

STATE OF SOUTH CAROLINA  
In The Supreme Court

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**Feb 14 2022**

APPEAL FROM GREENVILLE COUNTY  
Court of General Sessions

S.C. SUPREME COURT

R. Lawton McIntosh, Circuit Court Judge

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*On Petition for Writ of Certiorari to the South Carolina Court of Appeals*

Unpublished Opinion No. 2021-UP-278 (Filed July 21, 2021)  
Court of Appeals Appellate Case No. 2017-002011

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THE STATE,

Respondent,

v.

JASON FRANKLIN CARVER,

Petitioner.

Appellate Case No. 2021-001505

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## **PETITIONER'S 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*.

(Pet. at 2).

## **STATEMENT OF THE CASE**

Petitioner, Jason Franklin Carver, was indicted by the Anderson County grand jury in November of 2016 for the murder of Steven Cameron. He was tried before the Honorable R. Lawton McIntosh August 21st, through August 25th, 2017. The jury found Petitioner guilty as charged. (R. p. 775). Judge McIntosh sentenced him to thirty (30) years imprisonment. (R. p. 786). Petitioner then pursued a direct appeal and initial briefs were filed. However, by motion filed on October 23, 2018, Petitioner moved to hold his appeal in abeyance in order to file a motion for a new trial based on after-discovered evidence. (R. pp. 28-59). On December 12,

2018, the Court of Appeals granted his motion. On December 20, 2018, Petitioner submitted a motion for a new trial pursuant to SCRCrimP, Rule 29, which he amended on December 27, 2018. (R. pp. 130-331). Judge McIntosh denied the motion on January 3, 2019. (R. p. 4). Petitioner sought reconsideration, (R. pp. 339-63), which Judge McIntosh denied on January 19, 2019, (App. 2). Petitioner appealed and sought consolidation with the existing appeal. By its Order of April 4, 2019, the Court of Appeals granted the request for consolidation, set aside the prior briefing, and ordered new briefing.

After completion of additional briefing, but without oral argument, the Court of Appeals issued an unpublished opinion on July 21, 2021 that affirmed the conviction and sentence. (App. 1-6). Petitioner filed a timely petition for rehearing on August 16, 2021, (App. 7-39 and 43-46), and, at the Court of Appeals' direction, the State filed a return on September 7, 2021, (App. 61-68). The Court of Appeals denied the petition on November 22, 2021. (App. 71). Petitioner filed a petition for writ of certiorari with this Court on January 4, 2022. This return follows.

### **RESPONDENT'S STATEMENT OF THE FACTS**

On the evening of March 28, 2016, Petitioner was at the home of James Milton Gambrell repairing the transmission of a car. (R. pp. 633-34). Gambrell was testing out a dirt bike he had just purchased from the victim, Steven Cameron. (R. pp. 545 and 636). Also present was Woodrow Curry. (R. p. 544 and 634). Once the sale was completed, Gambrell asked Petitioner to drive Cameron back to his home. (R. pp. 544-45; 639-40). Petitioner drove Cameron back to his home on Sterling Bridge Road. (R. pp. 640-42). Petitioner then returned to Gambrell's home. (R. pp. 546; 644-45). According to Curry, Gambrell informed Curry and Petitioner that Cameron had stolen a large amount of cocaine. (R. pp. 546-47). Curry further testified that Gambrell instructed Petitioner and Curry to go back to Cameron's house and bring back the drugs, the money, or Cameron. (See R. pp. 547-49 and 567). Petitioner testified that he was asked simply to bring

Cameron back. (R. p. 646). According to Curry, Gambrell then gave Curry a .38 caliber and .25 caliber handgun while Petitioner had his own gun. (R. pp. 547-48).

When Petitioner and Curry arrived, they knocked on the door but no one answered. (R. pp. 548 and 651). Cameron then came out the front door to confront the two. (R. pp. 548-49 and 652-53). What began as a discussion quickly turned physical when Cameron shoved Curry. (R. pp. 550 and 653). Curry then pulled the .25 caliber handgun and pointed it in Cameron's face. (R. p. 653). Cameron slapped the gun away from his face. (R. p. 654). Curry then fired several shots with one round hitting the house, and two others hitting Cameron – one in his neck and one in his chest killing him. (R. pp. 454-56). Petitioner and Curry left. (R. pp. 551 and 655). Curry was arrested sometime during the following week on drug charges. (R. pp. 669-70). Petitioner testified that he believed this to be his opportunity to disclose his involvement. (R. pp. 669-72). Investigators subsequently took a statement from Petitioner in which he admitted some involvement. Though he asserted no knowledge of the drugs, he admitted he had gone to Cameron's home to bring Cameron back to Gambrell or "pick up some money," and also admitted taking a gun to the home. (See R. pp. 682-83 and 691).

