

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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**Jan 04 2022**

APPEAL FROM ANDERSON COUNTY  
Court of General Sessions

S.C. SUPREME COURT

R. Lawton McIntosh, Judge

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Opinion No. 2021-UP-278 (S.C. Ct. App. Filed July 21, 2021)  
Lower Court Case Number: 2016A05324

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State of South Carolina,

Respondent,

v.

Jason Franklin Carver,

Petitioner.

APPELLATE CASE NO. 2017-002011

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**PETITION FOR WRIT OF CERTIORARI**

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Respectfully submitted by:

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**CERTIFICATE OF COUNSEL**

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on November 22, 2021. (App., p. 71).

## QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by not finding reversible error in the trial court's instructing the jury on accomplice liability, "the hand of one is hand of all", when the State failed to prove that an agreement existed between Petitioner and the two other accused to commit murder.
2. Whether the Court of Appeals' decision in affirming the trial judge's instructions for accomplice liability runs in conflict with the *Wilds v. State* ruling.
3. Whether the Court of Appeals erred by not finding the trial court erred in denying a directed verdict when the State failed to prove the elements of murder.
4. Whether the Court of Appeals erred by not finding trial judge's judicial bias deprived Petitioner of his Constitutional Right to due process.
5. Whether the Court of Appeals erred by not finding Petitioner was denied his Constitutional Right to due process by prosecutorial abuse.
6. Whether the Court of Appeals erred by not finding the State's failure to disclose the details of the plea bargaining with Curry violated Petitioner's Constitutional Right to due process.
7. Whether the Court of Appeals erred by not finding the trial court abused its discretion in denying Petitioner's Motion for New Trial.
8. Whether the decision of the Court of Appeals in this case runs in conflict with its decision in *State v. Campbell*.

## STATEMENT OF THE CASE

### Procedural History

Petitioner was indicted by the Anderson County (Grand Jury) for the offense of murder. This murder charge arose from the shooting of Stephen Cameron on March 28, 2016. Woodrow Curry, the self-confessed shooter, implicated Milton Gambrell and herein Petitioner.

Petitioner's case was called to trial on August 21, 2017, before Judge R. Lawton McIntosh and a jury. Donald L. Smith represented Petitioner. Chelsey Moore and Scott McElhannon were the assistant solicitors handling the case for the State.

On August 25, 2017, the jury found Petitioner guilty, and he was sentenced to thirty (30) years. A timely notice of appeal was served on September 25, 2017, and the appeal was perfected. (R., pp. 407-408).

Petitioner was finalizing the record on appeal when he learned of the trial for Gambrell. It appears after Petitioner was tried and convicted, Gambrell was charged with "Accessory before the fact to a Felony" and "Solicitation to Commit Murder". Two witnesses from his trial, Detective Marzolf and Curry, were made State witness against Gambrell. These two witnesses offered statements that were either not introduced or ran inconsistent with their previous testimonies in Petitioner's case. Petitioner believed that these statements should be explored in depth as they go to the very core of the crime for which Petitioner was convicted and sentenced to thirty (30) years of imprisonment.

On October 19, 2018, Petitioner moved to hold his appeal in abeyance based on newly discovered evidence which this Court granted on December 10, 2018.

On December 21, 2018, Petitioner filed his Motion for New Trial in the trial court. (R., pp. 129-288). He amended the same on December 27, 2018. (R., pp. 289-337). The trial court

summarily dismissed the motion on January 4, 2019. (R., p. 3-4). Petitioner moved to reconsider said Order (R., pp. 338-402), and submitted an Addendum to it on January 17, 2019. (R., pp. 403-406). The trial judge denied the motion on January 30, 2019. (R., p. 1-2).

On February 7, 2019, Petitioner filed his Notice of Appeal and moved to consolidate the two (2) appeals. (R., pp. 414-417). This Court granted the Motion to Consolidate on April 4, 2019.

On July 21, 2021, in an unpublished opinion issued *per curiam*, the Court of Appeals affirmed Petitioner's conviction. (App., p. 1). A timely petition for rehearing was filed on August 16, 2021. (App., p. 7). The Court of Appeals requested a Return and on September 7, 2021, the State filed a Return. (App., p. 61). On November 22, 2021, the Court of Appeals denied the petition for rehearing. (App., p. 71). This Petition for Writ of Certiorari follows.

### **Relevant Facts**

This incident happened on March 28, 2016. Petitioner had known Gambrell for years and they had worked on cars together for additional income. (R., p. 599, 6.15). On that fateful day, Petitioner went to Gambrell's home to complete work on a car, which he had nearly finished that weekend. Petitioner went directly to the vehicle and never entered the household to partake in the festivities which were taking place in the home. Curry, Gambrell and Cameron, were inside the home.

Earlier that day, Cameron had sold his dirt bike to Gambrell's nephew and had no means of getting home. (R., p. 600, 22.25 & p. 601, p. 1.3). Gambrell, who had been drinking the whole day, was unable to drive, came outside to ask Petitioner to do him the favor of taking Cameron home. (R., p. 603, 4.14; p. 545, 2.15). Curry could not take him home because he did not have a driver's license. (R., p. 566, 13-18). Thereafter, Petitioner commenced to drive

Cameron to his home on Sterling Bridge Road, which took a total of approximately thirty (30) minutes. *Id.*

While Petitioner was away, Gambrell and Curry discovered an ounce of their cocaine was missing. Gambrell and Curry deduced Cameron had taken the cocaine. (R., p. 571, 1.15; p. 604, 15.18). They attempted to reach Petitioner and Cameron as they traveled to Cameron's home. (R., p. 568, 14.21; p. 604, 19.21). They were unable to reach either one as Petitioner had no mobile phone. *Id.*

Upon Petitioner's return, Gambrell told him he forgot something. He told him he wished he had a phone because he would have told him to turn around and come back. As a result, Gambrell asked him to go back and get Cameron. (R., p. 604, 22.25 & p. 605, 1.6; p. 646, 8.19). Neither Gambrell nor Curry shared the issue regarding the missing cocaine. (R., p. 647, 20.24; p. 650, 2.15). They did not want to take the chance that Petitioner would refuse to make the return trip. Based on the fact Petitioner was not incorporated into the cocaine issue, he understood he was merely bringing Cameron back because either he or Gambrell had forgotten something.

Since Curry insisted on coming with him and because Gambrell's statement was made with the implication that something was simply forgotten, Petitioner understood Cameron wanted to come back. Petitioner decided to use Gambrell's Buick since there would be no room for a third person in his car (with his pit bull and tires in the back seat of his Escort). (R., p. 646, 20.25; p. 647, 1.19). Petitioner needed an empty back seat for Cameron to sit. *Id.*

Upon nearing Cameron's residence, Petitioner discovered Curry had a gun on his person when it fell to the floor (a .38). (R., p. 650, 16.21). Petitioner was confused. He did not understand the need for a gun. Petitioner immediately started to cajole Curry into leaving the gun in the car. (R., p. 650 22.25 & p. 651, 1.2). In an effort to ensure that the gun did not leave

the vehicle, Petitioner remarked that there were two of them, as opposed to the solitary Cameron. Clearly, that was simply a fact.

Petitioner's negotiating prompted Curry to leave the .38 in the car. Seeing that Curry left the .38 in the car, Petitioner was confident that he had averted any unnecessary trouble. At the very least, he had withdrawn from any criminal act for which he may have been implicated. Both men got out of the vehicle, with Curry in the front.

#### **AT CAMERON'S PLACE: The Shooting**

Curry went to the door and knocked. There was no response. Thinking Cameron may not be home, Petitioner and Curry made their way back to the car. As they were doing so, Curry noticed Cameron peeking out the window; and he reversed his direction. By the time Cameron got to the front door, Curry was ascending the porch. Curry immediately broached the topic of the missing cocaine. (R., p. 549, 16.25). Cameron denied taking anything. (R., p. 1.5). He pushed Curry and let him know that he was not welcome. (R., p. 550, 14.19).

Upon Curry reiterating the accusation, Cameron nearly shoved him off the porch. (R., p. 550, 14.25; p. 653, p. 16.25). Curry rose with the .25, which he testified was in his waistband, and unknown to anyone but him. *Id.* He brought the gun to a stop and pointed it directly at Cameron.

Petitioner frantically screamed at him to put the gun away. (R., p. 653, 20.25 & p. 654, 7.10). When it became apparent that Curry would not heed his pleas, Petitioner started toward the car, intending to leave Curry behind. (R., p. 655, 6.23).

In the meantime, Cameron's "cocaine muscles" allowed him to mock Curry and his gun. "What are you going to do, shoot me?" As he finished the sentence, he swiped the gun from right to left. When Curry regained his control of the gun, he brought it back to where it had been

seconds before. He then shot Cameron twice at point blank range.

