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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of General Sessions

R. Lawton McIntosh, Judge

Appellate Case No. 2017-002011

Case Number: 2016A05324

State of South Carolina,

Respondent,

v.

Jason Franklin Appellant,

Appellant.

**PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC**

Pursuant to SCACR Rule 22 (a) and SCACR Rule 240(i), Appellant Jason Appellant, respectfully petitions this Court for a Rehearing of Opinion 2021-UP-278, filed July 21, 2021. Appellant respectfully submits the Court overlooked or misapprehended his arguments and evidence. (Kennedy v. S.C. Retirement System, 349 S.C. 531, 564 S.E.2d 322 (2001), Rehearing is warranted when the Court has overlooked or misapprehended an argument.). In support of this Petition for Rehearing, the attention of this Honorable Court is directed to material points of fact and law that were seemingly overlooked in the Appeal.

SUMMARY OF ARGUMENTS

This Honorable Court affirmed the trial court's denial of Appellant's Motion for New Trial based on after-discovered evidence, finding it did not abuse its discretion. This Court concluded that statements offered by Woodrow Curry, Detective Marzolf and James Milton

Gambrell in the latter's trial, were not in the nature of newly discovered and/or after-discovered evidence that would warrant a new trial. This Honorable Court declared the statements were not material and merely cumulative. (Unpublished Opinion No. 2021-UP-278, July 21, 2021, p. 2).

Appellant avers this Honorable Court misappreciated the import of the offered testimonial statements by aforesaid witnesses and believed the same are not merely cumulative. Appellant believes he was able to demonstrate the testimonial evidence, not only contradicts Curry's statements in Appellant's trial that led to his conviction, but also seriously undermined Respondents' theory of accomplice liability. This evidence, if it had been presented, would have changed the jury's verdict. The additional proof calls into serious question whether Appellant's conviction was anything more than a creation of the prosecution, its star witness and the rulings of the Court which prevented the defense from presenting witnesses and evidence.

Contrary to this Court's opinion, Appellant believes the prosecution's acts and statements as well as the trial court's actions towards the case deprived Appellant of a fair trial. Appellant asserts the prosecution abused its discretion. Its plea-bargaining arrangement and deferral of sentencing for the shooter in the case made his testimony nothing more than lip service for whatever the State sought in two (2) separate trials. Actions of the prosecution and Judge, who prevented Appellant from defending himself in earnest, were an affront to the truth-seeking mission of criminal justice system. This Court failed to appreciate the trial judge's acts and statements demonstrated bias against herein Appellant. The trial judge's actions and pronouncements were prejudicial to Appellant, and violative of his due process rights. This Court's Opinion ignored a fundamental Constitutional aspect of the argument, thus, the need for this Petition.

Appellant also submits this Court erred in affirming the denial of directed verdict.

Respondents failed to produce evidence tending to prove the elements of murder, the crime for which Appellant was charged. Key facts discussed in the summary of the case were omitted in the discussion of the charges hurled against Appellant.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Appellant herein appeals his conviction of murder, under the accomplice liability doctrine (otherwise known as “the hand of one is hand of all”). Appellant, together with Woodrow Curry (hereafter Curry) and Milton Gambrell (hereafter Gambrell) were charged with different offenses for the death of Stephen Cameron (hereafter Cameron): Appellant was charged with murder, Curry pleaded guilty to voluntary manslaughter, while Gambrell was charged with solicitation to commit armed robbery.

This incident happened on March 28, 2016. Appellant had known Gambrell for years and they had worked on cars together for additional income. (R., p. 599, 6.13). On that fateful day, Appellant went to Gambrell’s home to complete work on a car, which he had nearly finished that weekend. Appellant 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 Appellant to do him the favor of taking Cameron home. Curry could not take him home because he did not have a driver’s license. (R., p. 603, 4.14; p. 545, 2.15). Thereafter, Appellant commenced to drive Cameron to his home on Sterling Bridge Road, some 15 to 20-minute drive away from Gambrell’s home. *Id.*

While Appellant was away, Gambrell and Curry discovered an ounce of 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 Appellant 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 Appellant had no mobile phone. *Id.*

Upon Appellant'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 Appellant would refuse to make the return trip. Based on the fact Appellant 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 implication that something was simply forgotten, Appellant understood Cameron wanted to come back. Appellant 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). Appellant needed an empty back seat for Cameron to sit. *Id.*

Upon nearing Cameron's residence, Appellant discovered Curry had a gun on his person (a .38). (R., p. 650, 16.21). Appellant was confused. He did not understand the need for a gun. Appellant 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, Appellant remarked that there were two of them, and only Cameron. Clearly, that was simply a fact.

Appellant's negotiating prompted Curry to leave the .38 in the car. Seeing that Curry left the .38 in the car, Appellant 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, Appellant 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. He pushed Curry and let him know that he was not welcome.

Upon Curry reiterating the statement, 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.

Appellant 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, Appellant 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

Appellant, who had reached the car, heard the gunshots. Frightened and anxious, Appellant 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, 17). Unarmed, Appellant 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. 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 Appellant'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 Appellant and Curry arrived back at Gambrell's house, Appellant was emotional and still shaken by the events that night. Curry told Gambrell he shot Cameron, summing it up with a generic statement that stuff happens. He left Gambrell and Curry arguing about the shooting. (R., p. 661, 6.25, & p. 662, 1.10).