### **ARGUMENT**

"A writ of certiorari is not a matter of right, but of sound discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. Petitioner has failed show any "special and important reasons" to grant review of any one of his eight questions presented. Though there is no controlling or discrete definition of "special important reasons," this Court will generally consider whether there are "novel question of law" presented, or "there is a dissent," or conflict between the Court of Appeals resolution and precedent from this Court or the Supreme Court of the United States. *Id.* This Court may also consider whether the petition

presents a question reflecting a “substantial constitutional issue[.]” *Id.* Such circumstances are not present here, nor are there any like circumstances of broad application and pressing importance presented in this case. In essence, this case shows an ordinary application of law to the facts of the case. Of note, the two cases Petitioner cites for conflict, *Wilds v. State*, 407 S.C. 432, 756 S.E.2d 387 (Ct.App. 2014), and *State v. Campbell*, Op. No. 5885 (S.C.Ct.App. filed December 22, 2021), (*see* Questions 2 and 8), are cases from the Court of Appeals, not this Court or the Supreme Court. Moreover, comparison of the facts of those cases and the facts here, and the controlling law in each, reveal that actual conflict is not apparent. Petitioner basically seeks additional review, but does not show any exceptional questions. Certiorari review is not warranted, and the petition for writ of certiorari should be denied.

**IX. The Court of Appeals correctly resolved Petitioner’s allegation of trial court error in instructing the jury on accomplice liability was procedurally barred.**

Respondent asserted in its brief in the Court of Appeals that Petitioner had failed to preserve the above issue for appellate review as he failed to object at trial. (FBOR at 27-28, citing *State v. Williams*, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (“A defendant must object at his first opportunity to preserve an issue for appellate review.”)). The Court of Appeals resolved that the issue was not preserved and did not address the merits at all, not even in the alternative. (App. 5). The record fully and fairly supports the issue was procedurally barred and that Petitioner was not entitled to merits review. The trial court gave Petitioner the opportunity to object at both the charge conference and at the conclusion of the jury charge, and Petitioner declined both times. (R. p. 698-99 and 737; *see also* 774). Having failed to object, Petitioner did not preserve this issue for review. *State v. Stone*, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985) (“a defendant’s failure to object to the charge as made or to request an additional charge, when an opportunity has been afforded to do so, results in a waiver of his right to complain about the

charge on appeal”); *see also* Rule 20(b), SCRCrimP (failure to object to a jury instruction “shall constitute waiver of the objection”).

Petitioner does not acknowledge that the Court of Appeals found the issue procedurally barred. (See Pet. at 12-17). However, he argued in his petition for rehearing to the Court of Appeals that his ability to object was “shut down by the trial judge.” (App. petition 31-33). Yet, the record shows separate opportunities to object. (See R. pp. 698-99; 737 and 774). Consequently, the Court of Appeals appropriately found the issue barred. At any rate, and in the alternative, the record shows no error in the trial judge’s instruction.

Under the “hand of one, hand of all” theory of accomplice liability, a person “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. Langley*, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999). Here, there was evidence presented that Petitioner acted with Curry at the direction of Gambrell in order to bring Cameron back to Gambrell, or to bring the money or the drugs Cameron took from Gambrell back to Gambrell. (See R. pp. 547-49; 567 and 646). Both Curry and Petitioner were armed. (R. pp. 547-48). Consequently, there was evidence, if believed, that they joined together for an illegal purpose and the charge was appropriate. *See Barber v. State*, 393 S.C. 232, 712 S.E.2d 436 (2011) (charge appropriate even if another individual was the actual shooter when four men acted in concert to commit an armed robbery). The trial court did not err in charging the jury on accomplice liability as the evidence presented at trial supported the instruction.

Petitioner argues in his petition to this Court that “[t]he State failed to establish there was a prior agreement among the three defendants....” (Pet. at 15). This is simply a question for the jury to determine. However, Curry’s testimony, if credited, supports that he and Petitioner acted

together at Gambrell's direction, with Gambrell even supplying guns to Curry. Further, Petitioner admitted in his statement to officers and his testimony at trial that he was acting at Gambrell's direction, admitted being present, and admitted that weapons were being taken to Cameron's home. (*See* R. pp. 646-50 and 680-87). Respondent notes the evidence in the record that the jury carefully considered Petitioner's statement: the jury asked for the statement to be replayed and to be recharged on murder and hand of one, hand of all liability. (R. pp. 768-69). Notably, defense counsel again did not object to the "handling of the jury's request" by the trial judge. (R. p. 774). But again, the record confirms that the jury instruction issue was not preserved for merits review on appeal, and there is no error in the Court of Appeals' finding the issue was procedurally barred. Certiorari review is not warranted, and the petition should be denied.

