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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Honorable Diane S. Goodstein, Circuit Court Judge

Appellate Case No. 2020-001390

THE STATE, ...RESPONDENT

v.

TIFFANY ANN SANDERS,..... PETITIONER.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUES

I

Whether 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 the proceeding in which it was raised, and could not have been obtained at any earlier point?

II.

Whether the trial court should have found that Sean Kammerer's affidavit constituted after discovered evidence, and granted Appellant a new trial?

STATEMENT OF THE CASE

Appellant Tiffany Ann Sanders (hereinafter "Appellant") was indicted by the Dorchester County grand jury on a charge of murder. (App. pp. 114-115). She was tried on August 3-5, 2010, in Dorchester County before the Honorable Diane S. Goodstein and a jury. Appellant was represented at trial by attorney Michael O'Neal, Esquire. The State was represented by Assistant Solicitors Harrison Bell and Mandy Kimmons. (App. p. 226). At the conclusion of the trial, Appellant was convicted of murder and sentenced by Judge Goodstein to 30 years in prison. (App. p. 544; pp. 584-585; p. 116; p. 554)

Appellant did not initially appeal her conviction and sentence. (App. p. 101; pp. 107-108). However, she filed an application for post-conviction relief on August 3, 2011, as well as an amended application on August 24, 2011. Part of the relief sought by Appellant in her application was a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). An evidentiary hearing was conducted before the Honorable Deandrea G. Benjamin on May 24, 2012. (App. 129). Appellant was represented by Dale T. Cobb, Esquire and Thomas R. Goldstein, Esquire. (App. p. 98; p. 111; p. 129; pp. 100-106). Judge Benjamin granted Appellant a belated appeal pursuant to *White*, but denied Appellant's other claims for post-conviction relief. (App. p. 117-128).

Appellant filed a Petition for Writ of Certiorari to appeal the denial of post-conviction relief. This Court granted certiorari on the issue of Appellant's request for a belated appeal, but denied certiorari for Appellant's remaining issues. This Court then affirmed Appellant's conviction and sentence in its unpublished per curium opinion. *Sanders v. State*, No. 2014-MO-049, 2014 WL 7177386 (S.C. Dec. 17, 2014); App., p. 611. Appellant filed a Petition for Rehearing, but the Petition was denied on January 22, 2015.

On March 21, 2017, Appellant next filed a motion for a new trial pursuant to Rule 29(b) claiming after-discovered evidence. (App. p. 6). A motion hearing was conducted before Judge Goodstein on May 30, 2017. Appellant was represented by attorney Elizabeth Franklin-Best, Esquire. (App. p. 17; 22). Judge Goodstein denied the motion on February 5, 2018. (App. pp. 66-67). Appellant appealed the denial of her motion, but the Court of Appeals affirmed Judge Goodstein's decision by unpublished opinion filed August 12, 2020. *State v. Tiffany Ann Sanders*, No. 2018-000210, 2020 WL 4671611 (Ct. App. Aug. 12, 2020). Appellant sought a Writ of Certiorari from this Court on October 19, 2020. This Court granted certiorari on May 28, 2021, and ordered briefing. Respondent's Brief now follows.

STATEMENT OF FACTS

On June 8, 2007, through trickery and guile, Appellant lured Jesse Ham ("Victim") into her car and drove him to a secluded location where her boyfriend, Sean Kammerer, shot Victim four times with a pistol. (App. p. 448, line 6-19; p. 385; p. 400; p. 359, line 3 through p. 362, line 7; pp. 361-371; pp. 386-391). It is undisputed that Sean Kammerer pulled the trigger and murdered Victim. (App. p. 292, line 21 through p. 293, line 6; p. 570). It is also undisputed that Kammerer pled guilty to the murder prior to Appellant's trial. (App. p. 292, line 21 through p. 293, line 6; p. 570). The State charged Appellant with two alternative offenses: accessory before the fact to murder and murder. (App. pp. 580-87). Before trial, the parties stipulated that Kammerer murdered Victim. (App. p. 570). Based upon other evidence, the State's theory of the case was that Appellant was guilty of murder under the accomplice liability theory of "the hand of one, is the hand of all". (App. p. 332, line 16 through p. 335, line 6). Kammerer initially provided police with a statement that would lend support to Appellant's argument that she did not know his

intentions for murder. (App. p. 139, lines 23-25; p. 194, lines 12-15; p. 205, lines 10-22). However, neither the State nor the defense called Kammerer to testify at trial.

