

STATE OF SOUTH CAROLINA
In the South Carolina Supreme Court

RECEIVED

JUL 01 2021

S.C. SUPREME COURT

Appeal from Dorchester County
The Honorable Diane S. Goodstein

Appellate Case No. 2020-1390

The State of South Carolina,, Respondent,

v.

Tiffany Ann Sanders,, Petitioner.

SUPPLEMENTAL APPENDIX

Elizabeth Franklin-Best
Elizabeth Franklin-Best, P.C.
2725 Devine Street
Columbia, South Carolina 29205
elizabeth@franklinbestlaw.com
(803) 331-3421

Counsel for Petitioner

Other Counsel of Record:
Assistant Attorney General
P.O. Box 11549
Columbia, South Carolina 29211-1549

Attorney for Respondent

INDEX

APPELLANT'S FINAL BRIEF 2

RESPONDENT'S FINAL BRIEF 28

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY COURT OF GENERAL SESSIONS

Diane S. Goodstein, Circuit Court Judge

Case No. 2018-000210

Tiffany Ann SandersAppellant,

v.

State of South Carolina.....Respondent.

FINAL BRIEF OF APPELLANT

Elizabeth A. Franklin-Best
Blume Franklin-Best & Young, LLC
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
(803) 765-1044
betsy@blumelaw.com

Other Counsel:
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211-1549

RECEIVED

JAN 10 2019

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY COURT OF GENERAL SESSIONS

Diane S. Goodstein, Circuit Court Judge

Case No. 2018-000210

Tiffany Ann SandersAppellant,

v.

State of South Carolina.....Respondent.

FINAL BRIEF OF APPELLANT

Elizabeth A. Franklin-Best
Blume Franklin-Best & Young, LLC
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
(803) 765-1044
betsy@blumelaw.com

Other Counsel:
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211-1549

RECEIVED

JAN 10 2019

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY COURT OF GENERAL SESSIONS

Diane S. Goodstein, Circuit Court Judge

Case No. 2018-000210

Tiffany Ann SandersAppellant,

v.

State of South Carolina.....Respondent.

FINAL BRIEF OF APPELLANT

Elizabeth A. Franklin-Best
Blume Franklin-Best & Young, LLC
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
(803) 765-1044
betsy@blumelaw.com

Other Counsel:
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211-1549

TABLE OF CONTENTS

Table of Authorities ii

STATEMENT OF THE CASE 1

ARGUMENTS 2

 I. The trial court erred by denying Sanders' motion for a new trial based on after-discovered evidence pursuant to South Carolina Rules of Criminal Procedure, Rule 29(b) because Sean Kammerer's testimony, that Sanders was not aware of, nor did she participate in the murder of the victim, was not available until this proceeding, and could not have been obtained at any earlier point 2

 II. The trial court should have found that Sean Kammerer's affidavit constitutes after-discovered evidence, and granted Sanders a new trial 5

Relevant Facts 5

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993)..... 13, 14

McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013)..... 14

Smith v. State, 404 S.C. 493, 745 S.E.2d 378 (Ct. App. 2012) 4

State v. Hughes, 328 S.C. 146, S.E.2d 821, 824 (1997)..... 5

Tiffany Sanders v. State, Op. No. 2014-MO-049..... 1, 4

White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) 1, 3

Other Authorities

Rules of Professional Conduct Rule 4.2..... 4

S.C. Code Ann. §§ 17-27-10 to -120 (1985) 2

S.C. Code Ann. § 17-27-20(A)(4) (2014) 14

S.C. Code Ann. §17-27-150..... 3

S.C. Rules of Civil Procedure Rule 45 2

S.C. Rules of Civil Proceure Rule 71.1(a) 2

STATEMENT OF THE CASE

Tiffany Sanders was tried before the Honorable Diane S. Goodstein and a jury between August 3-5, 2010 in Dorchester County, South Carolina. She was represented by Michael O'Neal, Esquire. The State was represented by Harrison Bell and Mandy Kimmons. She was convicted of murder and sentenced to 30 years in prison. She did not initially appeal her conviction and sentence. She then filed an application for post-conviction relief on August 3, 2011 and an Amended application on August 24, 2011. After an evidentiary hearing on May 24, 2012 at the Orangeburg County courthouse, the Honorable Deandrea G. Benjamin granted her a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), but dismissed her other claims. That order was filed on August 3, 2012. Sanders was represented by Dale T. Cobb and Thomas R. Goldstein for the hearing and subsequent appeal.

Sanders then filed a petition for writ of certiorari from the denial of her PCR. On December 17, 2014, the South Carolina Supreme Court issued its memorandum opinion in *Tiffany Sanders v. State*, Op. No. 2014-MO-049. Sanders filed a petition for rehearing that was then denied on January 22, 2015.

Sanders then filed a Motion for a New Trial Based on After-Discovered Evidence on March 21, 2017. After a hearing on May 30, 2017 during which Judge Goodstein did not hear any testimony, she denied the motion on February 5, 2018.

This appeal timely follows.

ARGUMENTS

- I. **The trial court erred by denying Sanders' motion for a new trial based on after-discovered evidence pursuant to South Carolina Rules of Criminal Procedure, Rule 29(b) because Sean Kammerer's testimony, that Sanders was not aware of, nor did she participate in the murder of the victim, was not available until this proceeding, and could not have been obtained at any earlier point.**

The critical issue in this appeal is whether Sean Kammerer was available to testify at any earlier point prior to Sanders' motion for a new trial filed in March of 2017. Kammerer's testimony is the sole piece of evidence upon which Sanders relies in her motion for a new trial based on newly-discovered evidence. Judge Goodstein found, in her order, that he was. She found, in pertinent part:

Mr. Kammerer's testimony is not necessary to decide this issue because it does not fit within the definition of newly-discovered evidence. Kammerer was known to the Defendant at least since their arrest in 2007. While the Defendant may be correct in her assertion that Kammerer would not have wanted to testify at her PCR hearing while he was pursuing his own legal remedies through the PCR process, that fact does not mean that Kammerer was unavailable at the time. The Defendant had the means to subpoena Mr. Kammerer's testimony pursuant to Rule 45 of the SC Rules of Civil Procedure.

ROA 61-62.

This ruling is inaccurate, and the Court should reverse the order and find that Sean Kammerer's testimony is properly considered as newly-discovered evidence.

According to Rule 71.1(a), Post-Conviction Relief Actions, the procedure for post-conviction relief is provided by the Uniform Post-Conviction Procedure Act (Act), *S.C. Code Ann.* §§ 17-27-10 to -120 (1985). The South Carolina Rules of Civil Procedure shall apply to the extent that they are not inconsistent with the Act.

South Carolina Code Ann. §17-27-150, Discovery in post-conviction relief proceeding, provides: (a) A party in a noncapital post-conviction relief proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

The trial court is inaccurate when it finds that PCR counsel could have subpoenaed a co-defendant to testify at a PCR hearing without a judge's express permission to do so because the rules do not allow it. It would have been improper for PCR counsel to subpoena Kammerer without the court's permission. But also, it is highly unlikely that a judge would have given permission to do so since Sean Kammerer, at the time of Sanders' PCR hearing, was pursuing his own statutory legal remedies and thus could not have been forced to testify at his co-defendant's PCR hearing by way of a subpoena.

