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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of General Sessions

R. Lawton McIntosh, Judge

Opinion No. 2021-UP-278 (S.C. Ct. App. Filed July 21, 2021
Court of Appeals Appellate Case No.: 2017-002011

State of South Carolina, Respondent,

v.

Jason Franklin Carver, Petitioner.

APPELLATE CASE NO. 2021-001505

REPLY TO RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted by:

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March 5, 2022.

Petitioner makes the instant submission in response to Respondents' Return to Petition for Certiorari. Petitioner adopts and incorporates by reference the Statement of Case and Facts presented in his Petition for Certiorari. Petitioner would like to make exception to Respondent's Statement of Case as follows:

Respondent alleged Gambrell was testing a dirt bike he purchased from the victim, Cameron. (Respondent's Return, p. 2). Nothing in the Record, and particularly not in the cited provision, states Gambrell did such. The Record clearly shows Curry testifying Cameron brought a dirt bike to Gambrell's house, which he sold (R., p. 545, 7.12). Page 636 of the Record shows Carver testifying he saw Cameron outside showing Quay (Gambrell's nephew) how to start a dirt bike. Nowhere in the Record indicates Gambrell was the buyer. Contrary to the State's interpretation of the facts, Curry categorically stated the minibike was sold to Quay. (R., p. 562, 16.20).

By insinuating Gambrell bought the dirt bike, the State attempted to remove Quay from the narrative, which would justify the trial judge not attempting to have Quay and other witnesses picked up by the Sheriff pursuant to the subpoenas he had been served. The continuance requested to secure the witness(es) should have been granted as well. Ultimately, Petitioner was deprived of witnesses who would be able to establish (1) the only transaction he knew at the time was the bike sale; and (2) the lack of malicious intent on his part. Quay's testimony would negate, or the very least cast doubt on, the State's theory this case was about drug transaction gone awry.

With regard to the gun, the State failed to account for Curry's inconsistent statements on whether Petitioner had a gun with him when he went to Cameron's house. Initially, Curry

mentioned Petitioner had his own gun (R., p. 547, 15.25 & p. 548, 1.7), but he later recanted this by denying his knowledge of the same. (R., p. 549, 2.10).

The pertinent citation in the Record, with which the State draws its conclusion that Petitioner admitted having a gun is as follows:

> 02. A. Ma'am, I had the gun on me at that
> 03. time. And I did not have no phone.

(R., p. 691, 2.3).

What the State conveniently omitted is the discussion preceding this testimony by the Petitioner. On page 690 of the Record, Petitioner detailed how he was afraid of Curry because the latter had just recently fired a gun (R., p. 690, 6-9), that he did not actually see Curry shoot the gun as he (Carver) tried to escape (R., p. 690, 13.17) and that Curry pointed the gun at him (R., p. 690, 18.24). I had a gun on me meant he had a gun pointed at him.

Furthermore, Gambrell confirmed Petitioner had no gun on the day of the shooting. (R., p. 280). Gambrell stated he only saw Petitioner with a gun in 2015, a year prior to the shooting. *Id.* At that time, Petitioner was showing his brother's gun to Gambrell. *Id.*

More importantly, in the second trial in which he was the only witness, Curry testified that upon returning to Gambrell's house from Cameron's place, he and Petitioner went in to return the guns to Gambrell. (R. p. 810, 16.25). Clearly an attempt to rope in the Petitioner by mentioning the guns, Curry failed to see the absurdity in his claim. If it were true Petitioner brought his own gun, then there was no need to go back to Gambrell to return his own gun. Curry also offered he called Gambrell on the way home from Cameron's home in the second trial which he failed to offer in the first trial.

With regards to the fired shot, the State claims "Curry then fired several shots with one round hitting the house, and two others hitting Cameron-one in the neck and one in the chest

killing him". (R., p. 454-456). Nothing in the cited Record indicates Curry fired "several" shots. (R., p. 453-456). The cited pages were that of Dr. Brett Woodard, the medical examiner who explained the trajectory of the bullets in the deceased's body, the cause of death (gunshot wound and resultant bleeding; and the length of time it would have taken for Cameron to bleed to death. (R., p. 454-456). The medical examiner could not have been expected to testify on how many shots were fired as it would have been hearsay.

