STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
J. Cordell Maddox, Post-Conviction Relief Judge
Luke N. Brown, Trial Judge

Appellate Case No. 2019-000509

ROBERT ANTONIO STEED, SCDC #271499, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED ON CERTIORARI

Petitioner's Statement of Issue on Certiorari

Did the lower court err in denying Petitioner's request for Post-Conviction Relief where the record below shows that he demonstrated the existence of after discovered evidence which was material to his claim of innocence and established that the evidence in question could not have been discovered by him prior to his trial without the cooperation of two of his codefendants which he was powerless to obtain until such time as they decided to come forward and tell the truth?

Respondent's Counterstatement of Issue on Certiorari

Did the post-conviction relief court properly found Petitioner failed to establish he was entitled to post-conviction relief based on claims of after-discovered evidence, specifically the statements of Thomas Bond and Michael Griffin, where the statements would not have changed the result of Petitioner's trial, were discovered or discoverable more than a year before this application was filed, and are cumulative to other evidence that was presented at his trial?

STATEMENT OF THE CASE

Petitioner Robert Antonio Steed is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During its July 1999 term, the Charleston County Grand Jury indicted Petitioner for murder (1999-GS-10-4627), assault and battery with intent to kill (1999-GS-10-4628), first-degree burglary (1999-GS-4629), and armed robbery (1999-GS-10-4630). Thereafter, during its July 2000 term, the Charleston Grand Jury also indicted Petitioner for criminal conspiracy (2000-GS-10-5019). Chief Public Defender for the Ninth Judicial Circuit, D. Ashley Pennington, represented Petitioner on these charges. On December 4-7, 2000, Petitioner proceeded to a jury trial with one of his co-defendants, Michael Flynn, before the Honorable Luke N. Brown. Following deliberations, the jury convicted Petitioner as indicted for all charges. Judge Brown sentenced Petitioner to concurrent terms of imprisonment of thirty years for murder, twenty years for ABWIK, thirty years for first-degree burglary, thirty years for armed robbery, and five years for criminal conspiracy.

Petitioner filed a timely notice of appeal, and Stephan V. Futeral, Esquire, represented him on appeal. On June 7, 2004, Petitioner, through his counsel, filed a brief pursuant to *Anders v. California*. In his Anders brief, Petitioner raised the following issues:

1. Did the lower court err in denying Petitioner's Batson motion?
2. Did the lower court err in failing to use Petitioner's fifth and sixth voir dire questions?
3. Did the lower court err in permitting a witness for the State to testify regarding the witness' prior consistent statement?
4. Did the lower court err in denying Petitioner's motion for a directed verdict?
5. Did the lower court err in refusing to charge the jury regarding voluntary manslaughter?
6. Did the lower court err in permitting the prosecution, during closing argument, to vouch for witnesses who did not testify at trial?
7. Did the lower court err in refusing to charge the jury regarding Petitioner's proposed circumstantial evidence charge?

Thereafter, on July 29, 2004, Petitioner submitted his pro se brief, in which he raised the following issues:

1. Petitioner's trial was unconstitutionally held because the lower court lacked subject matter jurisdiction;
2. The lower court erred by denying Petitioner a timely demanded preliminary hearing;
3. The lower court erred in denying Petitioner's Batson motion;
4. The lower court erred in denying Petitioner effective assistance of counsel;
5. The lower court erred in denying Petitioner's motion for a directed verdict;
6. The lower court erred by failing to supply severance.

On December 6, 2004, the South Carolina Court of Appeals dismissed Petitioner's appeal by unpublished opinion. State v. Steed, Op. No. 2004-UP-608 (S.C. Ct. App. filed December 6, 2004). The remittitur was issued on January 6, 2005.