### **AFTER THE SHOOTING**

Petitioner, who had reached the car, heard the gunshots. Frightened and anxious, Petitioner dropped the keys on the floorboard. (R., p. 655, 15.16). As he grasped for them, Curry got in the passenger seat, and demanded he drive. Curry threatened his life and instructed him to leave the lights off and leave the neighborhood. (R., p. 658, 2.7). Unarmed, Petitioner did not put up any resistance; and he did as he was told. Curry also offered that should he feel compelled to tell anyone, he would kill him and his mother. (R., p. 657, 13.18). Since he had just seen him kill Cameron, he recognized that this was not a hollow threat.

Both men drove back to Gambrell's home in silence. Thoughts of how and why this occurred were racing through Petitioner's head. He wanted to get Gambrell's car back to him; grab his car and dog; and race to his mother's house. When Petitioner and Curry arrived back at Gambrell's house, Petitioner was emotional and still shaken by the events which had taken place. Curry told Gambrell he shot Cameron, summing it up with, "Shit happens." Petitioner left Gambrell and Curry arguing about the shooting. (R., p. 661, 6.25, & p. 662, 1.10).

Petitioner's apprehension was not unfounded. Fifteen (15) minutes later, Curry drove past Petitioner's mother's house in his green Grand Am. (R., p. 664, 2.19).

### **THE INVESTIGATION**

On the day Cameron's body was found on the front porch of his residence, Officer Eric Russell was assigned the duty of canvassing the neighborhood to see if anyone had seen or heard anything. It was brought to his attention by a fellow officer that there were video surveillance cameras on two of the homes near the crime scene. At Petitioner's trial, Russell testified the team obtained footage of the video and "skimmed" portions of the video that afternoon. (R., pp.

481, 18.25).

It appears several videos were collected from the neighbors by the law enforcement officers. Law enforcement officers and/or prosecution had copies of these video surveillance footages on the day following the shooting. Thus, as early as March 29, 2016, the officers and/or prosecution had video surveillance footages which they used to trace the vehicle back to Gambrell's house. A search warrant was executed on Gambrell's house. (R., p. 118, 9.25). Curry was found at Gambrell's house, with the .38 and drugs which he promptly admitted were his. Gambrell was not present at the time of the search warrant execution.

In his initial interaction with the investigating officers, Petitioner did not disclose Curry's deed for fear of retribution against him and his mother. It was only when Curry was arrested that Petitioner gathered his nerves and went to the police. He called Gambrell thinking he would also like to get it off his chest. Gambrell suggested they go to the police together. Petitioner intended to assist them with details of the shooting incident. Instead, he was arrested and charged with murder.

Prior to Petitioner's trial, Curry admitted to shooting Cameron. He entered into a plea agreement with the State prosecutor. He pled to Voluntary Manslaughter, but his sentencing was deferred. (R., p. 791, 12.17). Petitioner was tried for Murder.

Due to Curry's testimony, the judge believed this was a drug transaction gone awry. There was no transaction. A transaction in another word for contract, which requires something being given in exchange for something else. The judge charged the jury with the "hand of one is hand of all" doctrine.

#### **AT PETITIONER'S TRIAL**

At the trial, the State and the defense differed over the events that led to Cameron's

killing. According to the State, Petitioner was connected to a drug trade, and that Curry and Petitioner worked for Gambrell. The State's theory was that Gambrell, Curry and the Petitioner planned to collect on a drug debt, rob or kidnap Cameron. In support of its theory the State presented eleven (11) investigating officers, who did not seem to have been coordinated with one another; and Curry, the self-confessed shooter.

Detective Kreig Marzolf (hereinafter referred as "Marzolf"), the lead investigator in the case, testified to the following: (1) there were two (guns), a .25 and a .38 caliber revolver involved in this case (R. p.521, 8.23); (2) the .25 was not recovered, but the .38 caliber revolver was found at Appaloosa (R. p. 528, 24.25; p. 529, 1); (3) the residence where Buick was found was owned by Gambrell's friend (R. p. 495, 11.15); (4) Petitioner was not provided any gun (R. p., 526, 11.14); (5) Petitioner's fingerprints did not match the one found on the .38 caliber (R. p. 529, 2.9); (6) Petitioner came to the ACSO voluntarily, (R., p. 514, 4.8); (7) there had been people who had come and gone from Cameron's house, (R. p. 509); (8) Angie's friend came to the deceased's house and rolled his body (R. p. 500, 8.11); (9) Daniel White accompanied Detective Henry to the residence where the Buick was found (R., p. 504, 6.8); (10) Daniel White gave a statement that Christopher's girlfriend, Angela, planned on robbing Cameron (R. p. 507, 23.25; 508, 1.3); (11) ACSO reviewed two videos but did not review all the videos taken during the night of the shooting (R. p. 509, 7.12); (12) he could not say that Petitioner was part of any drug enterprise (R., p. 520, 2.6); (13) Petitioner was not in Gambrell's residence when cocaine was taken (R. p. 525, 23.25; p. 526, 1 ); ( 14) Curry expressed to Petitioner and Mrs. Curry that if they told anyone about anything, he would kill them (R. 531, 18.25 & p. 532, 1); and, (15) Petitioner was a witness to Curry shooting Cameron (R. p. 532, 2.5).

The State also presented Curry as a state witness. The State provided Curry with the

opportunity to plead to voluntary manslaughter as opposed to murder. Curry testified among other things, that: (1) he worked for Gambrell for three (3) years (R. p. 570, 5.7); (2) Petitioner took Cameron home and was gone for twenty or thirty minutes (R. p. 570, 14.16); (3) Gambrell discovered that cocaine was missing and told Curry about it (R. p. 570, 21.25; p. 390, 4.12); (4) Gambrell gave him a gun (R. p. 571, 13.15); (5) he had a .25 caliber gun in his waistband (R. p. 563, 20.25; 564, 1.4); (6) the minute Petitioner pulled in the driveway, Gambrell and Curry told him that he needed to go back and get Cameron (R. p. 572, 21.24); (7) Petitioner had a shiny gun that had a long barrel (R. p. 573, 22.25); (8) there was no plan to kill anybody (R. p. 574, 20.25); (9) he left the .38 caliber in the car (App. p. 574, 1.5); (10) he talked to Cameron and relayed that Gambrell wanted his drugs back or pay for it (R. p. 575, 8.12); (11) Cameron started pushing him and as a result he pulled his unknown gun and shot Cameron (R. p. 575, 22.25; 576, 1.3); (12) he was charged with murder but pled guilty to voluntary manslaughter (R. p. 553, 4.5); and, (13) despite his many charges before, this was the first time his sentence was deferred (R. p. 557, 20.25). The State did not introduce into evidence the gun which Petitioner allegedly possessed.

The prosecution also presented a surveillance video, taken from one of the deceased's neighbors, showing the traffic onto Cameron's property. It showed the first time Petitioner arrived at Cameron's his house, which was approximately 9:00 p.m. At approximately 9:30 p.m., it showed the white Buick Petitioner drove the second time he went to Cameron's house, pulling into the driveway. The surveillance video from the following day had a two-hour time gap.

For his part, since Curry threatened Petitioner and his mother's life, Petitioner intended to establish Curry's propensity for violent behavior. Petitioner called Sheila Curry, the wife of Curry, who admitted that her husband threatened to kill her and her son, if they were to discuss what had happened. (R. p. 583, 13.18).

Petitioner also presented his employer, Timothy Jacobs, who testified that he has known Petitioner since 1999. Petitioner worked at Greenville Transmission Clinic, which Jacobs owns. (R. p. 586, 18.22). He vouched for Petitioner's reliable, loving, hardworking and family-oriented personality. (R. p. 587, 16.25; 588, 1.5).

Gambrell was also called as a defense witness. The Court refused to allow Gambrell to testify. The judge failed to provide any reason for same. He did allow Petitioner to examine him outside the presence of the jury. (R, p. 598-605, 1.4). The Court indicated to Gambrell that he was strongly opposed to him testifying. (R., p. 606-607). Gambrell had his counsel present. Petitioner merely sought to establish he was not at Gambrell's home long enough to learn of the alleged theft.

However, the Court would have not any part of him testifying. The Court stopped Gambrell from testifying, despite the fact his learned counsel was there to offer him advice. The court mandated that Gambrell leave the courtroom with his attorney and exercise his right to remain silent. (R. p. 605-609, 1.12).

Petitioner believed that Gambrell would have testified as to what he relayed to Petitioner, would have exonerated the latter from the murder charge. Since Gambrell could no longer stand in court, Petitioner attempted to introduce the audio recording of Gambrell's police interrogation. (R., p. 618-619). The court initially denied Petitioner's request, deciding that it did not meet the standards as set forth in State v. Doctor, 413 S.E.2<sup>nd</sup> 36, and would not exculpate Petitioner. (R. p. 620, 5.16).