By alleging Curry fired several shots, the State attempts to present a scenario of a ruthless, determined assassin, instead of a man who arguably used unnecessary force in defending himself. This was made to strengthen the State's theory of accomplice liability.

Finally, the State has also misrepresented and/or misquoted Petitioner claiming he admitted to "having taken a gun to the house" and cited pages 682-683 and 691 of the Record. (Return, p. 3) Pages 682-683 was a discussion on whether Carver knew about the missing drugs at the time he returned to Cameron's house with Curry. Petitioner testified he came to learn only about the missing drugs way after the shooting happened, and only "on the way to the Anderson County Sheriff's Office to talk to Detective Marzolf and Detective Call." (R., p. 682, 20.25 & p. 683). He learned of the missing drugs because he rode with Gambrell to the Sheriff's Office on the day he came into the Sheriff's Office. He had never participated in a discussion regarding drugs prior to that ride. He was not privy to the fact the drugs were missing since it occurred when he was taking Cameron home. Petitioner has been consistent in his declaration he did not know of any missing and/or stolen drugs.

Petitioner believes these deviations from the facts of the case are not merely incidental or a product of oversight, but proof of the conscious effort to draw Petitioner as a willing and knowing participant in the crime of murder.

As Response to the issues and/or arguments raised by Respondent in its Return, Petitioner states as follows:

I.

THE COURT OF APPEALS ERRED BY NOT FINDING REVERSIBLE ERROR IN THE TRIAL COURT'S INSTRUCTING THE JURY ON ACCOMPLICE LIABILITY.

Respondent contends Petitioner was barred from raising the trial court's instruction to the jury on accomplice liability since Petitioner failed to object at the trial. Admittedly, Petitioner did not enter an objection during the court's charge on law but Petitioner's counsel moved for directed verdict, arguing the State has not proven the elements of accomplice liability since Petitioner had no prior knowledge of any crime committed (stolen drugs) or to be committed (underlying offenses of kidnapping, robbery and the murder of Cameron). (R., p. 718, 10.25). Petitioner argues the motion for directed verdict should be considered as an objection against the jury instruction. The purpose of a motion for directed verdict is to ask the court to render a verdict against the non-moving party, without giving the case to the jury. Here, the State expressed at the start of the trial it was going to prosecute Petitioner under the doctrine of accomplice liability. Petitioner's motion has the same objective as challenging the State's theory on the doctrine. The trial judge's denial of Petitioner's motion is tantamount to a denial of Petitioner's objection against accomplice liability jury trial instructions.

Petitioner maintained this challenge when he objected to the inclusion of the discussion on kidnapping and robbery in the State's closing argument. He continued his objection in his Motion for New Trial dated September 5, 2017. (R., p. 11). He reiterated his arguments in his Amended Motion for New Trial (R., p. 351-354) and Addendum to the Motion for New Trial. (R., p. 402-405). Petitioner has consistently objected on the aforesaid issue. Therefore, the issue

on the trial court's instruction to the jury on accomplice liability is not procedurally barred, and the Court of Appeals failure to resolve the same was a reversible error.

II.

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

Aside from reiterating its position on the issue of instruction as being procedurally barred, which Petitioner has addressed in the previous section, Respondent notes Petitioner contends that in citing the doctrine laid down in Wilds v. State, Petitioner raised an argument that was not "properly presented and preserved for the inclusion to the petition." (Return, p. 6). Petitioner disagrees.

The trial court nitpicked the facts of this case, giving credence and weight on those favorable to the State, while ignoring those presented by Petitioner. Petitioner went on to illustrate his position by showing how the trial court allowed Respondent to vacillate in its position: first by arguing that Petitioner was guilty under the "natural and probable consequence" rule and then switching to the statutorily required mental state ("Intent") by attempting to prove intent and malice on the part of Petitioner, all while ignoring Petitioner's duress and self-defense arguments. It was in this context that Petitioner cited the doctrine laid down in *Wilds v. State* that prohibited charging accomplice liability when the evidence of the case was not taken in its entirety.

Contrary to the State's position, the only unequivocal evidence presented in this case is Curry was the shooter as he has admitted to this fact. Whether Petitioner had prior knowledge of the alleged underlying offenses (i.e., kidnapping and robbery) or was acting in concert with Curry in the shooting of Cameron, was not established by any standard or legal burden of proof.