On November 17, 2017, more than twelve years following the conclusion of his direct appeal, Petitioner filed his first collateral challenge to his convictions – the application for post-conviction relief that is being challenged in this appeal. In this application, Petitioner alleged he was entitled to a new trial based on the following::

1. Newly discovered evidence, the existence of which could not have been discovered sooner through the reasonable exercise of diligence, has become known to the Petitioner and which validates his claims of actual innocence;
    a. Investigation is on-going, but to date the Petitioner has learned that at least one witness who testified at his trial has come forward seeking to recant trial testimony implicating Petitioner in the armed robbery and murder.
2. Further this newly discovered evidence indicates that the Petitioner's conviction is the result of prosecutorial misconduct involving the intimidation of one or more witnesses whose recanted testimony was known to the State prior to trial.
    a. Investigation is on-going, but to date the Petitioner has learned that at least one witness who testified at his trial attempted to recant statements implicating Petitioner in the crime but was threatened or coerced by agents of the State to testify against the Petitioner and did, in fact, testify against the Petitioner.

Respondent made its return and motion to dismiss on April 18, 2018, requesting the application be summarily dismissed for failing to make a *prima facie* case showing Petitioner was entitled to relief based upon newly discovered evidence. On April 27, 2018, the Honorable Kristi L. Harrington, in her capacity as Chief Administrative Judge for the Ninth Judicial Circuit, Court of Common Pleas for Charleston County, issued a conditional order of dismissal provisionally

dismissing the application with prejudice, while giving Petitioner twenty days to show why the conditional order should not become final. Thereafter, through counsel, Petitioner filed a response to the conditional order of dismissal on May 17, 2018. A hearing on Respondent's motion to dismiss was held on October 2, 2018, before the Honorable Michael G. Nettles. Petitioner was represented by Assistant Attorney General Kelly Oppenheimer of the South Carolina Attorney General's Office. After hearing arguments from both sides, Judge Nettles issued an order denying Respondent's motion to dismiss and ordering Petitioner's case be set for an evidentiary hearing. An evidentiary hearing into the matter was convened on January 22, 2019, at the Charleston County Courthouse before the Honorable J. Cordell Maddox Jr. Petitioner was presented at the hearing and was again represented by Cameron J. Blazer, Esquire. Assistant Attorney General Oppenheimer represented Respondent. Judge Maddox signed the Order of Dismissal on February 5, 2019 and the order was filed on February 20, 2019. The post-conviction relief court found that Applicant failed to make a prima facie showing he is entitled to relief. The court found Applicant wholly failed to establish the information presented at the evidentiary hearing would: (1) change the result if a new trial were had; (2) has been discovered since Applicant's trial; and (3) could not by the exercise of due diligence be discovered prior to trial. The court further found the inconsistency in Bond's and Griffin's statements were unreliable and undermined the possibility the result of a new trial would be different. Petitioner filed a Motion to Reconsider on March 4, 2019 and Respondent submitted its Return to Petitioner's Motion to Reconsider on March 15, 2019. The Court denied Petitioner's motion to reconsider by order filed April 3, 2019. Petitioner filed a timely notice of appeal on March 25, 2019.

STATEMENT OF FACTS

During school on May 3, 1999, John Griffin and Demetrius Green discussed robbing a house in Woodside Manor, where they could find drugs and money. Tr. 324-25, 379-80. John Griffin then contacted his brother, Michael Griffin, and Michael Flynn and told them what Green had said about this house in Woodside Manor. Tr. 382, 431. Michael Griffin, Flynn, and Tommy Bond then came to pick up John Griffin and Green. Tr. 327, 384-85, 535, 758-60. They all drove by the house in Woodside Manor, but no one was home; so they planned to return later that evening. Tr. 330, 387.

