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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

THE STATE OF SOUTH CAROLINA,

Respondent,

v.

SANTONIO TOREZ WILLIAMS,

Petitioner.

Appellate Case No. 2021-000872

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PROOF OF SERVICE

PETITIONER'S QUESTIONS PRESENTED

- I. Did the trial court err in failing to grant a new trial, when the State failed to disclose that a jailhouse snitch requested a deal prior to testifying at trial?
- II. When the State laid a foundation for authentication for rebuttal evidence during their case in chief, did the trial court err in allowing the State to introduce a recording of Appellant's jail call during through a rebuttal witness?

STATEMENT OF THE CASE

Petitioner was indicted for murder by the Aiken County Grand Jury (2016-GS-02-274). (R. p. 3, line 14-15; p, 4, lines 2-4). Solicitor Strom Thurmond and Assistant Solicitor Cassie Hall represented the State at trial. (R. p. 1). Defendant Santonio Torez Williams (hereinafter "Petitioner") was represented by attorneys Nicholas McCarley and Derek Bush. (hereinafter "defense counsel"). (R. p. 1). The case was called to trial before the Honorable Roger M. Young, and a jury, on January 30 through February 2, 2017. (R. p. 1). The jury returned a guilty verdict against Petitioner. (R. p. 531). Judge Young sentenced Petitioner to fifty (50) years imprisonment for murder. (R. p. 532, lines 2-6). On August 14, 2017, Judge Young heard Petitioner's Motion for New Trial, which he denied both from the bench and by formal Order, dated August 25, 2017. (R. p. 535; p. 617; p. 626).

Petitioner filed a Notice of Appeal on September 22, 2017. Attorney Tristan M. Shaffer filed the Final Brief of Appellant on June 11, 2019. The State filed its Final Brief of Respondent on May 22, 2019. The Court of Appeals filed its unpublished per curium opinion affirming Petitioner's conviction and sentence on May 5, 2021. *State v. Williams*, No. 2017-001950, 2021 WL 1784821 (S.C. Ct. App. May 5, 2021). Appellate Counsel for Petitioner filed a Petitioner for Rehearing on May 20, 2021. The Court of Appeals denied the Petition for Rehearing on July 14,

2021. Appellate Counsel filed a Petition for Writ of Certiorari to the Court of Appeals on behalf of Petitioner on September 2, 2021. This Return now follows.

STATEMENT OF FACTS

On April 14, 2015, a group of young men, including Petitioner, Demarius Jefferson (hereinafter “Mr. Jefferson”), Darian Davis (hereinafter “Mr. Davis”), and Demorris Harris a/k/a “Bope” (hereinafter “Mr. Harris”), were in Aiken County playing basketball at the city court. Mr. Jefferson had borrowed his girlfriend’s black, four-door Toyota Corolla, and the group was using this vehicle to get around town. Later that evening, Mr. Jefferson chose to stay and play some one-on-one with Mr. Davis, and agreed to loan his girlfriend’s car to Petitioner and Mr. Harris to use to go get weed.¹ (R. p. 112, line 24 through p. 113, line 2; p. 218, line 20 through p. 219, line 3). Mr. Jefferson testified that Petitioner was gone for approximately an hour, maybe an hour and a half, and recalled hearing police sirens everywhere during the time that Petitioner and Mr. Harris were gone. (R. p. 115, line 2 through p. 116, line 4).

Mr. Harris testified on behalf of the State as to the events that took place when he and Petitioner left the basketball courts. With Mr. Harris driving and Petitioner providing directions, the two individuals left together in the Toyota. (R. p. 218, line 16 through p. 224, line 14). Petitioner instructed Mr. Harris to pull over shortly after leaving; unbeknownst to Mr. Harris, Petitioner exited the vehicle and acquired a shotgun from the trunk. (R. p. 224, line 5 through p. 225, line 25). Petitioner returned to the backseat and continued giving driving instructions to Mr.