Without weighing the evidence, the mere presence of Petitioner at the scene of the crime does not evince "acting in concert" with the shooter. Even the act of Petitioner in driving Curry to Gambrell, does not by itself, show he concurred, agreed, or affirmed Curry's actions.

In essence, Petitioner posits while "the law charged the jury is determined by evidence presented", the evidence should not be taken out of context and should be presented and evaluated in its totality. There was simply no testimony of a plan to bring back the victim unwillingly. There was no allegation they planned to take money either. The State injected robbery and kidnapping because without them, accomplice liability fails. The only person to use those terms was counsel for the State. In addition, the elements of both were not portrayed.

The State's case hinged upon the testimony of the shooter himself who has presented varying description of the events that transpired during the day of the shooting. The trial judge has however focused on the version that supported the State's theory. Thus, Petitioner maintains the trial court improperly charged Petitioner with accomplice liability and the doctrine of *Wilds v. State* applies.

III.

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

Respondent claims "evidence shows Petitioner was knowingly engaged in the conspiracy to kidnap or rob the victim", and further alleged "evidence was presented to show that…both were armed." (Return, pp. 9-10).

Again, the operative words here are knowledge and conspiracy. To establish these elements, the State introduced the shooter himself, Curry, as its main witness. Curry testified to the following: (1) Petitioner had no knowledge of the stolen cocaine; (2) the gun was given to

him (and him alone); (3) Petitioner was not aware that Curry was carrying any weapon when they left Gambrell's house; (4) when Petitioner saw Curry's gun, Petitioner convinced the latter to leave the gun in the car; (5) Petitioner was not aware that Curry was carrying another weapon; (6) Curry shot the deceased to defend himself; (7) Curry knew where Appellant's mother's lives; and, (8) Petitioner did not take part in the shooting.

The State had not presented any evidence, outside of Curry's unreliable testimony, that Petitioner had prior knowledge of the stolen item nor separate instruction for Curry prior to his return to Cameron's house. Petitioner ferrying Curry was not in furtherance of Curry's aim to (1) get the money/drug, (2) forcibly bring Cameron to Gambrell's house; nor (3) to kill Cameron. Petitioner's actions were acts of self-preservation. He testified he attempted to leave only to drop the keys on the floorboard of the car-allowing Curry to get in the car. Petitioner's subsequent actions-failing to resist or object to ferrying Curry and/or reporting him to the authorities-- did not show consent, voluntariness nor willingness to help Curry. Petitioner's actions were seemingly those of someone who was fearful for his life and that of his mother.

The evidence presented does not prove murder through accomplice liability. Based on Curry's testimony, he was the only one who shot Cameron; that the shooting was unplanned and that it was a knee jerk reaction to Cameron's aggressive conduct. The State failed to provide clear and convincing evidence Petitioner intended to commit, or has committed a felony, nor that he acted in unity with Curry (and Gambrell). In the absence of evidence showing Petitioner had prior knowledge of the underlying offenses alleged by the State and failing to show Petitioner's intent to assist or encourage Curry in shooting Cameron, his driving Curry is not sufficient circumstantial evidence that would reasonably tend to prove Petitioner's guilt. The evidence was not sufficient to prove that Petitioner associated himself with, agreed to engage in some

affirmative conduct designed to aid Curry shooting Cameron to his death. At most, the evidence may only raise suspicion of him being an accessory after the fact, but he was not indicted, charged, nor convicted of the same. It has been well-established a trial judge should grant a directed verdict when the evidence merely raises a suspicion that accused is guilty. State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004); State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984). Thus, Petitioner was entitled to a directed verdict.

IV.

THE COURT OF APPEALS IMPROPERLY FOUND PETITIONER'S ALLEGATION OF TRIAL JUDGE'S BIAS WAS NOT PRESERVED FOR REVIEW.