Petitioner also subpoenaed Quay Gambrell to testify on the sale of the dirt bike. When the witness failed to attend the hearing, the Court refused to extend or continue the trial, ruling that the witnesses' testimonies were immaterial to the guilt of Petitioner. (R. p. 709,7.25 & p.

710, 1-15).

At the close of evidence, the judge charged the jury. The jury's instructions included discussion of murder and the accomplice liability theory. Following the deliberations, Petitioner was convicted of murder on August 25, 2017.

## ARGUMENTS

### I.

#### **THE COURT OF APPEALS ERRED IN FINDING NO ABUSE OF DISCRETION IN THE TRIAL JUDGE'S INSTRUCTION TO THE JURY ON ACCOMPLICE LIABILITY, "THE HAND OF ONE IS THE HAND OF ALL", WHEN THE STATE FAILED TO PROVE THAT AN AGREEMENT EXISTED BETWEEN PETITIONER AND THE TWO OTHER INDIVIDUALS ACCUSED OF COMMITTING MURDER.**

The indictment against Petitioner read as follows: "That Jason Carver did in Anderson County, on or between March 28, 2016, and March 29, 2016, unlawfully and with malice aforethought, either express or implied, kill Steven Cameron by means of shooting the victim with a gun, and the victim died as proximate result thereof. All in violation of §16-3-10, South Carolina Code of Laws (1976 as amended)."

At the trial, Petitioner objected to a charge of accomplice liability because the indictment charged him only as a principal in the murder case. There was nothing in the wording of the indictment that indicates Petitioner was being charged with the alternative theory of accomplice liability. Despite the principle laid down in State v. Hicks, 257 S.C. 279, Petitioner believes the evidence in this case does not support an accomplice liability charge.

Under the accomplice liability, "a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet or assist in the commission of that crime, through some overt act." State v. Langley, 334 S.C. 643, 649-50, 515 S.E.2d. 98, 101 (quoting State v. Austin, 299 S.C. 456, 459, 485 S.E.2d., 830, 832

(1989).

The first part of the definition does not apply to herein Petitioner, as the State admitted Petitioner did not shoot deceased Cameron. (R., p. 765, 11.12). The State's own witness, Curry, confessed to shooting the deceased when deceased Cameron charged at him during their heated exchange. (R., p. 550, 18.25).

The State failed to prove an agreement, or a common design bound Petitioner to his co-defendants, whether to commit murder or any kind of crime. To justify its theory of accomplice liability, the State argued the three defendants were involved in the drug trade. (R., p. 766, 4.5). The State endeavored to prove this case was a botched drug transaction, or a robbery and kidnapping. (R., p. 766, 10.15). Curry was made to provide the direct evidence by testifying about Gambrell's intent. In his testimony, Curry stated that upon discovering that Cameron stole his drugs, Gambrell instructed him to retrieve the same or collect money for it.

01. Q. Why were y'all going to Sterling  
02. Bridge Road?  
03. A. To go retrieve -- Milton had told us  
04. that Steven had stolen some drugs and that  
05. since Carver knew where his house was for us  
06. to go back over there and get either the dope  
07. or the money.

(R. p. 547, 1.7).

The State however failed to establish there was a drug transaction between Gambrell and Cameron. What the State proved by its witness Curry was that Gambrell had drugs in his possession and Cameron took the same against the latter's will. The State did not allege nor attempt to prove Gambrell intended to distribute the drugs in his possession. Even the State's witness did not admit to any drug transaction. The only transaction that occurred during this time was the sale of Cameron's bike. (R. p. 545, 4.15).

The State also failed to establish there was an attempt to kidnap Cameron. The State failed to allege the three defendants planned to unlawfully seize, confine, kidnap, abduct, or carry away Cameron. Its own witness, Curry, testified as to his confrontation with Cameron.

16. Q. So you say that you spoke to Steven  
17. Cameron that night. What did you say to him  
18. again?  
19. A. I told Milt Gambrell wanted his coke  
20. back, that he had stole the coke; and that Milt  
21. wanted him to pay for it or wanted his  
22. coke back.  
23. Q. Okay, and did Steven Cameron give  
24. you any money back.  
25. A. No, ma'am.

(R., p. 549, 16.25).

Curry's actions and statements did not show, either expressly or implicitly, he intended to seize Cameron against his will. In fact, Curry testified he was leaving Cameron's porch when the latter tried to lunge at him.

14. Q. So you had a chat with Steven  
15. Cameron. And after he did not give you any  
16. money and he did not give you any drugs, what  
17. did you do?  
18. A. I don't know, I like turned and he  
19. come at me, and I looked down, I didn't know

(R., p. 550, 14.19).

Even during their heated exchanges, Curry did not use, nor did he threaten the use of, force upon Cameron to bring him back to Gambrell's home. Cameron was not aware of the need for him to return to Appaloosa. There was no intent, nor was there an attempt, to kidnap him.

The discussion about the stolen drug and how to retrieve the same (or get its equivalence in monetary terms) did not include Petitioner as he was not at Gambrell's house when the latter discovered the stolen drug. (R., p. 570, 14.25). Curry himself stated Gambrell did not inform

Petitioner about the stolen drugs when the latter returned from driving Cameron to his house. (R. p. 572, 21.25; p. 573, 1.3).

The State made Curry testify there were two guns involved in this case, a .38 and a .25. (R. p. 548, 5.7). The State did not allege nor prove Carver was in possession of either of them. It failed to find Petitioner's fingerprints on the .25 caliber gun used to shoot Cameron. The State attempted to implicate Petitioner by having Curry testify he saw Petitioner with a gun (R. p. 569, 6.14), which was belied by Gambrell himself in his Affidavit. (R. p. 280). Furthermore, the State failed to produce the alleged .38 caliber gun, nor any gun supposedly owned by Carver.

The State failed to establish there was a prior agreement among the three defendants to commit robbery, kidnapping nor trade drugs. Petitioner could not have agreed nor acquiesced to do something of which he had no knowledge.

The State was unable to prove there was common intent and purpose among the three Defendants. It was clear from the testimonies of Petitioner and Curry they did not act with the same objective, since they were clearly given different orders. Gambrell's instruction to Curry was to get the stolen drug or the money (R. p. 547, 1.7), which Curry intended to carry out and clearly did.

16. Q. So you say that you spoke to Steven  
17. Cameron that night. What did you say to him  
18. again?  
19. A. I told Milt Gambrell wanted his coke  
20. back, that he had stole the coke; that Milt  
21. wanted him to pay for it or he wanted his  
22. coke back.

(R. p. 549, 16.22).

For his part, Petitioner was told to return to Cameron's house and bring him back to Gambrell's.

04. Q: Did Mr. Gambrel tell you, “go get that  
05. thief?  
06. A. No, sir, he just told me to go up  
07. there and pick him up, to bring him back,  
08. since I knew where I’d dropped him off at.

(R. p. 673, 4.8).

19. Q. When you got back to Milton  
20. Gambrell’s house, he sent you away again;  
21. didn’t he?  
22. A. Yes, ma’am.  
23. Q. He sent you away to get drugs, to  
24. get money, or bring Steven Cameron back: isn’t  
25. that right?  
01. A. He told me to go pick up Cameron and  
02. bring him back.

(R., p. 680, 19.25; 681, 1.2).

Petitioner testified as follows:

16. Q. I completely agree that would be  
17. inappropriate. So, you planned to bring  
18. Steven Cameron back with you. Correct?  
19. A. I was only asked to go up there and  
20. give him a ride back. That’s all that was  
21. said. We weren’t supposed to do no more.  
22. Q. You were supposed to bring him back.  
23. A. No, we were asked to go back up there and  
24. give him a ride back. If he wanted to come  
25. back, he would have come back. If not, then  
01. we would have returned back without him.  
02. Q. So if Steven Cameron had said ‘no,  
03. I’m not coming with you’—  
04. A. I would have left.  
05. Q. You would have just left?  
06. A. Yes, ma’am. “

(R. p, 693, 16.25 & p.694, 1.6).

The evidence shows Carver had no intent to deprive Cameron of his freedom, nor to use force against the latter. In fact, Carver had no interaction with Cameron throughout the time they were at the latter’s house.

The evidence adduced points to the fact there was no common design, no unity in purpose nor intent among the three Defendants with respect to what the State claims as the underlying felony offense or crime. In other words, the evidence presented by the State did not establish that Petitioner unlawfully combined for the purpose of accomplishing an unlawful act (i.e., kidnapping or robbing Cameron) or by unlawful means (i.e., intimidation or force).

## II.

### **IN AFFIRMING THE TRIAL COURT'S INSTRUCTION FOR ACCOMPLICE LIABILITY, THE COURT OF APPEALS' DECISION RUNS IN CONFLICT WITH THE APPELLATE COURTS' RULING IN *WILDS V. STATE*.**

In the case, *Wilds v. State*, the South Carolina Court of Appeals held, "an accomplice liability may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence." *Wilds v. State*, 407 S.C. 432, 440, 756 S.E.2d at 390 (quoting *Barber v. State*, 393 S.C. 232, 712 S.E.2d 436 (2011)).