Relevant Dates

The following are dates relevant to consideration of this issue.

- Sean Kammerer pleaded guilty to murder on March 24, 2008 and was sentenced to 34 years in prison.
- Kammerer filed a post-conviction relief application on January 26, 2009.
- Sanders was tried before Judge Goodstein and a jury between August 3-5, 2010 in Dorchester County, South Carolina.
- Sanders's PCR hearing was held on May 24, 2012 (she was granted a belated appeal pursuant to *White v. State*)
- Kammerer's PCR application was dismissed on June 14, 2013. He did not appeal.

- The South Carolina Supreme Court issues an unpublished opinion in *Tiffany Sanders v. State of South Carolina*, Opinion No. 2014-MO-049 on December 17, 2014 denying relief.
- Kammerer executes declaration on January 7, 2017.

The trial court's order finds that PCR counsel could have properly subpoenaed Kammerer to Sanders' PCR hearing and forced him to testify on Sanders's behalf while he was pursuing his statutory right to challenge his own conviction. The court did not address the fact that contacting a witness who is represented by counsel would have been improper. *See* Rule 4.2 of the Rules of Professional Conduct, Communication with Person Represented by Counsel. *And see Smith v. State*, 404 S.C. 493, 745 S.E.2d 378 (Ct. App. 2012) (acknowledging that Rule 4.2 imposed an impediment on trial counsel contacting a witness represented by counsel).

But also, the court found that, since Kammerer pleaded guilty, he could have been compelled to testify at Sanders's trial, even though he had already filed a PCR application and was represented by counsel:

As is the case for all guilty pleas, Mr. Kammerer was advised that he was surrendering his right to remain silent and his right against self-incrimination. Thus, he no longer enjoyed the privilege of refusing to testify upon the Court's acceptance of his plea. Therefore, at the time of her trial, Kammerer was available for Defendant to subpoena and attempt to interview... Due to Defendant's knowledge of Mr. Kammerer and the available legal means for obtaining his testimony at the time of trial, the testimony cannot be newly discovered evidence under the relevant definition.

ROA 62 (emphasis in original).

If the court's reasoning is allowed to stand, it will mean that criminal defendants, who plead guilty, effectively waive their rights to avail themselves of

post-conviction relief remedies because they can be compelled (by virtue of their guilty pleas) to testify at a co-defendant's PCR hearing. Kammerer exercised his legal statutory rights to collaterally challenge his conviction. Given that he was pursuing these remedies, there is no reason to think he would have willingly implicated himself in the murder that he was challenging and seeking to overturn. It would have been improper to then subpoena him at the trial, or the PCR hearing, to have him invoke his Fifth Amendment right not to incriminate himself. *See State v. Hughes*, 328 S.C. 146, 153, S.E.2d 821, 824 (1997) (witness may not be called solely for the sake of having witness invoke privilege against self-incrimination, for the purpose of permitting the jury to infer wrongdoing from that assertion). The trial court's ruling would effectively gut post-conviction relief for defendants who plead guilty, an action that would not be proper unless undertaken by the legislative branch.

II. The trial court should have found that Sean Kammerer's affidavit constitutes after-discovered evidence, and granted Sanders a new trial.

Relevant Facts

The essential facts of this case are not complex. Tiffany Sanders encountered Jesse Ham (the decedent), Brandon Frye, David Hughey, and Kevin King on June 8, 2007 in a neighborhood near where she lived as she was out driving with her disabled sister. While she was with these young men, she spoke to Sean Kammerer, a friend of hers, on the phone. Shortly afterwards, she drove Jesse Ham to a shopping center area near a Tire Kingdom in North Charleston, SC. After they arrived, Sean Kammerer shot and killed the victim.

The State's theory of the case, as Bell outlined in his opening argument, was that Tiffany lured the victim, J.H., to the area so that Sean Kemmerer could kill him.

The State prosecuted the case under the theory of "the hand of one is the hand of all."

ROA 329. As the State argued to the jury:

The difference between accessory before the fact of murder and murder is that you have to determine whether she was present or not. She was in her car when the murder happened outside the car. At some point she left the scene. It's up to you to decide if she was present or not.

If she was not present at the scene, you can find her guilty of accessory before the fact. If she was present at the scene, you can't find her guilty of accessory before the fact, but you can find her guilty of murder, because she aided and abetted and helped and joined in with this crime.

ROA 329-30.

At the conclusion of the opening argument, the State asked the jury to find her guilty "of either murder or accessory before the fact of murder." ROA 330.

But what the jury did not hear because it is only now being revealed, is that Tiffany Sanders had absolutely no knowledge that Sean Kammerer had a gun that night, or that he intended to shoot and kill Jesse Ham. Indeed, Sean Kammerer's affidavit is wholly consistent the version of events that Tiffany gave to law enforcement when this happened as discussed below.

At trial, the State elicited the following testimony from its witnesses:

David Watson, a special investigator with the Ninth Circuit Solicitor's Office, testified. At the time J.H. was killed, he was a detective with the North Charleston Police Department. He was dispatched to an area near a Tire Kingdom in North Charleston at approximately 11:15- 11:20pm on June 8, 2008. This area was on the

corner of Ashley Phosphate and Dorchester Road. There is an "infamous" Rock-n-Roll McDonald's restaurant on the corner. When he arrived, he saw the victim on the ground. ROA 345. This witness identified a number of photographs that were admitted into evidence.

Kevin King also testified for the State. He was a friend of J.H.'s from the neighborhood. ROA 350. They lived in Forest Hills neighborhood off Dorchester Road. ROA 351. On the night of the shooting J.H. came by King's house with another friend, and they decided to hang out. ROA 352. J.H.'s friend was "Brandon." ROA 353. They went back to a house right behind the Rock-n-Roll McDonald's. They hung out and "had a beer or two." ROA 353. Present were J.H., King, and another male.

Bored, they decided to walk around the neighborhood. ROA 353. While they were walking, a female drove into the neighborhood. The young men waved her down and she pulled up to them. They asked her what she was doing, and she said "Nothing with ya'll" and drove away. ROA 354. They walked back to the house. King testified this happened around 7:30 or 8:00pm. Back at the house, they sat in the backyard. They heard a loud horn. Brandon and the "other guy" went to the front of the house. King and J.H. stayed in the backyard. ROA 355. Brandon then came to the back yard and said "Hey, this girl wants to talk to you" referring to J.H. ROA 355. According to King, the girl asked them their names and they lied to her about them. ROA 355. He said they stood there talking for at least 30 to 45 minutes. ROA 355. King testified that she said she had a friend from the neighborhood who knew J.H. and wanted to meet him at the Rock-n-Roll McDonald's. While they were talking, she spoke on the

cell phone. King testified he put his ear to the phone and heard a guy's voice. ROA 356.