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

THE INVESTIGATION

The next 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 Appellant's trial, Russell testified the team obtained footage of the video and "skimmed" portions of the video that afternoon.

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 amounting to over fifty (50) hours 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. 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, Appellant did not disclose Curry's deed for fear of retribution against him and his mother. It was only when Curry was arrested that Appellant 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. Appellant intended to assist them with details of the shooting incident. Instead, he was arrested and charged with murder.

Prior to Appellant'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). Appellant 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 is 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 APPELLANT'S TRIAL

At the trial, the State and the defense differed over the events that led to Cameron's killing. According to the State, Appellant was connected to a drug trade, and that Curry and Appellant worked for Gambrell. The State's theory was that Gambrell, Curry and the Appellant 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. 528-529, 20.1); (3) the residence where Buick was found was owned by Gambrell's friend (R. p. 495,11.15); (4) Appellant was not provided any gun (R. p., 526, 3.14); (5) Appellant's fingerprints did not match the one found on the .38 caliber (R. p. 529, 2.9); (6) Appellant came to the ACSO voluntarily; (7) there had been people who had come and gone from Cameron's house, (R. p. 500; p. 509, 3.6); (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, lines 23-25& pp. 508, lines 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 Appellant was part of any drug enterprise (R., p. 520, 2.6); (13) Appellant was not in Gambrell's residence when cocaine was taken (R. p. 525-526, 23 .1); (14) Curry expressed to Appellant and Mrs. Curry that if they told anyone about anything, he would kill them (R. 531-532, 18.1); and, (15) Appellant 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) Appellant 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. 563-563); (6) the minute Appellant pulled in the driveway, Gambrell and Curry told him that he needed to go back and get Cameron (R. p. 572, 21.24); (7) Appellant 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 (R. 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, 22.4); (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). The State did not introduce into evidence the gun which Appellant allegedly used.

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 Appellant drove Cameron to his house. Sometime after, it showed the white Buick, that Appellant drove the second time he went to Cameron's house. The surveillance video had a two-hour time gap.

For his part, since Curry threatened Appellant and his mother's life, Appellant intended to establish Curry's propensity for violent behavior. Appellant 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, 13.17).

Appellant also presented his employer, Timothy Jacobs, who testified that he has known Appellant since 1999. Appellant worked at Greenville Transmission Clinic, which Jacobs owns. (R. p. 586-587, 20.15). He vouched for Appellant's reliable, loving, hardworking and family-oriented personality. (R. p.587-589, 16.2).

Gambrell was also called as defense witness. The Court refused to allow Gambrell to testify. The judge failed to provide any reason for same. He did allow Appellant to examine him outside the presence of the jury. The Court indicated to Gambrell that he was strongly opposed to him testifying. Gambrell had his counsel present. Appellant merely sought to establish he was not at Gambrell's home long enough to learn of the alleged theft and, therefore, could not have been part of any conspiracy to take it back.

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). The Court released Gambrell from the Appellant's subpoena and sent him on his way.

Appellant believed that Gambrell would have testified as to what he relayed to Appellant. That testimony would have exonerated the latter from the murder charge. Since Gambrell could no longer stand in court, Appellant attempted to introduce the audio recording of Gambrell's police interrogation. The Court initially denied Appellant's request, deciding that it did not meet the standards as set forth in State v. Doctor, 413 S.E.2nd 36, and would not exculpate Appellant. (R. p. 620, 5.16). Of course, the State was allowed to play it in Gambrell's trial.

Appellant 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 Appellant. (R. p. 709,7.25 & p. 710, 1-16). The Judge determined facts which is the task of the jury.

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, Appellant

was convicted of murder on August 25, 2017. He moved to vacate or arrest the verdict; or, in the alternative grant a new trial, but was denied in an Order, dated September 14, 2017.

POST-TRIAL: APPEAL AND MOTION FOR NEW TRIAL

Appellant perfected his appeal. (R. p. 22). He was finalizing the record on appeal when he learned of the trial for Gambrell. Gambrell was charged with “Accessory before the fact to a Felony” and “Solicitation to Commit Murder”. Detective Marzolf and Curry were made State witness against him. These two witnesses offered statements that were either not introduced or ran inconsistent with their previous testimonies in Appellant’s case. Appellant believed that these statements should be explored in depth as they go to the very core of the crime for which Appellant was convicted and sentenced to thirty (30) years of imprisonment.

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

In the trial court, Appellant filed his Motion for New Trial on December 20, 2018. He amended the same on December 27, 2018, which was summarily denied on January 4, 2019. Appellant moved to reconsider the said Order on January 14, 2019 and submitted an Addendum to it on January 17, 2019. The trial judge denied the motion on January 30, 2019.