The trial judge allowed the State to mention that the three accused committed or were committing the underlying felonies of drug distribution, kidnapping, robbery and/or coercion, without presenting sufficient evidence to establish the same. The State argued Petitioner was guilty of murdering for assisting Curry by being the getaway driver. In the closing remark, the State tried to apply intent and malice upon Petitioner by claiming the latter did not report the shooting. However, Curry confessed the shooting was not intentional.

Here, the sum of evidence presented by the State at the trial points to the crime of Voluntary Manslaughter committed by Curry. As in *Wilds*, there was no evidence presented that anyone other than Curry was the shooter, and Petitioner did not join in the scuffle between Curry and Cameron nor in the shooting of the latter. The trial judge has also ignored Petitioner's contention he was threatened with murder (along with his mother), by the man he witnessed

commit the same.

In charging Petitioner with Murder under the alternative theory of accomplice liability, the trial judge ignored Petitioner's duress and self-defense arguments. The accomplice liability instruction impermissibly invited the jury to speculate Petitioner willingly assisted Curry in killing the deceased.

### III.

#### **THE COURT OF APPEALS ERRED BY NOT FINDING THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING A DIRECTED VERDICT WHEN THE STATE FAILED TO PROVE THE ELEMENTS OF MURDER.**

Petitioner maintains the State failed to present any direct evidence or any circumstantial evidence reasonably tending to prove Petitioner's guilt for the crime of murder. Curry categorically stated there was no plan to kill anybody. (R., p. 574, 14.24).

Curry unequivocally confessed to shooting Cameron, offering self-defense. In his testimony, Curry stated:

14. Q. So you had a chat with Steven  
15. Cameron. And after he did not give you any  
16. money and he did not give you any drugs, what  
17. did you do?  
18. A. I don't know, I like turned and he  
19. come at me, and I looked down, I didn't know  
20. I had the gun but obviously I did—I had  
21. it, I mean. Then like, 'oh.' He charged  
22. at me and – I don't even remember pulling the  
23. trigger but I heard *Pop! Pop!* So—(pause).  
24. Q. So you shot Steven Cameron?  
25. A. Yeah, I guess.

(R. p. 550, 14.25).

The State introduced no other evidence with respect to Petitioner's involvement in the shooting of Cameron aside from the former driving Curry back to Gambrell's house.

The evidence simply does not support Petitioner had knowledge, motive, opportunity,

insight, nor intent to harm or kill Cameron. The lower court failed to appreciate Petitioner's defense of withdrawal (or abandonment) and duress (or coercion).

In the previous discussion, Petitioner explained why the State could not attribute to him any prior knowledge of any underlying offense(s). Physical impossibility is a defense Petitioner raised in such instance.

The State could not allege ill-motive on the part of Petitioner against Cameron since the two had minimal contact. The only time the two interacted was when Carver drove Cameron to his house. Even during his second trip to Cameron's place, Carver did not talk nor approach the former; thus, he had no opportunity to harm Cameron.

Contrary to the State's assertions, Petitioner could not have reasonably anticipated shooting as a natural consequence of him ferrying Cameron to Gambrell's house—this being his sole intent. He could not have predicted Curry and Carver would engage in a fight. He could not have expected the shooting since he has seen Curry leave the .38 on the floorboard of the car. He had no knowledge of a second gun. (R., p. 574, 1.13; p. 577, 2.4; p. 678, 11.16).

Petitioner has also made proper efforts to prevent the shooting by pleading for Curry to stop pointing the gun at Cameron. Upon understanding his pleas went unheeded, Petitioner immediately removed himself, intending to leave Curry behind. Some jurisdictions would interpret the same as withdrawal or a retreat, which is a defense against accomplice liability. State v. Hendrix, 270 S.C. 653, 659 n.3, 244 S.E.2d 503, 506 n.3 (citing 40 C.J.S. Homicide §§ 121, 133 (1944)).

Petitioner's attempt to escape was however thwarted when Curry caught him in the car and ordered him to drive back to Gambrell's under a threat to his and his mother's life. For his part, Petitioner believed Curry's intimidation and warnings was real, present, imminent, and of

such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done. Considering the facts at Petitioner's disposal at that particular time— (1) Curry possessed two (2) guns, one of which he used to shoot Cameron; (2) Curry knew where Carver's mother lived; (R., p. 565, 13.15) and, in fact, (3) passed by it on the night of the shooting. (R., p. 657, 13.18; 664, 2.22), there can be no other conclusion, at least in Petitioner's mind than Curry can and will follow through with his threats.

Evidence shows Petitioner did not voluntarily or willfully aid or assist Curry. It was made under duress and as an act of self-preservation. Petitioner believed the circuit court erred in not considering his statements as well as testimony as constituting sufficient evidence from which a jury could reasonably find that he was coerced into participating in the crime.

Furthermore, even assuming the existence of intent to commit the crime, that should not be read as accomplice liability theory based on the "natural and probable consequence", the element of intent and/or malice aforethought should at least be applied in the manner by which he allegedly "aided, assisted or abetted" the commission of the crime. Petitioner's lack of intent in advancing Curry's cause was evident when the former voluntarily presented himself to the sheriff's department after Curry was in custody. (R., p. 669, 7.25 & p. 670).

Petitioner maintains in the absence of evidence showing Petitioner's intent to assist or encourage Curry in shooting Cameron, his driving Curry to and from the scene of the crime is not sufficient circumstantial evidence that would reasonably tend to prove Petitioner's guilt. At most, the evidence may raise suspicion of him being an accessory after the fact, but not as a principal to murder. The evidence was not sufficient to prove that he associated himself with, engaged in, some affirmative conduct designed to aid the alleged criminal venture nor Cameron's shooting.

#### IV.

### **THE COURT OF APPEALS ERRED BY NOT FINDING THE JUDGE'S JUDICIAL BIAS DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS.**

Petitioner claims the trial judge denied him his right to due process by his prejudicial actions and statements throughout the proceedings, which clearly indicated a lack of neutrality. The following shows factual evidence of bias and misconduct on the part of the trial judge:

Firstly, evidence shows Gambrell was fully informed of his rights and the potential consequences of his testimony, and despite his counsel's advice, Gambrell showed a willingness to testify. (R., p. 595, 20.25 & p.598, 1.15). When the defense inquired about his instructions to herein Petitioner, the State objected, and the trial judge without inquiring of the basis for the objection, simply ruled in its favor. (R., p. 604, 22.25 & p. 605, 1.11). The Court immediately, and without action by Gambrell's counsel, stopped any further examination in its ongoing quest to prevent his testimony.

Prior to Gambrell taking the stand, the Court specifically inquired of his counsel whether he had explained the 5<sup>th</sup> Amendment to his client. He stated without qualification he had. Despite this statement by an Officer of the Court, the trial judge *sua sponte* decided Gambrell would not testify any further. The Judge then rehashed his thorough explanation of the 5<sup>th</sup> Amendment with an emphasis on how his testimony would be akin to self-mutilation. The Judge browbeat Gambrell into submission. The Court's terrorizing of the witness made him think the knowing decision he had already made to testify was wrong and that he was so stupid, his counsel had to not only advise him "not to testify", but also had to readvise him "not to testify any further". (R., p. 607, 8.17). In essence, he told Gambrell his attorney didn't know what he was talking about; and he should listen to the Court. The Judge took it upon himself to represent

the interests of a represented man. By injecting himself into the matter he wantonly and willfully used his position to strike fear and confusion in Gambrell which ultimately resulted in Gambrell changing his mind and pleading the 5<sup>th</sup>. The egregious actions of the Court ensured the Petitioner would not get a glimpse of Due Process. The Judge violated his oath in the following ways:

1. He failed to preserve and protect the Constitution by preventing Petitioner from calling witnesses.
2. He failed to uphold the integrity of the judiciary by intimidating Petitioner's witness so completely the witness became confused and ultimately withdrew his conscientious pledge to testify.
3. He failed to discharge his duties fairly, and he failed to treat persons entering the courtroom with fairness, by representing the interests of one side against the other, by pursuing a conviction against Petitioner with the use of intimidation against a witness.
4. He failed to sit impartially, by directly or indirectly preventing Petitioner from calling witnesses in support of his case.
5. He failed to seek justice, by preventing Petitioner from exhibiting evidence which would have exonerated him.

(Rule 502.1).

The Court's transcript illustrates a forum free of judiciousness. He spent an inordinate amount of time warning Gambrell of the potential effect of his testimony to his own case and directed him to consult with his counsel anew. (R., p. 608, 19.25 & p. 609, 1.12). Upon returning, Gambrell apparently had a change of heart and agreed to stop his testimony. (R., p. 609, 6.12). The trial judge ruled Gambrell's testimony would not be presented to the jury. (R., p. 609, 15.17).