King testified that J.H. was hesitant to go, but that eventually he went. King got into the backseat. He said he got into the car because J.H. was "his friend." ROA 357. She drove to the McDonald's, drove around it one time, and then pulled into a Publix parking lot. There was a delivery truck between the buildings, so she drove up to the wood line and backed in. ROA 357. There were four of them in the car—Tiffany, J.H. in the passenger seat, King, and then Tiffany's older, disabled sister next to King. ROA 358.

King testified that something did not seem right to him, and he wanted to get out of the car. As he was doing so, Sean came running up to the car with a gun and put it into King's stomach. King pushed him down and then ran. ROA 359. He ran between the buildings where the delivery truck was parked.

King testified that he knew Sean; that they grew up together and attended school together. ROA 360. As King ran, he continued to hear shots. ROA 360. He then took off through the woods behind the Publix because he knew the area. He called his dad to come and pick him up. ROA 361.

Later that morning, detectives got in touch with King and they told him that he needed to speak to them. ROA 362.

King described that Sean and J.H. used to be friends but that they had a fight over shoes. ROA 363. This argument happened two or three years before the shooting, but apparently they held grudges. The two of them "fought a lot." ROA 364.

J.H. got tired of it and hit Sean with a bat. ROA 364. King's testimony was conflicting as to the seriousness of their problems. He testified that Sean had screamed, in connection with the bat incident, that he would kill J.H. But then he stated there were other incidents, but they were not "too serious." ROA 364.

King admitted that he did not run into Publix to seek help for his friend. He testified, implausibly, that he tried to call 911 on his phone while he was in the woods, but that because he had a long distance phone, it would not call 911.

David Hughey also testified for the state. At the time of his testimony, he was employed by the U.S. Army. He lived down the street from Brandon and was friends with J.H. That night they were hanging out at Brandon's house. They were drinking and talking. ROA 377. While they were hanging out, Tiffany pulled up in her car. Hughey knew her before that night because they attended middle school together. ROA 378. They asked her what she was doing, and she said "nothing." Then she pulled off. ROA 379. After that, they returned to Brandon's house, and drank some more. According to Hughey, Tiffany then returned to the house. Hughey said that she was "trying to find out who Jessie was." ROA 381. She talked on her cell phone. Hughey testified that he thought she already knew who J.H. and Kevin were. ROA 382. Hughey testified that she said that a girl wanted to meet J.H. ROA 383. J.H., King and Tiffany, along with her sister, drove away. ROA 383. After they left, Hughey stayed at the house with Brandon for another 10 or 15 minutes, and then left. ROA 384.

Later that night, Brandon called Hughey and told him they needed to go to McDonald's to look for J.H. They rode their bikes there. There were police on the scene, so they went back home. Brandon spoke to the police. ROA 385.

Hughey admitted on cross-examination that he knew "a little bit" about the history between Sean and J.H. ROA 387. He never saw them fight. ROA 388. When he and Brandon went back up to the Publix area, Hughey took his gun. ROA 389. After encountering the police and not being searched for weapon, he rode his bike and then threw the gun into a ditch to get rid of it. ROA 390.

Brandon also testified for the State. ROA 391. He lived in the area behind the Rock-n-Roll McDonald's. Generally, Brandon corroborated King and Hughey's accounts. He stated that Kevin and J.H. were "hollering" at Tiffany and that she drove off. ROA 393. They asked her if she wanted to hang out with them, and she said no. ROA 395. After she, her sister, King and J.H. went to Publix, Tiffany returned about 15 minutes and said that "something happened." They drove back up there together. They did not see anything. They drove to the McDonald's and Publix parking lots. ROA 397. Brandon testified that she was acting like she was scared but that "you could tell it was an act." ROA 398. Brandon testified that Tiffany brought him back to his house and then left. He then called Hughey and they biked up there to check on J.H. ROA 399. They saw the police there. Brandon tried to leave, but he was chased down by a police officer who found marijuana on him. ROA 399-400. The next day he found out that J.H. had been killed. ROA 400.

Brandon had prior convictions of assault and battery of a high and aggravated nature. He also suffers from an anoxic brain injury that causes memory loss and makes him "slower." ROA 401.

Brandon testified he knew both Sean and J.H. and knew that they did not like one another. He never saw them fight in public. He testified that he heard Sean talk about killing J.H. ROA 403.

Jessica Hans, another State's witness, worked for Publix Supermarkets. She testified that as she and another co-worker were standing outside, they heard several loud pops. She looked over to the Papa John's/ Tire Kingdom area and saw a person firing a gun. After the shot was fired, the person with the gun ran to the other side of Tire Kingdom and then disappeared behind a building. She estimated that about 30 seconds later, she saw a Jeep Cherokee speed off in another direction. ROA 416. She and her co-worker then drove over to that area and found the victim on the ground. They called 911.

DeJuan Jenkins then testified for the State. He lived in Forest Oak, a neighborhood off Dorchester Road in Dorchester County. He testified that he had been with Sean Kammerer since 3 o'clock or 4 o'clock on the day that J.H. was killed. They had been at the mall; Jenkins had driven Sean's mother's car. Around 9 o'clock that evening, they returned back to Sean's house. He testified that around 10 o'clock, he and Sean went to the McDonald's. They parked in the Tire Kingdom parking lot. According to Jenkins, they were going to meet Sean's "girlfriend" there. Jenkins testified that once the "girlfriend" arrived, he observed Sean walk over to the car and

open up the passenger door. As he did so, someone exited the car. Sean then pulled out a gun. The victim then exited the car and tried running away. Sean started shooting at him. After he shot him, Sean got back into the car and told Jenkins to take him to his brother's house. Instead, he took him home.

Jenkins testified that he did not see Sean with a gun prior to being in the Tire Kingdom parking lot. Kammerer disputes this, and claims that Jenkins gave him the gun that night. At trial, Jenkins denied he gave the gun to Kammerer. Jenkins acknowledged that he did not call the police. Later, he pleaded guilty to accessory after the fact of murder and received a youthful offender sentence. Jenkins testified that Tiffany Sanders had not been present at the scene when the murder occurred—"She been left since—since he first started shooting and she leave." Jenkins testified that he did not know of any problems between Sean and J.H. ROA 426.

Detective James Sturkie was employed with the City of North Charleston Police Department. He spoke to Tiffany Sanders at the police station, and he recounted their interview during the trial. Her statement was admitted into evidence without objection. ROA 443. Her statement said:

Riding around with my sister, my parents called and said they was almost home. Rode to my neighborhood. Was riding through; seen Brandon, David, Jessie, and Kevin. I knew David and Brandon before.

Sean calls and asks who I'm with, then asked me to bring Jessie up to Publix. Kevin, Jessie, my sister and I ride to Publix.

Kevin and Jessie wanted to get out of the car, and as soon as they did Sean ran up to Kevin, pushed him and Jessie screamed "drive." And I took off and went to Brandon's house.

Went to Brandon's house, got Brandon, went back up there to see if any—if they ducked in the woods. I had no knowledge of a gun until I heard the shot.

After me and Brandon didn't see anyone, Brandon said, "All right you can take me home." I dropped Brandon off and went home. Tried to call Sean, no answer.