¹ Mr. Jefferson’s girlfriend, Mercedes Navas, confirmed that she let Mr. Jefferson borrow her vehicle and her phone. However, she was angry to learn that he let someone else borrow the car. She also testified that sometime after April 17th she received a phone call from Petitioner on a private number wherein he asked if she or Mr. Jefferson had mentioned his name to the police. (R. p. 91, lines 3-5; p. 93, lines 1-13; R. p. 103, lines 15-25).

Harris. Petitioner directed Mr. Harris to drive to Diamond Street in Aiken County. (R. p. 225, lines 5-16).

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

Mr. Harris and Petitioner approached the portion of the street where the group was sitting. Petitioner rolled down the window, stuck the barrel of his shotgun out of the window, and fired at the group. (R. p. 226, lines 1-14). Mr. Harris’ explanation of how the shooting took place was corroborated by Patricia Coach, who described seeing a dark-colored four door car drive down the street, after which she then saw the back seat window roll down, a flash from a gunshot, and felt the power from the gun as her sister was shot. (R. p. 68, lines 1-24). Victim was struck in the abdomen by a single shotgun slug and the vehicle sped off. (R. p. 199, line 22 through p. 200, line 5; p. 197, line 3-8). Police and EMS personnel quickly responded and Victim was rushed to the hospital, but her wound was too severe. She was pronounced dead at 9:55pm on April 14, 2015. (R. p. 249, lines 16-20). Mr. Harris testified that after returning to the group at the basketball courts and leaving together, Petitioner attempted to dispose of the gun by leaving it at the home of Jasmine Allison in the Chalet North Apartments. However, she refused to let him leave the gun at her home. (R. p. 229, line 11 through p. 230, line 18). On cross-examination Mr. Harris denied telling Kahlo Calhoun that Christian Gordon (aka “Brisco”) was in the car during the shooting and denied telling Calhoun that he was the shooter. (R. p. 244, lines 9-21).

In addition to the testimony offered by Mr. Harris, Mr. Jefferson also saw the shotgun as the group was returning from the basketball court. He testified that when they arrived at the Chalet North Apartments, he saw the barrel of a covered up shotgun. (R. p. 118, line 9 through p. 119, line 22). Mr. Jefferson testified that Petitioner took the shotgun out of the trunk and walked around to the right side of the apartments. (R. p. 119, lines 18-24). A few days later, Mr. Jefferson encountered Petitioner again at the local basketball courts, along with other individuals; he overheard Petitioner saying "I had a shootout with the Wolf Pack boys." (R. p. 122, line 18 through p. 123, line 17). Mr. Jefferson also testified that he had a phone conversations with Petitioner a few days later wherein Petitioner instructed Mr. Jefferson to wipe down the back of the car and keep his mouth shut. (R. p. 124, lines 11-25).

Petitioner's friend, Santana Nesbitt, testified that she and Petitioner had been talking with each other regularly before April 14, 2015. However, after that day, she testified that Petitioner started calling her from a different number. She also testified that they continued their communications after his arrest. On one such call on May 11, 2015, Petitioner asked her to contact his attorney and provide a false alibi for his whereabouts on the night of the murder. (R. p. 159, line 19 through p. 160, lines 6). State's Exhibit 14, a recording of this phone call, was entered into evidence and published for the jury.

Cell phone tower and sector records, discussed by expert Clay Simmonds, demonstrated that until the late evening of April 14, 2015, both Petitioner's and Mr. Jefferson's cell phones utilized the same cell phone towers at the same times of day. However, at 8:35pm, Petitioner's phone began using a different sector, while Mr. Jefferson's phone was silent. (R. p. 326 line 5 through p. 327, line 10). The cell phone tower and sector data demonstrated that Petitioner's phone was active with the tower and sector closest to the Diamond Street area at 8:57, 10 minutes before

the 911 call was made; Petitioner's phone used this tower and sector again at 9:08, one minute after the 911 call was made. (R. p. 329, lines 12-25; p. 330, lines 1-13). At 9:28, Petitioner's phone returned to using the tower and sector that services the basketball court (different from those that service Diamond Street), and Petitioner's and Mr. Jefferson's phones again used the same tower and sector for calls. (R. p. 333, line 23 through p. 334, line 5).

