. p. 107, ll. 10-14. Grill was permitted, without objection by the defense, to testify at length concerning how many of the facts in this case were typical of the actions of a drug dealer. App. p. 108, l. 5 - p. 128, l. 13. He went on to testify that on the date in question he observed a gray Dodge Charger down the street from the target location and recognized it to be a vehicle that law-enforcement knew Petitioner to drive. Grill resisted numerous attempts by the defense to get him to answer questions concerning whether he had ever personally seen Petitioner driving or riding in the car in question. App. p. 139, ll. 1 – p. 143, l. 17. Ultimately he admitted that he did not take pictures of the automobile or record its tag number. He acknowledged that his testimony that Petitioner was "known to" use that vehicle was based on "Intel", that he had no idea the source of. He even testified that he "wanted to say" the car had tags from North Carolina or Virginia which lead him to believe it

was a rental car. App. p. 166, l. 9 – p. 167, l. 22. Grill next stated that someone might have told them that was a car Petitioner had been seen in. App. p. 174, l. 12 – p. 176, l. 15. Burke on the other hand, eventually admitted that he did check out the ownership of the gray car in question, but claimed he did not document his findings because the car did not "come back" as registered to Petitioner and he attributed no significance to the fact that the vehicle would be registered to someone other than Petitioner, opining that the fact that the car that was not registered in his name was not significant. App. p. 279, l. 8 – 281, l. 3.

Grill offered testimony that he recognized Petitioner's voice on the audio recording of the transaction. Trial Counsel objected to this testimony on two grounds. First, Petitioner argued that Grill was not an expert in voice identification and secondly, Petitioner noted that no proper foundation had been laid for his voice identification testimony. App. p. 132, l. 23 – p. 135, l. 8. The Court overruled Petitioner's objection to this line of testimony indicating that it disagreed with Trial Counsel's analysis, but not indicating a ruling on the two separate grounds upon which the objection was raised. The Court did however note that Petitioner's objections were preserved for the record. App. p. 135, ll. 9-20. Only *after* the Court's ruling did the prosecution ask Grill questions designed to lay a foundation for his voice identification testimony. App. p. 136, l.14 - p. 138, l. 10. In this testimony, he claimed to have spoken with Petitioner on several occasions prior to the date of the alleged buy. He also testified that he was present when Petitioner was arrested at the same location where the buy was alleged to have occurred and had spoken with him after his arrest. Based upon that exposure, he claimed to be certain that the voice on the audio recording was that of Petitioner.

On cross-examination Grill acknowledged that his law enforcement training had taught him to document matters that were significant in his police reports. Notwithstanding that

training, he asserted that he didn't document the fact that he supposedly recognized Petitioner's voice in this case, noting that he "just didn't write it down". App. p. 139, l. 24 - p. 141, l. 15.

With regard to his previous opportunity to observe Petitioner's voice, on cross-examination Grill admitted that on the two occasions when he had previously spoken with Petitioner, ***"I believe it was just kind of a hey, how are you doing – type deal as we were on the street working either doing – – executing warrants in this area or just – – just an encounter."*** APP. p. 157, 1-6. He asserted, however, that after Petitioner was arrested ***"we did have a long conversation with the defendant. Yes, sir, I did."*** App. p. 157, ll. 6-9. When asked if he could remember when these two brief encounters with Petitioner before his arrest took place, Grill indicated that he did not remember when they occurred, but that he just knew that he had spoken to Petitioner in the past. When Trial Counsel asked him if these encounters were ***"said hello on the street?"***, Grill repeated ***"Yes sir, just an encounter."*** App. p. 157, ll. 10-16.

ARGUMENTS

I.

Issues I and II

The Trial Court erred in permitting the State to introduce the voice identification testimony of Detective Grill where the State failed to present a sufficient foundation for the testimony in question.

The Trial Court erred in permitting the State to introduce the voice identification testimony of Detective Grill where the witness had not been qualified as an expert in voice identification and the jury was likely, on the narrow facts of this case, to view his testimony as deriving from his qualification as an expert.