On February 7, 2019, Appellant filed his Notice of Appeal and moved to consolidate the two (2) appeals. This Court granted the Motion to Consolidate on April 4, 2019. On July 21, 2021, the Court of Appeals, through Justice Williams, Konduros and Hill, (hereafter referred as Panel) issued its Unpublished Opinion No. 2021-UP-278, affirming the trial court’s denial of Motion for New Trial and denying Appellant’s Appeal. Thus, this Petition.

ARGUMENTS

I.

**THE PANEL DECISION OVERLOOKED FACTS AND LAWS IN
DENYING THE MOTION FOR NEW TRIAL BASED ON
AFTER- DISCOVERED EVIDENCE.**

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 by exercise of due diligence have been discovered before the trial; (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 Appellant’s motion without ruling on the arguments raised in his Motion for New Trial. (R., p.5). The trial court Order merely stated it found “competent evidence (was) submitted to sustain the jury’s verdict”. (R., p. 4). Without explaining how it deemed Appellant’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 Appellant’s motion. This Panel failed to appreciate the new evidence submitted by herein Appellant.

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

Appellant’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 (which would be discussed in a separate chapter on due process).

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

Appellant cited additional statements Curry offered in the Gambrell trial that were not mentioned during Appellant'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 Respondent, strengthening the same by showing Gambrell induced Appellant and Curry to perform 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 Appellant's trial, where he declared, "I don't know, I like turned and he come at me, and I looked down, I didn't know I had the gun but obviously, I did." He shot at Cameron in self-defense. This statement was purposely added to Curry's testimony to eliminate Curry's self-defense alibi during Appellant'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 unidentified person wherein the word "dirt bike" was mentioned. (R. p. 804-805, 20.6). This neighbor was not mentioned in previous reports. Neither was it mentioned by any of the detectives who testified in the Appellant's trial.

Appellant contends this Court misappreciated all this new evidence and took them out of context. Contrary to this Panel's ruling, all this evidence satisfies the requirements for granting new trial. Since the Panel singled out materiality, non-cumulative and probability of changing the result or verdict, Appellant will focus his discussion on these three factors.

Evidence was material and would probably result in an Acquittal

These two factors are inter-related, since evidence is “material if there is a reasonable possibility that the new evidence would have changed the outcome be material”. The 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)). Evidence is material if it relates to the element of the crime.

Respondent's theory was that Appellant was guilty of murder for committing acts showing he acted in concert with Curry and Gambrell to cause the death of Cameron. To prove this, the State had to prove intent on the part of Appellant. Respondent had Curry testify Appellant (1) not only a gun at the day of the shooting, but that he brought the same with him at Cameron's house, (2) was informed by Gambrell of the stolen cocaine and (3) was instructed to get Cameron, the dope or the money.

Appellant did not deny 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 action in shooting Cameron.

Clearly, in declaring Appellant carried a gun with him, Curry was establishing an intent on the part of Appellant to participate in the use of force (or intimidation) upon Cameron. This would play right into the State's theory Gambrell instructed his “do-boys” to intimate or threaten Cameron into returning the stolen cocaine or pay for it.

Gambrell in unequivocally stating Appellant did not possess any gun on the day of the shooting undercut the element of intent in Respondent's case against Appellant.

In his Sworn Affidavit, Gambrell categorically denied Curry had a phone and called him to inform of the shooting of Cameron. This statement shuts down the Respondent'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 Appellant'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 Appellant's trial, considering the plethora of inconsistent statements discovered after Appellant's conviction. It is material because it weakens Respondent's theory, casting doubt if there was indeed concert of action and unity in purpose among the three defendants. The only concert was performed by the prosecution and Curry.

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 an evidence of the "same kind" as it is a documentary evidence and not a testimonial evidence. Therefore, this is not the "same evidence: contemplated by the law.

Furthermore, to be cumulative, it must be an 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 Appellant's trial, it directly contradicts a fact presented therein. Gambrell had been an unavailable witness as a result of the Court's actions during Appellant's trial.

For an 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 (9th Ed. 2009) (defining "impeach" as to discredit the veracity of a (witness)), as cited in *U.S. v. Robinson*, 627 F.3d 941 (4th 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, an evidence explaining an apparent conflict in, or contradicting evidence is not cumulative. As previously stated, this evidence did not only put in issue Respondent's main witness but goes to the very element of the crime.

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, Respondent offered Curry's testimonies implying Appellant's complicity (and intent and/or malice) to the "plan to rob or kidnap Cameron".

First, Curry testified Appellant took Cameron home upon Gambrell's order (R., p. 544-545, 1.7), only to change his tune during Gambrell's trial by testifying Appellant voluntarily took Cameron home. (R., p. 809, 16.23).

Second, Curry claimed Appellant brought his own gun to Cameron's, but in his testimony at Gambrell's trial, he testified upon returning from Cameron's house, he and Appellant went inside Gambrell's house to return the guns. (R., p. 810, 16.25). While trying to rope in Appellant in the conspiracy, Curry contradicting himself because there is no logical reason for Appellant 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 to 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 (7th Cir. 1994) as cited in *United States v. Custis*, 988 F.2d 1355, 1360 (4th Cir. 1993).¹ In *Taglia*, the 7th 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 2nd Circuit in the case of *United States v. Sanchez* emphasized motion for new trial

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

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 (2nd Cir. 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, Appellant introduced his Sworn Affidavit briefly explaining the terms of his plea bargain with the prosecution. ²

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

II.

