ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County
The Honorable Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2017-001950

THE STATE,

Respondent,

vs.

SANTONIO TOREZ WILLIAMS,

Appellant.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. When the State laid a foundation for authentication during their case in chief, did the trial court err in allowing the State to introduce a recording of Appellant's jail call through a rebuttal witness?

II. Did the court err in failing to grant a new trial, when the State failed to disclose that a jailhouse snitch requested a deal prior to testifying at trial?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Did the trial court abuse its discretion in permitting the State to put forth reply evidence in the form of a recorded phone call, when at no time during the State's case in chief did evidence suggest Mr. Harris was the shooter in connection with Victim's death?

II. Did the court abuse its discretion in denying Appellant's motion for a new trial on the basis of the Solicitor's lack of disclosure that the jailhouse informant made an unsolicited request for a plea deal prior to testifying at trial, when such request was immediately denied, and when no discussions, negotiations, or guarantees of any kind occurred until after the conclusion of Appellant's trial?

BRIEF ARGUMENT

The trial court did not abuse its discretion in permitting the State to lay a foundation for and enter Exhibit 63 into evidence on reply, via the testimony of Captain Gallam. During Appellant's case-in-chief, defense counsel elicited testimony from witness Kahlo Calhoun that Mr. Harris (Bope) had confessed to being the shooter in the drive-by that killed Victim. (R. p. 439, lines 9-23). This was the first evidence of any kind that identified Mr. Harris as the shooter. "[T]he admission of reply testimony is within the sound discretion of the trial judge, and there is no abuse of discretion if the testimony is arguably contradictory of and in reply to earlier testimony." *State v. Singleton*, 395 S.C. 6, 16, 716 S.E.2d 332, 337 (Ct. App. 2011) (quoting *State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986)). As such, the State was entitled to admit Exhibit 63, a recorded phone call from Appellant while incarcerated, wherein he specifically discussed Mr. Harris's lack of involvement in the crime. This evidence directly contradicted Appellant's newly presented issue and was properly admitted in reply.

The trial court also did not err in denying Appellant's Motion for New Trial on the basis of the State not divulging the jailhouse informant's initial and unsolicited request for a plea deal in exchange for his cooperation in testifying at trial. The trial court concluded that Mr. Mercuri's testimony concerning alleged promises for a plea deal was wholly lacking in credibility in comparison to credible testimony of Solicitor Thurmond, and that a statement of desire for a positive outcome by Mr. Mercuri was not material impeachment evidence requiring disclosure, nor would such information result in a differing outcome under *Brady*, had such information been disclosed. (R. p. 624-26).

The trial court's application of law and findings of fact were proper in this matter. There is no basis to support an abuse of discretion and the rulings of the trial court should be affirmed.

STATEMENT OF THE CASE

Appellant was indicted for murder by the Aiken County Grand Jury (2016-GS-02-274). (R. p. 3, line 14-15; p, 4, lines 2-4). Solicitor Strom Thurmond and Assistant Solicitor Cassie Hall represented the State at trial. (R. p. 1). Defendant Santonio Torez Williams (hereinafter "Appellant") was represented by attorneys Nicholas McCarley and Derek Bush. (hereinafter "defense counsel"). (R. p. 1). The case was called to trial before the Honorable Roger M. Young, and a jury, on January 30th through February 2, 2017. (R. p. 1). The jury returned a guilty verdict against Appellant. (R. p. 531). Judge Young sentenced Appellant to fifty (50) years imprisonment for murder. (R. p. 532, lines 2-6). On August 14, 2017, Judge Young heard Appellant's Motion for New Trial, which he denied both from the bench, and by formal Order, dated August 25, 2017. (Motion R. p. 535; p. 613; Order, p. 626). This appeal follows.

STANDARD OF REVIEW

"The admission of reply testimony is within the discretion of the trial judge, and his decision will not be disturbed on appeal absent a showing of abuse of discretion." *McGaha v. Mosley*, 283 S.C. 268, 276, 322 S.E.2d 461, 466 (Ct. App. 1984) (citing *Vernon v. Provident Life & Accident Ins. Co.,* 266 S.C. 208, 222 S.E.2d 501 (1976); *Ford v. A.A.A. Highway Express,* 204 S.C. 433, 29 S.E.2d 760 (1944); *State v. Stewart*, 283 S.C. 104, 106, 320 S.E.2d 447, 449 (1984); *State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986) "[T]he admission of reply testimony is within the sound discretion of the trial judge, and there is no abuse of discretion if the testimony is arguably contradictory of and in reply to earlier testimony." *State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986)); *State v. Stewart*, 283 S.C. 104, 106, 320 S.E.2d 447, 449 (1984); *State v. Singleton*, 395 S.C. 6, 16, 716 S.E.2d 332, 337 (Ct. App. 2011).

"In a criminal case, '[t]he only post verdict fact-based remedy available ... is a motion for a new trial.'" *State v. Taylor*, 348 S.C. 152, 158, 558 S.E.2d 917, 919 (Ct. App. 2001), aff'd, 355 S.C. 392, 585 S.E.2d 303 (2003) (quoting *State v. Miller*, 287 S.C. 280, 285, 337 S.E.2d 883, 886 (1985)). "It is well settled that the grant or refusal of a new trial is within the sound discretion of the trial judge." *State v. Taylor*, 348 S.C. 152, 159, 558 S.E.2d 917, 920 (Ct. App. 2001), aff'd, 355 S.C. 392, 585 S.E.2d 303 (2003). An abuse of discretion "means nothing more or less than that the ruling of the trial court was without reasonable factual support, resulted in prejudice to the rights of appellant, and therefore, in the circumstances, amounted to error of law." *Bridges v. Wyandotte Worsted Co.*, 239 S.C. 37, 40, 121 S.E.2d 300, 302 (1961).

STATEMENT OF FACTS

Summary

The State's evidence at trial showed that Appellant killed Victim in a drive-by shooting, and that Appellant's actions were in retaliation for the murder of Appellant's friend, Donnie Brooks. The State's evidence suggested that Victim's brother Taquan was Appellant's intended target. However, Appellant missed Taquan and struck Victim, who was sitting close to Taquan at the time. The following facts were presented to the jury:

The Crime

On April 14, 2015, a group of young men, including Appellant, Demarius Jefferson (hereinafter "Mr. Jefferson"), Darian Davis (hereinafter "Mr. Davis"), and Demorris Harris (hereinafter "Mr. Harris"), were in Aiken County playing basketball at various courts around town. Mr. Jefferson had borrowed his girlfriend's black, four-door Toyota Corolla, and the group was using this vehicle to get around town. Later that evening, Mr. Jefferson chose to stay and play some one-on-one with Mr. Davis, and agreed to loan his girlfriend's car to Appellant to use

for a bit to go get weed. (R. p. 218, line 20 through p. 219, line 3; p. 147, lines). With Mr. Harris driving and Appellant providing directions, the two individuals left together in the Toyota. (R. p. 218, line 16 through p. 221, line 7). Appellant instructed Mr. Harris to pull over shortly after leaving; unbeknownst to Mr. Harris, Appellant exited the vehicle and acquired a shotgun from the trunk. (R. p. 224, line 5 through p. 225, line 25). Appellant returned to the backseat and continued giving driving instructions to Mr. Harris. Appellant directed Mr. Harris to drive to Diamond Street in Aiken County. (R. p. 225, lines 5-16).