The State's theory of the case and evidence at trial showed that Petitioner killed Victim in a drive-by shooting, and that Petitioner's actions were in retaliation for the murder of Petitioner's friend, Donnie Brooks. The State's evidence suggested that Victim's brother Taquan was Petitioner's intended target. However, Petitioner missed Taquan and struck Victim, who was sitting close to Taquan at the time. Taquan testified that he was aware he was considered a suspect in Donnie's death, and while he acknowledged that he was at the apartment complex where Donnie Brooks was killed on the day of the murder, he testified he was not there when the murder took place. (R. p. 78, lines 9-24). Mr. Christian Gordon testified on this topic and informed the jury that he was with his brother Donnie Brooks at the time of his murder and that he saw Taquan running from the window after Donnie was shot. (R. p. 404, line 8 through p. 405, line 5).

Mr. Gordon testified that he communicated frequently with Petitioner on the night of April 14, 2015. (R. p. 407, lines 13-25). Mr. Gordon testified that on April 14, 2015, he was at home and that he received phone calls from Petitioner at 8:23pm, 8:57pm, and 9:08pm. All of which were corroborated by cellphone records. (R. p. 408, line 4 through p. 409, line 8). Following the April 14th murder of Victim, on October 24, 2016, Mr. Gordon received a phone call wherein Petitioner instructed him to "checkmate that king", which Mr. Gordon explained meant that he was to silence, intimidate, and/or hurt Mr. Jefferson, because it was believed that Mr. Jefferson was the reason Petitioner was arrested. (R. p. 410, lines 1 through p. 411, line 5). This phone call was then

published to the jury. (R. p. 412, lines 10-25). Mr. Gordon's testimony regarding this arranged speaker-to-speaker phone call with Petitioner was corroborated entirely by Ms. Ashton Brighthop. (R. p. 396-400).

Testimony of Victor Mercuri

Mr. Mercuri was an inmate at the Aiken County Detention Center for the charge of armed robbery (among other charges) and testified that he had received no promises or deals in exchange for his testimony. (R. p. 165, line 10 through p. 166, line 18). Mr. Mercuri testified that he was housed with Petitioner from approximately April 20, 2016, to the beginning of May, and then returned from May 20th to beginning of June.² (R. p. 166, line 19 through p. 167, line 4). While housed with Petitioner during recreation time, Mr. Mercuri testified that he heard discussion of this case between Petitioner, his cellmate Austin Pownall, and Reginald Hamilton. The group was teasing Petitioner for being a crappy shot and accidentally shooting a female. (R. p. 167, line 5 through p. 168, line 21). Mr. Mercuri heard Petitioner respond that he had intended to kill both of them, but that he "missed the nigger and shot the bitch". (R. p. 168, lines 18-20). On a separate occasion, Mr. Mercuri testified that he overheard Petitioner discussing the case while in his cell. He heard Petitioner claim that he "shot the bitch" out of retaliation for someone killing his brother, a fellow gang member, and that by doing so, he was going to obtain a higher rank in his gang. (R. p. 168, line 21 through p. 169, line 10). Mr. Mercuri testified that he could physically see Petitioner through his cell door during this conversation. (R. p. 169, line 11 through p. 170, line 11). On September 16, 2016, he provided a statement to authorities regarding what he overheard.

² Nick Gallam, who oversees the operations of the Aiken County detention center. He testified that Petitioner, Pownall, and inmate Mercuri were housed in the same location on April 20 periodically together for a total of about 20 days, and that in such a housing arrangement Petitioner and inmate Mercuri would have had substantial time to interact together. (R. p. 181, lines 4-25).