THE PANEL ERRED IN AFFIRMING THE DENIAL OF MOTION FOR DIRECTED VERDICT.

The standard for review of a denial of a motion for directed verdict is for the Court to “view the evidence of record and all reasonable inferences in the light most favorable to the State.” *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641 (2006); *State v. Bennett*, 415 S.C. 232, 235, 781 S.E.2d 352, 353 (2016) quoting *State v. Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014).

The Panel overlooked, misunderstood or misapplied facts or circumstances which can affect the result of the case, and which this Court is duty bound to correct because the right to

² More in-depth discussion on this matter in the section for due process.

liberty, which stands second only to life in the hierarchy of constitutional rights cannot be lightly taken.

Appellant maintains there was insufficient evidence from which the trial judge could find that the existence of conspiracy and/or pre-arranged plan to commit illegal acts among Appellant and his alleged co-conspirators, much less, that Appellant participated in furtherance of such illegal purposes.

Under the hand of one is hand of all [accomplice liability], one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.

State v. Thompson, 374 S.C 257, 261-62, 647 S.E. 2d 702, 704-05 (Ct. App. 2007).

In other words, it applies when two or more persons come to an agreement concerning the commission of a felony and decide to commit it. Its essence is the unity of action and purpose. Its elements, like the physical acts constituting the crime itself, must be proved beyond reasonable doubt.

Based on the Solicitor's closing argument, the relevant evidence presented against Appellant was Curry's testimony on the following: (1) Cameron stole drugs from Gambrell; (2) Gambrell instructions to get Cameron, or the dope or the money; (3) Appellant drove Curry to and from Cameron's house; (4) Curry brought two guns with him at Cameron's house ; (5) Appellant had a gun which he brought with him to Cameron's house; (6) Curry's presence at the shooting.

During Appellant's trial, the Solicitor proposed all three defendants were involved in drug trade and this incident was a drug trade gone awry. R., p. 765, 11.22 & p. 766, 4.15. However, virtually no evidence linked Appellant to any drugs or drug transaction or

conversations about drugs. In fact, no evidence was introduced a drug sale occurred on that fateful day. Records show the only transaction that transpired that day was the sale of a bike between Cameron and Gambrell's nephew. Thus, no evidence was offered to prove Respondent/the Court's drug trade conspiracy theory. No illegal act was undertaken.

Next, to establish what the Solicitor called the "plan to collect a drug debt or kidnap Cameron", Respondent introduced Curry's testimony on the missing cocaine and Gambrell suspecting Cameron took the same. (R. p. 570, 21.25; p. 390, 4.12).

The only evidence Respondent proffered to establish Appellant knew of the plan is the uncorroborated testimony of Curry that Gambrell instructed them "to go down there to get the dope or money". (R., p. 567). Aside from this being inconsistent with Appellant's recollection of Gambrell's suggestion to return to Cameron's and bring him back to Gambrell's, Curry contradicted his narrative in the same testimony. (R., p. 568, 1.5, where he testified Gambrell told Appellant "he needed to go back and get Mr. Cameron").

It was uncontroverted Appellant was not at Gambrell's house when the latter discovered of his missing cocaine. He had no way of knowing what transpired at Gambrell's house while he was transporting Cameron to his house. Appellant was consistent in testifying that upon arrival at Gambrell's house, he was instructed to return to Cameron's and bring him back to Gambrell's. (R., p. 646; p. 649; p. 673).

Before he was instructed by the Court to take the Fifth Amendment, Gambrell confirmed Appellant's lack of knowledge on the issue of missing cocaine when he testified (1) he had to wait for Appellant's return since the latter had no cellphone with him (R., p. 602, 9.12); (2) he asked Appellant to go back to Cameron's (R. p. 604, 22.25).

Assuming *arguendo* that a plan was hatched between Cameron and Curry regarding the missing cocaine, Appellant could not have consented to something he had no knowledge of. Furthermore, if we are to rely on Curry's testimony, there is nothing illegal in retrieving one's property.

Outside the unreliable statement of its main witness, Respondent had no other evidence to support its claim Appellant knew about missing cocaine and a plan for its retrieval.

Respondent's witness, Curry, testified Appellant had a gun and brought the same to Cameron's house. As previously stated, this was Respondent's attempt to show Appellant has "intent" or "malice" when he went back to Cameron's house. This testimony was unsubstantiated. In fact, Curry contradicted himself in the same testimony when he said he did not know the make or caliber of Appellant's gun. (R., p. 579, 2.5).

Respondent did not produce the gun Appellant allegedly owned and brought to the scene of the crime. Neither did it introduced fingerprint analysis or other evidence linking any of the two guns (i.e. 25 and .38) to herein Appellant.