Petitioner argues the trial judge's repeated warnings were overzealousness, which had the effect of pressuring Gambrell into invoking his Fifth Amendment right. This is the very thing the Supreme Court cautioned about in the case of Webb v. Texas, when it pronounced a trial judge's efforts to protect a defense witness may impermissibly intrude upon a defendant's right to

produce evidence. Webb v. Texas, 409 U.S. 95, 98 (1972). The Court in *Webb*, found that in admonishing defense's sole witness to refrain from lying, giving warnings of the dire consequences if witness did lie, the judge's actions effectively discouraged the witness from testifying at all. Ibid. The trial judge interfered with the witness' free and unhampered choice to testify.

The trial judge's decision to strike Gambrell's entire testimony runs in conflict with the doctrine laid down in *State v. McGuire*, where the Court held a witness, who is not also a defendant, can invoke a privilege against self-incrimination only after a potentially incriminating question has been posed. State v. McGuire, 272 S.C. 550-551. With respect to Petitioner's case, Gambrell was a material witness and not a co-defendant. "Non-defendant witnesses are privileged only to decline to respond to inquiries, not to be free from those inquiries designed to elicit responses self-incriminatory in nature." 1 CHARLES T. MCCORMICK ET AL., MCCORMICK ON EVIDENCE § 123 (John William Strong ed., 4th ed. 1992). In short, unlike a defendant (or a co-defendant) who is called to testify, a witness must invoke the privilege to each specific question and may not assert blanket privilege. Gambrell should have been allowed to take the stand and invoke the privilege in response to each question he or his counsel of record deemed incriminating. The court presiding over the proceeding has a duty to scrutinize a witness' invocation of the self-incriminatory defense.

The State relied on the case of State v. Hughes (328 S.C. 146, 493 S.E.2d 821 (1997)), which bars a defendant from ever calling a witness solely for the purpose of having the witness invoke his Fifth Amendment privilege. *Hughes* does not apply in the instant case because it was not established Gambrell intended to claim the privilege to all questions.

Furthermore, the trial judge striking the entirety of Gambrell's testimony was erroneous

because it was freely and voluntarily given, with full knowledge of its consequences and was made prior to his invocation of his right. Moreover, it was done under the watchful eye of his learned counsel.

In ruling out the testimony of Gambrell, the trial judge deprived Petitioner of a material witness, the one person who can exonerate him. When the trial judge urged Gambrell to invoke his right against self-incrimination, it infringed upon Petitioner's right to confrontation and compulsory processes, thus giving rise to a clash between the Fifth Amendment rights of a witness and the Sixth Amendment rights of a defendant. While case law provides the Sixth Amendment right must yield to the opposing Fifth Amendment, Petitioner believes it should not be a cookie-cutter approach to this matter particularly if there are other ways to address the conflict without totally depriving defendant of his right to present his evidence. For one, the trial court could offer use immunity to a defense witness who could offer potentially exculpatory testimony. This immunity could either be based on due process (defense should be able to offer immunity to its own witnesses similar to what is granted the State) or the Sixth Amendment right.

Secondly, the trial judge denied Petitioner a meaningful defense when he refused the latter's motion for continuance to present two other witnesses, one of which was Quay, Gambrell's nephew. Quay's testimony was material in showing lack of malicious intent on the part of Petitioner in driving to Cameron's house for the second time that night. Quay was to testify on the bike sale that transpired between Quay and Cameron. Quay's testimony would have negated the State's theory of drug distribution as an underlying offense, at least on the part of herein Petitioner. Again, the trial judge's ruling contradicts the long-standing principle laid down in the case of *Washington v. Texas*:

The right to offer the testimony of witnesses and to compel their attendance, if necessary is in plain terms the right to present a defense, the right to present defendant's version of the facts to the jury so it may be able to decide where the truth lies. Just as an accused has the right to confront the prosecution's own witnesses for the purposes of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process law."

State v. Lyles, Op. No. 4406, (Ct. App., 2008) citing Washington v. Texas, 388 U.S. 14, 19 (1967).

Thirdly, the trial judge abused his discretion when he denied Petitioner's motion to recall two State witnesses, Detective Marzolf and Sheila Curry. Petitioner sought to call Marzolf back to the witness stand to clarify the disparity in the testimony he offered and that of Gambrell with regards to the guns used by Curry. The request to recall the witness was not merely for purposes of impeaching the witness, but to show the impropriety of charging the accomplice liability for failure to establish its elements-i.e. lack of unity and intent.

Petitioner believes that the interest of justice will be served if these witnesses were allowed to testify considering with Gambrell's testimony having been stricken off the record, Petitioner was left with no way to defend himself. It is important that the facts are set straight because Petitioner's life and freedom are at stake.

Fourthly, the trial judge has shown lack of neutrality in his various statements during the trial. The following statements illustrate the trial judge had made-up his mind about a criminal enterprise even when the State had not established the elements of the alleged underlying felonies.

In denying Petitioner's motion to recall witness Marzolf, the trial judge mentioned how the accomplice liability applied to the case:

01. Mr. Gambrell tells us specifically that Curry
02. took the gun. That is the hand of one, hand
03. of all.

04. THE COURT: I disagree. The hand of  
05. one is the hand of all is when they went down  
06. there to talk to the man about drugs and it  
07. spiraled out of control.  
08. Do you think if they just went down there  
09. and said --picked up the money for this  
10. gentleman, that that would have been an  
11. illegal act?  
12. MR. SMITH: I don't know what status  
13. that is, sir. I don't know of a criminal act  
14. here.  
15. THE COURT: Selling drugs and buying  
16. drugs, that as illegal as it can be.  
17. MR. SMITH: Sure.  
18. THE COURT: Going to retrieve drugs is  
19. illegal too.

(R., p. 617, 1.19).

After Gambrell's testimony had been stricken, Petitioner had no other way to introduce Gambrell's side of the story other than to show the latter's police interview. The judge initially denied Petitioner's motion stating:

06. THE COURT: Well, let me think about  
07. that on the hand of one, hand of all. But  
08. here are my thoughts on that. First, I don't  
09. think that it exculpates your client, the  
10. reason being --I think that they had a  
11. criminal enterprises regardless of the  
12. shooting; that is, 'go get him', go get this  
13. man, go get the drugs or go get the money like  
14. he said and the other officers testified to.  
15. If the jury finds that to be the case, that's  
16. a illegal plan or scheme in that they have --  
17. the cases are replete with the nexus between  
18. drugs and guns, also drugs and violence.  
19. So, if you look at the charge of hand of  
20. one, hand of all, it says that "if two people  
21. join with another to commit an unlawful act  
22. then they are responsible for everything done  
23. by the other person which happens as a  
24. probable or natural consequence of the act(s)  
25. in carrying out the common plan or purpose."  
01. So therefore -- although I think probably that

02. your client did not know that a gun—that he
03. was going to shoot this fellow, but—the
04. cases recognize the connection between guns,
05. drugs and violence where the plan was illegal
07. and it just spiraled out of hand.
08. So, the jury may believe that he was an
09. innocent bystander, but that's my belief as to
10. why the video of Mr. Gambrell does not
11. exculpate your client. “

(R., p. 702, 6.25 & p. 703, 1.10).

The trial judge rendered the above-mentioned statement during Petitioner’s re-direct examination. Clearly, the trial judge had formed his opinion of the case and Petitioner’s culpability prior to charging the jury instructions. It was improper for the trial judge to comment on evidence, particularly when the same has not been established during the trial (no distribution of drugs, no agreement to bring Cameron to Gambrell’s place by force, etc.) or to suggest an outcome to the jury (i.e. criminal conspiracy). The trial judge’s statements had the effect of swaying the jury’s mind on the application of accomplice liability in this case.

## V.

### **THE COURT OF APPEALS ERRED BY NOT FINDING PETITIONER WAS DENIED HIS RIGHT TO DUE PROCESS DUE TO PROSECUTORIAL MISCONDUCT.**

The State committed questionable acts in prosecuting herein Petitioner. In its zealotry to get a conviction, the prosecution went beyond its bounds.

First, the prosecution team met with Curry, the State’s star witness, several times without informing Petitioner and/or his counsel of the nature, details or results of said meetings. They either did not record the discussions or withheld them, denying Petitioner the ability to share exactly why Curry was nothing more than a mouthpiece for the State.

Second, the State deferred Curry’s sentencing for over a year when the Order specifically stated it would only be until after Petitioner’s trial. (R., p. 793, 2.6). There was no legitimate

reason for this extension other than to ensure Curry's testimony would once again be beneficial to the State.

Third, the State failed to disclose information and/or witness that may exculpate Petitioner. As early as March 29, 2016, the law enforcement had video surveillance. The investigation on Petitioner's case was completed April or May 2016. The State offered him a copy of the discovery response, which should have included all the surveillance videos, only in December 2016. Counsel was unable to open the discovery. Counsel received 59 hours of video the week before the trial. The State withheld discovery it was obligated to give Petitioner, for greater than 14 months.