ARGUMENT AS ADVANCED IN THE S.C. COURT OF APPEALS

As noted by the South Carolina Court of Appeals in *State v. Smith*, 3 S.C. 376, 425 S.E.2d 409 (Ct. App. 1993), voice identification testimony from a person having heard

someone's voice has long been regarded as legitimate and competent evidence to establish the identity in criminal cases. *See also*, *State v. Plyer*, 275 S.C. 291, 270 S.E.2d 126 (1980). The facts in this case are however readily distinguishable from those in *Plyler* and *Smith.* In *Smith*, *supra*, a dispatch operator received a call from an anonymous caller relating to that homicide case. The dispatcher described the caller's voice as that of a white male around 40 years old with a ***"very country and rugged, scratchy like voice."*** She specifically noted that the voice stuck out in her mind due to the fact that it ***"was so country [and] kind of had a ring to it."*** Id, 306 SC at 386, 415 SE 2d at 415. In *Smith*, the dispatcher testified that less than 24 hours after receiving the anonymous call, Smith came to the sheriff's office and told the dispatcher he was there to talk to detectives. The dispatcher testified that she immediately turned to her partner and informed him that she recognized the man's voice. She next told the detectives that Smith was there to see them and informed them promptly that Smith sounded like the man she had talked with the day before. The facts in Petitioner's case are far different from those in *Smith*. Here Grill did not document having recognized Petitioner's voice as he listened to the audio recording on the live feed from the crime scene. To the contrary, Grill did not apparently report his claim that he recognized Petitioner's voice until after, according to his own testimony, he had prolonged exposure to Petitioner's voice during his arrest and the lengthy conversation which followed. He did not document recognizing Petitioner's voice at any stage prior to this trial. Petitioner would respectfully submit that his prolonged exposure to Petitioner's voice, as someone who was under arrest for this offense, had the strong potential to taint Grill's identification based on prior extremely brief encounters at some unknown point in the past.

The facts in *Plyler, supra*, are even more dissimilar to those in Petitioner's case. In *Plyler* the defendant's ex-wife had been at her mother's home visiting with her sister who had arrived driving her own car. The sister left earlier than the ex-wife. The ex-wife was subsequently on

the phone with her sister when she excused herself to answer a knock at her door. The sister placed the phone on the couch and the ex-wife then heard a conversation followed by several gun shots. The ex-wife was still at her mother's home at the time of the call and immediately turned and exclaimed that her ex-husband, Harry Plyler, had just shot her sister, Linda. She then rushed to her sister's residence. Thus, the witness in *Plyler* had intimate knowledge of the defendant's voice and immediately reported recognizing the voice she heard on the phone as that of her ex-husband. There, as here, the State sought to introduce her testimony to place *Plyler* at the scene of the shooting. In that case our Supreme Court noted that voice identification testimony is regarded as legitimate and competent to establish identity in criminal and civil cases. However, unlike in the present case, the witness in *Plyler* had extensive familiarity with the voice in question and, as in *Smith*, *supra*, she immediately reported her recognition of that voice. Here, Grill admitted he had only a fleeting exposure to Petitioner's in the past and he could not recall how long ago that exposure had taken place. In addition, his identification of Petitioner's voice was no doubt tainted by the fact that his more lengthy, and more recent, exposure to Petitioner's voice which took place in the context of conversations held between him, Burke and Petitioner after he was already in custody on these same charges. In addition, in this case we have the additional factor that there is no evidence that Grill ever reported his alleged recognition of Petitioner's voice until this trial nearly three (3) years after Petitioner's arrest. We know for certain that he did not document it.

Petitioner would submit that there is one additional problem with the admission of the voice identification testimony of Detective Grill. As noted in the statement of facts above, Detective Grill was offered by the State as an expert *in narcotics investigations*. Trial Counsel objected to his voice identification testimony on the ground that he *was not* an expert in voice identification and, additionally, that a proper foundation had not been laid for this testimony.