(R. p. 170, lines 12-14). He could not recall precisely, but believed these conversations took place somewhere between June 3rd and June 4th. (R. p. 170, lines 15-20).

Testimony of Kahlo Calhoun

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

State’s evidence offered in Reply

On reply, Captain Gallam retook the stand and identified State’s Exhibit No. 65 as a call detail report from the Aiken County Detention Center’s inmate telephone system. (R. p. 463, lines 5-10). Captain Gallam further identified the date, time, duration, and recipient’s phone number of the call. (R. p. 463, lines 17-20). He then identified State’s Exhibit 63 as the downloaded phone call by Petitioner, which corresponded to the call detail report he had just discussed. (R. p. 463, line 21 through p. 464, line 5). The State argued that Exhibit 63 should be admitted because it contained Petitioner’s recorded phone call, which in direct contradiction to Mr. Calhoun’s testimony, indicated Mr. Harris was not really involved in the crime. (R. p. 453, line 12 through

p. 454, line 6). The trial court admitted these exhibits into evidence over the objection of defense counsel and the exhibits were published to the jury. (R. p. 464, lines 6-22).³

Petitioner's Motion Hearing for a New Trial

On August 14, 2017, the Honorable Judge Roger M. Young heard Petitioner's Motion for a New Trial. At this motion hearing, Mr. Mercuri recanted his entire trial testimony approximately one hour after his guilty plea and eighteen year sentence were entered on his charge for armed robbery. (R. p. 574, lines 1-4; p. 562, lines 23-24). Mr. Mercuri testified that his trial testimony was a fabrication he made up using rumors he had heard. However, he also testified that at the instruction of his attorney he adjusted his timeline of events to match the Solicitor's timeline, because it would "look better" that way.⁴ Mr. Mercuri testified that he intended to recant his testimony regardless of the outcome of his plea, and that Solicitor Thurmond expressly promised him a plea offer to the reduced charge of nonviolent strong-armed robbery, with instruction to not mention his promised leniency at trial.⁵ (R. p. 553, line 22 through p. 554, line 3; p. 553, lines 4-16). Mr. Mercuri testified that despite being under oath for both Petitioner's trial and his own plea, wherein he claims to have lied repeatedly, he was being truthful at the hearing before Judge Young. (R. p. 575, line 7 through p. 578, line 20).

Solicitor Thurmond likewise testified and unequivocally informed the court that at no time did he offer any plea deal to Mr. Mercuri or infer that leniency would be given in exchange for his

³ State's Exhibit 63, directly contradicted the testimony of Kahlo Calhoun, who testified that Mr. Harris confessed to being the shooter. (R. p. 439, line 4 through p. 440, line 5).

⁴ Mr. Mercuri inconsistently testified that the Solicitor actively "gave [him] all the statements" for his trial testimony and that discussions taking place during the brief tardiness of his attorney gave him the opportunity to adjust his timeline to match the Solicitor's. (R. p. 561, lines 8-11; p. 564, line 11 through p. 565, line 19).

⁵ Mr. Mercuri also provided inconsistent testimony as to being offered any plea deal in advance, suggesting instead that such an expectation arose from his own attorney. (R. p. 552, lines 2-18; p. 551, lines 5-11; p. 546, lines 10-12; p. 552, lines 2-18; p. 551, lines 5-11).

testimony against Petitioner. Mr. Mercuri reached out to the Solicitor's office on his own accord. The matter was handled by first sending an investigator to interview Mr. Mercuri. A follow up interview was conducted by Solicitor Thurmond on November 9, 2016, wherein he, Ms. Hall, Mr. Miano, Mr. Hayes (Mr. Mercuri's attorney), and Mr. Mercuri attended. (R. p. 581, lines 14-17). Solicitor Thurmond testified that he did not take Mr. Mercuri's knowledge of the crime at face value, but confirmed that his information contained numerous corroborations to the State's theory of the case and that Mr. Mercuri was in fact housed with Petitioner and Pownall, so as to confirm the source of his information. (R. p. 581, line 23 through p. 582, line 7).