Appellant's Trial

On June 8, 2007, Victim and his three friends (Kevin King, David Hughey, and Brandon Frye) were walking down the street. (App. pp. 357-58; pp. 382-83; p. 397). Appellant drove by the group and they waved her down and asked what she was doing. King testified that Appellant responded by saying "Nothing with y'all," and continued to drive on. (App. p. 359; pp. 382-83; pp. 398-400). After this exchange, Victim and his friends returned to Brandon's house. (App. pp. 397-98).

Twenty minutes later, the group heard Appellant honking her horn in front of Brandon's house. (App. p. 359; p. 385; p. 400). Appellant was there because she had received a call from her boyfriend, co-defendant Sean Kammerer. Kammerer had asked her who she was with and directed her to bring Victim to the nearby Publix. (App. p. 448). Appellant did so under the false pretense that she would take Victim to McDonald's to meet a girl who was romantically interested in him; it required 45 minutes of convincing before Victim agreed to go. (App. p. 359, line 3 through p. 361, line 7; 361-371; pp. 386-391). King was with Victim during Appellant's efforts to take Victim with her. King was suspicious of Appellant's statements and behavior, but ultimately accompanied Victim out of concern. King sat in the back right passenger seat behind Victim, Appellant's sister, who has some mental deficiencies, was seated in the back seat behind Appellant. (App. pp. 362-63; pp. 375-77; p. 402).

Appellant drove around the McDonald's, but ultimately parked in the area behind the nearby Publix. She attempted to go in-between buildings, but a delivery truck blocked the alleyway. (App. p. 362). Appellant, who was still on the phone at the time, stated "Oh, there's a

delivery truck. I can't get behind there . . . . Okay." (App. p. 362). Appellant backed her car into an unlit area behind Publix that abutted the woods. (App. p. 362-63). King described Appellant as "acting shady like." "She was acting like everything was fine, but at the same time . . . she knew something was about to happen." (App. pp. 363-65). Appellant was asked by the passengers to move the car to a more lighted area, but Appellant adamantly refused and turned the car off. (App. p. 362). When she refused to move the car to another location King chose to exit the vehicle. He was immediately confronted by Kammerer who pulled a gun on him. King knocked the gun away, resulting in a shot being fired between King's legs. King proceeded to run from the scene. As he fled, he heard three or four gunshots fired behind him. (App. p. 362, line 25 through p. 364, line 17; p. 378). Evidence demonstrated that Victim was shot four times; he was shot three times in the back and once in the neck and died at the scene. (App. p. 570).

King further testified that Victim and Kammerer had been fighting for two to three years, and that it was common knowledge that Victim had beaten Kammerer in the head with a miniature souvenir baseball bat on a previous occasion. King testified that Kammerer would tell everybody that he was going to kill Victim. (App. p. 369, lines 2-19; p. 449, lines 7-9; p. 188). By Appellant's own admission, she was aware of the baseball bat incident and that Kammerer wanted revenge. (App. p. 449, lines 6-11). Appellant signed a confession wherein she admitted to taking Victim to the scene knowing that Kammerer wanted to fight Victim, but in her confession she denied knowing Kammerer had a gun and intended to kill Victim. (App. p. 448, line 6 through p. 449, line 11; pp. 571-573).

In preparation for the murder, Kammerer, who did not have a driver's license, had asked his friend Dejuan Jenkins to drive him. (App. p. 425). Kammerer directed Dejuan to park behind the Tire Kingdom (which was adjacent to the Publix) because Kammerer was meeting Appellant

there. (App. p. 427). Dejuan parked on one side of the Tire Kingdom building and waited for Appellant to arrive. (App. p. 427). Kammerer walked over to Appellant's car when she arrived. (App. p. 429). After murdering Victim, Kammerer got back into the car, and Dejuan took him home. (App. p. 429). Dejuan never informed the police about the shooting and later pled guilty to accessory after the fact. (App. p. 429).

Jessica Hans, a Publix employee, testified that she heard several "loud pops" while in the parking lot. (App. p. 420). When she looked in the direction of the "pops", she saw a person on the other side of the parking lot pointing a gun at the ground and eventually firing. (App. p. 420). Jessica also saw another person running between two buildings. (App. p. 420). After the shot was fired, Jessica saw the shooter disappear behind the side of the building. (App. p. 420). Thirty seconds later, a Jeep Cherokee pulled out from the same side of the building and exited the parking lot. (App. p. 421). Jessica did not remember seeing any other vehicles at that end of the parking lot. (App. p. 422). She noted that the same delivery truck Appellant mentioned on her phone had recently pulled in to the parking lot. (App. p. 422).