As its fourth argument, Respondent avers Petitioner's claim of judicial bias was "unpreserved for appellate review". What the Respondent and the Panel ignored is the fact Petitioner filed a Motion for New Trial in September 5, 2017 and again in December 21, 2018 (amending the same in December 27, 2018), and in both instances, he raised the issue of the trial judge's lack of neutrality by questioning his (1) apparent zealousness in convincing Gambrell (whose attorney was present in the courtroom) to invoke the Fifth Amendment (R., pp. 11.12, 355, 359); (2) denial of Petitioner's motion for continuance preventing Petitioner from presenting his witnesses (R., p. 14.16); (3) failure to rebuke the prosecution's untimely disclosure of information material to Petitioner's defense and allowing these to be placed in record, (R., p. 152. 156); (4) conclusory statements (relating to robbery and kidnapping) during the trial (R., p. 354).

Petitioner is aware of the general rule that where bias and prejudice of a trial judge is claimed, the issue must be raised when the facts first become known and, in any event, before the matter is submitted for decision." Butler v. Sea Pines Plantation Co., 282 S.C. 113, 122-123, 317 S.E.2d 464, 470 (Ct.App. 1984). In this case however, it is the totality of the trial judge's action

and rulings during the trial that is at issue, and not just one ruling. Furthermore, the tone and tenor of the trial judge's remarks concerning the accomplice liability charge and testimony of Gambrell foreclosed any objections from the defense. A clear example of this is the trial judge's statement in initially denying Petitioner's request to have the video of Gambrell's police interview is the following:

> THE COURT: Well, let me think about that on the hand of one, hand of all. But here are my thoughts on that. First, I don't think that it exculpates your client, the reason being --I think that they had a criminal enterprises regardless of the shooting; that is, 'go get him', go get this man, go get the drugs or go get the money like he said and the other officers testified to.
>
> If the jury finds that to be the case, that's a illegal plan or scheme in that they have --the cases are replete with the nexus between drugs and guns, also drugs and violence.
>
> So, if you look at the charge of hand of one, hand of all, it says that "if two people join with another to commit an unlawful act
> then they are responsible for everything done by the other person which happens as a probable or natural consequence of the act(s) in carrying out the common plan or purpose."
>
> So therefore -- although I think probably that your client did not know that a gun—that he was going to shoot this fellow, but—the cases recognize the connection between guns, drugs and violence where the plan was illegal and it just spiraled out of hand.
>
> So, the jury may believe that he was an innocent bystander, but that's my belief as to why the video of Mr. Gambrell does not exculpate your client. "

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

This statement was made by the trial judge, mid-trial, and without viewing the video prior to denying Petitioner's request. Furthermore, the trial judge has clearly made-up his mind about the alleged criminal enterprise long before charging the jury with the accomplice liability doctrine. (R. p. 617, 1.19).

The Judge's comment was made prior to hearing other witnesses for the defense.

> "THE COURT: This isn't necessarily an accomplice, but it's the hand of one, hand of all. I deny the Motion.
>
> I think that there are sufficient facts in the record that a jury can determine—although he 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. So I deny your Motion. "

(R. p. 718, 22.25 & p. 719, 1.7).

Note that the judge used the term "criminal conspiracy" when the State has yet to prove an agreement

Finally, contrary to Respondent's assertions, Petitioner sought relief on the issue of bias when he moved for mistrial based on the judge's denial of right to present his witnesses (i.e. Quay). (R., p. 719, 8.25). Thus, Respondent's averments of waiver of alleged error on the part of Petitioner does not hold water.

V.

THE COURT OF APPEALS ERRED IN NOT FINDING THAT PETITIONER WAS DENIED DUE PROCESS WHEN IT FOUND TRIAL COURT DID NOT ABUSE ITS DISCRETION BASED ON PROSECUTORIAL MISCONDUCT.

Respondent avers the issue raised by Petitioner with regards to prosecutorial misconduct in his Petition for Certiorari differs from the issue he has raised from the trial court's abuse of discretion in denying his Motion for New Trial. (Return, p. 12). Petitioner submits there is no such variation because both of which refers to the prosecutor's misconduct and abuse of discretion on Petitioner's case.

In his Motion for New Trial, Petitioner argued the trial court abused its discretion in denying the new trial by reason of the prosecutor's misconduct in handling of this case. The

standard for review of abuse of discretion is "'where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that without evidentiary support." McClurg v. Deaton, 380 SC 563 (S.Ct. App. 2008) citing BBT v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 502-503 (2006).