Solicitor Thurmond agreed that in his first meeting, Mr. Mercuri "blurted out" that he wanted to plead to strong-armed robbery charge. Solicitor Thurmond testified that he explained in response: "I told him that I was not prosecuting his case, I'm not handling his case I didn't know anything about his case and that he needed to listen to his attorney and tell the truth." (R. p. 583, lines 14-19). He likewise testified that he did not make any deals with Mr. Mercuri's attorney, David Hayes, and that he held no conversations with Mr. Hayes until after Petitioner's trial. Solicitor Thurmond likewise noted that Mr. Hayes never made any guarantees of leniency while in his presence. (R. p. 584, lines 6-24; p. 588, lines 12-18).

On cross-examination, Solicitor Thurmond testified that he could not testify as to what Mr. Mercuri expected. However, while Mr. Mercuri may have wanted to plead guilty to a reduced charge,⁶ any such expectation was unfounded and could not have been the result of any promise, offer, or deal made by any member of his staff. (R. p. 587, lines 2-20). Solicitor Thurmond testified that at this meeting, he shut down Mr. Mercuri's unsolicited demands for a deal and made clear to

⁶ Solicitor Thurmond mentions "voluntary manslaughter," as the suggested charge; from the record it appears Solicitor Thurmond simply misspoke, as Mr. Mercuri was facing an armed robbery charge. (R. p. 587, lines 14-17).

Mr. Mercuri that he was not making any offers or promises; he then read the statement that Mr. Mercuri had provided to the investigator during their initial meeting and asked if it was true. Mr. Mercuri stated that it was the truth. (R. p. 587, line 11 through p. 588, line 4).

STANDARD OF REVIEW

“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242(b), SCACR. The South Carolina Appellate Court Rules set forth a nonexclusive list of the circumstances in which review may be granted. Therein, Rule 242(b) continues: “[t]he following, while neither controlling nor fully measuring the Supreme Court’s discretion or power to grant review in general, indicate the character of reasons which will be considered:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.” Rule 242(b), SCACR.

ARGUMENTS

I. The Court of Appeals was correct to find no abuse of discretion by the trial court in denying Petitioner’s Motion for New Trial on the basis of the nondisclosure of a jailhouse informant’s desire for a plea deal.

The Court of Appeals did not err in affirming the decision of the trial court to deny Petitioner’s motion for a new trial. The trial court’s ruling was based upon the proper *Brady* standard for materiality, and its findings of fact concerning materiality were proper in light of the

ample evidence of guilt and the diminutive revelation that Mr. Mercuri desired a favorable outcome in his case. Moreover, *Brady* does not extend to include a witness's mere hope that he may receive leniency by testifying on behalf of the state. If there is no existing agreement for leniency by the state, nor assertions by the State that would cause a defendant to expect leniency, a witness's unsolicited and immediately rebuked request for leniency does not constitute *Brady* materials. The affirmation by the Court of Appeals was proper and certiorari should be denied.

In the plain language of the trial court's Order denying a new trial, the correct law is set forth, and the facts of this case were accurately applied to that law. To constitute a *Brady* violation, a defendant must show 1) the evidence in question was favorable to the accused, 2) it was in possession of the prosecution, 3) it was suppressed by the prosecution, and 4) it was material to guilt or punishment. (R. p. 624); *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). The trial court correctly cited these elements and correctly noted that the *Brady* rules apply to both exculpatory and impeachment evidence. (R. p. 624); *Id.*, citing *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481 (1985). Lastly, the trial court correctly recited that:

[F]avorable evidence is material, and constitutional error results from its suppression by the government if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. . . A reasonable probability of a different result is accordingly shown when the Government's evidentiary suppression undermines confidence in the outcome of the trial.