While Petitioner does not dispute the fact that lay witnesses may offer voice identification testimony, the facts are not nearly so simple in Petitioner's case. This officer had already been qualified as an expert *in narcotics investigations*. This jury would ultimately receive special jury instructions concerning the testimony of expert witnesses. In that charge, the jury was expressly told that expert witnesses, unlike lay witnesses, were allowed to testify as to their opinions and conclusions. App. p. 467, l. 9 - p. 468, l. 3. Furthermore, Petitioner's jury heard Trial Counsel object to this testimony on the ground that this witness was not a voice identification expert. That objection was overruled and the witness, in the presence of the jury, was told he could continue. Although the prosecution stated that they were not attempting to admit Grill as an expert, that statement did not cure the prejudice to Petitioner where the jury had already heard Grill qualified as an expert witness. App. p. 133, ll.1-16. When Trial Counsel renewed his objection just moments later, the jury was excused from the courtroom. It was then that the trial court stated that it disagreed with Trial Counsel's analysis, "but it's preserved for the record." App. p. 134, l. 8 - p. 135, l. 20. When the jury was subsequently returned to the court room, this line of testimony concerning Grill's ability to identify Petitioner's voice continued and Grill was allowed to testify to his conclusion that the voice on the video was the voice he recognized as Petitioner. App. p. 136, l. 4 - p. 137, l. 10.

In this case, Drayton admitted that he could be mistaken about his identification of Petitioner as someone he saw at the scene. In light of that testimony, which easily could have created reasonable doubt in the minds of the jury, the claim by Grill that he was able to positively identify Petitioner's voice was highly prejudicial. The admission of eyewitness identification testimony which is tainted by suggestive pre-trial identification procedures violates due process. *Neil v. Biggers*, 409 U.S. 188(1972). Petitioner asserts that tainted voice identification does the same damage. In the case before this Honorable Court, Grill had very

little prior exposure to Petitioner's voice before the date of the alleged drug transaction. He himself described his prior exposure to Petitioner's voice as ***"Hey, how are you doing"*** conversations. On the facts of this case, the trial court erred in admitting Grill's voice identification testimony. As correctly argued by Petitioner at trial, the State had not laid a sufficient foundation to establish a reliable basis for Grill's ability to identify Petitioner's voice. Furthermore, due to the way this issue developed at trial, there was a very real danger that Petitioner's jury would evaluate the credibility of this witness testimony on this crucial issue through the prism of expert authority.

THE DECISION OF THE S.C. COURT OF APPEALS

Section 1 in the Opinion of the Court of Appeals

At trial, Petitioner's Counsel objected to the voice identification testimony of Detective Grill[1] on two distinct grounds. First, Petitioner argued that Detective Grill was not an expert in voice identification. Additionally, he argued that the prosecution had not laid a proper foundation for his voice identification testimony. App. p. 132, l. 23- p. 135, l. 8.

Petitioner respectfully submits that the opinion of the Court of Appeals in this case failed to address the two separate components of Petitioner's challenge to this testimony. Petitioner did not dispute that a non-expert may offer voice identification testimony. Petitioner objected to the admission of said testimony on the ground that a proper foundation had not been laid for the introduction of such testimony from this witness. It was Petitioner's position that, as with eye-witness identification testimony, the admission of voice identification testimony tainted by suggestive pre-trial identification procedures violates due process. *Neil v. Biggers*, 409 U.S. 188 (1972). Ordinarily, in determining whether eye-witness testimony is reliable, independent of the alleged opportunity for taint, the Court looks to the factors set forth in *Neil v. Biggers, supra.*

[1] The witness's trial testimony is summarized in the Final Brief of Petitioner at pages 8-9.