On this same day Patricia Coach, Gail McFadgen (hereinafter "Victim"), and Taquan Coach were on Diamond Street in Aiken County attending a birthday party for their cousin, Tyson Coleman. (R. p. 64, line 20 through p. 65, line 25). This event had been made public through postings on social media. (R. p. 65, lines 11-19). At approximately 9:00pm that night, the group was hanging out together on the brick wall adjacent to the street. (R. p. 66, line 1 through p. 67, line 25).

Harris and Appellant approached the portion of the street where the group was sitting, Appellant rolled down the window, stuck the barrel of his shotgun out of the window and fired at the group. (R. p. 226, lines 1-14). Victim was struck in the abdomen by a single shotgun slug round and the vehicle sped off. (R. p. 199, line 22 through p. 200, line 5; p. 197, line 3-8). Police and EMS personnel quickly responded and Victim was rushed to the hospital. Victim was pronounced dead at 9:55pm on April 14, 2015. (R. p. 249, lines 16-20). The forensic evidence gathered from the scene of the crime did not link any individual to the crime. (R. p. 191, lines 11-15).

Summary of State's Evidence Presented at trial

Testimony of Patricia Coach

Patricia Coach (hereinafter "Patricia" is the sister of Taquan Coach, Jenny Roper, and Victim, Gail McFadgen. (R. p. 64, lines 6-7). Patricia testified that on April 14, 2015, she and Victim were on Diamond Street attending their cousin Tyson Coleman's birthday party and noted that the party had been announced on Facebook. (R. p. 65, lines 3-15). At 9pm that night, Patricia testified that she, Victim, Taquan, and Tyson were sitting on a brick wall adjacent to the street. (R. p. 66, line 1 through p. 67, line 23). Patricia testified that she saw a dark-colored, four-door car come down the street, but she and her family thought nothing of it at first. (R. p. 68, lines 1- 6). She then saw the back seat window roll down, saw the flash from a gunshot, and felt the power from the gun as her sister was shot. (R. p. 68, lines 6-24).

Patricia testified that she could not see who was in the car, or how many people were in the car. (R. p. 69, lines 11-24). EMS and law enforcement arrived shortly after Patricia provided a statement to law enforcement. (R. p. 70, line 15 through p. 71, line 2). On cross-examination, Patricia testified that she could not recall whether or not she told Sergeant Turner that the person in the car had a white shirt on that night. (R. p. 72, lines 12-15).

Testimony of Taquan Coach

Taquan Coach (hereinafter "Taquan") testified to the same basic details of the drive by shooting that his sister Patricia had testified to, and likewise provided a statement to police regarding the crime. (R. p. 74-77).

On cross-examination, Taquan testified regarding an individual named Donnie Brooks,[1] whom he knew to have been killed in January of 2015. (R. p. 78, lines 1-5). Taquan testified that he was aware he was considered a suspect in Brooks' death, and while he acknowledged that he was at the apartment complex where Donnie Brooks was killed on the day of the murder, he testified he was not there when the murder took place. (R. p. 78, lines 9-24).

Testimony of Mercedes Navas

Ms. Navas was dating Mr. Jefferson in April, 2015. (R. p. 88, line 24 through p. 89, line 6). She testified that Mr. Jefferson would often stay with her in her dorm on campus and would also loan her black, four-door Toyota Corolla to him while she was in class. (R. p. 89, line 8 through p. 91, line 2). She testified that she specifically recalls loaning him the vehicle on April 14, 2015, and likewise had allowed Mr. Jefferson to borrow her cellphone that day. (R. p. 91, lines 3-5; p. 93, lines 1-13). Ms. Navas testified that her cell phone number was (727) 247-9470. (R. p. 93, lines 14-18). Soon after, Ms. Navas testified that she learned, much to her displeasure, that Mr. Jefferson failed to return the car that evening as he was supposed to do and that he had loaned the car to someone else.[2] (R. p. 94, line 1 through p. 98, line 23). Ms. Navas had met Appellant and knew him as "Red", but did not know him very well. (R. p. 98, lines 8-23; p. 100, lines 14-16).

On April 17, 2015, Ms. Navas testified that she and Mr. Jefferson were sitting together at Bob Richard's car dealership while waiting on her oil-change to be completed. (R. p. 101, lines 4-17). During this time period, Mr. Jefferson used Navas' phone and Lieutenant Fluery

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[1] The facts elicited at trial demonstrated that Donnie Brooks was killed by a rival gang, and that Victim's death was an accidental result of the retaliation for Mr. Brooks' death. (R. p. 423, lines 4-14); (R. p. 404, line 9 through p. 405, line 5); (R. p. 168, line 21 through p. 169, line 10).

[2] The record shows that Appellant was the recipient of the loaned car, but this information drew objections from the defense. The Solicitor moved on from the topic following the sustained objection. (R. p. 94-97).

responded by arriving at the dealership to communicate with Mr. Jefferson. (R. p. 101, line 18 through p. 102, line 7). Mr. Jefferson and Ms. Navas accompanied Lieutenant Fluery to the station wherein she provided a statement and gave consent for her car to be searched. (R. p. 102, lines 13-22). She later consented to providing her phone and iPad to authorities for a search as well. (R. p. 103, lines 2-14). Ms. Navas testified that sometime after April 17th, she received a phone call from Appellant on a private number wherein Appellant asked if she or Mr. Jefferson had mentioned his name to police. (R. p. 103, lines 15-25).

Testimony of Demarious Jefferson

Mr. Jefferson, who has pending charges for unlawfully carrying a pistol and possession of a controlled substance, testified that he had not been promised anything in exchange for his testimony. (R. p. 106, lines 6-25). Mr. Jefferson testified that he has known Appellant for a few years. (R. p. 108, lines 2-5). He testified that he spent the previous night with his girlfriend, and that on April 14, 2015, he borrowed her car and spent the day with Appellant. (R. p. 108, line 21 through p. 109, line 24). In his endeavors on April 14, Mr. Jefferson ran into Mr. Harris. (R. p. 110, lines 11-23). Mr. Harris accompanied Mr. Jefferson and they then went to pick up Appellant in North Augusta. (R. p. 110, line 17 through p. 111, line 16). The three individuals then picked up Mr. Davis, and the group proceeded to gamble and play basketball together at various courts around the area. (R. p. 111, line 11 through p. 112, line 7). Mr. Jefferson testified that he allowed Mr. Harris (also referred to as "Bope") and Appellant to borrow the car, while he and Mr. Davis continued to play basketball. (R. p. 114, lines 4 through p. 115, line 8).