In his Appellant's Brief, Petitioner maintained the prosecutor's actions—charging different offenses against co-accused, deferring sentence of a co-accused to testify against alleged co-conspirators—infringed on Petitioner's constitutional rights to due process and fair trial. The Court of Appeals did not find trial court abused its discretion in denying the motion for new trial; and upheld the State's broad prosecutorial discretion. (Unpublished Order, p. 2). In effect, the Court of Appeals ruled out Petitioner's claim he was denied fair trial and/or due process.

While it is true that prosecution has vast prosecutorial discretion, it is not without limits. In its exercise of discretion, the prosecutor violated the law foremost of which is Rule 3.8(d) of the Rules of Professional Conduct. The prosecution failed to make timely disclosure to the defense of information and/or witnesses that may exculpate Petitioner. The prosecution failed (1) to inform Petitioner and/or his counsel of the meetings that transpired between the team and Curry; (2) turn over 59 hours of surveillance video which they were in possession of for 14 months prior to the trial; (3) inform the Petitioner of details of plea bargain in violation of the Brady rule. Furthermore, the prosecution has deliberately misled the trial judge and the defense when it offered it would defer Curry's sentencing until after Petitioner's trial, and then turn around and extend the same for a year to enable him to testify against Gambrell.

With regards to Respondent's claim Petitioner failed to show State knowingly offered an unreliable witness, Petitioner has cited Respondent had initially lied about Petitioner being the

shooter. (R., p. 806, 16.25 & p. 807, 1.2). Throughout the trial, Curry has provided conflicting testimonies and yet, the prosecution did not remove him as a state witness and continued to use him to testify against Gambrell in the latter's trial.

> A conviction acquired through the knowing use of perjured testimony by the prosecution violates due process. See Napue v. Illinois, 360 U.S. 264, 269 (1959). This is true regardless of whether the prosecution solicited testimony it knew to be false or simply allowed such testimony to pass uncorrected. See Giglio v. United States, 405 U.S. 150, 153 (1972); Napue, 360 U.S. at 269. The knowing use of perjured testimony constitutes a due process violation when "'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Kyles v. Whitley, 514 U.S. 419, 433-34 (1995) (quoting United States v. Agurs, 427 U.S. 97, 103 (1976)).

United States v. White, 238 F.3d 537, 540-41 (4th Cir. 2001).

VI.

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

Contrary to the State's claims Petitioner did not raise the scope of Curry's plea bargain as issue for appeal., Petitioner alleged this matter in his Appellant's Brief, albeit not in a detailed way. Petitioner avers,

> First according to the prosecution's star witness, Curry met with the prosecution team, three times. Marzolf was in at least one of these meetings. The prosecution provided no recording, or failed to make one, of the time they visited Curry to speak to him on his manslaughter deal. Appellant's counsel received two video interviews, but the Solicitor withheld (or conveniently did not make) the third. Appellant was not shown the video, or any other evidence, of what exactly the prosecution offered Curry.

(R. p. 278).

As the United States Court of Appeals for the Fourth Circuit explained in *Campbell v. Reed*, 594 F.2d 4 (4th Cir.1979):

> The fact that [the witness] was not aware of the exact terms of the plea agreement only increases the significance, for purposes of assessing credibility, of his expectation of favorable treatment. . . [A] tentative promise of leniency might be interpreted by a witness as contingent upon the nature of his testimony. Thus, there would be a greater incentive for the witness to try to make his testimony pleasing to the prosecutor. That a witness may curry favor with a prosecutor by his testimony was demonstrated when the prosecutor renegotiated a more favorable plea agreement with [the witness] after [the defendant] was convicted. *Id*. at 7-8 (internal citations omitted). *See Boone v.* 351 *Paderick*, 541 F.2d 447, 451 (4th Cir.1976). *351

As cited in Wilson v. State, 363 Md 333 (MD2001), 768 A.2d 675 (Mar. 9, 2001).