I had no knowledge of a gun being present to take a life. The only knowledge that I had was Sean wanting to fight Jessie because of Jessie beating Sean in the head with a baseball bat. I had—if I had known guns would have been involved, I would have kept Jessie and Kevin at Brandon's house.

ROA 443-44.

The newly discovered information presented in Sean Kammerer's affidavit is so critical to this case because the State conceded how weak its case was during the trial. The State clearly indicated they did not have any proof that Tiffany possessed any malice on the night this happened.

MR. BELL: Well, Your Honor, I think that malice exists from the fact that the principle in this case has admitted and pled guilty to murder. So, malice does exist. She is here as a person that aided, abetted under the "hand of one, the hand of all." I don't know that we have to assume that she had malice, but that malice existed in the commission of the crime...It's up to the jury to decide whether that the murder was the probable or natural consequence of this fight that she—that she gave in her, you know, self-serving statement....

And her part is either she was present or not present, thus accessory before the fact of murder or murder. The malice is certainly there. It's not necessarily her malice, but all it says is "malice." It doesn't say it has to be that person's malice, but that malice existed before somebody was killed.

The information contained in Sean Kammerer's affidavit is newly discovered evidence that proves that Tiffany Sanders is not guilty of murder.

In *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993), the S.C. Supreme Court

held that to obtain a new trial based on after discovered evidence, the party must show that the evidence:

- (1) would probably change the result if a new trial is had;
- (2) has been discovered since the trial;
- (3) could not have been discovered before trial;
- (4) is material to the issue of guilt or innocence; and
- (5) is not merely cumulative or impeaching.

And see *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013); *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993).

Additionally, the PCR Act provides that "[a]ny person who has been convicted of, or sentenced for, a crime and who claims . . . that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice" is entitled to seek post-conviction relief. *S.C. Code Ann.* § 17-27-20(A)(4) (2014).

The information contained in Kammerer's affidavit is after-discovered evidence that entitles Ms. Sanders to a new trial. This information—that Tiffany Sanders was unaware of the existence of a gun, or that Kammerer had any intention of killing Jesse Ham prior to his actually doing so—would have changed the outcome of the trial since the State's entire theory of the case was that she did know about Kammerer's plans that night. But as Kammerer admits, not only was Tiffany Sanders unaware of his plans, but the gun was not even present at the scene until after Kammerer and Tiffany Sanders spoke that night. DeJuan Jenkins pulled out the gun

and handed it to Kammerer once they arrived at the scene of the shooting. This information was discovered after trial, and could not have been discovered before trial by counsel because Sean Kammerer was pursuing his own legal remedies. This information is material to the issue of guilt or innocence because Tiffany Sander's knowledge of the existence of the gun constitutes an element of the offense. And also, this information is not merely cumulative or impeaching since it is information that has not been revealed, in any manner, until now. Judge Goodstein erred when she found that this evidence did not constitute newly-discovered evidence, and she should have granted Sanders a new trial.

CONCLUSION

Respectfully, this Court should find Sean Kammerer's affidavit constitutes newly-discovered evidence and either grant a remand to allow the trial court judge to consider Kammerer's testimony, or grant her a new trial based on the affidavit.

Respectfully submitted,

Elizabeth A. Franklin-Best
Blume Franklin-Best & Young, LLC
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
(803) 765-1044
betsy@blumelaw.com

January 9, 2019.

and handed it to Kammerer once they arrived at the scene of the shooting. This information was discovered after trial, and could not have been discovered before trial by counsel because Sean Kammerer was pursuing his own legal remedies. This information is material to the issue of guilt or innocence because Tiffany Sander's knowledge of the existence of the gun constitutes an element of the offense. And also, this information is not merely cumulative or impeaching since it is information that has not been revealed, in any manner, until now. Judge Goodstein erred when she found that this evidence did not constitute newly-discovered evidence, and she should have granted Sanders a new trial.

CONCLUSION

Respectfully, this Court should find Sean Kammerer's affidavit constitutes newly-discovered evidence and either grant a remand to allow the trial court judge to consider Kammerer's testimony, or grant her a new trial based on the affidavit.

Respectfully submitted,



Elizabeth A. Franklin-Best
Blume Franklin-Best & Young, LLC
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
(803) 765-1044
betsy@blumelaw.com

January 10, 2019.

STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
JAN 10 2019
SC Court of Appeals

Appeal from Dorchester County
The Honorable Diane S. Goodstein

Appellate Case No. 2018-000210

The State of South Carolina, Respondent,

v.

Tiffany Ann Sanders, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



Elizabeth Franklin-Best
Blume Franklin-Best & Young, LLC
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
(803) 765-1044
betsy@blumelaw.com
Counsel for Appellant

January 10, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIESiii

APPELLANT'S STATEMENT OF ISSUES ON APPEAL.....1

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

RESPONDENT'S STATEMENT OF FACTS.....4

ARGUMENT.....12

 I. The trial court was correct in denying Appellant's motion for a new trial because the written statements from Sean Kammerer did not qualify as after-discovered evidence due to the fact that Kammerer was known to Appellant and available to testify at Appellant's trial.....12

CONCLUSION.....17

DESIGNATION OF MATTER

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Federal Cases

<i>Boykin v. Alabama</i> , 395 U.S. 238 (1969)	15
<i>Chirino v. NTSB</i> , 849 F.2d 1525 (D.C.Cir.1988)	17
<i>United States v. Dale</i> 991 F.2d 819 (D.C.Cir.1993).....	17
<i>United States v. Diggs</i> , 649 F.2d 731 (9th Cir.1981).....	16
<i>United States v. Gustafson</i> , 728 F.2d 1078 (8th Cir.1984).....	16
<i>United States v. Jacobs</i> , 475 F.2d 270 (2d Cir.1973).....	16
<i>United States v. Kamel</i> , 965 F.2d 484 (7th Cir.1992).....	15
<i>United States v. Levy-Cordero</i> , 67 F.3d 1002 (1st Cir. 1995).....	15
<i>United States v. Mangieri</i> , 694 F.2d 1270 (D.C.Cir.1982)	16
<i>United States v. Metz</i> , 652 F.2d 478 (5th Cir. 1981).....	16
<i>United States v. Reyes-Alvarado</i> , 963 F.2d 1184 (9th Cir.1992).....	16
<i>United States v. Sensi</i> , 879 F.2d 888 (D.C.Cir.1989)	16
<i>United States v. Thomas</i> , 492 F. App'x 690 (7th Cir. 2012)	15

State Cases

<i>Demnsev v. State</i> , 363 S.C. 365, 610 S.E.2d 812 (2005).....	13
<i>Haydan v. State</i> , 278 S.C. 610, 299 S.E.2d 854 (1983).....	14
<i>Hyman v. State</i> , 397 S.C. 35, 723 S.E.2d 375 (2012).....	15
<i>McLaughlin v. State</i> , 352 S.C. 476, 575 S.E.2d 841 (2003).....	13
<i>Rivers v. Strickland</i> , 264 S.C. 121, 213 S.E.2d 97 (1975).....	15