(R. p. 624-625; *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999) (citing *Kyles v. Whitley*, 514 U.S. 419, 432-42, 115 S.Ct. 1555, 1565-69, 131 L.Ed.2d 490, 505-10 (1995))). In application of the law, the trial court noted that no negotiation for leniency took place, as Solicitor

immediately “shut down” Mr. Mercuri’s remark regarding a reduced plea and found absolutely no credibility to Mr. Mercuri’s claims to the contrary. (R. p. 623-625).

The trial court then accurately characterized Petitioner’s argument as one where his counsel claimed to be unaware of Mr. Mercuri’s desire for a positive result in his case. He found such an argument to be lacking in merit because the record demonstrates that counsel explicitly cross-examined Mr. Mercuri in such a way as to show bias in his testimony for fear of receiving the full 35 years of sentencing exposure he might receive for his own crimes. (R. p. 625). In further discussion of that argument, the trial court found that the desire for a favorable outcome was inherent to any such circumstance, and that a “mere statement in that regard” does not create discoverable impeachment evidence. (R. p. 625). In any case, the trial court concluded that the diminutive impact of such an inherent desire “would not have created a ‘reasonable probability of a different result.’” (R. p. 626). As such, the trial court properly found a lack of materiality to the remark in question. The application of law and fact was entirely proper.

The Court of Appeals, likewise citing to the *Brady* elements, found no abuse of discretion in Judge Young’s decision, commenting that the ample evidence of guilt against Petitioner could not render such a remark material under *Brady*. The Court of Appeals then provided an extensive string citation as to the underlying law for its conclusion. Such citations included reliance upon *State v. Durant*, 430 S.C. 98, 110, 844 S.E.2d 49, 55 (2020), wherein this Court held that there was no abuse of discretion for alleged impeachment evidence, as such was immaterial due to the “‘ample evidence supporting [the] verdict.’” Petitioner’s allegations of error regarding the application of the law on the part of the trial court and the Court of Appeals are entirely without merit.

Petitioner offers little argument to challenge the finding of no materiality under *Brady*. Petitioner references the importance of Petitioner's confession through Mr. Mercuri, but otherwise suggests that Mr. Harris and all the other witnesses could have been lying to shift blame away from themselves. Such an argument disregards the evidence of Petitioner's phone call explicitly noting Mr. Harris's lack of involvement; his efforts to get his girlfriend to provide a false alibi; Mr. Jefferson's testimony as to seeing the shotgun; Mr. Gordon's and Ms. Brighthop's testimonies that Petitioner instructed Mr. Gordon to "silence" Mr. Jefferson as a witness against him; the corroborating times of cell phone records; the corroborating records of cell site location data; and the evidence supporting Petitioner's motive to retaliate for the murder of his friend Donnie. There is ample evidence of Petitioner's guilt, notwithstanding the evidence of his confession through Mr. Mercuri, and the Court of Appeals citation to *State v. Durant* for such a basic legal premise was proper.

Second, Petitioner attempts to overstrain existing *Brady* precedent to include Mr. Mercuri's mere desire for a favorable outcome in his case. It is not a reasonable argument to claim Mr. Mercuri *expected* leniency. He may have *wanted* leniency, but the evidence offered to the trial court during hearing was correctly found to lack credibility that an expectation arose from any promise or inference by the Solicitor's office. As such, Petitioner's referenced cases that address a witness's *expectation* or *belief* about the benefit he would receive do not support the argument that Petitioner now seeks to present.

As such, there is neither factual nor legal error present in the findings of the trial court's order denying a motion for new trial, or in the Court of Appeals' affirmation. Certiorari is not warranted and should be denied.

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

The trial court's admission of State's Exhibit 63 was not an abuse of discretion. Prior to the testimony of defense witness Kahlo Calhoun there was no evidence tending to show that Mr. Harris was the shooter who murdered Victim. When evidence supporting such a proposition was entered by the defense, the trial court was within its discretion to permit Exhibit 63 as reply evidence, as it contradicts the alleged fact that Mr. Harris pulled the trigger. The Court of Appeals was therefore correct in affirming the trial court's decision. Certiorari is not warranted in this matter.