Next, Appellant drove back to Brandon Frye's house and told Brandon "something happened." (App. p. 402). Brandon rode in the car with her to the scene. (App. p. 402). While driving, Appellant told Brandon that she, Victim, and King had seen somebody come out of the woods and then she drove off, leaving the boys behind. (App. p. 403). Appellant drove around the parking lot a few times before dropping Brandon off back at his house. (App. p. 403). Brandon noted that Appellant seemed fake and had "alligator tears." (App. p. 403). Concerned, Brandon called and asked David Hughey to go with him to the crime scene. (App. p. 403). He also instructed David to bring a gun. (App. p. 403). By the time the two of them arrived at the scene the police had cordoned off the area. (App.. pp. 403-404). The police questioned both of them.

(App. pp. 404-405). Afterwards, David threw the gun into a ditch. (App. p. 394). Brandon left in the middle of questioning by police and was chased down. (App. pp. 404-405). During a search, the police found marijuana in his pockets, and charged him with simple possession. Afterwards, Brandon went home. (App. p. 405).

The next day, the police brought Appellant in for questioning. It was at that time that she signed her confession admitting she took Victim to the scene, but claimed she only took him there because Kammerer wanted to fight. (App. pp. 571-73). She also disclaimed knowledge that Kammerer had a gun on him that night. (App. pp. 571-73).

PCR Evidentiary hearing

Appellant raised as her first allegation for post-conviction relief that counsel was ineffective for failing to call Sean Kammerer as a witness.[1] (App. p. 106). Appellant testified at her evidentiary hearing that she was aware Kammerer had entered a guilty plea to murder. She further testified that while Kammerer was not at her trial, her lawyer, Michael O'Neal, discussed with her the possibility of getting a statement from Kammerer for purposes of trial. (App. p. 140, lines 15-22). During cross-examination on the topic, Appellant agreed that Kammerer could have been presented at trial, but that Appellant and counsel could not be certain what he would say if he had taken the stand. (App. p. 145, line 15 through p. 146, line 15). In conclusion on the topic, Appellant's evidentiary hearing testimony reads as follows:

> Q Okay. And you also discussed with your attorney whether or not Mr. Kaminer should be produced as a witness for the defense; is that correct?
> A Yes, ma'am.
> Q And was it that – that also discussed that it might not be a good idea to do that because you don't have any control over what he may say once he gets on the witness stand; is that true?
> A Yes, ma'am.

[1] During the PCR evidentiary hearing Sean Kammerer's name is spelled as "Kaminer".

Q And it was decided, again, as a matter of trial strategy, that it would be best not to call Mr. Kaminer because there is no control and you don't know what's going to happen?
A Yes, ma'am.
Q But now that you've gone to trial and the result is not as you had hoped, you now wish you had called him just to see if it would make a difference?
A Yes, ma'am.

(App. p. 158, lines 8-25).

On the topic of potentially calling Kammerer, trial counsel Michael O'Neal testified that he believed in retrospect that it was a mistake not to go and speak with him and bring him to Appellant's trial. He testified that he 1) had Kammerer's statement to police which cast doubt upon what Appellant expected to happen between Victim and Kammerer, 2) knew Appellant would not be taking the stand, and 3) knew that Appellant's sister would not be taking the stand. He conceded that he wanted last argument, and that he would take that over putting up other testimony. (App. p. 26, lines 15-17; p. 42, lines 4-11; p. 140, lines 20 through p. 141, line 2; p. 193, lines 15-25; p. 195, line 6 through p. 196, line 10; p. 214, lines 8-15; p. 217, lines 1-16). Mr. O'Neal agreed that he discussed this trial strategy with Appellant before trial, and explained it as best he could to her. (App. p. 198, lines 9-16). Mr. O'Neal further agreed that by the time of Appellant's trial, Kammerer had been sentenced to 34 years in prison and had no reward or motivation to avoid testifying at trial under subpoena. (App. p. 207, lines 14-18). Lastly, Mr. O'Neal was aware that Kammerer had already been untruthful under oath in court, and that even if he had gone to take a statement from Kammerer, there was no way to know what he might say once he got on the stand. (App. p. 215, lines 2-19).