Respondent further contends Petitioner knew the terms of Curry's plea as he made use of the same on cross-examination. However, it has long been established that cross-examination of the witnesses regarding inducements to testify does not substitute for adequate disclosure. *See Reutter v. Solem,* 888 F.2d 578, 581 (8th Cir.1989); *Sutton,*542 F.2d at 1243; *Boone,* 541 F.2d at 451 (noting that "no matter how good defense counsel's argument may have been, it was apparent to the jury that it rested upon conjecture — a conjecture which the prosecutor disputed"); *Commonwealth v. Collins,* 386 Mass. 1, 434 N.E.2d 964, 971 (1982), as cited in Wilson, supra.

A number of states have abided by Napue/Agurs strict standard of materiality for perjured testimony, which is that a reversal of a conviction is warranted if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury". Agurs, 427 U.S. at 103, 96 S.Ct at 2397, 49 L.E.2d 342, as cited in Wilson, supra. The Court in *Wilson* cited Jimenez, 918 P.2d at 687, where the witness denied having received benefits from the State in exchange for his testimony on the stand when in fact, he was a police informant and his criminal charges were dismissed by the police for his testimony, as an example wherein the Supreme Court applied the strict standard of materiality, adjudged witness' testimony as "at best inaccurate and at worst perjury", and set aside the conviction of therein petitioner. *Id. at 694.*

Petitioner emphasizes the doctrine laid down in Giglio as follows, "when the government depends almost entirely on the testimony of a key witness to establish its prima facie case and the witness' credibility, therefore it is an important issue, 'evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility." Giglio, 405 U.S. at 154-55, 92 S.Ct. 763, 766, 31 L.Ed.2d 104, as cited in Wilson, supra. In the instant case, in failing to disclose the plea agreements that it had with Curry and considering the ever-changing and misleading testimonies by Curry in both Petitioner and Gambrell's trial, the State failed to fulfil its constitutionally mandated obligation to disclose any favorable evidence material to the defense. Curry believed his leniency was dependent on the *success of the prosecution in the two (2) cases in which he testified.* Hence, his testimony changed to fit the defendant.

VII.

THE COURT OF APPEALS ERRED IN NOT FINDING ABUSE OF DISCRETION IN THE TRIAL JUDGE'S DENIAL OF PETITIONER'S MOTION FOR A NEW TRIAL.

In its seventh argument, Respondent argues that Curry's inconsistent statements are merely cumulative or impeaching, while the affidavits of Curry and Gambrell do not qualify to support a new trial. (Return, p. 16). Petitioner states otherwise.

Respondent asserts the detective's reference to Cameron's neighbor overhearing a discussion between Cameron and an unidentified person wherein the word "dirt bike" was mentioned, as having no exculpatory value. Petitioner maintains this information is material and exculpatory. First, because it proves lack of motive of herein Petitioner. This information has the effect of corroborating Petitioner's testimony that he only knew of the transaction involving the bike and negating Respondent's theory he drove to Cameron's with intent to steal, kidnap or rob the latter.

Secondly, this information shows the State's tendency to conceal evidence. This information was offered by Detective Marzolf in his testimony during Gambrell's trial. (R., p. 804, 20.25 & p. 805, 1.21). This was never mentioned during Petitioner's trial.

Respondent also argued Gambrell's Affidavit, in which he belied Carver had any gun, was being insignificant since "no one suggested that Petitioner used a separate gun during the event". (Return, p. 18). This argument runs in conflict with the State's very own narrative in its Statement of the Case. (Return, p. 3). Again, this is a testament to the State's constricted version of "totality of circumstances".

This evidence is material and not merely cumulative or impeaching. In citing Curry's inconsistent testimonies where in one case, he says Petitioner brought his own gun; and in the second case, Curry stated he brought Gambrell's guns back to him. This is not merely impeaching his previous testimony during Petitioner's trial. This is an undisputable proof he manufactured his testimony. Thus, it is not just the credibility of Curry that was placed in issue but the truth/veracity of the facts of the record as presented by Respondent. During his testimony in Gambrell's trial, Curry added information that he did not testify to in Carver's trial (i.e. Curry calling Gambrell to 'report' about the shooting). Curry's testimony was offered not as an exercise of truth-seeking function, but to be the mouthpiece of the State, to sink whoever defendant he was supposed to testify against, and an attempt to make his testimony pleasing to the prosecutor.