Respondent argued Appellant could have anticipated the shooting as a natural and probable consequence of the pre-arranged plan to go to Cameron's home. The only evidence introduced by Respondent in this regard is Curry's testimony implying Appellant had seen him with a gun when they were approaching Cameron's house. Appellant testified that as soon as he saw Curry with the gun, he pleaded with Curry to leave the same in the car. (R., p. 649; p. 678). As far as Appellant knew, Curry only had one gun with him and the same was left in the floorboard. (R., p. 574, 6.13). In his testimony, Curry confirmed Appellant's statement by admitting he left the gun in the car. (R., p. 574, 1.5). This admission by Curry strikes at the heart of Respondent's closing argument, "What did they think was going to happen?". The

evidence simply does not support Appellant knew an illegal activity occurred (stolen cocaine), nor could he have anticipated a shooting will occur considering he saw Curry leaving the gun in the car.

This leaves us to Appellant driving Curry to Cameron's house. In fact, Appellant's conviction for murder was largely based on the argument he drove the shooter to Cameron's house and back to Gambrell's.

Following the State's logic, Appellant was guilty of killing Cameron, not by bullet but by a car. In the words of the Solicitor, "Jason didn't pull that trigger, but he delivered Woodrow Curry to Steven Cameron's doorstep". (R., p. 765). This logic fails to consider the "intent" and malice aforethought" element of murder.

The question therefore is whether Appellant's act of driving Curry is considered an act aiding, abetting or even assisting Curry in the commission of the murder. To determine this, the case of *State v. Mattison* declared:

For a person who has not actually committed the homicidal act to be regarded as a participant in a homicide, he or she must have aided, abetted, assisted, encouraged or advised the killing. Also, the courts have required that the alleged accomplice must have acted with the intention of encouraging and abetting the commission of the homicide, or, at least the commission of the murder by the principal must have been a reasonably foreseeable consequence of the defendant's action.

State v. Mattison, 388 S.C. 469 (S.C. 2010).

Since Appellant was charged under the accomplice liability doctrine which is based on unity of design and unity of action, Respondent's evidence must show Appellant knowingly intended to assist in the commission of the actual offense. In other words, to be guilty as principal, Appellant must have acted with the state of mind required for guilt.

Respondent failed to establish in driving Curry to Cameron's house, Appellant intended to, or expected Cameron to be shot. No evidence was presented that Appellant had any hostility or grudge against Cameron. In absence of strong motives on his part to kill Cameron, it cannot be safely concluded he had intent or malice to kill Cameron (or conspired to have him killed).

The absence of intent is also shown from the unwavering and consistent statement by Appellant of his reason for driving back to Cameron's place. (R., pp. 646, 649, 673). Even Respondent's witness, Curry, confirmed this in his testimony. (R., pp. 568, 572).³

Additional evidence where Appellant's intent can be inferred is his choice to use Gambrell's car to allow space for Cameron at the back, instead of his own since his dog was in his car. (R., p. 693, 1.15).

Respondent contends Appellant could have anticipated Cameron's shooting as a "natural and probable consequence" of him driving "a man that he knew to be armed, who he knew had a short fuse to another man's house, who also had a short fuse, to collect on a drug debt or to kidnap him..." (R., p. 766, 10.15).

Record shows Appellant did not interact, much less know Curry and Cameron enough for him to know the two had a "short fuse". In fact, Appellant testified he had only met Cameron three times and barely talked with him while he drove him to his house. (R., p. 641-642).

To assist in determining whether Appellant's action aided, abetted or assisted in the commission of the crime, an inquiry should be made over Appellant's overt acts before, during and after the shooting.

Prior to arriving at Cameron's house, Curry testified Appellant asked him to leave the .38 in the car. (R. p. 574, 1.5). He also testified upon reaching Cameron's place, Appellant merely

³ During his entire testimony, Curry has prevaricated on this issue.

stood behind him while he talked to Cameron.

Curry testified that after he shot Cameron, he found Appellant inside the car already. (R., p. 551, 8.12). This corroborated Appellant's testimony he ran away from Curry when the latter refused to heed his pleas to stop pointing a gun at Cameron. (R., p. 655, 11.16 & p. 657, 2.12).

That Appellant drove Curry back to Gambrell is not sufficient to establish he cooperated or assisted Curry, particularly considering his defense of duress and grave threat. Appellant had a gun and threatened him and his mother's life, (R., p. 657, 13.18). Curry was seen driving by Appellant's mother's house. (R., p. 664, 2.19). Curry admitted knowing Appellant's mother's address.

Furthermore, it is well-established a person can not be found guilty of aiding and abetting a crime that has already been fully committed. *United States v. Love*, 767 F.2d 1052 (4th Cir. 1985).

In the absence of evidence to show intent to assist or encourage Curry in shooting Cameron, and even without reading Appellant's defense, Appellant driving Curry to and from the scene of the crime is not sufficient circumstantial evidence that would reasonably tend to prove guilt of Appellant. At most, the evidence may raise suspicion of him being an accessory. The evidence was not sufficient to prove that he associated himself with, and engaged in, some affirmative conduct designed to aid the criminal venture.

III.

THE PANEL ERRED IN NOT FINDING APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED.

Appellant was deprived of fair trial due to prosecution's abuse of discretion.

It is well-established 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). Here the terms of the plea agreement between Respondent and Curry was not made available to defense counsel, prior to the trial. In fact, it was during Appellant's trial he learned of Curry's plea to a lesser offense.