**II. The Court of Appeals did not reach the merits of Petitioner's accomplice liability instruction issue as the issue was procedurally barred. Consequently, the Court of Appeals decision is not contrary to resolution of the accomplice liability issue on the merits as reflected in *Wilds v. State*.**

Again, there was no objection to the instruction and the Court of Appeals appropriately found the instruction issue was procedurally barred. Respondents incorporates the prior discussion as if repeated verbatim. Further, Respondent notes that Petitioner neither relied upon *Wilds*, a 2014 case, in the brief of appellant dated October 4, 2019, nor raised an argument based on *Wilds* in his petition for rehearing in addition to contesting the procedural bar, (see App. at 37-38). It is difficult to see how any such argument on conflict with precedent was properly presented and preserved for inclusion in the petition. *See generally* Rule 242 (d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition..."). At any rate, the issue is without merit. Petitioner argues that "Curry was the shooter, and Petitioner did not join in the scuffle" and subsequent shooting. (Pet.

at 17). In light of his asserted factual conclusion of no connection, he argues that the accomplice liability charge was erroneously given. (Pet. at 17-18). Petitioner's position fails both on the law and his interpretation of the conflicting facts.

In *Wilds*, this Court found that counsel was deficient in failing to object to the charge, and the defendant was prejudiced, because the only evidence presented was that *the defendant* was the shooter. 407 S.C. at 439, 756 S.E.2d at 390. As such, there was no need to charge accomplice liability during his trial. *Id* at 439-40, 756 S.E.2d at 390-91. The opposite is at work here. The evidence was that Curry was the shooter, but that Petitioner was acting in concert with him to obtain either the drugs, money or Cameron himself to take back to Gambrell. (*See R.* pp. 547-49; 567; 646-50 and 680-87). Consequently, there is no conflict in resolution of these two cases. The charge here was appropriate to the facts of the case. *See Barber, supra*. *See also State v. Washington*, 431 S.C. 394, 407, 848 S.E.2d 779, 786 (2020) (“if the record contains no evidence [alleged accomplice] was the shooter, then the accomplice liability instruction should not have been given.”).

To the extent Petitioner argues to this Court that he did not “join in the scuffle” and, additionally, that the trial judge failed to consider the testimony Petitioner was threatened by Curry after the crime, (see Pet. at 17-18), these are suggestions for argument, not identification of the lack of evidence supporting the instruction. Because the law is determined by the evidence presented, and not counsel's argument on what the jury should accept, the argument presented here cannot prevail. *See Washington*, 431 S.C. at 411, 848 S.E.2d at 788 (noting “the settled principle that “[t]he law to be charged to the jury is determined by the evidence presented at trial”) (quoting *State v. Gaines*, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008)), Here, the trial court appropriately instructed on the legal structure needed for the jury to consider the

conflicting evidence of the extent to knowledge and involvement and determine whether the State proved beyond a reasonable doubt criminal liability through hand of one, hand of all. *See generally State v. Harry*, 413 S.C. 534, 541, 776 S.E.2d 387, 391 (Ct. App. 2015), *aff'd*, 420 S.C. 290, 803 S.E.2d 272 (2017) (“ ‘In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties.’ ”) (quoting *State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 770 (Ct.App.2010)); *see also State v. Crowe*, 258 S.C. 258, 265, 188 S.E.2d 379, 382 (1972) (“It is further well settled that, if two or more combine together to commit an unlawful act, such as robbery, and, in the execution of that criminal act, a homicide is committed by one of the actors, as a probable or natural consequence of the acts done in pursuance of the common design, all present participating in the unlawful undertaking are as guilty as the one who committed the fatal act.”). Again, the issue is procedurally barred, but if not so, Petitioner’s argument would fail on the merits. Certiorari is not warranted, and the petition should be denied.

**III. The Court of Appeals did not err in affirming the denial of a directed verdict where the co-conspirator Curry testified that there was no plan to kill the decedent. The evidence shows that Petitioner was knowingly engaged in the conspiracy to kidnap or rob the victim.**

The Court of Appeals resolved the trial judge did not err in declining to direct a verdict of acquittal “because the State produced evidence of Carver’s presence at the scene of the shooting as a result of an arranged plan to undertake an illegal act.” (App. 3). The Court of Appeals decision is supported by the record and well-established case law.