Mr. Jefferson testified that Appellant was gone for approximately an hour, maybe an hour and a half, and recalled hearing police sirens everywhere during the time that Appellant and Mr. Harris were gone. (R. p. 115, line 2 through p. 116, line 4). Appellant and Mr. Harris returned

and the group left the basketball courts to drop-off Mr. Davis. (R. p. 116, line 18 through p. 117, line 10). The remaining group of three continued to hang out that night and drove the Chalet North apartments. When they arrived Mr. Jefferson testified that he saw in the trunk something covered up, but saw the barrel of a shotgun. (R. p. 118, line 9 through p. 119, line 17). Mr. Jefferson testified that Appellant took the shotgun out of the trunk and walked around to the right side of the apartments. (R. p. 119, lines 18-24). The group then left and drove to the Belvedere Terrace neighborhood, and then later to the Riverwatch area in Augusta to see Mr. Harris's girlfriend. (R. p. 120, line 2 through p. 121, line 13).

A few days later, Mr. Jefferson encountered Appellant again at the local basketball courts, along with other individuals; he overheard Appellant saying "I had a shootout with the Wolf pack boys" (R. p. 122, line 18 through p. 123, line 17). Mr. Jefferson also testified that he had a phone conversations with Appellant days later wherein Appellant instructed Mr. Jefferson to wipe down the back of the car and keep his mouth shut. (R. p. 124, lines 11-25). In review of phone records, Mr. Jefferson testified that he contacted Appellant by phone at (706)-755-9252. (R. p. 125, lines 3-18). On cross-examination, Jefferson acknowledged having said to ATF agent Matt Morlan that "Red ain't killed that girl", and argued that he was repeating it as street talk. (R. p. 134, line 6 through p. 135, line 22). On redirect, Mr. Jefferson testified that he was not in the vehicle during the drive-by shooting and that his statements to Agent Matt Morlan only shared the information and rumors he had received on the street, none of which were eyewitness testimony. (R. p. 140, lines 2-15).

Testimony of Darian Davis

Mr. Davis testified that he is from the same neighborhood as Appellant, and had known him for fifteen to twenty years. (R. p. 143, line 25 through p. 144, lines 7). Mr. Davis confirmed

that he was picked up in a black, four-door car and that the group of four all went to play basketball on April 14, 2015. (R. p. 145, lines 2-21). At a later point in the evening he and Mr. Jefferson stayed and played one-on-one basketball while the other two individuals stayed near the car. (R. p. 147, line 4 through p. 149, line 25). Mr. Davis testified that he overheard Jefferson and Appellant arguing about the car, and ultimately Mr. Jefferson ended up walking back over to the court to play ball, and said that "he wasn't dealing with none of that." (R. p. 149, lines 8-20). Mr. Davis testified that Appellant and the other individual left in the car, and were gone for about an hour. (R. p. 150, lines 1-11). When they returned, he and Mr. Jefferson got into the car and Mr. Davis was dropped off shortly after at his home. (R. p. 150, line 25 through p. 151, line 6).

Testimony of Santana Nesbitt

Ms. Nesbitt testified that she was on leave from military service during the week of April 14, 2015, and was communicating regularly with Appellant. (R. p. 155, line 18 through p. 156, line 10). She had known him from the neighborhood for years. After review of her phone records, Ms. Nesbitt confirmed that she was contacting Appellant by phone at (706) 755-9252. (R. p. 156, line 13 through p. 157, line 4). She testified that shortly after the shooting Appellant changed phone numbers and contacted her using his new number. (R. p. 157, line 19-25). After his arrest, Appellant continued to contact her from prison. (R. p. 158, lines 1-3). Ms. Nesbitt testified that she would put money on Appellant's prison phone account to allow him to make calls. (R. p. 158, lines 4-13). Ms. Nesbitt testified that she spoke with Appellant every day and recognized his voice. (R. p. 158, line 16-20). Ms. Nesbitt was shown State's Exhibit No 14, which she recognized as a disc bearing her initials for which she had listened to the day prior and testified that it accurately portrayed her phone call with Appellant on May 11, 2015. (R. p. 158,

line 21 through p. 159, line 7). State's Exhibit 14 was admitted into evidence and published to the jury without objection. (R. p. 159, lines 8-16). Before publication, Ms. Nesbitt testified that Appellant had asked her to contact his attorney and provide a false alibi for his whereabouts that night. (R. p. 159, line 19 through p. 160, lines 6). Ms. Nesbitt testified that she was at home in Beaufort on the night of the murder, that she was not with Appellant at that time, and that she did not contact Appellant's lawyer in order to lie about Appellant's whereabouts on April 14, 2015. (R. p. 160, line 17 through p. 161, lines 5).

Testimony of Victor Mercuri

Mr. Mercuri was a resident of Aiken County Detention Center on armed robbery charges (among other charges) and testified that he has received no promises or deals in exchange for his testimony. (R. p. 165, line 10 through p. 166, line 18). Mr. Mercuri testified that he was housed with Appellant from approximately April 20, 2016, to the beginning of May, and then returned from May 20th to beginning of June. (R. p. 166, line 19 through p. 167, line 4). While housed with Appellant during recreation time, Mr. Mercuri testified that he heard discussion of this case between Appellant and other inmates wherein Appellant was being teased for being a crappy shot, and shooting a female. (R. p. 167, line 5 through p. 168, line 21). Mr. Mercuri heard Appellant respond that he had intended to kill both of them, but that he "missed the nigger and shot the bitch". (R. p. 168, lines 18-20). On a separate occasion, Mr. Mercuri testified that he overheard Appellant discussing the case while in his cell. He heard Appellant claim that he "shot the bitch" out of retaliation for someone killing his brother, a fellow gang member, and that by doing so, he was going to obtain a higher rank in his gang. (R. p. 168, line 21 through p. 169, line 10). Mr. Mercuri testified that he could physically see Appellant through his cell door during this conversation. (R. p. 169, line 11 through p. 170, line 11). He provided a statement to

authorities regarding what he overheard on September 16, 2016. (R. p. 170, lines 12-14). He does not recall precisely, but believed these conversations took place somewhere between June 3rd and June 4th. (R. p. 170, lines 15-20).

Testimony of Nick Gallam

Captain Gallam was employed with the Aiken County Sheriff's Office, and testified as to the system used for inmates using telephone privileges. (R. p. 174, line 5-23). He explained that inmates are assigned a PIN number that allows them to load money and use the phone for personal calls, and inmates are made aware by both signage and pre-recorded message that their telephone conversations are monitored. (R. p. 174, line 24 through p. 176, line 22). Captain Gallam also explained that it is a violation of rules for inmates to use each other's PIN numbers, but acknowledged that inmates will sometimes do so in order to conceal the content of their phone calls. (R. p. 175, lines 11-18). Call records and recordings are maintained by a separate vender called Securus and are usually stored for one year. (R. p. 176, line 23 through p. 177, line 13). In review of State's exhibits 16 and 49, Captain Gallam testified these exhibits were a corresponding call log and a recorded phone call from March 29, 2015, made by Appellant while using another inmate's PIN number. (R. p. 178, line 18 through p. 179, line 25). Captain Gallam testified that the calls were made by Appellant, but that the PIN number assigned to Terence Wideman was used to place the call.