Aside from the prosecution's failure to disclose its plea bargain with Curry, Appellant challenges the constitutionality of the plea bargain based on due process.

A number of out-of-state courts have censured bargains conditioned upon a witness's agreement to testify in a particular manner and have overturned the resulting convictions on both due process and policy grounds. (*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 this case, Curry's sworn declaration stated:

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. 397).

The Doctrine of Due process guarantees defendants a right to fair procedure and has traditionally operated to exclude involuntary confessions and unreliable witness testimony. While majority of courts do not consider plea bargaining as violative of the due process rights of the defendant, an increasing number of them has recognized that the process encourages perjured testimony and wrongful convictions. (*Washington v. Texas*, 388 U.S. 14, 22-23 (1967)).

In fact, some out-of-state courts have ruled due process rights to fair trial was violated when "the prosecutor influences the witness to testify for the prosecution instead of the defense

or interferes with the content of his testimony for the defense”. (United States v. Fricke, 684 F.2d 1126, 1130 (5th Cir. 1982), cert. denied, 460 U.S. 1011 (1983); United States v. Goodwin, 625 F.2d 693, 703 (5th Cir. 1980). The 5th Circuit Court has reversed a conviction on this ground. United States v. Hammond, 598 F.2d 1008, 1013 (5th Cir. 1979).

In this case, 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 did not only deprive Appellant of fair trial as he did not have the same authority and or leverage to elicit favorable testimony for himself. This practice encourage fabrication and would explain Curry’s ever-changing testimonies.

The same argument applies with the delay in sentencing of Curry. Since the prosecution failed to disclose the terms of the plea bargain agreement, Appellant was denied the opportunity to cross examine Curry regarding the same. The Court in the case of State v. Dean states,

"[I]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with witnesses against him." U.S. Const. amend. VI. "The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias." State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991) (citing Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.E.2d 347 (1974)). "The fact that a cooperating witness avoided a mandatory minimum sentence is critical information that a defendant must be allowed to present to the jury." State v. Gracely, 399 S.C. 363, 374-75, 731 S.E.2d 880, 886 (2012).

State v. Dean, Op. No. 5648, (SC Ct. App. 2019).

Similar to Dean’s case, Curry’s sentence and whether he received any leniency in sentencing in exchange for his cooperation was discovered after Appellant’s trial and sentencing. Appellant was unable to cross-examine Curry regarding the terms of the agreement and his cooperation with the prosecution, which goes to Curry’s motive and bias in testifying the way he

did. That the trial court denied Appellant's motion for new trial based on violation of his due process rights due to prosecutor's (mis)conduct is an error of law that this Panel overlooked. The Panel's failure to appreciate this is an error of law for which Appellant seeks this Court's review.

Respondent also failed to disclose information and/or witness that may exculpate Appellant. As early as March 29, 2016, the law enforcement had video surveillance. The investigation on Appellant's case was completed April or May 2016. Respondent offered Appellant a copy of the discovery response, which should have included all the surveillance videos, only in December 2016. Despite receipt of the videos in December of 2016, Appellant was unable to access them. This fact was known and acknowledged by the State. Appellant was provided with accessible discovery the week before trial. Appellant was not given enough time to view all the video exhibits, aside from the fact that one video could not be viewed at all.

A prosecutor's primary duty is to seek justice. 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 Appellant his right to due process.

Again, the trial court did not rule on this violation, and this Panel erred in not finding the same as error of law.

Appellant was deprived of his due process due to judicial bias.

The trial judge has exhibited bias throughout the proceedings on this case. For one, he allowed the prosecutor to proceed with charging Appellant under accomplice liability doctrine

when he was indicted for murder. It was only during the trial he discovered of the additional accusation against him Appellant believed he was deprived of sufficient information of all the violation he allegedly committed and as such, he was unable to prepare for his defense accordingly. The additional charge of accomplice liability and the underlying offenses of kidnapping and robbery was not presented during the preliminary hearing, which takes this away from the ruling in State v. Hicks, 257 S.C. 279, 185 S.E.2d 746 (1971).

The trial judge has also abused his discretion in refusing Appellant to recall two important witnesses because it run in counter with the Confrontation Clause. In particular, the trial judge refused to recall Marzol who swore Curry told him Gambrell gave him the gun. In Gambrell's audio interview presented during the trial, he denied Curry's allegations, and declared the latter took the gun without his permission. Appellant requested to recall Marzolf to inquire into Gambrell's statements, but the trial judge, in explaining its denial stated Appellant could have cross-examined Marzolf and that if he was mistaken, he can be corrected in appeal. (R., p. 623).

While the law provides that it is upon the discretion of the Court to allow a witness to be recalled, Appellant avers that the interest of justice will be served if these witnesses have been allowed to testify considering that Gambrell's testimony was stricken out by the Court. The Court has ruled defendant is entitled to cross examine witnesses when there is lack of sufficient evidence to build his defense. State v. Pradubsri, 403 S.C. 270 (S.C. Ct. App. 2013).