“On appeal from the denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the State.” *State v. Bennett*, 415 S.C. 232, 235–36, 781 S.E.2d 352, 353–54 (2016) (quoting *State v. Butler*, 407 S.C. 376, 381,

755 S.E.2d 457, 460 (2014)). “The Court’s review is limited to considering the existence or nonexistence of evidence, not its weight.” *Id.* (citing *State v. Cherry*, 361 S.C. 588, 593, 606 S.E.2d 475, 478–79 (2004)). In essence, “[u]nless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error.” *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776-77 (2011).

At the close of evidence, Petitioner moved for a directed verdict. (*See R.* pp. 718-19). The trial judge determined the case should go to the jury, noting “although [Petitioner] might not have gone down there for the ultimate act that was committed, the jury has a right to find or could find that it was a natural and probable consequence of their initial criminal conspiracy.” (*R.* p. 719, lines 2-6). The record does not show error in the trial judge’s ruling.

In the similar case of *State v. Harry*, 420 S.C. 290, 803 S.E.2d 272 (2017), the appellant appealed his murder conviction under the “hand of one, hand of all” theory of accomplice liability. He argued the circuit court erred in denying his motion for directed verdict as the State failed to present any direct or substantial circumstantial evidence he acted in concert with his codefendant who had admitted shooting the victim. In reviewing the facts, this Court set out that Harry had gathered a group to aid in retrieving a TV from the victim, and one of the group shot the victim. *Harry*, at 293, 803 S.E.2d at 273. Much like the differing testimony here, Harry claimed he did not know the retrieval process would turn deadly, and even asserted he tried to “calm the waters” when the interaction became “tense.” *Id.* This Court resolved the matter was appropriate to submit to the jury due to the “differing inferences that may be drawn from the evidence....” *Harry*, at 293, 803 S.E.2d at 273.

Petitioner asserts there is insufficient evidence to show he and Curry were acting in concert “to harm or kill Cameron.” (*Pet.* at 18-19). As explained in the first issue above,

evidence was presented to show that they did in fact act in concert, both were armed, and, in these circumstances, like *Harry*, a jury may logically resolve that the death was a natural and probable consequence of their joint enterprise. Though Petitioner disagrees with the jury's factual resolutions, that is not a proper basis for appellate review of his directed verdict issue. *See State v. Larmand*, 415 S.C. 23, 32, 780 S.E.2d 892, 896 (2015) (“[O]ur duty is not to weigh the plausibility of the parties’ competing explanations.”). Certiorari is not warranted, and the petition should be denied.

**IV. The Court of Appeals properly found Petitioner’s allegation of trial judge bias was not preserved for review.**

The Court of Appeals resolved in summary fashion that Petitioner’s arguments that “his right to due process and a fair trial were impaired because the trial court’s actions suggested a lack of neutrality” were “unpreserved for appellate review.” (App. 5). Though Petitioner asserts there were various instances in this trial where he received unfavorable rulings which he contends reflects bias, noticeably absent is an assertion that he objected on bias, or made any motion for mistrial or other remedy based on bias. (See Pet. at 21-27). Consequently, the Court of Appeals properly found the issue was procedurally barred. *See Parks v. Morris Homes Corp.*, 245 S.C. 461, 471, 141 S.E.2d 129, 134 (1965) (“If the remarks of the trial judge were considered prejudicial, it was the duty of the defendant to call the matter to the court’s attention at some appropriate time during the trial, and the failure to do so amounts to a waiver of the alleged error.”). Further, merely showing “adverse rulings” does not support trial court bias. *Davis v. Parkview Apartments*, 409 S.C. 266, 288, 762 S.E.2d 535, 547 (2014). Further still, the rulings complained of simply do not show error much less bias.