RULE 29(b) Hearing

On May 30, 2017, the Honorable Judge Diane S. Goodstein conducted a hearing to consider arguments on Appellant's motion for a new trial under South Carolina Rule of Criminal Procedure

29(b). (App. p. 22). At the outset of the motion hearing, Kammerer was present and conducted a colloquy with Judge Goodstein that ensured he was assigned counsel to discuss his rights and risks of testifying at the motion hearing. (App. pp. 24-32). Counsel for Appellant, Elizabeth Franklin-Best, informed the court that she acquired a written statement from Kammerer that indicated Appellant was not aware he had a gun at the time of the altercation, and did not know that he had a hostile relationship with Victim until after the murder. (App.. pp. 18-19). The statement also indicated that Kammerer did not instruct Appellant to bring Victim to the parking lot that night, and that Appellant never even informed him that she was bringing Victim to the parking lot to meet him. Kammerer's statement then states that he "did not tell anyone of this information earlier, (i.e. Dale Cobbs who was Tiffany's [Appellant's] P.C.R. lawyer) because I was pursuing my own legal remedies at that time." (App. pp. 18-19).

Judge Goodstein reviewed the statement and concluded that she would not consider it a sworn affidavit, as it lacked notarization. *Counsel for Appellant acknowledged this inadequacy and conceded that the statement did not constitute an affidavit.* Counsel articulated that she believed Kammerer would adopt the contents of the statement via testimony under oath.[2] (App. p. 30; p. 35, line 9 through p. 36, line 4). Appellant argued that Kammerer's testimony was not available to Appellant because Kammerer was pursuing his own collateral remedies, and also relied upon what collateral remedies Kammerer *might* have had available to him in the future. (App. p. 34, lines 3-24). The State, represented by Solicitor Sorenson, argued in response that Appellant had failed to comply with the one-year statute of limitations discovery rule applicable to Rule 29(b) motions. He articulated that Appellant had knowledge of Kammerer as a witness for

[2] Kammerer did not testify that day and his testimony was ultimately deemed unnecessary by Judge Goodstein. Her denial of the motion was found on grounds that Kammerer's supposed testimony, regardless of veracity, was not newly discovered evidence.

the defense since the incident occurred in June of 2007. (App. p. 37, line 18 through p. 39, line 12). Solicitor Sorenson bolstered his argument by highlighting the fact that Appellant's first PCR allegation was to claim ineffective assistance of counsel for failing to call Kammerer as a witness at trial and that such a claim was denied on the basis that counsel made a strategic choice not to call Kammerer as a witness. (App. p. 39, line 25 through p. 41, line 1). Moreover, Solicitor Sorenson noted that Kammerer appeared before Judge Dickson in May of 2013 and *requested the court to allow him to voluntarily withdraw his PCR with prejudice*. Judge Dickson granted that motion on June 5, 2013. There is no indication that Kammerer possessed or pursued any further legal remedies. As such, even if Kammerer's pursuit of legal remedies were to be considered an impediment, Appellant waited three and a half years to pursue a new trial motion on the basis of after-discovered evidence once such alleged perceived impediments were absent. Solicitor Sorenson argued that Appellant could therefore not possibly satisfy the reasonable diligence portion of the Rule 29(b) discovery rule. (App. p. 39, lines 13-21; p. 41, lines 12-24).

Appellant conceded at the hearing that the statement made by Kammerer to law enforcement was known to the defense, that Kammerer for various points in time was represented by counsel, and that counsel could have contacted Kammerer's lawyer to request an opportunity to speak with him.[3] (App. p. 46, lines 1-23).

Unware of any case law to support Appellant's argument, Judge Goodstein asked if Appellant could identify any precedent to support the contention that a witness or co-defendant's pursuit of their own legal remedies after having pled guilty would render them unavailable for interview or subpoena. Counsel for Appellant did not have any such case law at the time of the

[3] Appellant's arguments at this point diverted to questioning the propriety of the ruling of the court in denying Appellant's PCR application. (App. pp. 48-49).

hearing, but informed the court she would search for such precedent. (App. p. 50, lines 6-14; p. 60, lines 1-11).