<i>State v. Caskey,</i> 273 S.C. 325, 256 S.E.2d 737 (1979).....	14
<i>State v. Patterson,</i> 278 S.C. 319, 295 S.E.2d 264 (1982).....	15
<i>State v. Rice,</i> 401 S.C. 330, 737 S.E.2d 485 (2013).....	15
<i>State v. South,</i> 310 S.C. 504, 427 S.E.2d 666 (1993).....	12
<i>White v. State,</i> 263 S.C. 110, 208 S.E.2d 35 (1974).....	2
<i>Whitehead v. State,</i> 308 S.C. 119, 417 S.E.2d 530 (1992).....	13

State Rules

South Carolina Rules of Criminal Procedure, Rule 29(b)	1, 2
--	------

APPELLANT'S STATEMENT OF ISSUE ON APPEAL

- I. The trial court erred by denying Sander's motion for a new trial based on after-discovered evidence pursuant to South Carolina Rules of Criminal Procedure, Rule 29(b) because Sean Kammerer's testimony, that Sanders was not aware of, nor did she participate in the murder of the victim, was not available until this proceeding, and could not have been obtained at any earlier point.

- II. The trial court should have found that Sean Kammerer's affidavit constitutes after-discovered evidence, and granted Sanders a new trial.

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

- I. Was the trial court correct in denying Appellant's motion for a new trial because the exculpatory statements offered by Appellant's codefendant did not qualify as after-discovered evidence due to the fact that the codefendant was known to Appellant and available to testify at Appellant's trial?

STATEMENT OF THE CASE

Tiffany Sanders (“Appellant”) was indicted by the Dorchester County grand jury on a charge of murder. (R.pp. 109-10). Appellant was tried before the Honorable Diane S. Goodstein from August 3, to August 5, 2010. (R. p. 221). She was represented by Michael O’Neal, Esquire. (R. p. 221). Assistant Solicitors Harrison Bell, Esquire, and Mandy Kimmons, Esquire, prosecuted the case on behalf of the First Circuit Solicitor’s Office. (R. p. 221). At the conclusion of the trial, the jury found Appellant guilty as indicted. (R. p. 534; p. 574). Following the conviction, Judge Goodstein sentenced Appellant to thirty years in prison for murder. (R. p. 111; p. 544; p. 575). Appellant did not initially appeal her conviction or sentence. (R. p. 96; pp. 102-03). Appellant later filed an application for Post-Conviction Relief on August 3, 2011, and an amended application on August 24, 2011, (R. pp. 103-106). An evidentiary hearing was held on May 24, 2011, before the Honorable Deandrea G. Benjamin. (R. p. 124). Appellant was represented by Dale T. Cobb, Esquire, and Thomas R. Goldstein, Esquire. (R. p. 93; p. 106; p. 124; APCR). At its conclusion, Judge Benjamin granted Appellant a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), but dismissed Appellant’s remaining claims by written order filed August 3, 2012. (R. pp. 112-123).

Appellant filed a petition for writ of certiorari from the dismissal of her PCR. (R. p. 63; APCR). The South Carolina Supreme Court denied relief in *Tiffany Sanders v. State*, Op. No. 2014-MO-049. (R. pp. 90-92). Sanders filed for rehearing that was then denied on January 22, 2015. (R. pp. 89-92; Denial of Motion for Rehearing).

On March 21, 2017, Appellant filed a motion for a new trial pursuant to Rule 29(b)-After Discovered Evidence. (R. p. 1). A hearing was held before Judge Goodstein on May 30, 2017. (R. p. 17). Appellant was represented by Elizabeth Franklin-Best, Esquire. (R. p. 12; p. 17). The motion was subsequently denied on February 5, 2018. (R. p. 61-62; Judge Goodstein’s Order).

Appellant filed notice of appeal on February 8, 2018, and Attorney Franklin-Best submitted Appellant's Initial Brief on August 20, 2018. This Brief of Respondent follows.

RESPONDENT'S STATEMENT OF THE FACTS

Murder of Jesse Ham

On June 8, 2007, Appellant lured Jesse Ham through trickery into her car and drove him to a secluded location where her boyfriend, Sean Kammerer, shot Jesse four times with a pistol. (R. p. 577):

Earlier that day, Jesse Ham and three of his friends (Kevin King, David Hughey, and Brandon Frye) were walking down the street. (R. pp. 352-53; pp. 377-78; p. 392). As Appellant drove by, the group waved her down and asked what she was doing. (R. p. 354; pp. 377-78; pp. 393-95). Appellant retorted "Nothing with y'all," and drove off. (R. p. 354; pp. 377-78; pp. 393-95). Appellant was accompanied by her sister, Amanda Fender. (R. p. 379). Afterwards, Jesse and the group returned to Brandon's house. (R. pp. 392-93). Sean Kammerer, Appellant's co-defendant, called Appellant, asked her who she was with, and directed Appellant to bring Jesse to Publix. (R. p. 443).

Twenty minutes later, the group heard Appellant honking her horn in front of Brandon's house. (R. p. 354; p. 380; p. 395). She specifically asked for Kevin and Jesse but not by name. (R. p. 396). Jesse and Kevin met with Appellant, who asked them what their names were. (R. p. 135; pp. 380-81). At first Jesse and Kevin lied, telling her their names were Ben and Kyle, but Appellant insisted she knew a girl who urgently wanted to meet Jesse at a nearby McDonald's. Appellant pleaded with them for thirty to forty-five minutes to come with her. (R. pp. 366-56; pp. 381-86). Appellant also answered and talked on her cell phone several times during her interaction with Jesse and Kevin. (R. p. 356). Suspicious, Kevin put his ear to the phone while Appellant talked and heard a man's voice. (R. p. 356). However, when Jesse took the cell phone he heard a woman's voice. (R. p. 356). Jesse was hesitant, but decided to believe Appellant. (R.

p. 357). Kevin, concerned about his friend, sat in the back right passenger seat behind Jesse as Appellant started the car. (R. p. 357; pp. 370-72; p. 397). Appellant's sister rode next to Kevin behind the driver's seat. (R. p. 358).

As Appellant approached McDonald's, she drove around it once and drove to a nearby Publix/Tire King parking lot. (R. p. 358). She attempted to go in-between buildings, but a delivery truck blocked the alleyway. (R. p. 357). Appellant, still on the phone, stated "Oh, there's a delivery truck. I can't get behind there Okay." (R. p. 357). Appellant backed her car into an unlit, wooded area behind Publix. (R. p. 358). The car abutted the woods. (R. p. 357). Appellant was asked by the passengers to move the car to a more lighted area but Appellant refused and turned the car off. (R. p. 358). Appellant declared "No. We're not moving." (R. p. 359).