Petitioner makes four separate arguments in support of his assertion of bias: 1) the trial judge's treatment of Gambrell's decision whether to testify<sup>1</sup>; 2) the trial judge failed to allow a continuance to present Gambrell's nephew, Quay; 3) the trial judge's denial of Petitioner's motion to recall Detective Marzolf and Sheila Curry; and 4) alleged the trial judge demonstrated a "lack of neutrality in his various statements during trial" regarding the illegal plan to get the drugs, money or Cameron which indicated he had formed an opinion in the case. (Pet. at 21-27). The Court of Appeals found record support that Gambrell had made a decision to invoke the Fifth Amendment so there was no error in the trial judge not allowing him to take the stand. (App. 4, citing *State v. Hughes*, 328 S.C. 146, 150, 493 S.E.2d 821, 823 (1997)); that the trial judge did not abuse his discretion to grant a continuance where the testimony could have been cumulative, (App. 4); that there was no error in denying Petitioner's request to recall the detective where Petitioner had received the ability to cross-examine, (App. 5); and that any argument regarding the recalling of Curry was abandoned on appeal as Petitioner "did not make any arguments or cite any authority related to this witness," (App. at 5 n. 2). Petitioner does not acknowledge these rulings, or that the Court of Appeals correctly resolved the matters based on clear record support. To the extent that a pattern of adverse rulings may show some type of bias, Petitioner has not even shown the adverse rulings at issue here were anything other than proper rulings on the facts and law. But again, Petitioner did not make any objection or otherwise seek relief on the basis of alleged bias. The issue is not preserved for review. Consequently, certiorari is not warranted, and the petition should be denied.

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<sup>1</sup> Relatedly, Petitioner argued that "his due process rights were violated by the trial court's efforts to explain his codefendant's Fifth Amendment rights," but the Court of Appeals found that issue was not preserved either. (App. 5).

**V. The Court of Appeals found no merit to Petitioner’s allegation that the trial court abused its discretion in denying Petitioner’s new trial motion based on the allegations that the State filed different charges for co-defendants; deferred sentencing of one co-defendant; and that any error in disclosure of a recording of the prosecution’s meeting with a co-defendant was cured when the trial court allowed time and opportunity to view the recording before cross-examination.**

Respondent first notes that Petitioner alleges prosecutorial misconduct rather than claiming an abuse of discretion in denial of the new trial motion. (See Pet. at 27). Consequently, this issue differs from the issue raised and ruled upon by the Court of Appeals and is not appropriate for a Rule 242 petition for writ of certiorari. (See 242(d)(2), SCACR, limiting issues to those raised in the Court of Appeals). Even so, the logic of the disposition of the issues actually raised demonstrates that the arguments are without merit both legally and factually.

As to the allegation of differing charges,<sup>2</sup> Respondent asserted the facts do not support such an allegation. “[A] defendant asserting prosecutorial misconduct carries a “heavy burden of proving that the ... prosecution ‘could not be justified as a proper exercise of prosecutorial discretion.” *U.S. v. Wilson*, 262 F.3d 305, 316 (4th Cir.2001) (internal quotations omitted). Additionally, a prosecutor “has discretion in choosing how to proceed with a case, including whether to prosecute in the first place and whether he brings it to trial or offers a plea bargain.” *State v. Langford*, 400 S.C. 421, 435 n. 6, 735 S.E.2d 471, 479 n. 6 (2012). “[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.” *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). Here, the State acted within its broad discretion in charging Petitioner with murder and pleading his accomplice to manslaughter. *See, e.g., Harry*, 420 S.C. at 297, 803 S.E.2d at 276

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<sup>2</sup> Respondent treated the base claim regarding the filing of different charges as one of prosecutorial misconduct under the broader umbrella of the standard of review of denial of a motion for a new trial. (See FBOR at 13 and 19).

(affirming murder conviction under “hand of one, hand of all” despite that codefendant shot the victim and later pled guilty to voluntary manslaughter). The record does not show some type of misconduct.

Petitioner also alleges misconduct in Curry’s deferred sentencing; however, Petitioner again shows no error. In *State v. Wright*, 269 S.C. 414, 416, 237 S.E.2d 764, 766 (1977), this Court considered a similar issue in context of whether the deferral of sentencing encouraged perjury or otherwise offended due process. The Court resolved that “[a]n unsentenced codefendant is a competent witness for the State” and rejected a claim the defendant’s right to due process was in anyway violated. *Id.*, at 417, 237 S.E.2d at 766. Further, Petitioner here was aware of the deferral and allowed to cross-examine the witness on same. (*See R.* p. 557). The record shows no error.