Captain Gallam also testified that Aiken County Detention Center maintains a log of inmate housing, pods, and cell assignments. (R. p. 180, lines 1-5). Captain Gallam testified that States exhibit 16(A) contained housing logs for inmates Victor Mercuri, Appellant, and Austin Pownall. (R. p. 180, lines 15-23). He testified that Appellant, Pownall, and inmate Mercuri were housed in the same location on April 20 periodically together for a total of about 20 days, and

that in such a housing arrangement Appellant and inmate Mercuri would have substantial time to interact together. (R. p. 181, lines 4-25).

Testimony of Demorris Harris

Mr. Harris testified that his nickname is "Bope", and that he was arrested on March 30, 2016, for a myriad of charges. (R. p. 211, line 7 through p. 212, line 25). Mr. Harris testified that he had not been charged in connection with victim's murder until after law enforcement came and spoke with him at Edgefield County penitentiary. His statements to authorities resulted in his charge relating to victim's murder. (R. p. 213, lines 1-16). Mr. Harris testified that he had received no promises or deals in exchange for his testimony against Appellant. (R. p. 213, lines 17-20).

Mr. Harris testified that he and Appellant left the group at the basketball courts in order to go buy some weed. Mr. Johnson agreed to allow Appellant to use the car to do so, and Mr. Harris agreed to drive. (R. p. 218, lines 20-22). During the drive, he and Appellant made a number of stops. Appellant instructed Mr. Harris to stop at a home nearby, wherein he saw Appellant put something into the trunk and then get into the back seat. (R. p. 222, lines 1-23). He stopped again at a nearby baseball field and Appellant went back to the trunk and returned to the back seat of the car. (R. p. 224, lines 11-25). Appellant proceeded to use the phone, and instructed Mr. Harris to drive slowly down Diamond Street two separate times. (R. p. 223, line 1 through p. 225, line 11). Mr. Harris did as instructed, and the first trip down the road did not result in anything happening. (R. p. 225, lines 5-11). Mr. Harris testified that he presumed they were preparing to buy weed, but on the second slow drive down the road he heard Appellant roll down a window, pump a shot gun, and start to shoot at the people on the side of the road. (R. p. 225, line 12 through p. 226, line 19).

Mr. Harris testified that he was surprised by Appellant's actions and sped off; he then drove to pick up Mr. Jefferson and Mr. Davis from the basketball court. (R. p. 225, line 21 through p. 226, line 24). They then dropped off Mr. Davis and proceeded to the home of Jasmine Allison, where Mr. Harris testified that Appellant attempted to dispose of the gun. (R. p. 228, lines 6-11). However, according to Mr. Harris, Ms. Allison would not allow Appellant to leave the gun. (R. p. 230, lines 7-18).

Mr. Harris testified next regarding how long he had known appellant and whether he was familiar with Appellant's friends, Donnie Brooks and Christian Gordon (aka "Brisco"). Mr. Harris testified that he knew both individuals and identified them in a photograph, State's exhibit 44. (R. p. 234, line 22 through p. 236, line 17). On cross-examination Mr. Harris denied telling Kahlo Calhoun that Christian Gordon (aka "Brisco") was in the car during the shooting and denied confessing to Calhoun that he fired the gun. (R. p. 244, lines 9-21; p. 235, lines 12-16).

Testimony of Clay Simmonds

Cell phone tower and sector records, discussed by expert Clay Simmonds, demonstrated that until the late evening of April 14, 2015, both Appellant's and Mr. Jefferson's cell phones utilized the same cell phone towers at the same times of day. However, at 8:35pm, Appellant's phone began using a different sector, while Mr. Jefferson's phone was silent. (R. p. 326 line 5 through p. 327, line 10). The cell phone tower and sector data demonstrated that Appellant's phone was active in the Diamond Street area at 8:57, 10 minutes before the 911 call was made; Appellant was likewise so located at 9:08, one minute after the 911 call was made. (R. p. 329, lines 12-25; p. 330, lines 1-13).[3] At 9:28, Appellant's phone returned to the basketball court area,

[3] Mr. Simmonds' testimony could not pinpoint precisely where Appellant's phone was based on tower usage, but was able to testify that the tower and sector usage for the Diamond Street area was the tower and sector used by Appellant at the time of the murder.

which utilizes different tower and sectors from the Diamond Street area, and Appellant's and Mr. Jefferson's phones again used the same tower and sector for calls. (R. p. 333, line 23 through p. 334, line 5).

Testimony of Christian Gordon

Mr. Gordon (aka "Brisco") testified that he is charged with criminal conspiracy and intimidation of a witness in relation to Victim's murder, and that he had be promised nothing in exchange for his testimony in Appellant's trial. (R. p. 403 line 18 through p. 404, line 4). Mr. Gordon testified that he was with "his brother" Donnie Brooks at the time of his murder and that he saw Taquan running from the window after Donnie Brooks had been shot. (R. p. 404, line 8 through p. 405, line 5). Mr. Gordon testified that his cell phone number was (706) 840-5578, and that he communicated with Appellant on the night of April 14, 2015. (R. p. 407, lines 13-25). Mr. Gordon testified that on April 14, 2015, he was at home and that he received phone calls from Appellant at 8:23pm, 8:57pm, and 9:08pm, all of which were corroborated by cellphone records.[4] (R. p. 408, line 4 through p. 409, line 8).

Mr. Gordon then testified that he was able to later communicate with Appellant by phone on October 24, 2016. He described that he was on speaker phone while communicating with another phone using speaker phone. (R. p. 409, lines 9-24). During this phone conversation Appellant instructed Mr. Gordon to "checkmate that king", which Mr. Gordon explained meant that he was to silence, intimidate, and/or hurt Mr. Jefferson, because Mr. Jefferson was the reason Appellant was arrested. (R. p. 410, lines 1 through p. 411, line 5). This phone call was then published to the jury. (R. p. 412, lines 10-25). Mr. Gordon's testimony regarding this

[4] The timing of these calls corresponds precisely with the time of Victim's shooting.

arranged speaker-to-speaker phone call with Appellant was corroborated entirely by Ms. Ashton Brighthop. (R. p. 396-400).

Summary of Appellant's Evidence Presented at Trial

Testimony of Kahlo Calhoun

Mr. Calhoun testified that he was an incarcerated inmate in the Aiken County Detention Center with pending charges for simply larceny, and was also on probation for "possession with intent to distribute." (R. p. 437, lines 7-18). Mr. Calhoun testified that he saw Mr. Harris (Bope) on the day after the murder and that Mr. Harris told him that "he pulled the trigger." (R. p. 439, lines 9-23). On cross-examination, Mr. Calhoun responded "I don't know about none of that" when asked about why he would let his own cousin sit in jail for nearly two years, and only reveal Mr. Harris as the shooter on the day before trial. (R. p. 440, lines 14-21). Mr. Calhoun denied being "in a gang", but confirmed that he is a "Boss" in "an organization", and denied telling law enforcement that Appellant was also "a Boss". (R. p. 440, line 24 through p. 441, line 9).