The case law on the admission of reply testimony and evidence is well established in South Carolina. Our Supreme Court has held that "[t]he admission of reply testimony is within the sound discretion of the trial judge, and there is no abuse of discretion if the testimony is arguably contradictory of and in reply to earlier testimony." *State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986); *State v. Stewart*, 283 S.C. 104, 106, 320 S.E.2d 447, 449 (1984). "Any arguably contradictory testimony is proper on reply." *State v. South*, 285 S.C. 529, 535, 331 S.E.2d 775, 779 (1985).

This issue boils down to the simple premise that *questions* do not constitute *evidence*. Here, specifically, defense counsel questioned Mr. Harris on whether he denied confessing to Kahlo Calhoun that he was the shooter in this crime. Petitioner relied upon that cross-examination as a defense to the admissibility of Exhibit 63 as reply evidence. (R. p. 244; p. 453-456). However, the record is clear that Mr. Harris denied any such confession and those questions do not establish any actual evidence that Mr. Harris was the shooter. Nor do those questions even establish the fact that Kahlo Calhoun would ultimately testify in a manner consistent with the accusation. As a result,

there was no evidence within the State's case-in-chief that tended to show Mr. Harris was anything other than the driver; as such, a recording of Petitioner stating that Mr. Harris was not really involved in the shooting, was not yet pertinent to the case. Once Kahlo Calhoun offered sworn testimony that Mr. Harris had confessed to him that he was the shooter, the factual issue materialized and State's Exhibit 63 became relevant as evidence that directly contradicted the testimony offered by Mr. Calhoun.

The trial court was well within its discretion to admit State's Exhibit 63 as evidence in reply. The trial court correctly noted that "the issue of whether Bope (Mr. Harris) was the shooter was not in evidence until Mr. Calen – or Calhoun, I guess it was, testified. And so that would be new evidence that was not in during direct of their case in chief, so it would be in reply." The court correctly gave no weight to the fact that the evidence was "available" to the State prior to Mr. Calhoun's testimony. See *State v. McDowell*, 272 S.C. 203, 205, 249 S.E.2d 916, 917 (1978)(noting that the availability of a pathologist's testimony as to Victim's head resting against a hard flat object when the third bullet struck did not have to be admitted in the state's case-in-chief, but became relevant and admissible reply evidence when the defense attempted to portray Victim as standing at the time of a rapid succession of fired bullets); See *State v. Prather*, 429 S.C. 583, 604, 840 S.E.2d 551, 562 (2020) (noting that until defendant's testimony portrayed Victim as alive, unmutilated, and uncovered just prior to Phillip's return inside the dwelling, thereby insinuating Phillip's guilt for the murder, the expert testimony as to an opposing explanation for the individuals present in the dwelling was unnecessary. Thus, offering such evidence on reply was proper.). Likewise, the trial court was not persuaded by defense counsel's assertion that he cross-examined Mr. Harris on the issue. The trial court correctly noted that such questions were

denied, so no evidence existed to the issue until the defense put Mr. Calhoun on the stand. (R. p. 455, line 21 through p. 456, line 15).

The Court of Appeals in review was correct to find no abuse of discretion on the part of the trial court. The recording of Petitioner indicating Mr. Harris's lack of involvement was indeed not necessary or relevant to the State's case-in-chief, but was "arguably contradictory" to the testimony offered by Mr. Calhoun that Mr. Harris confessed to being the shooter who murdered Victim. State's Exhibit 63 was proper evidence on reply. Certiorari should therefore be denied.

CONCLUSION

The Court of Appeals' reasoning and legal basis for affirming the trial court's decisions was well-founded and proper. For all the foregoing reasons, it is respectfully submitted that certiorari be denied in this matter.

(Signature on following page)

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