Appellant was described as acting 'shady like.' She was acting like everything was fine, but it was obvious she knew something was about to happen. (R. pp. 358-60). Kevin, now apprehensive, began to exit the car. (R. pp. 358-60; p. 373). Kammerer, who had been lying in wait, immersed and put a gun up against Kevin's stomach. (R. pp. 358-60; p. 373). Kevin knocked the gun away causing Kammerer to shoot between Kevin's legs. Kevin ran. (R. pp. 358-60; p. 373). As he ran between the buildings where the delivery truck was located, Kevin heard three to four shots behind him. (R. pp. 359-60). Appellant drove away after the shots started. (R. pp. 359-60; p. 422; p. 443). Jesse was shot four times, three in the back and one in the neck. He died at the scene. (R. p. 560).

At trial, Kevin explained that Kammerer and Jesse had been fighting for two to three years. (R. p. 364). Kammerer had been loudly telling everyone he was going to kill Jesse. (R.

p. 364; p. 183). It was also common knowledge that Jesse beat Kammerer with a bat. (R. p. 364; p. 403). Appellant was aware Kammerer wanted revenge. (R. p. 444).

In preparation for the murder, Kammerer, who did not have a license, had asked his friend Dejuan Jenkins to drive him. (R. p. 420). Kammerer directed Dejuan to park behind the Tire Kingdom because Kammerer was meeting his girlfriend there. (R. p. 422). Dejuan parked on one side of the Tire Kingdom building. (R. p. 422). They waited for Kammerer's girlfriend to arrive. Kammerer walked over to Appellant's car when Appellant arrived. (R. p. 424). After murdering Jesse, Kammerer got back into the car, and Dejuan took him home. (R. p. 424). Dejuan never informed the police about the shooting and later pled guilty to accessory after the fact. (R. p. 424).

Jessica Hans, a Publix employee, testified that she heard several loud pops while in the parking lot. (R. p. 415). When she looked in the direction of the pops, Jessica saw a person on the other side of the parking lot pointing a gun at the ground and eventually firing. (R. p. 415). Jessica also saw another person running between two buildings. (R. p. 415). After the shot was fired, Jessica saw the shooter disappear behind the side of the building. (R. p. 415). Thirty seconds later, a Jeep Cherokee pulled out from the same side of the building and exited the parking lot. (R. p. 416). Jessica did not remember seeing any other vehicles at that end of the parking lot. (R. p. 417). She noted that the delivery truck Appellant mentioned on her phone had recently pulled in to the parking lot. (R. p. 417).

Next, Appellant drove back to Brandon's house and told Brandon "something happened." (R. p. 397). Brandon rode in the car with her to the scene. (R. p. 397). While driving, Appellant told Brandon that she, Jesse, and Brandon had seen somebody come out of the woods and then Appellant drove off, leaving the boys behind. (R. p. 398). Appellant drove around the parking

lot a few times before dropping Brandon off back at his house. (R. p. 398). Brandon noted she seemed fake and had "alligator tears." (R. p. 398). Concerned, Brandon called and asked David to go with him to the crime scene. (R. p. 398). He also instructed David to bring a gun. (R. p. 398). By the time the two of them arrived at the scene the police had cordoned off the area. (R. pp. 398-99). The police questioned both of them. (R. pp. 399-400). Afterwards, David threw the gun into a ditch. (R. p. 389). Brandon left in the middle of questioning and was chased down. (R. pp. 399-400). During a search, the police found marijuana in his pockets, and charged him with simple possession. Afterwards, Brandon went home. (R. p. 400).

The next day, the police brought Appellant in for questioning. She signed a confession admitting she took Jesse to the scene, but claimed she only took him there because Kammerer wanted to fight. (R. pp. 561-63). She also disclaimed knowledge that Kammerer had a gun. (R. p. 561-63). Kammerer pled guilty to murder before Appellant's trial. (R. p. 288; p. 560).

Trial

The State charged Appellant with two alternative offenses: accessory before the fact to murder and murder. (R. pp. 570-77). If Appellant had been present at the scene of the murder, she would be guilty of murder, but if she had not been present, she would have been guilty of accessory before the fact of murder. Before trial, the parties stipulated that Kammerer murdered Jesse. (R. p. 560).

At trial, the State argued that, under the "hand of one, hand of all" accomplice liability theory, Appellant was guilty of murder. (R. p. 329). Appellant and Kammerer formed a common scheme to take Jesse to a secluded location and murder him. (R. pp. 327-28). The State presented testimony from Jesse's friends Kevin King, David Hughey and Brandon Frye. Also, the State also presented testimony from Jessica Hans and Dejuan Jenkins as well as

testimony from two police officers, photographic evidence of the scene, and Appellant's written confession. At the close of the State's case, Appellant made a motion for directed verdict, arguing that the State had failed to prove malice. (R. pp. 445-48). The judge denied the motion. (R. p. 448).

Appellant did not present a case and renewed the directed verdict motion. (R. p. 455; p. 457). Also, she objected to the charge on accessory before the fact of murder, arguing the phrase "the crime of murder" should be used instead of "any crime." (R. pp. 517-18). The judge denied this objection. (R. pp. 519-20).

During deliberations, the jury asked the Court several questions. (R. pp. 522-33; pp. 345-348). After four hours of deliberation, the jury found Appellant guilty of murder. (R. p. 534). Appellant was sentenced by Judge Goodstein to thirty years in prison. (R. pp. 544-45).

Hearing Pursuant to Appellant's Rule 29(b) Motion

On May 30, 2017, Judge Goodstein held a motions hearing to determine the merit of Appellant's After-Discovered Evidence motion. At the hearing Appellant's counsel testified that she was retained by the Appellant soon after her period to file for federal habeas elapsed. (R. pp. 29-30). At this point Kammerer had exhausted his collateral remedies.¹ (R. p. 29). Counsel testified that she had since reached out to Kammerer. From this meeting, Kammerer agreed to write affidavits in which he attests that Appellant was unaware of the plot to murder Jesse. (R. p. 30). Judge Goodstein was careful to note that the "affidavits" were neither sworn to nor notarized. (R. p. 30). Nevertheless, Counsel indicated that Kammerer would be willing to testify and affirm the contents of the written statements. (R. p. 30). In response, the State objected to the motion on the ground that Appellant's circumstances did not meet the elements necessary to

¹ Kammerer pled guilty to the murder of Jesse. R. p. 35. He did not appeal his conviction. R. p. 33. He did file an application for post-conviction relief which he eventually withdrew. R. p. 34.

establish her Rule 29(b) claim. It was the State's position that Kammerer's testimony was available at Appellant's trial. (R. pp. 32-33). The State further presented that during the PCR evidentiary hearing Appellant and Trial Counsel testified that they engaged in discussions prior to trial on whether to call Kammerer as a witness. They eventually elected not to. (R. pp. 33-36; pp. 47-50).

In response to the State's argument, Appellant's counsel reaffirmed her position that Kammerer was unavailable to Appellant and Trial Counsel for the fact that, at the time of Appellant's trial, Kammerer had applied for PCR and was "in his own legal jeopardy." (R. pp. 39-40). Judge Goodstein asked Counsel for any case law which held that a potential witness is rendered unavailable when pursuing collateral remedies. (R, p. 45). Appellant's counsel indicated that she would search for such a holding. (R. p. 45).