Furthermore, this Panel affirmed trial judge's refusal to recall the witness was "because Carver was able to cross-examine the detective as to the relevant subject matter". However, based on the procedure of the trial, Appellant could not have cross-examined Marzolf with

regards to the issue of the guns until the testimonies of Curry and Gambrell have been concluded.

Appellant believes this is a callous disregard of Appellant's rights, where the trial judge fails to exert efforts in obtaining all the facts in this case considering this involve the life of Appellant. This kind of behavior reflects the slow departure from the truth-seeking mission of the criminal justice system to ensuring a conviction.

The judge's bias can also be gleaned from his sentencing statement:

THE COURT: So I—I am convinced that it was not necessarily Mr. Carver's intention to kill anybody when they went down there. But I'm equally convinced that you went down there to get the man, the money or the drugs back. As such you, engaged in a criminal conspiracy that ultimately spiraled out of control. It was notable to me that you drove away with the lights off, 911 wasn't called, that you didn't involve yourself with law enforcement until Mr. Curry was involved with the law enforcement himself. You can interpret that several ways.

I think it's clear that 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.

Also, 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.

That being said and done, I think it is only fair that you be treated equally, so I am going to sentence you to thirty (30) years. You have ten days to appeal this decision. If he is entitled to any credit, give him credit for any time served. Okay?"

(R. p. 785-786, 5.10).

Appellant believed that it was improper for a judge to comment on evidence, especially when the same was not established in the trial (i.e. no evidence presented that Appellant hid Gambrell's car) or to suggest an outcome (i.e. "criminal conspiracy"). The trial judge did both.

Lastly, the judge impermissibly intruded upon defendant's rights by repeatedly admonishing Gambrell of his right not to testify and that it may be used against him in his upcoming trial against himself. It is all the more suspect when, instead of Gambrell's own lawyer, it was the prosecution who raised an objection just when Gambrell was discussing his "instructions" to herein Appellant. (R., p. 596-598; p. p. 605-608, 2.12).

This level of overzealousness by the trial judge can be likened to what is termed as judicial intimidation. The court in *Webb v. Texas*, found the judge's actions --in singling out defendant's witness for a lengthy admonition on his right to not testify, implying the latter will lie in court, and the dangers of perjury—have exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify. *Webb v. Texas*, 409 U.S. 95, 98 (1972).

One striking similarity between *Webb* and the instant case is the fact that the defendant's witness was initially willing to testify, only refusing to do so after the judge's admonition (in this case, repeated warning about taking the Fifth Amendment).

In both instances, the judges effectively drove the witness off the stand, resulting to the defendants being deprived of their due process of law under the Fourteenth Amendment.

The record is replete with instances biases from the trial judge. For instance, in response to Appellant's motion for directed verdict based on failure of the State to establish intent on his part, the trial judge outright denied his motion, stating "This isn't necessarily an accomplice but it's hand of one, hand of all." This statement is clearly misleading, or at the very least vague, since the aiding and abetting acts of an accomplice is considered similar as to the hand of one hand of all doctrine. (R., p. 718, 22.25; p. 719, 1.7).

It should be noted the trial judge was quick to berate and/or chastise Appellant's counsel

for bringing up Gambrell's audio tape (police interview) when the judge himself prevented him from doing so. (R., p. 612, 15.21). But the judge glossed over the prosecution's violation of the discovery rule, allowing the 36-hour long video and other materials submitted only two weeks prior to trial. The delay in the discovery is made much egregious considering the State withheld the materials for more than one year past its own review. (R. p. 463, 19.24).

In sum, this Panel erred in not considering the factual evidence of bias and misconduct on the part of the judge and the prosecution. Appellant believes there are times when the exercise of the Fifth Amendment rights infringes on defendant's due process right. One such case is when the "only person capable of furnishing useful testimony will be implicated in some way in the crime." Kastigar v. United States, 406 US441, 446. In this case, Appellant was entitled to a new trial since he was deprived of his due process to a fair trial.

IV.

THE PANEL ERRED IN FINDING ISSUES RAISED BY APPELLANT WERE NOT PROPERLY PRESERVED FOR APPELLATE REVIEW.

In the case of *State v. Dean*, the Court of Appeals laid down the precepts on preservation

Our appellate courts have consistently found issues preserved for review when the issue was raised to and ruled upon by the trial court." *State v. Cain*, 419 S.C. 24, 33-34, 795 S.E.2d 846, 851 (2017). See, e.g., *State v. Williams*, 417 S.C. 209, 228 n.10, 789 S.E.2d 582, 592 n.10 (Ct. App. 2016) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge." (quoting *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003)). " While a party may not argue one ground at trial and another ground on appeal, *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989), we do not require a party to use the same language on appeal as it did at trial, *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011)." *Id.* at 33-34, 795 S.E.2d at 851. "

State v. Dean, supra.

This Panel erred in finding that Appellant's assertions as to (1) the failure to be informed

of the charges against him, (2) the charge for the “hand of one is hand of all” doctrine, (3) lack of neutrality of the trial judge, and (4) violation of his due process rights by trial court’s efforts to explain Fifth Amendment rights to his co-defendants, were not preserved for appellate review. This Panel failed to appreciate Counsel for Appellant’s efforts to challenge the charges of murder and accomplice liability during the trial, which were shut down by the trial judge. (R., pp. 156.160, 351, 718 & 766).