Later that evening, Flynn called Applicant (a.k.a. "T-Lo"), and Applicant came over to Peter Davis's house, where Michael Griffin, Flynn, and Bond were. Tr. 434, 540, 760-62. Flynn and Applicant both had nine millimeter guns, and Michael Griffin had a .32 revolver. Tr. 442, 480, 493, 540-41, 577, 581, 762. Around nine o'clock, Michael Griffin, Bond, Flynn, and Applicant went to pick up Green and John Griffin in two separate cars. Tr. 331-32, 387-89, 543. Bond and Griffin were in a four-door Honda, and Applicant and Flynn were in a dark green Alero. Tr. 765. John Griffin got in the car with Michael Griffin and Bond, and Green got into the car with Applicant and Flynn. Tr. 332, 388-89, 444, 543. The two cars drove to Woodside Manor, saw someone was home, and parked at a church located on the street behind the neighborhood. Tr. 332, 389, 446, 543.

Applicant, Michael Griffin, and Flynn then exited their vehicles, and went through a path, which led to Woodside Manor. Tr. 332-35, 390, 446, 544. All three of them had their faces covered with bandanas, went to look around the house with their guns out, and knocked on the back door. Tr. 446-48. No one answered, so Applicant told Michael Griffin to take his bandana off, give Applicant his gun, and knock on the front door. Tr. 448-50. Michael Griffin knocked,

and two men came to the door. Tr. 452. After hearing the knock, Porter Walker, who was inside watching television with Christopher Gorski, asked who it was, to which Michael Griffin said "Mike." Tr. 161, 221-22, 452. Walker opened the door and attempted to tell Michael Griffin he had the wrong house; but as Walker went to close the door, Applicant and Flynn came around the corner and Michael Griffin kicked the door in. Tr. 222-23, 452. As the men entered the home, Applicant[1] shot Walker. Tr. 223, 452-55. Walker got to the ground, and Applicant stood over him screaming at Walker not to look at Applicant's face, to keep his mouth shut, and demanding money and drugs. Tr. 225-26.

Meanwhile, Michael Griffin went into the back bedroom, where Walker's girlfriend (Tonya Holbrook) and son were sleeping. Tr. 161. Michael Griffin put a gun in Holbrook's face and asked where the money and drugs were. Tr. 162. Gorski then entered the room with Flynn and Applicant. Tr. 163, 201, 227-28, 456-57. At that time, Walker ran out of the house to find help. Tr. 229. The men then led Gorski back to the living room, where they shot him multiple times. Tr. 166-67, 202, 229-30, 459-60.

Michael Griffin, Flynn, and Applicant then left the house and returned to the cars, where Bond, John Griffin, and Green were waiting. Tr. 336, 392-93, 461, 545. When Applicant got back in the car with Green and Flynn, he told Flynn: "[N]ext time, you get your priorities straight." Tr. 336. After they had dropped John Griffin and Green off, Applicant, Flynn, Bond, and Michael Griffin went to Peter Davis's house. Tr. 546, 767. Applicant changed clothes, and stated: "[I]f anyone tells, we're dead." Tr. 549. They then went to a woman's (Asa's) house, around 11:30 that evening. Tr. 550, 770-71. Applicant stayed there for about an hour, then left in the green Alero. Tr. 771.

A day or two later, Bond, Green, John Griffin, and Michael Griffin were interviewed by law enforcement. Tr. 281-85, 339, 401, 464, 552. All four of them gave statements to law enforcement implicating not only themselves but also "T-Lo" and Flynn in the crimes that occurred on Woodside Manor on May 3, 1999.[2] Tr. 285-88, 307, 343-44, 359, 424-25, 501-02, 555. At trial, all four identified Applicant as "T-Lo." Tr. 330, 336, 396, 465, 559.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. *Smalls*, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. *Id.* Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly found Petitioner failed to establish he was entitled to post-conviction relief based on claims of after-discovered evidence, specifically the statements of Thomas Bond and Michael Griffin, where the statements would not have changed the result of Petitioner's trial, were discovered or discoverable more than a year before this application was filed, and are cumulative to other evidence that was presented at his trial