Lastly, Petitioner argues that a recording was not timely turned over to his defense counsel during trial. However, “where a party fails to comply with Rule 5, the court may order the noncomplying party to permit inspection, grant a continuance, prohibit introduction of the nondisclosed evidence, or enter such order as it deems just under the circumstances.” *State v. Kerr*, 330 S.C. 132, 150, 498 S.E.2d 212, 221 (Ct. App. 1998) (citing Rule 5(d)(2), SCRCrimP; *State v. Trotter*, 322 S.C. 537, 542, 473 S.E.2d 452, 458 (1996)). “Sanctions for noncompliance with disclosure rules are within the discretion of the trial judge and will not be disturbed absent an abuse of discretion.” *Id.* (citing *State v. Davis*, 309 S.C. 56, 63, 419 S.E.2d 820, 825 (Ct. App. 1992)). The tape at issue is audio from an interview with the victim’s brother. (*R.* pp. 457-58). During the trial judge’s inquiry into the delay, he determined that the delay resulted from Law Enforcement’s mistaken belief that it was turned over previously. (*R.* pp. 461-63). While the trial judge rebuked the State for failing to turn over the particular material in a timely manner, he also

determined that Petitioner had been in possession of the tape for two-weeks and expressed concern over his not having reviewed the disclosure. (*See R.* p. 459; and p. 463, lines 19-24 (“You received it on the 9th, it is now the 22nd and you told me that you haven’t listened to it. That’s unacceptable as well. You have an obligation. So that cuts both ways.”).<sup>3</sup> Even so, the trial court adjourned court early on the day the discovery issue arose, in order to permit the defense additional time to review any of the material counsel contended was late in being disclosed. (*See R.* pp. 465-66). The trial court properly resolved suppression was not necessary. *See also State v. Patterson*, 290 S.C. 523, 529, 351 S.E.2d 853, 856 (1986) (finding no prejudice in delayed disclosure where tape of interview with a prosecution witness produced before witness testified and trial judge allowed defense to delay cross-examination to following day). Again, the record does not support error in the handling of this matter at trial.

Petitioner also generally asserts that the State knew of Curry’s “tendencies to lie and/or withhold information,” yet still called Curry as a witness, and also that the State did not try the co-defendants in one trial. (Pet. at 28-29). These claims were not made as allegation of prosecutorial misconduct in the brief to the Court of Appeals. Further, the claims fail under the law. Petitioner had the opportunity to cross-examine Curry on any fact of bias or motive to misrepresent. *See generally* Rule 608, SCRE (outlining ways to challenge witness credibility); *see also White v. Illinois*, 502 U.S. 346, 356 (1992) (noting “the importance of cross-examination, ‘the greatest legal engine ever invented for the discovery of truth.’ ”) (citing

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<sup>3</sup> To the extent Petitioner would also reference he was unable to open portions of the digital discovery provided by the State, the record shows that *during a pretrial hearing*, counsel commented that he had had trouble opening a video of Petitioner’s statement on his computer. However, counsel did not make any accusations of prosecutorial misconduct. The trial court instructed the parties to get together and facilitate access to the material. The State indicated that defense counsel could review the material at their office, and affirmed that it had already offered this opportunity. Neither side further argued these facts. (*See R.* pp. 440-41).

*California v. Green*, 399 U.S. 149, 158 (1970)). Moreover, nothing requires all defendants to be tried at the same time in the same way. Even so, the argument circles back to differing treatment among the defendants, which, as shown above, is not indicative of a violation of rights.

Petitioner has failed to show certiorari review is warranted. The petition should be denied.

**VI. Petitioner did not raise an issue regarding the failure to disclose the scope of the plea bargain with Petitioner’s co-defendant Curry and there is no ruling by the Court of Appeals for this Court to review.**

Petitioner alleges he could have used the information about the scope of Curry’s bargain with the State had it been disclosed. (See Pet. at 30). Not only was such an issue not raised to the Court of Appeals, thus not ruled upon by the Court of Appeals, the claim is factually without merit. Petitioner was not only aware of the terms of Curry’s plea during trial, he made use of this knowledge on cross-examination. (See R. pp. 557-58). “The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias.” *State v. Gracely*, 399 S.C. 363, 372, 731 S.E.2d 880, 885 (2012) (citing *State v. Clark*, 315 S.C. 478, 481, 445 S.E.2d 633, 634 (1994)). “A defendant demonstrates a Confrontation Clause violation when he is prohibited from ‘engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias ... from which jurors ... could draw inferences relating to the reliability of the witness.’” *Id* (quoting *State v. Stokes*, 381 S.C. 390, 401–02, 673 S.E.2d 434, 439 (2009)). This Petitioner cannot do. To the extent the issue could be entertained, it would afford no relief. The petition should be denied.