Testimony of Cheryll Nicole Grubbs

Ms. Grubbs testified that she had known Mr. Jefferson for approximately nine years. (R. p. 443, lines 18-20). Ms. Grubbs testified that Mr. Jefferson drove to her house one night in April, was acting a little nervous, and claimed that he had been the driver in a drive-by shooting wherein a little girl had been shot. (R. p. 444, line 5 through p. 445, line 3). On cross-examination, in reference to Mr. Jefferson's alleged involvement in the drive-by, Ms. Grubbs testified that she had told investigators "I will put my hand on the Bible, he did not say he was there or involved." (R. p. 446, lines 1-14). She also admitted telling the Solicitor's officer that the only statement Mr. Jefferson made that night was "old boy is upset in the car because he was

involved in a shooting with a little girl." (R. p. 447, lines 3-7). Ms. Grubbs testified that she was on Xanax and methadone at the time of her original statements that Mr. Jefferson was not involved, but was sober on her following interview. (R. p. 449, line 10-16). Ms. Grubbs denied ever asking investigators for reward money in exchange for her statement. (R. p. 449, lines 3-7).

State's evidence offered in Reply

Testimony of Matt Morlan

Mr. Morlan testified that he was an agent with ATF, and that on Tuesday, the 31st, he conducted an interview with Kahlo Calhoun. (R. p. 457, line 24 through p. 458, line 3). Mr. Morlan testified that the interview was recorded, and that during the interview Mr. Calhoun stated that Appellant was a member of an organization known as a "Boss".[5] (R. p. 458, lines 5-10). On cross, Mr. Morlan testified that Mr. Calhoun informed him that Mr. Harris (Bope) was the shooter in the case. (R. p. 459, lines 5-8). Next, Investigator Chuck Cain testified that after conclusion of taking the statement of Cheryll Grubbs, she asked on multiple occasions for reward money in exchange for her statement.[6] (R. p. 459, line 20 through p. 460, line 7; p. 461, lines 17-20). Lastly, Captain Gallam retook the stand and identified State's Exhibit No. 65 as a call detail report from Aiken County Detention Center's inmate telephone system. (R. p. 463, lines 5-10). Captain Gallam further identified the date, time, duration, and recipient phone number of the call. (R. p. 463, lines 17-20). He then identified State's Exhibit 63 as the downloaded call of Appellant corresponding to the call detail report he just discussed. (R. p. 463, line 21 through p. 464, line 5). The State argued that Exhibit 63 should be admitted because it contained Appellant's recorded phone call discussion about Mr. Harris not really being involved

[5] This was in contradiction to Mr. Calhoun's testimony that he did not recall telling Mr. Morlan that Appellant was a Boss. (R. p. 441, lines 7-9).

[6] This was in contradiction to Ms. Grubb's testimony wherein she denied asking for reward money. (R. p. 449, lines 3-10).

in the crime. (R. p. 453, line 12 through p. 454, line 6). The trial court admitted these exhibits into evidence over the objection of defense counsel and the exhibits were published to the jury. (R. p. 464, lines 6-22).[7]

APPELLANT'S MOTION FOR NEW TRIAL

On August 14, 2017, Judge Young heard Appellant's Motion for New Trial. The following facts and testimony were offered at Appellant's motion hearing:

Mr. Mercuri, who testified at Appellant's trial that he had overheard Appellant discussing the shooting and that he was actually aiming for someone else, recanted his entire trial testimony approximately one hour after his guilty plea and eighteen year sentence were entered on his charge of armed robbery. (R. p. 574, lines 1-4; p. 562, lines 23-24). Mr. Mercuri's testimony at Appellant's motion hearing is summarized as follows:

- Mr. Mercuri testified that he contacted the Solicitor's office about having information on Appellant's case; no one sought him out. (R. p. 560, lines 7-16).
- Mr. Mercuri testified that his entire testimony at trial was a lie that he constructed using the rumors he had heard in prison, and then providing a vague statement to the Solicitor. Mr. Mercuri testified that he then used additional information from his discussions with the Solicitor to further develop his lie. (R. p. 548, lines 2-6).
- Mr. Mercuri testified that the Solicitor's office "gave [him] all the statements" for his trial testimony. (R. p. 561, lines 8-11).
- Mr. Mercuri testified that his attorney was late to one of the meetings with the Solicitor's office and it was during that time that the State provided him with documentation that contradicted the timeline he had provided, and as a result he

[7] State's Exhibit 63, directly contradicted the testimony of Kahlo Calhoun, who testified that Mr. Harris confessed to being the shooter. (R. p. 439, line 4 through p. 440, line 5).

corrected his timeline to conform to the evidence the Solicitor's office was showing him. (R. p. 564, line 11 through p. 565, line 19).

- Mr. Mercuri testified that his lawyer was the individual who gave him the expectation of pleading to non-violent strong-armed robbery, and that the Solicitor's office did not commit to specifics. (R. p. 546, lines 10-12; p. 552, lines 2-18; p. 551, lines 5-11).
- Mr. Mercuri testified that Solicitor Thurmond was specific that he would receive a nonviolent, strong-armed robbery plea. (R. p. 553, line 22 through p. 554, line 3).
- Mr. Mercuri testified that Assistant Solicitor Cassie Hall also told him that he would benefit if he provided testimony at Appellant's trial. (R. p. 552, lines 17-24).
- Mr. Mercuri testified that he expected to receive a five year, non-violent strong-armed robbery charge, but that the State double-crossed him and gave him an insufficient plea deal different from what they had promised. (R. p. 546, lines 10-23; p. 569, lines 4-8).
- Mr. Mercuri testified that he knew prior to his plea hearing that he would receive a recommended cap of twenty years for his guilty plea to armed robbery, and acknowledged that he had four other charges dismissed as a result of his plea. (R. p. 562, line 5 through p. 563, line 6; p. 564, lines 4-6).
- Mr. Mercuri testified that his lies during Appellant's trial also required him to tell his plea court, the Honorable Judge Doyet A. Early, III, that he had not been promised anything. (R. p. 577, lines 1-25).