Petitioner contends the lower court erred in denying his application for post-conviction relief based on purported newly discovered evidence based on statements from two witnesses that are recanting their prior testimony, arguing the record below shows that he demonstrated the existence of after discovered evidence which was material to his claim of innocence and established that the evidence in question could not have been discovered by him prior to his trial without the cooperation of two of his codefendants which he was powerless to obtain until such time as they decided to come forward and tell the truth. However, the post-conviction relief court properly rejected this argument, finding the recantation testimony was not credible and did not meet the standards for relief based on newly discovered evidence. Specifically, the post-conviction relief court found the jury was presented with both Bond's and Griffin's recantations at trial and were given the opportunity to believe either Applicant was involved in these crimes and the letters were true or Applicant was involved in these crimes and the letters were a lie. The jury chose to believe the latter. The recanted testimony was not discovered since trial and is not newly discovered evidence. The post-conviction relief court further found that the evidence was not such that would probably change the result if a new trial were had. Two other co-defendants testified against Applicant specifically identifying Applicant as being involved. April Mook testified that Applicant was involved both before and after the commission of these crimes. Neither of the co-

defendants have recanted their testimony. Additionally, the victim testified that he was one hundred percent sure Applicant was the shooter and nothing presented by Applicant changed his certainty in his identification of Applicant. Therefore, there is probative evidence to support the post-conviction relief court's findings as to the newly discovered evidence claim. Further, there is probative evidence to support the post-conviction relief court's finding the testimony of Petitioner's witness' was not credible, the testimony of other witnesses would still implicate Petitioner if there were to be a new trial, and the substance of Petitioner's witness' testimony was cumulative to testimony considered by the jury at Petitioner's trial. This Court should deny certiorari.

The Uniform Post-Conviction Relief Act states a person may institute a post-conviction relief action if "there exists evidence or material facts. Not previously presented and heard, that requires vacation of the conviction or sentences in the interest of justice." S.C. Code Ann. §17-27-20(A)(4). If an applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). An applicant requesting a new trial based on after-discovered evidence after a conviction must show that the evidence:

1. Is such as would probably change the result if a new trial was had;
2. Has been discovered since the trial;
3. Could not by the exercise of due diligence have been discovered before the trial;
4. Is material to the issue of guilt or innocence; and,
5. Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing *State v. Caskey*, 273 S.C. 325, 256 S.E.2d 737 (1979)).

The determination of whether new evidence is credible for purposes of a new trial rests with the trial court. *State v. Porter*, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977). In particular, "our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment." *State v. Monroe*, 381 S.C. 149, 168, 672 S.E.2d 556, 565 (2009). (citing *Porter*, 269 S.C. at 621, 239 S.E.2d at 643). "When testimony is in direct conflict and depends largely on the credibility of the new evidence, the trial judge is charged with the duty of assessing the evidence." *State v. Deese*, 266 S.C. 534, 538 225 S.E.2d 175, 176 (1976) (citing *State v. Fowler*, 264 S.C. 149, 155, 213 S.E.2d 447, 450 (1975)). Moreover, where the ground for a new trial is the recantation of testimony, the closest testimony, the closest scrutiny should be applied, as this type of testimony is ordinarily unreliable. *State v. Wright*, 269 S.C. 414, 421, 237 S.E.2d 764, 768 (1977). Additionally, inconsistency in statements undermines the possibility that the result of a new trial would be different. *See Johnson v. Catoe*, 345 S.C. 389, 548 S.E.2d 587 (2001) (holding the Applicant failed to meet the requirement for a new trial such that the evidence would probably change the result if a new trial were granted when the witnesses upon which the newly discovered evidence was based made prior inconsistent statements and, therefore, was not credible). "The credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for determination by the circuit judge to whom it is offered. In him, not this court, resides the power to weigh such evidence; and his judgment will not be disturbed except for error of law or abuse of discretion." *State v. Corn*, 224 S.C. 74, 77 S.E.2d 354 (1953).