**VII. The Court of Appeals did not err in finding no abuse of discretion in the trial judge’s denial of Petitioner’s motion for a new trial.**

Petitioner argues the Court of Appeals erred in not reversing the trial judge’s denial of the new trial motion because he presented new evidence that should have been heard. (Pet. at 32-33). In particular, Petitioner argues that inconsistencies in Curry’s later testimony in Gambrell’s

trial, along with Gambrell's affidavit, demonstrate evidence supportive of a new trial. (Pet. at 33-38). Respondent notes that Gambrell asserted the Fifth Amendment at Petitioner's trial. At any rate, Petitioner has not shown an abuse of discretion. As the Court of Appeals found, the inconsistencies Petitioner offered do not raise to the level of being material evidence that "would probably change the result," and "is not merely cumulative or impeaching." (App. 2). The record supports the trial judge's denial of relief and the Court of Appeals affirmance of that ruling.

"The decision whether to grant a new trial rests within the sound discretion of the trial court, and [the appellate court] will not disturb the trial court's decision absent an abuse of discretion." *State v. Senter*, 396 S.C. 547, 552, 722 S.E.2d 233, 236 (Ct.App.2011) (brackets in original) (quoting *State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009)). "[I]f competent evidence supports the jury's verdict, the trial [court] may not substitute [its] own judgment for that of the jury and overturn that verdict." *Id* (citing *State v. Miller*, 287 S.C. 280, 283, 337 S.E.2d 883, 885 (1985)). On January 3, 2019, Judge McIntosh issued an order denying Petitioner's motion for a new trial, finding no cause to hold a hearing, given "that there was competent evidence admitted to sustain the jury's verdict of guilty[,] and [that] the court may not substitute its judgment for that of the jury." (R. p. 4, citing *State v. Taylor*, 348 S.C. 152, 558 S.E.2d 917 (Ct.App. 2001)).

Though Petitioner relies upon "[a]ffidavits of Curry and Gambrell, as well as statements by witnesses in Gambrell's trial" as a basis for a new trial, the evidence he offered simply does not qualify as evidence which would support a new trial. A party requesting a new trial based on after-discovered evidence must show that the evidence (1) would probably change the result if a new trial was had; (2) has been discovered since the trial; (3) could not have been discovered

before the trial by exercise of due diligence; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching. *State v. Caskey*, 273 S.C. 325, 329 256 S.E.2d 737, 738-39 (1979). In plain example of the failings in his argument, in his brief to the Court of Appeals, Petitioner argued:

- a. “[D]uring the trial for Appellant’s case, Curry denied having named anyone as the shooter, insisting that it was him who shot Cameron. . . . However, in the Gambrell trial, Carver learned that Curry, [sic] initially tried to pin the shooting on Appellant. (Initial Brief of Appellant, pp. 9-10).
- b. “[W]hen Curry was asked what he did after leaving [the victim’s] house during Car’s [sic] trial, Curry stated in a straightforward manner that they went back to Gambrell’s house. . . . However, when the same question was asked at the Gambrell trial, Curry revealed, for the first time, that he called Gambrell on the way back to this house and told him of [the victim’s] shooting.” (Initial Brief of Appellant, p. 10).
- c. “[A]t Appellant’s trial, Curry testified that Gambrell instructed Appellant to drive Cameron to his house. . . . In his subsequent testimony at Gambrell’s trial, Curry implied that Appellant voluntarily took Cameron home.” (Initial Brief of Appellant, p. 11).
- d. “Curry, implicated Appellant by testifying that he had a gun when they went to Cameron’s house, only to deny the same in his subsequent testimony. . . . Gambrell confirmed that Carver did not have a gun on March 28 or 29, 2016. (Affidavit of James Milton Gambrell, November 30, 2018). Gambrell stated that the only time he saw Appellant with a gun was in 2015, one year prior to the shooting incident. At that time, Carver was showing his brother’s gun to Gambrell.” (Initial Brief of Appellant, p. 12).
- e. “[I]n recalling what transpired between him and [the victim], Curry testified that he only realized that he had a gun with him when Cameron came charging at him and that he had no choice but to shoot the latter. . . . In his testimony at Gambrell’s trial, Curry testified that he pulled the gun to intimidate Cameron, who charged at him at that point. He pulled the gun prior to any exchange of words between him and Cameron.” (Initial Brief of Appellant, pp. 13).
- f. “[I]n Gambrell’s trial, Curry testified that upon returning to Gambrell’s house from Cameron’s place, Carver went in to return the gun to Gambrell. Of course, this testimony conflicts with Curry’s testimony that Carver had his own gun.” (Initial Brief of Appellant, p. 15).