On February 5, 2018, Judge Goodstein filed a written Order denying Appellant's motion for a new trial. Judge Goodstein reasoned that Kammerer's testimony was not necessary for the sake of acquiring its contents under oath because the purported content of his statement did not satisfy the definition of newly discovered evidence. Judge Goodstein found that Kammerer was known to Appellant at least as early as her arrest in 2007. Appellant had methods available to her to subpoena Kammerer for her PCR evidentiary hearing, if he was found to be unwilling to do so voluntarily. Moreover, Judge Goodstein found that Kammerer had surrendered his rights against self-incrimination and pled guilty prior to Appellant's trial. He therefore no longer enjoyed that privilege and could have been subpoenaed by Appellant as a witness for the defense *at trial*. As such, Kammerer's supposed testimony and statement did not constitute newly discovered evidence and Judge Goodstein denied the motion for new trial. (App. pp. 66-67).

STANDARD OF REVIEW
(General Appellate Standard)

In criminal cases, an appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); *State v. Wood*, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). Thus, the appellate court is bound by the trial court's factual findings unless they are clearly erroneous. *Id.*; *State v. Landis*, 362 S.C. 97, 101, 606 S.E.2d 503, 504 (Ct. App. 2004). On appeal, the appellate court is limited to determining whether the trial court abused its discretion. *State v. Walker*, 366 S.C. 643, 653, 623 S.E.2d 122, 127 (Ct. App. 2005).

(Motion for a New Trial based on after discovered evidence)

"The granting of a new trial because of after-discovered evidence is not favored," and this Court will affirm the trial court's denial of such a motion unless the trial court abused its discretion.

State v. Irvin, 270 S.C. 539, 545, 243 S.E.2d 195, 197–98 (1978); *State v. Harris*, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011). As the South Carolina Supreme Court held in *State v. Rhodes*, 44 S.C. 325, 327, 21 S.E. 807 (1895):

> We, however avail ourselves of this opportunity to say that the universally recognized doctrine is that applications of this kind should be scrutinized with great caution, in order to avoid delays, and prevent any obstructions to the administration of justice. As was said by the late Chief Justice Simpson in the case of *State v. David*, 14 S.C. at page 432, "There can be no doubt that motions of this sort should be received with the utmost caution, because, as it is said by a learned judge, there are but few cases tried in which something new may not be hunted up, and also because it tends to perjury; and as was said in the case of *State v. Harding*, 2 Bay, 268, it would have a mischievous tendency after all the evidence on the part of the state had been fully disclosed, to allow one with his life in danger, an opportunity, by the assistance of confederates, to procure unprincipled witnesses to contradict the evidence on the part of the state, and thereby defeat the ends of justice"

Rhodes, 44 S.C. at 327, 21 S.E. 807.

"A motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge." *State v. Irvin*, 270 S.C. at 545, 243 S.E.2d at 197; *State v. Harris*, 391 S.C. at 544, 706 S.E.2d at 529. The credibility of newly-discovered evidence is for the trial court to determine. *State v. Porter*, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977); *Harris*, 391 S.C. at 545, 706 S.E.2d at 529. Only the trial court, and not the appellate court, has the power to weigh the evidence; the trial court's judgment will not be disturbed except for error of law or abuse of discretion. *Id.*; *Harris*, 391 S.C. at 545, 706 S.E.2d at 529. "In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment." *State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009); *Harris*, 391 S.C. at 545, 706 S.E.2d at 529. "On review, we may not make our own findings of fact. The deferential standard

of review constrains us to affirm the trial court if reasonably supported by the evidence." *Id.*; *Harris*, 391 S.C. at 545, 706 S.E.2d at 529.

ARGUMENT

I. The South Carolina Court of Appeals was correct in affirming the trial court's denial of a new trial and finding that Kammerer's potential testimony was discoverable at the time of Appellant's trial and that the trial court did not abuse its discretion in denying Appellant's Rule 29(b) motion for a new trial.

Appellant has failed to demonstrate that Kammerer's testimony constitutes newly discovered evidence acquired after Appellant's trial, or that Appellant complied with the requirements set forth by SCRCrimP Rule 29(b). As such, Appellant has failed to demonstrate that the circuit court abused its discretion in denying the motion for a new trial and that the Court of Appeals erred in affirming that decision. The ruling of the Court of Appeals should therefore be affirmed.