Judge Goodstein then took the opportunity to note on the record that, on dismissing Appellant's PCR, the PCR Court concluded that trial counsel's failure to call Kammerer was strategy and not deficient performance. (R. pp. 43-44). She then presented the following line of reasoning:

I know that in your argument you have argued that the determination by the PCR Court that the decision not to call Mr. Kammerer was strategy. And that that was to a great or lesser extent integral to the court denying the PCR. It feels as though you are asking me to go behind that determination and make a different finding. And I just want to make sure that I give you an opportunity to address that because I do not believe that I can do that.

(R. p. 46).

To this, Appellant's Counsel responded:

So I don't know that you would have to go so far as to say I find that particular order to be inaccurate and I hereby overrule it. But I think that you're not -- I mean, this is a different procedure. I don't think that you're bound by, you know, a case that arose in a different procedural posture.

(R. p. 47).

Judge Goodstein elected to take the matter under advisement, but not before requesting the following from Appellant's Counsel:

I think that it is imperative that you be able to direct to me case -- South Carolina case law if it's available that substantiates the argument that is propounded that while this witness was known, he was not available because of his own legal circumstance. Because I'm unaware of such case law, but -- but, I certainly don't want to make a decision if it's there and I don't know about it. So I'm going to look for that. Do you think you can provide that in ten days?

Counsel responded that she would comply. (R. p. 56).

On February 5, 2018, Judge Goodstein issued a written order dismissing Appellant's motion for a new trial. In the dismissal Judge Goodstein indicated that she had considered memorandums provided by both parties. The order then sets forth in pertinent part: "Due to the Defendant's knowledge of Mr. Kammerer and the available legal means of obtaining his testimony at the time of trial, the testimony cannot be newly discovered evidence under the relevant definition." (R. pp. 61-62; Judge Goodstein's Order).

ARGUMENT

- I. **The Trial Court Was Correct In Denying Appellant's Motion For A New Trial Because The Written Statements From Sean Kammerer Did Not Qualify As After-Discovered Evidence Due To The Fact That Kammerer Was Available To Testify At The Time Of Appellant's Trial.**

Standard of Review

"[A] motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge . . ." *State v. South*, 310 S.C. 504, 507, 427 S.E.2d 666, 668 (1993).

"The denial of a motion for a new trial will not be reversed absent an abuse of discretion." *Id.*

Analysis

Appellant begins her argument by claiming error in the trial court's conclusion that Sean Kammerer was available to testify at Appellant's PCR Evidentiary Hearing. However, the actual basis for the trial court's dismissal was that Kammerer was known and available to testify *at Appellant's trial*. To this point, the order of dismissal correctly states:

The fact that control is to be judged at the time of trial strengthens the State's position. Mr. Kammerer pled guilty to his charges in 2008, and had been incarcerated in the South Carolina Department of Corrections for over two years prior to Defendant's trial. As is the case for all guilty pleas, Mr. Kammerer was advised that he was surrendering his right to remain silent and his right against self-incrimination. Thus, he no longer enjoyed the privilege of refusing to testify upon the Court's acceptance of his plea. Therefore, at the time of trial, Kammerer was available for Defendant to subpoena or attempt to interview. The reasoning behind Defendant's decision to not call Kammerer to the stand during her trial is immaterial to the Court's decision today. Due to the Defendant's knowledge of Mr. Kammerer and the available legal means of obtaining his testimony at the time of trial, the testimony cannot be newly discovered evidence under the relevant definition.

(R. p. 62; Judge Goodstein's Order, p. 2).

The trial court's reference to Appellant's PCR dismissal was to acknowledge the PCR court's determination that Appellant's failure to call Kammerer at trial was strategy. During Appellant's after-discovered evidence hearing, the State referenced Appellant's PCR to support its position that Sean Kammerer was known and available to testify at Appellant's trial. *See R. pp. 34-36.*

In her pursuit of post-conviction relief, Appellant raised a claim of ineffective assistance of counsel for failure to call Sean Kammerer at trial. At the PCR evidentiary hearing Appellant and trial counsel both testified that the issue of calling Kammerer as a witness at trial was considered and a decision was made in favor of not calling him. *See R. pp. 153-54; p. 190.*

In regards to Appellant's ineffective assistance of counsel claim, the PCR Court held:

[T]his Court finds that trial counsel articulated a valid strategic reason for not calling Kammerer as a defense witness based upon the uncertainty of what he might ultimately say when actually placed under oath on the witness stand. Counsel fully discussed this strategy with Applicant before trial and Applicant concurred. This was a legitimate concern and is one which was shared at the time by Applicant. This Court notes that it is still not known what Kammerer would have said at trial. It is only now after conviction and the lack of success of the original trial strategy respecting Kammerer that Applicant and trial counsel are second-guessing the strategy originally employed. This Court will not second-guess defense counsel's reasonable trial tactic. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also Demnsev v. State*, 363 S.C. 365, 610 S.E.2d 812 (2005) and *McLaughlin v. State*, 352 S.C. 476, 575 S.E.2d 841 (2003). As noted above, trial counsel articulated valid strategic reasons for not calling Kammerer as a defense witness and used Kammerer's absence from trial to Applicant's advantage. Applicant has not shown that counsel was deficient in that choice of tactic or that she suffered the requisite prejudice. The allegation is without merit and is denied and dismissed.

(R. pp. 116-17).

The finding by the PCR court supports the trial court's dismissal of Appellant's new trial motion. A party requesting a new trial based on after-discovered evidence must show that the evidence (1) would probably change the result if a new trial was had; (2) has been discovered

since the trial; (3) could not have been discovered before the trial by exercise of due diligence; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching. *State v. Caskey, et al.*, 273 S.C. 325, 256 S.E.2d 737 (1979).

In the *Haydan v. State*, the South Carolina Supreme Court applied *Caskey* to circumstances similar to those presented by Appellant. 278 S.C. 610, 612, 299 S.E.2d 854, 855 (1983). In *Haydan*, the respondent sought a new trial based on after-discovered evidence. To support his claim, he presented the testimony of Leonard Horger. Horger had testified against the respondent during trial. At the after-discovered evidence hearing, Horger testified he had conspired to frame respondent and that the SLED agents planted the drugs. *Id.* The Court ruled that Horger's allegation that he had conspired to frame the Appellant did not meet the *Caskey* requirements, as evidence of the alleged setup was clearly known by and available to respondent at trial. *Haydan*, 278 S.C. at 612, 299 S.E.2d at 856. The Court concluded that "respondent failed to show that evidence of the alleged setup was discovered after the trial or could not by the exercise of due diligence have been discovered before trial." *Id.*

In the pending appeal, the record reflects that the evidence Appellant seeks to present was known and available to Appellant at trial. Therefore, Appellant's is unable to satisfy the second element *Caskey* that the after-discovered evidence has been discovered since the trial.