In his Motion for New Trial, Appellant raised the issue of the trial judge’s lack of neutrality by questioning his (1) apparent zealotry in convincing Gambrell to invoke the Fifth Amendment (R., pp. 11.12, 355, 359); (2) denial of Appellant’s motion for continuance preventing Appellant from presenting his witnesses (R., p. 14.16); (3) failure to rebuke the prosecution’s untimely disclosure of information material to Appellant’s defense and allowing these to be placed in record, (R., p. 152. 156); (4) conclusory statements during the trial (R., p. 354).

In his Motion for New Trial dated September 5, 2019, Appellant challenged the trial court’s action in repeatedly interjecting to warn Gambrell of his right to refuse to testify which led to him invoking the Fifth. In this Motion, Appellant averred the trial court overstepped the line by becoming an advocate for the state effectively preventing Appellant from pursuing his witness’ testimony. (R., p. 11-12). The issue was raised anew in his Amended Motion for New Trial and in his Motion for Reconsideration, as part of Appellant’s attempt to show the judge’s bias (R., pp. 323, 355-359).

Contrary to this Panel’s findings, Appellant challenged the charge of “hand of one is hand of all” in its initial Motion for New Trial, by objecting to the inclusion of the discussion on

kidnapping and robbery. (R., p. 11). This was reiterated in his Amended Motion for New Trial (R., p. 351-354), and in his Addendum to the Motion for Reconsideration, (R., p. 402-405).

The same can be argued with the issue on judge's neutrality. Appellant has challenged the judge's neutrality in not compelling two witnesses for Appellant, and in allowing untimely discovery, in his Initial Motion for New Trial. (R., p. 14-16). The same argument was raised in Appellant's subsequent Amended Motion for New Trial. R., p. 348-350).

Since the Panel erred in finding Appellant's above-cited issues unpreserved, Appellant requests that the unresolved issues in the previous briefing be allowed to be presented in the Petition for Rehearing, or in the alternative, be resubmitted for decision in this Court.

In sum, Appellant reiterates his position that this Panel erred in affirming the trial court's findings. Appellant challenges the sufficiency of evidence and his conviction. Construing ALL of the evidence and the inferences therefrom in the light most favorable to the Respondent, the evidence was not sufficient to sustain his conviction beyond reasonable doubt, for the crime of Murder.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests this Court an en banc review.

Respectfully submitted by:

s/Donald L. Smith

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attorneydonaldsmith@gmail.com

Attorney for Appellant

Anderson, South Carolina
August 16, 2021.

**FORM 7
PROOF OF SERVICE**

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of General Sessions

R. Lawton McIntosh, Judge

Appellate Case No. 2017-002011
Case Number: 2016A05324

State of South Carolina,

Respondent,

v.

Jason Franklin Carver,

Appellant.

PROOF OF SERVICE

Pursuant to Supreme Court of South Carolina’s Amended Order 2020-05-29-02, I served a copy of Appellant’s Petition for Rehearing, and Proof of Service, of same upon The Honorable Jenny Abbott Kitchings, Clerk of South Carolina Court of Appeals, and upon the Respondent, by and through its counsel of record, Attorney General Alan McCrory Wilson, Chief Deputy Attorney General W. Jeffrey Young, Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General Melody J. Brown, by email through the following addresses:

Ms. Jenny Abbott-Kitchings	ctappfilings@sccourts.org
Attorney General Alan McCrory Wilson	awilson@scag.gov
Chief Deputy Atty. General W. Jeffrey Young	jyoung@scag.gov
Deputy Attorney General Donald J. Zelenka	dzelenka@scag.gov
Sr. Asst. Deputy Atty. General Melody J. Brown	mbrown@scag.gov

A copy of the above-mentioned Motion shall be mailed to The Honorable Jenny

Abbott Kitchings, Clerk of Court South Carolina Court of Appeals, at PO Box 11629
Columbia, SC 29211, and the Respondents, by and through Honorable Alan Wilson at the
Office Attorney General, P.O. Box 11549, Columbia, S.C. 29211, by depositing copy of
it in the United States Mail, postage prepaid, as ordered.

Anderson, South Carolina
August 16, 2021.

s/Donald L. Smith
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Attorney for Appellants

RECEIVED

Aug 16 2021

FORM 8
LETTER TO THE COURT OF APPEALS CLERK OF COURT
FILING APPELLANT'S PETITION FOR REHEARING

SC Court of Appeals

August 16, 2021

The Honorable Jenny Abbott Kitchings
Clerk of Court South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

RE: State of South Carolina v. Jason Carver
Appellate Case No.: 2017-002011
Case No. 2016-A05324

Dear Ms. Kitchings:

Please find enclosed the following documents for filing:

1. Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc,
2. Proof of Service of same.

Sincerely,

s/Donald L. Smith

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Attorney for Appellants

cc:

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Chief Deputy Attorney General W. Jeffrey Young
Deputy Attorney General Donald J. Zelenka
Senior Assistant Attorney General Melody J. Brown