"In order 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." *Clark v. State*, 315 S.C. 385, 387–88, 434 S.E.2d 266, 267 (1993). A motion for a new trial based on after-discovered evidence must be made within one (1) year after the date of actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence. SCRCrimP 29(b). "'A motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge.'" *State v. Harris, 391 S.C. 539, 544–45, 706 S.E.2d 526, 529 (Ct. App. 2011).* (citing *State v. Irvin*, 270 S.C. 539, 545, 243 S.E.2d 195, 197 (1978). "'The granting of a new trial because of after-discovered evidence is not favored,'" and a

reviewing court "will affirm the trial court's denial of such a motion unless the trial court abused its discretion." *Id.* (citing *State v. Irvin*, 270 S.C. at 545, 243 S.E.2d at 197–98).

The Court of Appeals properly referenced the applicable law concerning the elements for a new trial on after-discovered evidence, the disfavor of granting such a remedy, and the standard of review that a denial of a new trial based on after-discovered evidence should only be reversed upon a showing of abuse of discretion. *Sanders*, No. 2018-000210, 2020 WL 4671611, at *1 (S.C. Ct. App. Aug. 12, 2020). In the application of such case law, the Court of Appeals correctly affirmed the trial court's decision, holding that "Sanders could have discovered Kammerer's potential testimony by exercising due diligence prior to her trial." *Id.* The Court of Appeals was correct to affirm Judge Goodstein's ruling wherein Appellant failed to demonstrate both the second and third elements for after-discovered evidence.[4] Regarding the second and third elements, the

[4] Respondent would also argue that Appellant failed to satisfy the first element. Appellant's own admissions are sufficient to render her guilty of murder, notwithstanding the issues concerning her knowledge of a gun or her knowledge of Appellant's immediate intention to kill Victim. Appellant confessed that she agreed to lure Victim under false pretenses into her car so that she could take him to Kammerer, who she knew to be lying-in-wait in a dark and secluded area to surprise Victim and cause harm to Victim. Appellant knew that Kammerer's intention was to cause harm to Victim as revenge for a prior violent incident where Victim hit Kammerer with a souvenir baseball bat. Appellant knew that her efforts were to conspiratorially place Victim in an unaware and defensive position without his express permission or consent to engage in combat. Appellant's participation in such a way, and for such a purpose, renders a foreseeable consequence that a deadly weapon might be involved and a foreseeable consequence that death might result from such an intentional violent altercation. *State v. Williams*, 189 S.C. 19, 199 S.E. 906, 908 (1938) ("There can be no doubt of the general rule of law that a person engaged in the commission of an unlawful act is legally responsible for all the consequences which naturally or necessarily flow from it, and that if he combines and confederates with others to accomplish an illegal purpose he is liable criminaliter for everything done by his confederates which follows incidentally in the execution of the common design, as one of its probable and natural consequences, even though what was done was not intended as a part of the original design or common plan.")); *State v. Harry*, 420 S.C. 290, 292, 803 S.E.2d 272, 273 (2017) (holding victim's death during a robbery was *foreseeable consequence* to the plan to steal victim's television, and therefore sufficient to establish guilt under the hand of one is the hand of all theory of accomplice liability); *State v. Bennett*, 328 S.C. 251, 263, 493 S.E.2d 845, 851 (1997) (holding that under certain circumstances hands or fists can be deemed deadly weapons by the jury.). It is also important to note that the contents of Kammerer's

record demonstrates that Kammerer was a known witness to the defense *prior to the time of trial* and that Kammerer had already waived his right against self-incrimination and pled guilty. He was therefore a witness available to the defense; trial counsel simply could have 1) interviewed him, 2) determined precisely what he could testify to, and 3) trusted that he would testify truthfully and consistently with their trial preparations. Appellant and trial counsel likewise had reason to believe he would be a favorable witness who would testify in Appellant's favor. (App. p. 42, lines 4-11; p. 140, lines 20 through p. 141, line 2). However, as trial counsel testified during Appellant's PCR hearing, they were wary of Kammerer's potential to be dishonest from the stand and strategically chose not to prepare Kammerer as a defense witness. They chose instead to preserve the right to final argument. Trial counsel also noted that *in retrospect*, he wished he had interviewed and prepared Kammerer as a witness as he believes it would have been the better choice. He expressed no indication that such an effort was not possible or that Kammerer was somehow unavailable, and though not successful, *Appellant asserted as a basis for PCR relief that counsel was ineffective for failing to call Kammerer as a witness.* Availability was not at issue in the minds of Appellant or her trial attorney, and Kammerer's unavailability was never encountered as a problem. It cannot now be presumed a problem, in the absence of an actual effort to obtain Kammerer's testimony at the appropriate time. [5]

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statement are devoid of any credibility as they suggest not only that Appellant lacked knowledge of his gun and intentions, but that she was unaware of their violent past, that he never instructed her to bring Victim to the parking lot the night Victim died, and that Appellant never informed him she was bringing Victim to the parking lot to meet him. Such assertions are contrary to Appellant's own confession, and if believed, would require the jury to conclude that Victim's arrival at Kammerer's precise location by vehicle occurred simply by chance. The improbability of such a theory destroys any credibility to Kammerer's new statements. "Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial." *State v. Whitener*, 228 S.C. 244, 261, 89 S.E.2d 701, 709 (1955).