Curry's Affidavit proves Petitioner's claims. (R., p. 397). This after- discovered evidence included the elements of drug trafficking, a most violent offense, as Curry discussed how the prosecution suggested "it would look better if I testify against Carver". (R., p. 278). In the same breath, Curry admitted the prosecution dropped the drug trafficking charges against him

after he testified during Petitioner's trial. (R., p. 278). This evidence showed Curry would be willing to say anything to aid in his sentence reduction.

Petitioner reiterates the above-mentioned after-discovered evidence is relevant and material, and sufficient to change the result if a new trial had been had. The jury did not have all the evidence related to Petitioner's case. Had the jury been made aware that Curry, the shooter, received a reduction in his sentence for the murder and the dismissal of separate drug charges, some of the jurors could have a different perspective of Curry's testimony, while some might treat his testimony questionable or useless. The jury did not to know he testified at two trials and received a great reduction on two cases- one of which did not even relate to this case.

The trial court, the jury as well as Petitioner were also misled as to his sentencing. It was clear during Curry's plea bargain hearing that his sentence was to be meted after his participation in Appellant's trial. (R., p791, 12.17). This was not the case. The idea Curry had not been sentenced for his charge can only mean the sentence was the manner in which to mold his testimony for Gambrell's trial. The State did not sentence Curry so he would be compelled to testify in favor of Respondent. Curry's Affidavit stated the prosecution team let him plead to Voluntary Manslaughter despite shooting Cameron for no reason. It implied they met with him on several occasions and told him "it would look better if he testified against Carver." For Gambrell, they met with him again despite fact he already testified. They gave him question and discussed the questions. They inferred they would not have a problem suggesting 15 years. (R., p. 278). Whether or not it is true, does not matter. The open-ended sentence led Curry to believe he could still help himself by helping the prosecution.

VIII.

IN ITS LIMITED SENSE, THE DOCTRINE LAID DOWN IN STATE V. CAMPBELL IS APPLICABLE TO THE INSTANT CASE.

Respondent challenges Petitioner's assertions that the trial judge's comments on the three accused engaging in a drug transaction as "part and parcel" of his ruling and should not be considered as instruction. Petitioner counters *Campbell* did not make any distinction which kind of statement may or may not be covered as "improper court-sponsored emphasis of a fact in evidence". For as long as the trial judge has directly commented upon the facts in evidence without even viewing the same, speaks of bias.

Furthermore, the fact the prosecution and the trial court focused on some parts of Curry's testimony while ignoring his conflicting statements, contradicts the doctrine laid down in Barber v. State393 S.C. 232, 712 S.E.2d 436, 438 (2011), State v. Washington, 431 S.C. 394, 406, 848 S.E.2d 779, 785 (2020), and Wilds v. State, 407 S.C. 432, 756 S.E.2d 387, 391 (Ct. App. 2014), stated, "an alternate theory of liability may not be charged to a jury merely on the theory may believe some of the evidence and disbelieve other evidence. The Appellate Court in Campbell reiterated, "for an accomplice liability instruction to be warranted, the evidence must not be 'equivocal on some integral fact and the jury [must have] been presented with evidence upon which it could rely to find the existence or nonexistence of that fact." Washington at 407, 848 S.E.2d at 786 as cited in ***Campbell, supra.***

In this case, the important elements of unity of intent, purpose and action with respect to Petitioner's involvement in Curry's shooting, were not established, and ambiguous at best. The State witness offered conflicting, unreliable statements. The one person who can provide information (e.g. specific instructions given to each accused) was not allowed to testify. The trial judge glossed over Petitioner's defenses (i.e. lack of knowledge of stolen cocaine due to physical impossibility; non-participation in the commission of the crime, and grave threats to Petitioner and his mother's lives). Prosecution time and again pushed for consideration of the totality of

circumstances, but only applied the same to their theory of the case. As such, Petitioner believed if the trial court used the same manner of evaluating the evidence presented in this case, it would be clear there was no sufficient evidence to support the application of the accomplice liability.

CONCLUSION

For these reasons, as well as those addressed in his Brief to this Court, Petitioner respectfully requests reverse the decision of the Court of Appeals, and set aside the trial court's ruling for violation of Petitioner's due process, and/or remand the case for new trial. Allowing a man to be sentenced to thirty (30) years when it is undeniable his co-defendant Curry worked in conjunction with the State to prevent a fair trial would be catastrophic.

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