Under the law, a prosecutor shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense. (Rule 3.8(d) of the Rules of Professional Conduct). It failed to do the same. Failing to submit the video surveillance and required discovery materials within the reglementary period is tantamount to the State denying Petitioner his right to due process.

Fourth, the State deliberately offered Curry despite knowledge of his tendencies to lie and/or withhold information from the beginning. It should be noted he initially said Petitioner shot Camerson. It is clear he was offered for the very fact he was willing to tailor his testimony to bolster the State's respective cases to mitigate his own sentence. The State's failure to present Curry for sentencing allowed them to hold the carrot of "hope" above his head. As he stated in his affidavit, a term of 15 years was thrown on the table by the State. Given Curry's recognition of his grave situation as it related to his future, he was grasping onto anything he could grab to allow him to believe. This has been proven by Curry's conflicting statements during Petitioner's and Gambrell's respective trials, which will be discussed in depth in Issue no. 7 below.

Finally, while the usual practice is to have a joint trial for co-accused/co-defendants and for a defendant to request for severance if he wants to be tried separate from his co-defendants. In this case, the State ensured their convictions by trying the three accused separately and contracting with the guilty party to confess to a lesser included offense and implicate two people who had nothing to do with bringing weapons to what would have amounted to a discussion. The Petitioner did not have the knowledge the Court alone imputed to him.

Prosecutors enjoy vast discretion in their prosecutorial function: they have the sole responsibility of deciding who to charge, what to charge, what plea to offer and what evidence to present to a jury at trial. However, this power should be exercised in search of truth and justice. Justice was subverted in this case when the prosecutors knew that the murder charge would not hold with their evidence and their own witness Curry can only establish the crime of voluntary manslaughter. Despite these insufficiencies, they charged and indicted Petitioner with murder. Petitioner is presently serving a sentenced of thirty (30) years for a crime that the State's witness committed.

## VI.

### **THE COURT OF APPEALS ERRED BY NOT FINDING THE STATE'S FAILURE TO DISCLOSE THE TERMS OF THE PLEA BARGAINING WITH CURRY VIOLATES PETITIONER'S DUE PROCESS.**

The Supreme Court in *United States v. Bagley* laid down the doctrine that plea bargains made between the government and a witness must be fully disclosed to the defendant. United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed.2d 481 (1985). The State must disclose promises made to witnesses. Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). This duty to disclose evidence to the defense "extends to any understanding or agreement between the witness and the State". Ware v. States, 348 Md. 19, 41,

702 A.2d. at 710.

Here, the State extended a plea offer to Curry without informing Petitioner nor his counsel. In fact, it was immediately prior to Petitioner's trial that he learned of Curry's plea to a lesser offense. The State also knowingly failed to disclose the terms or details of the plea bargain to Petitioner nor his counsel, before or during the trial. If Curry had not been offered anything, he would have had no reason to alter his testimony to fit the facts of each trial. The State needs to be held accountable for the "wink wink" way in which they garner their beneficial testimony. This is in clear violation of the *Bagley* doctrine.

This non-disclosure is tantamount to suppression of evidence within the meaning of the Brady. The doctrine laid down in *Brady v. Maryland* provides, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. at 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed. 2d 215.

The information about the plea bargaining is crucial in that Petitioner could have used the same as an impeaching material and to show Curry's bias. Curry avoided a potential death sentence for murder and a five (5) to thirty (30) years imprisonment for his drugs charges (Possession and drug trafficking). These would have been important fodder for cross examination. *State v. Williams*, 432 S.C. 515, 524, 854 S.E.2d 166, 170 (Ct. App. 2021) (finding trial court erred in refusing to allow Petitioner to cross-examine witness about potential sentencing exposure for pending charges); *State v. Gracely*, 399 S.C. 363, 731 S.E.2d 880 (2012)).

This is all the more evident when one considers the following established facts: (1) the

State's decision not to do a joint trial for the three accused; (2) the State capitalized on Curry's testimony, which was proven to have been inconsistent and false; (3) the State deferred Curry's sentencing for over a year, when the Order specifically stated it would only be until after Petitioner's trial, (R., p. 791, p.12.17 & 793, 2.6) and (4) Curry's admission the State suggested a reduced sentence for him should Gambrell be convicted. (R., p. 278 & p. 397).

Curry's sentencing was deferred for more than one year with no legitimate reason other than to ensure that his testimony would be beneficial to the State in the Gambrell trial. There could only be one conclusion -- Curry did not testify the way he did out of a sense of justice but out of the expectation of a reduced sentence.

Had the terms of the plea agreements been disclosed to Petitioner and/or his counsel, there is a substantial possibility the outcome of Petitioner's case would have been different since the State's only witness was the individual which both the Petitioner and jury deserved to understand the basis of Curry's testimony. The Court's suppression of this important impeaching material relating to Curry's credibility ensured Petitioner's conviction.

In addition, Petitioner challenges the constitutionality of the plea bargain based on the due process clause. While plea bargaining is part of the judicial process, it can infringe on defendant's right to fair procedure when the same is used in an abusive manner. An increasing number of out-of-state courts recognize the process encourages perjured testimony and wrongful convictions. Washington v. Texas, 388 U.S. 14, 22-23 (1967). The 5<sup>th</sup> Circuit Court has reversed a conviction on this ground. United States v. Hammond, 598 F.2d 1008, 1013 (5th Cir. 1979).

In an out-of-state case, the California Court of Appeal held that a plea bargain was invalid if it required the witness to testify to a particular version of the facts, and that testimony given pursuant to that bargain was tainted. People v. Medina, 41 Cal. App. 3d 438,455, 116 Cal.

Rptr. 133, 145 (1974) ("[A] defendant is denied a fair trial if the prosecution's case depends substantially upon accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion."). In *Medina*, the effect of the plea agreement was to place an accomplice under a "strong compulsion" to testify against the defendant in a particular fashion that amounted to scripted testimony.

In this case, Curry admitted in his Sworn Affidavit to the following:

After Jason Carver's conviction, Greenville dropped drug charges, and I was moved to Anderson. Marzolf and Chelsea said they would suggest voluntary manslaughter if I pled guilty. They also said it would look better if I testified against Carver. For Gambrell, I was offered the fact that Chelsea would have no problem suggesting 15 years provided Gambrell was convicted. However, neither of them spoke up when sentenced to 28 years.

(R., p. 278).

It would appear the terms of agreement between the prosecutor and Curry was contingent upon his favorable testimony for the prosecution, as well as the resulting verdict. In availing of this outcome-oriented plea bargaining, the prosecution not only deprived Petitioner of fair trial as he did not have the same authority and or leverage to elicit favorable testimony for himself, but also subverted the ends of justice. A prosecutor's obligation should be balanced by the overriding goal of seeking justice.

## VII.

### **THE COURT OF APPEALS ERRED BY NOT FINDING THE TRIAL JUDGE ABUSED HIS DISCRETION BY DENYING PETITIONER'S MOTION FOR NEW TRIAL.**

For courts to grant a new trial based on newly discovered (or after-discovered) evidence, a party must show the new evidence has (1) been discovered since the trial; (2) could not have been discovered with the exercise of due diligence before the trial court; (3) material to the issue

of guilt or innocence; (4) not merely cumulative or impeaching; (5) is such as would probably change the result if a new trial was held. State v. Caskey, 256 S.E.2d 737 (S.C. 1979), cited in Hayden v. State, 299 S.E.2d 854 (S.C. 1983).

The trial court denied Petitioner's motion without ruling on the arguments raised in his Motion for New Trial. The trial court Order merely stated it found "competent evidence (was) submitted to sustain the jury's verdict. (App., p. 4). Without explaining how it deemed Petitioner's new evidence as not material, merely cumulative and would not have changed the result, this Panel ruled the trial court did not abuse its discretion in denying Petitioner's motion. This Panel failed to appreciate the new evidence submitted by herein Petitioner.

Petitioner was charged with murder under the theory of "hand of one is hand of all". State's theory is all four men – Petitioner, Gambrell, Curry and Cameron—were involved in a drug trade. State built their case against Petitioner on the testimonies of law enforcement officers who conducted the investigation, the surveillance video and Curry's testimonial statements.

Petitioner's proffer of after-discovered evidence in support of his Motion for New Trial consisted of Gambrell's Sworn Affidavit, testimonies from Curry and Marzolf, and Curry's Affidavit.

Gambrell's sworn declaration contained the following relevant facts: (1) Curry had no phone on the day of the shooting; (2) Curry did not call him about the Cameron shooting; (3) Petitioner did not have a gun on the day of the shooting.