Petitioner submits that the *Biggers* factors are equally relevant with voice identification witnesses. Petitioner has outlined in detail the trial testimony which establishes that Detective Grill admitted very limited prior opportunity to hear Petitioner speak. He did not promptly report his alleged recognition of Petitioner's voice, nor did he document it in any way. He could not say how long ago the fleeting exposure he did have had taken place. There was no evidence that Detective Grill had ever reported his alleged recognition of Petitioner's voice on the audio recording of the drug transaction in this case. On direct-examination he claimed to have spoken with Petitioner on several occasions prior to the date of the alleged buy involved in this case. He, in fact, claimed that he had actual *conversations* with Petitioner. He answered "Yes, ma'am" when asked point blank if those were *actual conversations* with Petitioner and repeated that response when asked if they were, "[b]ack and forth conversations." App. p. 132, l. 19- p. 133, l. 24. Adding, "I mean, just --you know, just typical police info--you know, that's all it way." [2] App. p. 133, ll. 20-25. He expressly stated, "I believe so, yes, ma'am" when asked if these "conversations were more than just yes or no." App. p. 134, ll. 1-3. As noted in the Brief of Petitioner, on cross-examination, however, Detective Grill testified as follows:

> With regard to his previous opportunity to observe Petitioner's voice, on cross-examination Grill admitted that on the two occasions when he had previously spoken with Petitioner, **"I believe it was just kind of a hey, how are you doing - type deal as we were on the street working either doing - - executing warrants in this area or just - - just an encounter".** APP. p. 157, 1-6. He asserted, however, that after Petitioner was arrested **"we did have a long conversation with the defendant. Yes, sir, I did."** App. p. 157, ll. 6-9. When asked if he could remember when these two brief encounters with Petitioner before his arrest took place, Grill indicated that he did not remember when they occurred, but that he just knew that he had spoken to Petitioner in the past. When Trial Counsel asked him if these encounters were **"said hello on the street?"**, Grill repeated **"Yes sir, just an encounter."** App. p. 157, ll. 10-16.

The Petitioner's argument on appeal was that no foundation had been laid to establish a

[2] There was no objection to Detective Grill's interjection of testimony about his prior police involvement with Petitioner.

basis for Detective Grill to give reliable voice identification testimony independent of the lengthy conversation he had with Petitioner right after his arrest. The impact of that conversation would have had his ability to independently identify Petitioner's voice on the audio tape in question is obvious in light of his very limited prior exposure to Petitioner's voice, and the inherent prejudice flowing from his involvement *in this case* as a narcotic's detective. Petitioner urges this Honorable Court to grant his request for rehearing on this ground.

Likewise, the opinion of the Court of Appeals appears to overlook the main thrust of Petitioner's Question II, dealing with the fact that Detective Grill was not qualified as an expert in voice identification. As argued in his brief, Petitioner believes that although the prosecution stated they were not attempting to introduce him as an expert[3], the truth is he had already been qualified, without objection, as an expert in narcotics investigations. App. p. 107, ll. 10-14. On the very narrow facts of this case, Petitioner submitted that the voice identification testimony should have been excluded, not only because the State failed to lay a proper foundation, but also because there existed a very real danger the jury would give it weight to which it was not entitled because of his status as an expert. Therefore, Petitioner has not asserted that he should not have been allowed to present this testimony simply because he was not a voice identification expert, but rather that on the facts of this case the jury was likely to improperly attribute credibility to his opinion as to his voice identification in light of his recognition by the Court as an expert.

Issue III

The trial court erred, and thereby violated Petitioner's right to due process of law, by instructing Petitioner's jury on the law as it relates to accomplice liability where there was no evidence adduced at trial which tended to establish that Petitioner acted in concert with anyone in the crime charged.

ARGUMENT AS ADVANCED IN THE S.C. COURT OF APPEALS

[3] App. p. 133, ll. 8-14.

During the charge conference held before jury instructions were issued, the trial judge asked Trial Counsel if he objected to "hand of one charge." Trial Counsel noted his objection to a charge on the law of accomplice liability at that time. App. p. 418, ll. 4-9. The trial judge then stated that she would be "charging hand of one based upon the testimony that was presented." App. p. 418, ll. 7-8. Petitioner now respectfully submits that the trial court erred in issuing a jury instruction on the law of accomplice liability where there was no evidence presented at trial which established that Petitioner was acting in concert with anyone.