First, Petitioner argues at length that the lower court abused its discretion in finding Petitioner's witnesses not to be credible where the victim's testimony also contained a number of inconsistencies. However, Petitioner's discussion of the inconsistencies in the victim's testimony is wholly irrelevant in considering the court's determination as to the credibility of Petitioner's

witnesses, further, the court made no specific credibility finding as to the victim's testimony. Petitioner essentially argues the court abused its discretion in finding the victim credible and finding Petitioner's witnesses not credible, however, this argument relies on a nonexistent finding that the victim was credible. The lower court properly performed its gatekeeping role in determining the credibility of witnesses, applying the closest scrutiny to ordinarily unreliable recantation testimony.

Second, there is probative evidence to support the lower court finding Thomas Bond's testimony not credible where the court applied the closest scrutiny to the recanted testimony and where Bond's prior inconsistent statements supported the court's finding. Including his testimony at the PCR hearing, Thomas Bond has now given four different versions of the events that occurred on May 3, 1999 and who all was involved in those events. Bond's first statement to law enforcement stated that a man named Steve Smith committed the crimes, however, Bond admitted at trial that the statement was a lie and was based in revenge. App. 563-64, 580, 607. Bond's second statement to law enforcement implicated Michael Griffin, John Griffin, Flynn, Green, and Petitioner. Bond testified consistent with this statement at trial and stated that he changed his statement because he did not want "an innocent man locked up for life." App. 583, 601. Bond also wrote a letter to Petitioner prior to trial stating that he was told to implicate Petitioner because the person who committed the crimes would kill him if he told the truth. Bond admitted at trial that the letter was a lie. Finally, Bond now testified that Petitioner was not involved in the crimes. The lower court's finding that Bond's PCR testimony was not credible was supported by probative evidence, which is afforded great deference on appeal. As the above cited jurisprudence makes clear, evaluation of the credibility of witnesses lies solely with the lower court. The court properly

applied close scrutiny to the statements of Bond and found that his numerous prior inconsistent statements made his testimony not credible.

Third, the lower court properly found that the recanted testimony would be merely cumulative to testimony already presented to the jury at Petitioner's trial. The letter Bond wrote to Petitioner prior to trial stating that Petitioner was not involved in the crimes was presented to the jury, further, counsel was able to cross-examine Bond about the letter in furtherance of his theory that the co-defendants were lying to protect another person. App. 144-63, 566, 568, 606, 892-915. Michael Griffin's letter to his girlfriend was also presented to the jury in which he stated that Petitioner was being setup for the crimes so that another person would go free. App. 488, 520-22. Again, counsel was able to cross-examine Griffin in furtherance of his theory that the co-defendants were lying to help someone else. App. 520-22. Ultimately, the jury was presented with statements from both of Petitioner's witnesses at trial that he was not involved in the crimes and that they had discussed lying to keep another person free. The jury was presented with a statement from Bond at trial similar to the one presented at the PCR hearing and convicted Petitioner. The lower court, considering the cumulative nature of Bond's testimony and the inconsistency of the prior statements, properly found that Petitioner's alleged newly discovered evidence would not likely change the result if a new trial were granted.

Finally, the lower court properly found that the recanted testimony would not probably change the result if a new trial were granted due to the testimony of other witnesses from Petitioner's trial. Green and John Griffin, two of Petitioner's co-defendants, both testified at trial specifically identifying Petitioner as being involved in the crimes. App. 338-47, 399-407. April Mook also testified at Petitioner's trial, he was present before and after the crimes, that Petitioner was involved in the crimes as well as in their planning. App. 771-82, 800-801. None of these

witnesses have recanted their testimony and would be expected to testify to the same if a new trial were granted. Further, even considering Michael Griffin's recanted testimony, Petitioner would still be liable at trial under the theory of accomplice liability. Griffin testified at the PCR hearing that he was the one who shot Walker, but that Petitioner was at Walker's house and involved in the commission of the crimes. The lower court properly found Petitioner's alleged newly discovered evidence would not change the result if a new trial were granted considering the inconsistency of the recanting witness' testimony, the un-recanted testimony of the other three witnesses, and Griffin's recanted testimony implicating Petitioner.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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