- Mr. Mercuri confirmed that as soon as his sentence was given, regardless of what plea deal he received, he intended to recant his testimony. (R. p. 573, lines 11-15).
- Mr. Mercuri testified that he had not been threatened or intimidated to recant his testimony. (R. p. 555, lines 7-10).
- Mr. Mercuri testified that on his initial meeting with the solicitor's office investigator, he offered statements he learned in prison concerning a completely separate crime. Mr. Mercuri stated that "I didn't make up lies, but I told him about another statement, yes, sir." When asked if his statements about this other case were still the truth, Mr. Mercuri stated "I don't know." (R. p. 569, line 14 through p. 570, line 12).[8]

Testimony of Solicitor Strom Thurmond

Solicitor Thurmond was assisting in the prosecution of Appellant, along with co-counsel Cassie Hall, and investigator Steve Miano. (R. p. 579, lines 17-25). Solicitor Thurmond testified that Mr. Mercuri reached out to his prosecuting solicitor, Ms. Beth Ann Young, and informed her that he had information about Appellant's case, and one other case. (R. p. 580, lines 11-16). Solicitor Thurmond did not know what information Mr. Mercuri possessed, so he sent investigator Miano to the Aiken County Detention Center to meet with him; he gave Mr. Mercuri no authority to offer any deals or immunity from prosecution. (R. p. 580, line 17 through p. 581, line 2). Mr. Miano created a summary of this meeting for Solicitor Thurmond. (R. p. 581, lines 3-5). Solicitor Thurmond arranged for a second interview on November 9, 2016, wherein he, Ms, Hall, Mr. Miano, Mr. Hayes (Mr. Mercuri's attorney), and Mr. Mercuri attended. (R. p.

[8] This other case involved a Reginald Hamilton. Mr. Mercuri testified at trial that Reginald Hamilton is one of the individuals he overheard discussing victim's murder, and to which he heard Appellant respond by confessing his guilt for the murder. (R. p. 168, lines 8-20); (R. p. 570, lines 2-12).

581, lines 14-17). Following this interview, Solicitor Thurmond noted that Mr. Mercuri's statement contained numerous corroborations to the State's theory of the case. These corroborations included:

- The theory that the shooting occurred as a gang retaliation for the murder of Donnie Brooks;
- The theory that Appellant had intended to shoot someone else, but missed and killed Gail McFadden by mistake.
- The fact that Taquan Coach was a suspect to Donnie Brooks's murder and was in close proximity to the unintended victim, his sister Gail McFadden;

(R. p. 581, line 23 through p. 582, line 7). Solicitor Thurmond also noted that his office took efforts to obtain documentation from Aiken County Detention Center to try and further corroborate Mr. Mercuri's statements. Those documents demonstrated that on two separate occasions, Mr. Mercuri was housed in the same pod as Appellant. Additionally, Mr. Mercuri noted that he heard his longtime friend, Austin Pownall, discuss with Appellant the murder of victim, and records showed that Mr. Pownall was cellmates with Mr. Mercuri. (R. p. 167, line 16 through p. 171, lines 12); (R. p. 582, lines 7-20). Solicitor Thurmond testified that they did not accept Mr. Mercuri's statement at face value; they corroborated it with the other information available to them. (R. p. 582, lines 20-22). Mr. Thurmond testified that he and his office met with Mr. Mercuri one other time prior to his testimony being given at trial. (R. p. 583, lines 1-6).

Mr. Thurmond testified unequivocally that neither he, nor any member of his office made Mr. Mercuri any offer, deal, or promise in this matter, nor did he imply such a benefit would be received if Mr. Mercuri cooperated. (R. p. 583, lines 7-13). He noted that Ms. Cassie Hall never spoke one word to Mr. Mercuri, and that the prosecuting attorney, Ms. Beth Young, was never present for Mr. Mercuri's meetings. (R. p. 583, lines 20 through p. 584, line 10). Solicitor Thurmond testified that his discussion with Assistant Solicitor Young about offering a plea deal

in Mr. Mercuri's case did not occur until after the conclusion of Appellant's trial. (R. p. 584, lines 6-10).

Solicitor Thurmond did explain that in his first meeting, Mr. Mercuri "blurted out" that he wanted to plead to strong-armed robbery charge. Solicitor Thurmond testified that he explained in response: "I told him that I was not prosecuting his case, I'm not handling his case I didn't know anything about his case and that he needed to listen to his attorney and tell the truth." (R. p. 583, lines 14-19). He likewise testified that he did not make any deals with Mr. Mercuri's attorney, David Hayes, and that he held no conversations with Mr. Hayes until after the Appellant's trial; Solicitor Thurmond likewise noted that Mr. Hayes never made any guarantees of leniency while in his presence. (R. p. 584, lines 6-24; p. 588, lines 12-18). After the conclusion of Appellant's trial, he informed Ms. Young that Mr. Mercuri had provided truthful testimony and that he was entitled to consideration for it; Ms. Cassie Hall attended Mr. Mercuri's plea and personally relayed this sentiment to Judge Early during sentencing. (R. p. 584, line 25 through p. 585, line 7).

On cross-examination, Solicitor Thurmond testified that while Mr. Mercuri allegedly harbored expectations for his cooperation in Appellant's trial, such expectation could not have been the result of any promise, offer, or deal made by any member of his staff. (R. p. 587, lines 2-8). Solicitor Thurmond testified that at his meeting, he shut down Mr. Mercuri's unsolicited demands for a deal and made clear to Mr. Mercuri that he was not making any offers or promises; he then read the statement that Mr. Mercuri had provided to the investigator during their initial meeting and asked if it was true. Mr. Mercuri stated that it was the truth. (Motion, R. p. 587, line 11 through p. 588, line 4). Solicitor Thurmond expressed that it was important that

Mr. Mercuri's testimony under oath be given absent incentive. (R. p. 591, line 14 through p. 592, line 3).

Solicitor Thurmond was asked if he'd explained his particular reasoning to either Mr, Mercuri or his attorney, Mr. Hayes; Solicitor Thurmond testified that he could not recall if he had given that full explanation or not. (R. p. 592, lines 1-12). He also testified that he does not recall whether he disclosed the fact that Mr. Mercuri specifically demanded a plea at the outset of the discussion, and did not recall it coming out at trial. (R. p. 592, lines 13-16; p. 595, lines 18-21).

ARGUMENT

I. The trial court did not abuse its discretion in admitting State's Exhibit 63 into evidence in reply to the testimony of witness Kahlo Calhoun.

The trial court did not abuse its discretion in admitting State's Exhibit 63 as evidence in reply from the State after the conclusion of its case-in-chief. Appellant's conviction and sentence should be affirmed.

The case law on the admission of reply testimony and evidence is well established in South Carolina. Our Supreme Court has held that "[t]he admission of reply testimony is within the sound discretion of the trial judge, and there is no abuse of discretion if the testimony is arguably contradictory of and in reply to earlier testimony." *State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986); *State v. Stewart*, 283 S.C. 104, 106, 320 S.E.2d 447, 449 (1984). In *State v. Todd*, the Court permitted the State's witness, Ms. Clayton, to testify in reply after the defendant testified at trial that he had not wrecked his truck prior to the shooting. The Court concluded that Ms. Clayton's testimony directly contradicted that portion of the defendant's testimony and therefore found no error in the admission of Ms. Clayton's testimony in reply. *Id.*

Appellant's case is not distinguishable in regard to application of rules concerning reply

testimony. State's Exhibit 63 was CD containing a recorded telephone conversation of Appellant made while he was incarcerated. The State called witness Ashton Brighthop during its case-in-chief to testify to her communications with Appellant while he was incarcerated. During the course of her testimony she was able to identify and authenticate Appellant's voice on two different recorded phone call CDs, State's Exhibits 46 which was immediately entered into evidence[9], and State's Exhibit 63, which was not immediately offered for admission into evidence. (R. p. 398, line 18 through p. 400, line 2). The state ended its case-in-chief without offering State's Exhibit 63 into evidence.