Indictment as a principal does not in itself preclude a finding of guilt on an alternative theory of accomplice liability. *State v. Mattison*, 388 S.C. 469, 697 S.E.2d 578 (2010). "Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." *Id.* at 479, 697 S.E.2d at 584.

However, an instruction on the alternative theory of accomplice liability must be supported by the evidence. *State v. Dickman*, 341 S.C. 293, 534 S.E.2d 268 (2000) (accomplice liability charge was proper when there was evidence that the defendant and a second person planned the murder and the second person was the shooter). "Like a lesser-included offense, an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact." *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011) (citing *State v. Funchess*, 267 S.C. 427, 229 S.E.2d 331 (1976) (lesser-included offense charge properly refused where no evidence supported it), and *Dickman*, *supra*). *See also, Dempsey v. State*, 363 S.C. 365, 610 S.E.2d 812 (2005); *State v. Foxworth,* 269 S.C. 496, 238 S.E.2d 172 (1977); *State v. Fields*, 356 S.C. 517, 589 S.E.2d 792 (Ct. App. 2003).

In the case before this Honorable Court, there simply was no evidence that Petitioner

acted in concert with anyone else. Drayton did testify that there were three people in the apartment at the time of the deal. App. p. 185, l. 9. He did not explain how he knew that fact since he was claiming that he had not gone inside at the crime scene, but rather had conducted this deal with someone who lowered the drugs out the second story window. He expressly testified that he did not see the person who lowered the drugs out the window in a cup on a string. App. p. 184, l. 25 – p. 185, l. 7. There was no testimony concerning who rented the apartment or who lived there. There was no testimony from the confidential informant, Drayton, that Petitioner was known to sell drugs with others from that location. Simply put, there was no evidence that Petitioner was acting with partners in a mutually agreed upon plan to sell drugs. For that reason, it was error for the Court to issue a jury instruction on the law in this state concerning accomplice liability. Where Drayton admitted that he may have been mistaken about having seen Petitioner at all at the scene of this drug deal, this error violated Petitioner's right to due process of law. This error was highly prejudicial to Petitioner and requires reversal of his conviction and sentence and the remand of his case for a new trial.

THE DECISION OF THE S.C. COURT OF APPEALS

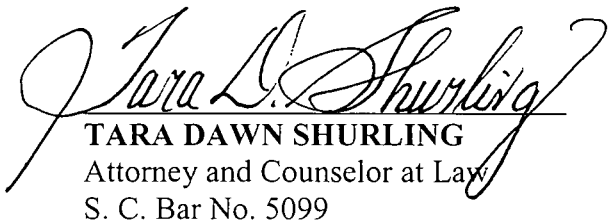
Section 2 in the Opinion of the Court

Petitioner, respectfully submits that the record before this Honorable Court is void of any evidence that tended to prove Petitioner acted in concert with anyone. While, as the opinion of the Court of Appeals opinion notes, an agreement may be established through "circumstantial evidence and the conduct of the parties", there was no such evidence in this case. While an agreement to act in concert may be found in circumstantial evidence and the conduct of the parties, Petitioner respectfully asserts that the decision of the Court of Appeals fails to note any such evidence supporting a instruction on accomplice liability in this case.

CONCLUSION

For all the reasons set forth herein, Petitioner prayers that the Writ be granted, that this Honorable Court dispense with further briefing and vacate his conviction and sentence. Alternatively, he asks that he be granted the opportunity to more fully brief the issues summarized herein.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

This 9th day of October, 2017

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Honorable Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2017-001928

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DEAN NELSON SEAGERS,

PETITIONER.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Writ of Certiorari and Appendix in the above-entitled case has been served upon opposing counsel by depositing in the U.S. Mail, postage prepaid, this 9th day of October, 2017, addressed as follows:

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SWORN TO BEFORE me this 9th day of October, 2017.

Notary Public for South Carolina
My Commission Expires: 2/28/24