[5] It is also important to note that Appellant's arguments often lapse into an effort to draw into question the propriety of the PCR Court's findings of fact and law in denying relief. Such is

This Court has endeavored to rule upon this type of issue once before. In *Hayden v. State*, this Court applied *Caskey* to circumstances similar to those presented by Appellant. 278 S.C. 610, 612, 299 S.E.2d 854, 855 (1983). In *Hayden*, 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 respondent did not meet the *Caskey* requirements, as evidence of the alleged setup was clearly known by and available to respondent at trial. *Hayden*, 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. Hayden* is instructive and lends weight to the lack of merit in Appellant's appeal.

However, instead of referencing a witness's recantation of testimony, which Kammerer would allegedly have done if the contents of his statement are to be believed, Appellant rests her argument of Kammerer's unavailability due to the fact that he was engaged in litigating his own post-conviction relief action and could not engage in testimony that would result in self-incrimination. There are a multitude of fallacies with such an argument.

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improper, is barred by the doctrine *res judicata*, and was a concern shared by Judge Goodstein in hearing Appellant's Rule 29 Motion. *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 571, 776 S.E.2d 397, 403 (Ct. App. 2015); *Brown v. Felsen*, 442 U.S. 127, 131, 99 S. Ct. 2205, 2209, 60 L. Ed. 2d 767 (1979). The primary relevance of the PCR evidentiary hearing testimony to the matter at hand is that it proves unequivocally that both trial counsel and Appellant were aware, *prior to trial,* of the potential usefulness of Kammerer's testimony as a defense witness at her trial. Appellant now misconceives such testimony as newly discovered evidence.

First, as the Court of Appeals correctly noted, Appellant has failed to present any case law that holds a witness is deemed unavailable if involved in collateral litigation for their own crime. *State v. Sanders*, No. 2018-000210, 2020 WL 4671611, at *1, n.1 (Ct. App. Aug. 12, 2020). Such a circumstance likewise does not satisfy any of the prescribed conditions that a witness is deemed unavailable under SCRE Rule 804. Persuasive authority on the issue actually holds contrary to Appellant's argument; pendency of litigation does not render a witness unavailable. Courts that have had the opportunity to directly address the issue 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.").

Second, Kammerer had already pled guilty and waived his right against self-incrimination. There is no authority demonstrating that such a right is returned to the applicant for purposes of collateral litigation or that such a right can be asserted if subpoenaed to testify at trial. In any case,

there is no support within the record to demonstrate that Kammerer would have refused to testify on Appellant's behalf at trial. Such is merely a convenient assumption by Appellant.

Third, guilt and innocence are not at issue in a post-conviction relief action, as the subject matter is question is whether the conviction (in this case, Kammerer's guilty plea) can somehow be *collaterally attacked* and shown to be involuntarily entered via the failures of counsel or through some other cognizable basis for relief. Had Kammerer been called to testify at Appellant's trial or PCR hearing, doing so would in no way have impacted the potential success or failure of his own PCR action.

Fourth, Appellant is mistaken to argue that Kammerer was an unavailable witness in reliance upon the notion that leave of the court is required to subpoena a witness for a PCR evidentiary hearing and that the PCR court would not likely have granted such a request. Appellant's argument that Mr. Kammerer could not have been subpoenaed as a witness at Appellant's PCR evidentiary hearing is completely unsubstantiated. Subpoenaing a witness to testify at an evidentiary hearing is not considered discovery demanding PCR court approval. Moreover, Appellant never made her desire to call such a witness known to the PCR court, nor did she actually request permission from the PCR court to issue such a subpoena. Appellant instead, *again*, assumes certain conclusions and responses of other individuals in such a way as to protect the misconceived feasibility of the limited arguments now presented.