However, during Appellant's case-in-chief, defense counsel put forth the testimony of witness Kahlo Calhoun who testified that Mr. Harris (Bope) confessed to being the shooter from the drive-by shooting of victim. At the conclusion of Appellant's case-in-chief, the trial court asked if the State wished to present any evidence in reply. (R. p. 450, lines 11-14). The State informed the court that it had three witnesses it wished to produce in reply so as to introduce evidence that would directly contradict certain evidence put forth by Appellant. (R. p. 450, line 22 through p. 454, line 6). One such witness was Captain Gallam, who had already testified briefly regarding the manner in which Aiken County Detention Center regulates, records, and stores inmate telephone conversations. (R. p. 174-182). The State sought to re-call Captain Gallam to the stand so that he could lay a foundation for the recorded telephone conversation of Appellant, Exhibit 63, wherein Appellant specifically discussed Mr. Harris's lack of involvement in the crime. (R. p. 453, line 12 through p. 454, line 6). Assistant Solicitor Hall specifically noted that Appellant's voice had already been authenticated by a prior witness, but that the state needed to call Captain Gallam so as to lay a foundation through the jail administrator. (R. p. 453, lines

[9] The State ultimately admitted Exhibit 46 into evidence after Ms. Brighthop's testimony, and then did so again during Mr. Christian Gordan's testimony. (R. p. 399; p. 411).

12-17).

Defense counsel objected to the introduction of the recorded phone conversation and argued that if the State wanted to introduce that recording, it should have done so during its case-in-chief, and that to admit the evidence in reply would be in error. Defense counsel argued that the State had full knowledge of Mr. Calhoun's testimony naming Mr. Harris as the shooter, that he had asked Mr. Harris on cross-examination if he was the shooter, and that there was no surprise to the State in this matter. (R. p. 454, line 10 through p. 455, line 12). Defense counsel did not raise any objection that the State's Exhibit 63 was inadequately contradictive, but merely argued that it should have been admitted during the State's case-in-chief, based on their preexisting knowledge of the issue, and due to the brief cross-examination of Mr. Harris on the topic. The State noted that Mr. Calhoun was only a potential witness until he was actually called to testify, and that the State was unaware as to whether the identification of Mr. Harris as the shooter would actually be stated in court. (R. p. 455, lines 13-18).

The Court agreed with the State. Judge Young found that, until the testimony of Mr. Calhoun, the new issue identifying Mr. Harris as the shooter had not been established by any other evidence put forth during the trial. (R. p. 455 line 21 through p. 456, line 15).The Court correctly noted that even though defense counsel cross-examined Mr. Harris and asked if he had confessed to Mr. Calhoun that he was the shooter, such allegations were denied, and defense counsel's questions would not constitute evidence establishing the issue. (R. p. 456, lines 3-16; R. 244, lines 9-21); See *State v. Saltz*, 346 S.C. 114, 137, 551 S.E.2d 240, 252 (2001). As such, the trial court permitted the State to call Captain Gallam and enter State's Exhibit 63 in reply.

The purpose of the evidence and the ruling of the court are in conformity with the rules governing admission of evidence in reply. State's Exhibit 63 was entered specifically to

contradict Mr. Calhoun's testimony that Mr. Harris confessed to being the shooter in the drive-by. As this was an issue that had not yet been established by any prior evidence, it was new evidence and perfectly satisfied the parameters for admission of evidence in reply. *State v. Todd*, at 340; *State v. Stewart*, at 449. The court's ruling in this matter was proper, and there is no basis to argue for an abuse of discretion, given the accuracy of the judge's factual recollection in comparison to the record and his application of law in this matter. Appellant's conviction and sentence should be affirmed.

II. The trial court did not err in denying Appellant's Motion for New Trial on the basis of the nondisclosure of a jailhouse informant's unsolicited request for a plea deal.

The trial court did not abuse its discretion in denying the Motion for New Trial on the basis of the State not divulging the jailhouse informant's initial and unsolicited request for a plea deal in exchange for his cooperation in testifying at trial. Appellant's conviction and sentence should be affirmed.

A few months after the conclusion of Appellant's trial, Mr. Mercuri went on to plead guilty to armed robbery in his own case. Just one hour after the conclusion of his guilty plea hearing and sentencing, Mr. Mercuri recanted his entire testimony offered at trial and alleged that he had been promised a plea deal by the Solicitor's office that he later did not receive. At Appellant's motion hearing, Solicitor Thurmond recalled that in efforts to meet with Mr. Mercuri, Mr. Mercuri "blurted out" a desire to plead guilty to a reduced charge of strong-armed robbery in his pending case. (R. p. 583, lines 14-19). Solicitor Thurmond immediately denied Mr. Mercuri any offers, deals, or promises in exchange for his testimony, but could not recall disclosing to defense that the unsolicited request was made. (R. p. 583, lines 14-19; p. 592, lines 13-16). Appellant used Mr. Mercuri's recantation and allegations as a basis for seeking a new trial. Appellant claimed that he was entitled to a new trial because the Solicitor's office did not

disclose the fact that Mr. Mercuri had made an unsolicited request for leniency in his case. Appellant now seeks to appeal the trial court's denial of its Motion for New trial.

Appellant argued for a new trial on the grounds that the Solicitor's nondisclosure constituted a *Brady* violation. "A *Brady* claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Evidence considered favorable to the defendant can include either exculpatory evidence or impeachment evidence. *State v. Moses*, 390 S.C. 502, 517, 702 S.E.2d 395, 403 (Ct. App. 2010). Moreover, "[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *State v. Moses*, 390 S.C. 502, 517, 702 S.E.2d 395, 403 (Ct. App. 2010) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). A defendant shows a *Brady* violation by demonstrating that "favorable evidence could [have been presented] to put the whole case in such a different light as to undermine confidence in the verdict." *Fradella v. Town of Mount Pleasant*, 325 S.C. 469, 479, 482 S.E.2d 53, 58 (Ct. App. 1997) (quoting *Kyles v. Whitley*, 514 U.S. 419, ___, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995)).