Petitioner cited additional statements Curry offered in the Gambrell trial that were not mentioned during Petitioner's trial. First, Curry, testified he called Gambrell to inform him of Cameron's shooting (R., p. 109, 9.15). This testimony served to emphasize the conspiracy

theory being thrust by State, strengthening the same by showing Gambrell induced Petitioner and Curry into performing criminal acts.

Curry also testified for the first time he pulled a gun to intimidate Cameron in their confrontation. This information was not offered during Petitioner's trial, where he declared he shot at Cameron in self-defense. This statement was purposely added to Curry's testimony to eliminate Curry's self-defense alibi during Petitioner's trial and emphasized intent and/or malice on the part of Curry to use force (or aggression) against Cameron.

Detective Marzolf testified that during one of their neighbor canvasses, one of his detectives talked to a neighbor who heard about an argument between Cameron and an unidentified person wherein the word "dirt bike" was mentioned. (R. p. 804, 20.25 & p. 805, 1.6). This neighbor was not mentioned in previous reports. Neither was it mentioned by any of the detectives who testified during Petitioner's trial.

Petitioner declares the after-discovered evidence are material, non-cumulative and would probably change the result or verdict.

The materiality of an evidence is closely linked to its possible effect on the verdict. An evidence is "material if there is a reasonable possibility that the new evidence has the potential to alter the outcome of the lawsuit". Wilkins v. Sec'y, Dep't of Health & Human Servs., 953 F.2d 93, 95-96 (4th Cir. 1991) (*en banc*) (quoting Williams v. Sullivan, 905 F.2d 214, 216 (8th Cir. 1990)). Also, an evidence is material if it relates to the element of the crime.

Petitioner never denied he ferried Curry to and from Cameron's house. His entire defense was he lacked the intent, malice and prior knowledge to provide support to Curry's criminal intent in shooting Cameron. In his Sworn Affidavit, Gambrell unequivocally stated Petitioner did not possess any gun on the day of the shooting, and in effect, undercut the element

of intent in State's case against Petitioner.

Gambrell categorically denied Curry had a phone and called him to inform of the shooting of Cameron. (R., p. 280). This statement shuts down the State's attempt to establish a conspiracy (or any form of agreement) to commit a crime, by painting a picture of a consigliere calling the mob boss after he had done a dirty deed on his behalf.

Gambrell's sworn declaration would more likely convince a jury that Petitioner's intent was never to fight, intimidate, coerce, rob or kidnap Cameron. This new evidence debunks the State has established all the elements of the crime of murder, beyond reasonable doubt. The new evidence also directly challenges Curry's credibility and puts in question the information he offered in Petitioner's trial, considering the plethora of inconsistent statements discovered after Petitioner's conviction. It is material because it weakens State's theory, casting doubt if there was indeed concert of action and unity in purpose among the three defendants.

The new evidence was not merely cumulative nor impeaching. For evidence to be cumulative,

Cumulative evidence has been tersely defined as additional evidence of the same kind to the same point. It is apparent that there is a wide difference in meaning between the terms 'of the same kind' and 'to the same point', as used in the various definitions. Newly discovered evidence, to be cumulative, must not only tend to prove facts which were in evidence at the trial, but must be the same kind of evidence as that produced at the trial to prove those facts. If it is of a different kind, though upon the same issue, or of the same kind on a different issue, it is not cumulative. Nor is evidence cumulative in the legal sense which, while tending to establish the same general result, does it by proof of a new and distinct fact. To render evidence subject to the objection that it is cumulative, in the legal sense, it must be cumulative, not with respect to the main issue between the parties, but on some collateral or subordinate fact bearing on that issue. \* \* \* Newly discovered evidence raising a new ground of claim or defense is, of course, not cumulative, nor is evidence explaining an apparent conflict in or contradicting, evidence offered at the trial. Newly discovered evidence of admissions has been held not to be cumulative to evidence of facts and circumstances."

McCabe v. Sloan, 184 S.C. 158, 191 S.E., 905, quoting 20 R.C.L., 297, Sec. 79, as cited in

Johnston v. Belk-McKnight Co., Inc., 188 S.C. 149 (S.C. 1938).

Gambrell's Sworn Affidavit is not evidence of the "same kind" as it is documentary evidence and not testimonial evidence. Therefore, this is not the "same evidence: contemplated by the law".

Furthermore, to be cumulative, it must be additional evidence to that "which was presented at trial as to a fact." U.S. v. Fenn, No. 1:12cr 510 (JCC), 2014 U.S. Dist. LEXIS 46939, at \* 9 (E.D. Va. April 3, 2014). In this case, the sworn declaration is not cumulative because it does not merely add to a fact presented at Petitioner's trial, it directly contradicts a fact presented therein.

For evidence to be merely impeaching, it involves...unrelated [matter] with issues that had no bearing on those at [the defendant's] trial. Black's Dictionary 830 (9<sup>th</sup> Ed. 2009) (defining "impeach" as to discredit the veracity of a (witness)), as cited in U.S. V. Robinson, 627 F.3d 941 (4<sup>th</sup> Cir. 2010). In this case, Gambrell's Affidavit is not evidence of an unrelated matter challenging the credibility of a witness. Gambrell's Affidavit was presented to explain contradicting statements offered by Curry. As defined, evidence explaining an apparent conflict in, or contradicting evidence is not cumulative. As previously stated, this evidence did not only put in issue State's main witness but goes to the very element of the crime.

The inconsistent statements by Curry (and Marzolf) offered in separate trials of his co-accused may be considered as newly discovered evidence.

To establish the link between the defendants, State offered Curry's testimonies implying Petitioner's complicity (and intent and/or malice) to the "plan to rob or kidnap Cameron".

First, Curry testified Petitioner took Cameron home upon Gambrell's order (R., p. 544-545, 1.6), only to change his tune during Gambrell's trial by testifying Petitioner voluntarily took

Cameron home. (R., p. 809, 16.25).

Second, Curry claimed Petitioner brought his own gun to Cameron's house, but in his testimony at Gambrell's trial, he testified upon returning from Cameron's house, he and Petitioner went inside Gambrell's house to return the guns. (R., p. 810, 16.25). While trying to rope in Petitioner in the conspiracy, Curry contradicted himself because there is no logical reason for Petitioner to return "his own gun" to Gambrell. *Id.* There can be **no explanation other than he was lying to reduce his sentence.**

Curry has offered too many conflicting and illogical statements for his testimonial evidence to be considered reliable. How can this Court allow such a catastrophic injustice take place when it is beyond a reasonable doubt the offeror is utterly incredible?

Some out-of-state cases recognize there are special circumstances where motion for new trial based on impeaching evidence discovered after trial may be granted. The case of *U.S v. Custis* cited cases where new trial was granted on the basis of newly discovered impeachment evidence. *U.S. v. Taglia*, 992 F.2d 413, 415-416 (7<sup>th</sup> Cir. 1994) as cited in *United States v. Custis*, 988 F.2d 1355, 1360 (4<sup>th</sup> Cir. 1993).<sup>1</sup> In *Taglia*, the 7<sup>th</sup> Circuit court held that "(I)f the government rested entirely on the uncorroborated testimony of a single witness who was discovered after trial to be utterly unworthy of being believed because he had lied consistently in a string of previous cases, the district judge would have the power to grant a new trial in order to prevent an innocent person from being convicted." *Id.* at 415.

The 2<sup>nd</sup> Circuit in the case of *United States v. Sanchez* emphasized motion for new trial should be granted "only with great caution" such as when there is "real concern that an innocent person may have been convicted". *United States v. Sanchez*, 969 F.2d 1409, 1419 (2<sup>nd</sup> Cir.

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<sup>1</sup> This case noted possible exception, but the Court did not find the requirements for exception satisfied in this particular case.

1992) as cited in Custis, supra.

In this case, Curry exhibited a propensity to lie and/or change his story as it suits him. To put Curry's statements in perspective, Petitioner introduced his Sworn Affidavit briefly explaining the terms of his plea bargain with the prosecution.

In sum, the new evidence submitted by Petitioner satisfies the requirements for the grant of new trial based on newly discovered or after-discovered evidence. All this evidence surfaced after Petitioner's trial. Petitioner could not have known of Curry's new testimonies because it was either a fabrication or was intentionally omitted, for which, Petitioner, even with exercise of due diligence, could not have found or uncovered. Petitioner is entitled to have his request for his case for new trial.

The Supreme Court of Maryland laid down the following important doctrine:

... a conviction obtained by knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.

Agurs, 427 U.S. at 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d. 342.

Curry's testimony provided the only direct link between Petitioner and the crime. The best evidence that could exonerate Petitioner had been denied him. The fact Curry's sentence was deferred until the last accused, Gambrell, was convicted increased the significance his testimony was made in expectation of favorable treatment. The promise of leniency, deferral of sentence and Curry's conflicting and ever-changing testimony should be enough evidence to set aside Petitioner's conviction.