Alternatively, Appellant pleads for a finding that a witness is deemed unavailable to testify when they are pursuing collateral relief. Appellant presents that "[i]f the court's reasoning is allowed to stand, it will mean that criminal defendants, who plead guilty, effectively waive their rights to avail themselves of post-conviction relief remedies because they can be compelled by virtue of their guilty pleas to testify at a co-defendant's PCR conviction." (IBOA at p. 4-5). This argument has nothing to do with Appellant's current position or Appellant's rights. It

instead focuses on the perspective rights of Sean Kammerer. *Cf. State v. Hiott*, 276 S.C. 72, 78 (1981) (citing *U.S. v. Payner*, 447 U.S. 727(1980) (“The law is well-settled that these rights are personal and one person may not claim the rights of another.”). Nevertheless, Appellant’s argument ignores the fact that Mr. Kammerer pled guilty to the murder of Jesse Ham, and as a result of the plea, Kammerer no longer had the right to avoid testifying. “[I]n South Carolina, a guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights.” *State v. Rice*, 401 S.C. 330, 331–32, 737 S.E.2d 485, 485–86 (2013) (citing *Hyman v. State*, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). By entering a guilty plea, “[a]n accused [] waives the right to trial and the incidents thereof and the constitutional guarantees with respect to criminal prosecutions.” *Rivers v. Strickland*, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975) (citation omitted). “A defendant who pleads guilty simultaneously waives several constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury and the right to confront his accusers.” *State v. Patterson*, 278 S.C. 319, 322, 295 S.E.2d 264, 265 (1982), overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (citing *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)).

Courts that have had the opportunity to directly address the issue presented by Appellant have found that pending litigation does not render a witness unavailable. *See U.S. v. Thomas*, 492 F. App'x 690, 692 (7th Cir. 2012) (“But despite knowing that testimony from Murray could support his defense, Thomas did not attempt to subpoena Murray. Had Thomas sought to compel Murray's testimony, Murray might have resisted on Fifth Amendment grounds, but Thomas was nonetheless required to make the effort if he hoped to show due diligence.”); *U.S. v. Kamel*, 965 F.2d 484, 493 (7th Cir.1992) (“If there is possible evidence which would exonerate a defendant, he may not simply ignore it....”); *U.S. v. Levy-Cordero*, 67 F.3d 1002, 1018 (1st Cir. 1995) (“As

the district court noted, although Castro-Gómez' motion indicates that he is reluctant to testify, and that he desires protection from the court, it simply does not demonstrate that his testimony is unavailable. Indeed, the last sentence quoted above indicates that he anticipated being forced to take the stand and testify. Nevertheless, Forty-Estremera never sought to subpoena Castro-Gómez or compel him to testify. Under such circumstances, we conclude that the district court did not abuse its discretion in concluding that appellant failed to establish that Castro-Gómez' testimony was unknown or unavailable.”).

Lastly, during the new trial hearing, Appellant alternatively presented that Kammerer likely would not have testified had he been called by Appellant as witness at trial. However, Respondent posits that just because an individual refuses to testify at trial does not make his later testimony new evidence. Other courts have reached this conclusion as well. In *United States v. Dale*, the Court of Appeals for the D.C. Circuit persuasively held:

To obtain a new trial based on newly discovered evidence, a convicted defendant must offer evidence that “ ‘ha [s] been discovered since the trial.’ ” *Sensi*, 879 F.2d at 901 (quoting *United States v. Mangieri*, 694 F.2d 1270, 1284 (D.C.Cir.1982)). The unanimous view of circuits that have considered the question is that this requirement is not met simply by offering the post-trial testimony of a co-conspirator who refused to testify at trial. See *United States v. Reyes-Alvarado*, 963 F.2d 1184, 1188 (9th Cir.1992) (“ ‘[W]hen a defendant who has chosen not to testify comes forward to offer testimony exculpating a codefendant, the evidence is not “newly discovered.” ’ ”) (quoting *United States v. Diggs*, 649 F.2d 731, 740 (9th Cir.), cert. denied, 454 U.S. 970, 102 S.Ct. 516, 70 L.Ed.2d 387 (1981)); *United States v. Gustafson*, 728 F.2d 1078, 1084 (8th Cir.) (finding no abuse of discretion in denying new trial motion based on probability that post-trial testimony of convicted co-defendants, who had agreed to provide government with information in return for lenient sentence, would deviate from their trial testimony and no longer implicate defendant-appellant), cert. denied, 469 U.S. 979, 105 S.Ct. 380, 83 L.Ed.2d 315 (1984); *United States v. Metz*, 652 F.2d 478, 480 (5th Cir. Unit A Aug. 3, 1981) (rejecting contention that “ ‘newly available’ evidence is synonymous with ‘newly discovered’ evidence” and finding no abuse of discretion in denial of new trial motion based on co-defendant's post-conviction exculpating affidavits); *United States v. Jacobs*, 475 F.2d 270, 286 n. 33 (2d Cir.) (“[W]e fully agree with the judge's alternative ground [for denying a new trial motion], that a court must exercise great caution

in considering evidence to be 'newly discovered' when it existed all along and was unavailable only because a co-defendant, since convicted, had availed himself of his privilege not to testify.”), cert. denied, 414 U.S. 821, 94 S.Ct. 131, 38 L.Ed.2d 53 (1973). We recently acknowledged this principle in the administrative context to hold that the National Transportation Safety Board had reasonably concluded the proffered testimony of an FAA inspector who had invoked his fifth amendment privilege at a pilot certification hearing but had since pleaded guilty to charges related to the hearing's subject-matter did not constitute “newly discovered” evidence under an NTSB rule so as to warrant reconsideration of the certification denial. *See Chirino v. NTSB*, 849 F.2d 1525 (D.C.Cir.1988). In light of our holding in *Chirino* and the holdings of the other circuits in the cited cases, we conclude it was not an abuse of discretion to deny a new trial based on Sweeney's post-trial testimony.

U.S. v. Dale, 991 F.2d 819, 839 (D.C.Cir.1993).

CONCLUSION

The record supports the trial court's finding that the evidence Appellant sought to present was known and available to Appellant at trial. Both Appellant and Trial Counsel supported this position during the PCR evidentiary hearing when they acknowledged their awareness of Kammerer and their decision to not call him as a witness. Clearly not calling Kammerer was an unsuccessful strategy. Appellant now seeks to go back and remedy this misstep by submitting Kammerer's testimony under the guise of after-discovered evidence. To permit relief under these circumstances would undermine Appellant's conviction and the PCR court's dismissal. The facts presented by Appellant simply do not satisfy the requirements under *Caskey*. For this reason, it is respectfully submitted that the dismissal of Appellant's Rule 29(b) motion be upheld and the appeal dismissed.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SAMUEL M. BAILEY
Assistant Attorney General
S.C. Bar No. 103131

By: 
Samuel M. Bailey

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

January 30, 2019.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Dorchester County

The Honorable Diane S. Goodstein, Circuit Court Judge

THE STATE,

Respondent,

v.

TIFFANY ANN SANDERS,

Appellant.

RECEIVED

JAN 30 2019


SC Court of Appeals

Appellate Case No. 2018-000210

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 30th day of January, 2019.


SAMUEL M. BAILEY
Assistant Attorney General

ATTORNEY FOR RESPONDENT