The trial court correctly applied this test to the nondisclosure of Mr. Mercuri's request for a favorable plea and found for a number of reasons that Appellant had failed to support his motion on the basis of *Brady*. First, the trial court reasoned that it was unconvincing for Appellant to claim that Mr. Mercuri's desire for favorable outcome in his case was unknown and undisclosed to him. The trial court found that an inmate hoping for leniency in his case was such

a basic and inherent desire that it cannot be argued as an undisclosed fact. The fact that an inmate made a prior statement of that desire "does not create new and discoverable impeachable evidence." (R. p. 625). The court reasoned that this is particularly so given that this topic of self-benefit has already been covered in cross-examination when defense counsel sought to determine if Mr. Mercuri had been assured of any plea offers or deals in exchange for his cooperation. (R. p. 625). Moreover, while Mr. Mercrui's request was not disclosed, there was nothing to prevent defense counsel from asking Mr. Mercuri if he harbored hopes of leniency in the future or if he had made specific requests for such leniency in coming forward with his testimony. If such questions had been posed to Mr. Mercuri, he could either have answered yes, in which case the jury would not likely have been surprised; or he could answer no, in which case he would likely have further damaged his credibility.

Most importantly, the trial court concluded that the nondisclosure in question simply did not constitute material evidence. Judge Young found that "Mr. Mercuri's testimony at trial was in addition to significant direct and circumstantial evidence presented by the State" and that Appellant's knowledge of the remark in question would not have given rise to a reasonable probability of differing result. (R. p. 625-26). The lack of materiality renders Appellant's arguments insufficient to establish a viable claim under *Brady*.

Appellate cites to *United States v. Bagley* and *Reutter v. Solem* in support of his argument. However, both of these cases are easily distinguishable from the facts of Appellant's case. In *Bagley*, defense counsel requested that the solicitor disclose any inducements that had been made to the informant witnesses. While there was no guaranteed promise or contract, *per se*, the solicitor failed to disclose that the possibility of a reward had been held out to both testifying inmate witnesses, under condition that the information they supplied had to help render

a satisfactory result at trial for the government. The court found this reprehensible, but remanded the case to permit the lower court to conduct an evaluation of the materiality of such a nondisclosure. *United States v. Bagley*, 473 U.S. 667, 683–84, 105 S. Ct. 3375, 3384, 87 L. Ed. 2d 481 (1985). On remand, the Ninth Circuit ruled that this constituted a material nondisclosure, i.e. a *Brady* violation, and was sufficient to warrant reversal given the government's sole reliance upon the testimony of the witnesses in question. *Bagley v. Lumpkin*, 798 F.2d 1297, 1301 (9th Cir. 1986).

Similarly, though not controlling authority in South Carolina, the state's *key witness in Reutter v. State,* Mr. Trygstad, was a convicted felon. On February 24th (the last available day to timely respond) the state complied with an order for disclosure exculpatory evidence. On the same day, the parole board agreed to postpone its commutation of sentencing hearing for Mr. Trygstad until immediately after Mr. Reutter's trial. The state did not disclose the fact that Mr. Trygstad had specifically sought a commutation of sentence or that his hearing had been postpone until the conclusion of Mr. Reutter's trial. The 8th Circuit found that the materiality of these nondisclosures was compounded by the fact that the state highlighted in closing argument the fact that Mr. Trygstad's "had nothing to gain" from his cooperation. The court noted:

> The District Court characterized the prosecutor's remarks as only "marginally misleading" since it is generally understood that every prisoner hopes that cooperation with the state will lead to favorable treatment at some future time. We disagree with that generous assessment. The prosecutor here was not merely glossing over the widely understood fact that cooperation with the state eventually may be helpful to a prisoner. He instead was representing to the jury that Trygstad had no reason to expect any specific benefit from his testimony. In view of the pendency of Trygstad's commutation hearing, which had been rescheduled so that it came at the end of petitioner's trial, this was hardly the full truth and it is difficult for us to conclude there is not a reasonable probability that the prosecutor's remarks had an effect on the judgment of the jury. We do not, however, need to decide whether the prosecutor's

> deceptive remarks alone would require a new trial. Here, the prosecutor's misleading closing statements merely serve further to undermine our confidence in the outcome of the trial. We are convinced that if the fact of Trygstad's petition for commutation and upcoming hearing thereon had been disclosed to the defense there is a reasonable probability the result of the trial would have been different

Reutter v. Solem, 888 F.2d 578, 582 (8th Cir. 1989). In both cases, the nondisclosures in question were overt and there existed an easily discernable basis for which the testifying inmate would have a genuine expectation of benefit for his testimony. In both of these cases the inmate witnesses were relied upon heavily to achieve a conviction. Neither of these circumstances is present in Appellant's case. In appellant's case, there was an abundance of evidence demonstrating Appellant's guilt. Each of the testimonies of Mr. Jefferson, Mr. Davis, and Mr. Harris were consistent with one another, and both Mr. Jefferson and Mr. Harris testified to Appellant being the shooter. Moreover, Mr. Harris's statements against Appellant ultimately constituted a confession that led to Mr. Harris being charged with accessory after the fact for the murder of Victim. (R. p. 212, line 7 through p. 213, line 16). Additionally, while not outright confessions, there were numerous inmate phone call recordings of Appellant that further demonstrated his guilt, along with the cell phone tower and sector analysis that was consistent with placing Appellant in the area of the crime at the exact time the crime occurred.

Even in the complete absence of Mr. Mercuri's testimony, there is still substantial evidence of guilt sufficient for a conviction, and sufficient evidence to render the state's nondisclosure of Mr. Mercuri's desire for a plea deal completely immaterial for purposes of a *Brady* evaluation. Our Supreme Court has recognized that on occasion, a *Brady* demand can constitute a "blunderbuss shot into the air in hopes that some game would fall to the earth", when describing defendants' efforts to stretch *Brady v. Maryland* to lengths that are neither intended

nor operable. *State v. Mixon*, 275 S.C. 575, 580–81, 274 S.E.2d 406, 408 (1981). Appellant has done the same here.

In the case at hand, the complained of nondisclosure does not satisfy the materiality requirements of *Brady,* nor does it constituted new discoverable impeachment evidence. The fact that an inmate testifying against a fellow inmate would *desire* leniency for a pending charge would be a realistic assumption of any juror; it certainly does not change the light in which this case was tried and confidently decided. Nor would this disclosure have any effect on the likelihood of a differing result, due both to diminutive value of the nondisclosed information and the significant evidence of guilt against Appellant. The trial court was correct to deny Appellant's motion for lack of merit. As Appellant desires to challenge the trial court's denial of a motion for new trial, it must demonstrate an abuse of discretion. *State v. Taylor*, 348 S.C. 152, 159, 558 S.E.2d 917, 920 (Ct. App. 2001), aff'd, 355 S.C. 392, 585 S.E.2d 303 (2003). The trial court made a well-reasoned ruling consistent with both the facts of the case and law under *Brady*, and as such there can be no basis in which to find an abuse of discretion in this matter. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). The conviction and sentence of Appellant should be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully submitted,

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May 22, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County
The Honorable Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2017-001950

THE STATE,

Respondent,

vs.

SANTONIO TOREZ WILLIAMS,

Appellant.

CERTIFICATE OF COMPLIANCE

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

This 22nd day of May, 2019.

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