#### **VIII. THE DECISION OF THE COURT OF APPEALS IN THIS CASE RUNS IN CONFLICT WITH ITS DECISION IN STATE V. CAMPBELL.**

The Court of Appeals' decision in affirming the trial court's ruling is also in conflict with its recent decision in the State v. Campbell, Op. No. 5885, December 22, 2021.

In *Campbell*, a gunman shot at least 14 bullets from a rifle into Katrina Brown's apartment, causing serious physical injuries to two people and death to one. No one saw the shooter, but prior to the shooting, Katrina Brown had a conflict with Campbell.

In their investigation, the police recovered a security footage showing a Gold Buick from where two (2) individuals exited and walked toward the Gadsden Green. The footage showed the two individuals walking back to the car with a third individual holding a rifle. Investigation showed Tomeka as the owner of the Gold Buick, while the two individuals shown in the footage were identified as Trivell "Vell" Richardson and Andrews "Ace" Rivers. President and Richardson were both linked to Campbell. Richardson and Campbell were both charged with murder, and two counts of attempted murder under the theory of accomplice liability.

During the trial, President testified Campbell was with her in North Charleston the night before the shooting but was not there when she woke up, and her keys to the Buick were missing.

Richardson testified (1) he was with Campbell in Austin Lakes in North Charleston on the morning of the day of the shooting; (2) Campbell asked him to go with him to get cigarettes, (3) instead of going to a gas station they drove downtown; (4) Campbell asked Richardson to park the car on Nunan Street; (5) Campbell exited on Kennedy Street and walked towards Gadsden Green; (6) Richardson asked Rivers, who was on the Kennedy Street when they arrived, to ride with him to Nunan Street; (7) Richardson and Rivers were walking towards Gadsden Green when they heard gunshots; (8) Richardson was trying to start the car when Campbell got in with a rifle and told him to "go"; (9) Rivers ran and left Richardson; and, (10) Richardson drove back to Austin Lakes in North Charleston.

Peggy Blake, a witness who lived across Katrina's house, testified she heard the shooting and saw a black man wearing a hoodie and holding a "sporty rifle" get into a lime green car.

Campbell moved for directed verdict which was denied. The trial court charged the jury with inferred malice by use of deadly weapon as well as “hand of one is hand of all” theory. Campbell objected to both instructions, arguing against accomplice liability when no evidence implicated second party. He also objected against inferred malice instruction as conflicting with *State v. Belcher*. Nevertheless, the jury convicted Campbell. On appeal, the Court of Appeals reversed and remanded the case to the trial court.

In reversing the trial court’s ruling, the Court of Appeals agreed with Campbell that trial court erred by giving an inferred malice jury instruction because attempted murder is a specific intent crime and requires both express malice and specific intent to kill. *State v. King*, 422 S.C. 47, 810 S.Ed.2d 18 (2017) as cited in *Campbell*, *supra*.

In declining the inferred malice jury instructions, the Court held that “when the trial court tells the jury it may use evidence of the use of a deadly weapon to establish the existence of malice... the trial court has directly commented upon the facts in evidence, elevated those facts, and emphasized them to the jury”. *Id.*

Applying this reasoning to the instant case, while the trial court did not instruct the jury with inferred malice by use of deadly weapon, the trial judge made comments throughout the trial that conveyed his belief that the three accused were engaged in a drug transaction. (R., p. 702, 6.26 & p. 703, 1.10). The trial judge’s actions can be likened to an inferred malice instruction, as both are “improper court-sponsored emphasis of a fact in evidence”.

With respect to the accomplice liability instruction, the Court of Appeals agreed again with Campbell when he argued against the same since no evidence was presented, he acted with another pursuant to a common design or plan. *Campbell, supra*.

The Appellate Court applied the doctrine laid down in *Barber v. State*, 393 S.C. 232, 712

S.E.2d 436, 438 (2011), *State v. Washington*, 431 S.C. 394, 406, 848 S.E.2d 779, 785 (2020), and *Wilds v. State*, 407 S.C. 432, 756 S.E.2d 387, 391 (Ct. App. 2014), which stated, “an alternate theory of liability may not be charged to a jury merely on the theory may believe some of the evidence and disbelieve other evidence. The Appellate Court in *Campbell* reiterated, “for an accomplice liability instruction to be warranted, the evidence must be ‘equivocal on some integral fact and the jury [must have] been presented with evidence upon which it could rely to find the existence or nonexistence of that fact.” *Washington* at 407, 848 S.E.2d at 786 as cited in *Campbell, supra*.

It would appear in *Campbell*, the Court of Appeals factored in all the testimonies of the witnesses. While based on the evidence presented at trial, Richardson could have been Campbell’s accomplice as he rode with Campbell from North Charleston to Gadsden Green, parked the car for Gambrell and drove him back to North Charleston, there was no evidence presented that Richardson and Campbell joined together to carry out the shooting, particularly since Richardson denied knowing Campbell was going to drive to Gadsden Green or the reason for parking at Nunan Street. *Campbell, supra*.

More importantly, the Court of Appeals considered Blake’s eyewitness account of the gunman (wearing a hoodie and left the scene in a lime car) as evidence that someone other than Campbell may have been the shooter (Campbell was wearing a jersey and was in a Gold Buick). And for accomplice liability to apply the parties should have presented evidence Richardson was the shooter. No such evidence was submitted, and the security footage showed Richardson walking in Gadsden Green at the time of the shooting.

It would appear in ruling that instruction on accomplice liability as not warranted, the Court of Appeals considered the totality of the circumstances in *Campbell*. If the Trial Court had

used the same manner of evaluating the evidence presented in this case, it would have been impossible to see the failure to prove either accomplice liability or express malice.

In the instant case, Petitioner believes the trial court failed and/or ignored the following circumstances in applying the accomplice liability doctrine:

1. Gambrell and Curry discovered cocaine was missing when Carver was driving Cameron home. It was physically impossible for Carver to know this due to his absence while taking Cameron home; and the fact he did not have a phone. Therefore, any planning made as a result of the missing drugs did not include Carver.
2. Gambrell said he told Carver he needed to go back and get Cameron, and nothing more. Carver did not know about the missing drugs. Curry said Gambrell did not tell Carver the drugs were missing. Carver was getting him because he did not have a ride.
3. Gambrell stated in his affidavit that Carver did not have a gun on the day Cameron died. He stated in his interview Curry had taken his .38 prior to leaving for Cameron's home.
4. Curry said the solicitor told him he could help himself by testifying in the Carver trial. Curry said Carver brought his own gun in the latter's trial. Carver was convicted.
5. Curry said the solicitor told him she would not be opposed to him receiving 15 years for voluntary manslaughter if Gambrell was convicted. Curry said he and Carver gave Gambrell back his guns in his trial. Gambrell was convicted.
6. The Court stated that Carver "went down there to get the man, the money or the drugs back. As such you, engaged in a criminal conspiracy that spiraled out of control." A conspiracy is an agreement to commit an unlawful act or an agreement to commit a lawful act by unlawful means. Both Gambrell and Curry denied Carver had knowledge of the missing drugs. Therefore, he did not, nor could he, agree to anything related to the drugs.
7. The Court stated, "...when you start messing around with drugs, especially the type of drugs that y'all were using, a natural and probable consequence such as what ultimately happened in this case is what you will see." There is no evidence of Petitioner using drugs or drinking that day.
8. The Court stated, "the fact that this car of Mr. Gambrell's was used instead of yours is an indication that you did go with the intent to bring this guy back. And then you hid it after the fact, too; which is a sign that y'all knew that you had a problem." There is no evidence whatsoever Petitioner had anything to do with Gambrell's car upon returning from Cameron's home.

9. The Court had evidence of Curry threatening Carver and his mother, and his wife and her son, if they mentioned a word of this event. Carver testified he drove without the lights on due to Curry's verbal threat and the physical threat of the .38 on his lap. Carver testified Curry drove by his mother's home shortly after verbally threatening the lives of him and his mother. Carver went to the police immediately following Curry being picked up following the raid on Gambrell's home.

The Court charged "hand of one, hand of all", yet did not charge duress. The Court made the jury's findings of the facts for them.

10. Over objection, the Court allowed the State to argue the underlying felonies of attempted robbery, attempted kidnapping or grave threats, without the presence of the elements of same.

There was no evidence of Petitioner having knowledge of any illegality arising from the act of taking Mr. Cameron to his home, or the act of bringing him back. He did not have time to speak of a purpose for his return. Without knowledge of underlying facts, he could not have been part of arranging a plan or common scheme to commit a crime. Therefore, he cannot be guilty of anything related to accomplice liability.

### **CONCLUSION**

For the reasons set forth above, Petitioner respectfully requests this Court grant the Petition for Writ of Certiorari, reverse the decision of the Court of Appeals, and set aside the trial court's ruling for violations of Petitioner's due process.

Respectfully submitted by:

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