Appellant bases her argument entirely on the speculation that Kammerer would have 1) refused to testify at Appellant's PCR evidentiary hearing, or 2) the PCR court would have denied the misconstrued obligatory discovery request. Appellant can be assured of neither. An individual's rights cannot be asserted for them, therefore Appellant cannot argue with legal faculty that Kammerer would have refused to testify. *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."). Moreover, though Appellant believes Kammerer retained his Fifth Amendment right, *a court can not presume such a right to be asserted without actually calling the witness to testify*. Appellant's argument inherently confirms that Appellant had a means of seeking Kammerer's testimony that was not pursued. As such, regardless of Appellant's misguided belief that a Fifth Amendment right existed for Kammerer, it cannot be asserted by Appellant on Mr. Kammerer's behalf to demonstrate unavailability. Nor can Appellant simply presume Mr. Kammerer would have asserted such a right to sidestep the shortcomings of her arguments. Appellant failed to actually call Kammerer and see the issue come to fruition. That failure negates any potential merit to her arguments for unavailability. Cf. *State v. Terry*, 339 S.C. 352, 356, 529 S.E.2d 274, 276 (2000).

Judge Goodstein's conclusion that Kammerer's supposed testimony was known and discoverable prior to Appellant's trial is of sound reasoning and without error. There is no basis to demonstrate an abuse of discretion. For the numerous explanations set forth above, Appellant has failed to demonstrate error on the part of the Court of Appeals in affirming Judge Goodstein's denial of a new trial under Rule 29(b) and Appellant's conviction and sentence should be affirmed.

II. Appellant has failed to present any factual or legal basis as to why the Court of Appeals erred in finding that Kammerer's statement failed to satisfy the requirements for constituting after-discovered evidence.

Appellant's second issue is largely encompassed by Respondent's arguments set forth under Respondent's Argument I. (*Supra*). Nevertheless, Appellant has failed to demonstrate any error on the part of the Court of Appeals or the circuit court in concluding Kammerer's purported testimony did not constitute after-discovered evidence. The ruling of the Court of Appeals should be affirmed.

As an initial matter, Kammerer never provided an "affidavit" due to the failure to have the statement notarized. *Black v. Lexington Sch. Dist. No. 2,* 327 S.C. 55, 58, 488 S.E.2d 327, 328 (1997) (noting that "[a]lthough the document was a sworn statement, it did not comply with South Carolina's requirements for a valid affidavit because it was not notarized."). Counsel for Appellant conceded this point during the hearing. (App. p. 35, line 12 through p. 36, line 4). Secondly, Appellant was not only on notice of Kammerer's guilt for the murder of Victim, she and her attorney were aware of his statement to police that could cast doubt upon Appellant's knowledge of his intentions to kill Victim and allegedly aid in her legal defense. Pursuant to Rule 29(b), a motion for a new trial based on after-discovered evidence must be made within one (1) year after the date of actual discovery of the evidence by the defendant *or after the date when the evidence could have been ascertained by the exercise of reasonable diligence*. SCRCP Rule 29(b) (emphasis added).

Even if Appellant's arguments for unavailability were to be considered, Appellant has provided no explanation for why her motion for new trial could be considered timely under Rule 29. As the record demonstrates, Kammerer voluntarily withdrew his PCR application and allowed the statute of limitations to all collateral litigation to expire. (App. p. 39). Nevertheless, Appellant waited more than three years to file the present motion. It cannot be considered newly discovered evidence under Rule 29(b), as it fails to abide by the restraints of the incorporated discovery rule. To the extent Appellant contends that Kammerer had more details to provide pertinent to Appellant's alleged innocence, those details could likewise have been ascertained prior to trial had counsel pursued such a strategy. The nature of the evidence in question and Appellant's long held knowledge of that evidence prevent Appellant from establishing the second and third elements

necessary for after-discovered evidence under Rule 29(b) and fail to demonstrate the timeliness of the motion.

Moreover, persuasive authority holds that even if Kammerer had refused to testify at trial, his willingness to testify at a later date does not constitute newly discovered evidence for the purposes of a motion for new trial. In *U.S. v. Dale*, the Court of Appeals for the D.C. Circuit 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). As follows, the very foundation of Appellant's appeal is not supported by the courts that have addressed the issue.

As such, Appellant has failed to set forth evidence that satisfies the standards necessary to constitute after-discovered evidence under Rule 29(b). The ruling of the Court of Appeals was correct and should be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the ruling of the Court of Appeals be affirmed.

(Signature on Following Page)

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