These “inconsistencies” are not “new” to the event, rather, these purported discrepancies surround the events for which Petitioner was, admittedly, present. Evidence presented, which

was known to the defendant at the time of his trial, cannot be considered “new evidence” for purposes of receiving a new trial. *See Hayden v. State*, 278 S.C. 610, 612, 299 S.E.2d 854, 855–56 (1983). Further, the bits of evidence offered as “new evidence” are largely insignificant in light of the totality of the evidence actually presented. In particular, as to Petitioner having or not having a separate gun, no one suggested that Petitioner used a separate gun during the event, and the testimony was firm that Curry shot Cameron. At the most, Curry’s testimony at Gambrell’s trial is merely cumulative or impeaching. *See Caskey*, 273 S.C. at 330, 256 S.E.2d at 739 (denying new trial after finding “the alleged after-discovered evidence was at most merely impeaching of [witness’s] credibility and not material to appellant’s guilt or innocence.”).

Petitioner also mentions testimony from Detective Marzolf at Gambrel’s trial, asserting the detective referenced a neighbor hearing some argument between the victim and another over a “dirt bike.” (Pet. at 34). That testimony similarly does not show any relief is warranted. Testimony concerning statements made by the victim’s neighbors could only be hearsay and could possess no exculpatory value. Even so, because the victim had gone to Gambrell’s home to sell a dirt bike on the day of the murder, the mention of “dirt bike” during the altercation is unsurprising and does not change the circumstances of the murder.

Again, the record supports the trial judge’s ruling, and the Court of Appeals affirmance of that ruling. Certiorari is not warranted, and the petition should be denied.

**VIII. Petitioner cannot show conflict with the ruling in *State v. Campbell* that resolved a charge on the inference of malice by use of a deadly weapon and, separately, that an accomplice liability instruction was not warranted when there is no evidence that another fired the fatal shot, because the case is inapposite to Petitioner’s factually and no conflict could exist.**

Petitioner next relies on the Court of Appeals December 2021 decision in *Campbell* to assert “conflict” in resolution of that case compared to his case. Petitioner apparently does not

contend a direct conflict exists, but alleged instead that there are subtle similarities. First, Petitioner asserts that “the trial judge made comments throughout the trial that conveyed his belief that the three accused were engaged in a drug transaction” and those comments “can be likened to an inferred malice instruction, as both are ‘improper court-sponsored emphasis of a fact in evidence.’” (Pet. at 40). Second, he asserts that the Court of Appeals in *Campbell* “considered the totality of the circumstances” in determining whether to charge accomplice liability which he contends the trial judge failed to do in his case. (Pet. at 41). Both of his arguments must fail in light of the law and facts.

As an initial and overarching point in response, to what extent, if any, that Petitioner may raise this argument based solely on *Campbell* is questionable. *Campbell* neither shows a new controlling rule that should have been applied in his case, nor does it demonstrate error in this case. Even so, the subtle similarities Petitioner attempts to cultivate simply are not supported by the record.

As to the implied malice by use of a weapon instruction, the trial judge did not give an implied malice by use of a weapon instruction so prejudice is impossible. Petitioner admits this. (See Pet. at 40). Consequently, Petitioner cannot show an instruction that actually could be considered a comment on the facts based on the instruction. Further, while Petitioner also challenges “comments” by the trial judge, (see Pet. at 40), the trial judge was not the fact-finder. Petitioner cannot show error in the trial judge’s “comments” for the “comments” are part and parcel of the rulings that he was required to make. (See R. pp. 702-703, ruling on Petitioner’s evidence admissibility argument; see also R. pp. 718-19, ruling on the directed verdict motion, outside the presence of the jury).

As to considering the accomplice liability charge, as noted above, the evidence supported the charge be given to provide the correct and proper legal framework for the jury to consider. Though Petitioner argues the trial judge failed to consider the totality of the evidence, a review of his petition argument demonstrates that he urges a finding of credibility that only the jury could make. *Larmand, supra*. For example, the jury had to consider and determine important facts such as: was Petitioner told that Cameron took the drugs; was his accompanying Curry an agreement? (*See* Pet. at 42-43). These matters, which Petitioner contested, were properly submitted to the jury for determination. Consequently, the trial judge did not err in instructing the jury on hand of one, hand of all, as evidence, if believed, would support liability for the *murder* as it could logically be a nature and probable consequence of the criminal undertaking that included force and use and/or carrying of weapons.

Again, Petitioner has failed to show error, and failed to show an issue that would support certiorari review. The petition should be denied.

### **CONCLUSION**

For all the foregoing reasons, Respondent submits that this Court should deny the petition.

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