

VOLUME III OF III

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Dec 05 2022

S.C. SUPREME COURT

Certiorari to Beaufort County

Honorable Robert J. Bonds, Circuit Court Judge

AUSTIN MCQUARTERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000628

APPENDIX

KATHRINE H. HUDGINS
Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

LAUREN MIMS
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

INDEX

INDEX	i
TRIAL TRANSCRIPT DATED JULY 20-22, 2015.....	1
TRANSCRIPT OF MOTION FOR A NEW TRIAL AFTER DISCOVERED EVIDENCE DATED AUGUST 12, 2015.....	570
COURT’S EXHIBIT #1 (SUPPLEMENTAL REPORT)	611
MOTION TO VACATE CONVICTION AND ORDER NEW TRIAL	616
RESPONSE TO DEFENDANT’S MOTION TO VACATE CONVICTION AND ORDER NEW TRIAL	618
INDICTMENTS AND SENTENCE SHEETS.....	623
TRIAL TRANSCRIPT DATED FEBRUARY 17-19, 2015 ENDING IN HUNG JURY	629
FINAL BRIEF OF APPELLANT	1058
FINAL BRIEF OF RESPONDENT	1074
<u>STATE V. AUSTIN MCQUARTERS</u> NO. 2017-UP-320 (S.C. CT. APP FILED AUGUST 2, 2017).....	1098
APPLICATION FOR POST-CONVICTION RELIEF FILED JANUARY 29, 2018.....	1100
RETURN AND PARTIAL MOTION TO DISMISS FILED MAY 3, 2018	1107
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED MARCH 10, 2022	1113
ORDER OF DISMISSAL FILED APRIL 27, 2022.....	1147

State v Austin McQuarters
Proceedings
February 19, 2015

1 at the outset of the trial that in the opening statements
2 the attorneys were not permitted to engage in argument.
3 Well we've reached the point now where they are permitted
4 to use the art of advocacy to attempt to get you to see
5 things as they would like you to see them on behalf of
6 their respective positions. That doesn't change the
7 burden of proof. The burden is entirely on the State as
8 I will tell you repeatedly and have already told you.

9 Now I always take a break between when they finish,
10 when the lawyers finish talking and when I start. I get
11 set up and move some things around and get ready.
12 Sometimes I take a break between the arguments; it just
13 depends on how long the attorneys talk. So we'll play it
14 by ear.

15 But after the closing arguments are finished we'll
16 take a brief recess. I'll bring you out here. I'll tell
17 you the law; it's going to take me about 26 to 28 minutes
18 to tell you the law based on what I've got now and then
19 shortly after that the case will be given to you to
20 decide. I invite your close attention. Solicitor,
21 you're recognized for your closing argument.

22 MS. CONCANNON: Thank you, Your Honor. May it
23 please the court?

24 THE COURT: Yes, ma'am.
25

State v Austin McQuarters
Closing Argument-By Ms. Concannon
February 19, 2015

1 CLOSING ARGUMENT

2 BY MS. CONCANNON:

3 At the beginning of this trial I told you that you
4 were going to hear pieces of a puzzle. And I asked that
5 you listen carefully to all of the testimony and all the
6 evidence you saw and take each piece and put it together
7 and at the end you would have a complete puzzle and that
8 would show that Austin McQuarters is guilty.

9 I'm going to take you back piece by piece to every
10 piece of this puzzle that we saw. It started with Deputy
11 Brian Michael. He was the first to respond on the night
12 of October 20th, 2013 to the movie theatre on Hilton Head
13 Northridge Cinemas. When he got there he found the
14 victim, John Snodgrass beaten and bloody inside the movie
15 theatre.

16 Mr. Snodgrass came out and gave a description of who
17 attacked him and what happened immediately prior to the
18 attack. Deputy Michael canvassed the area. He searched
19 for suspects, he attempted to get surveillance footage;
20 he couldn't find anything. Mr. Snodgrass was then taken
21 to the hospital.

22 Next you heard from the victim himself. Mr.
23 Snodgrass took you back to that night. He told y'all
24 he's the manager of the movie theatre and one of his
25 duties as a night manager is closing. Part of that duty

State v Austin McQuarters
Closing Argument-By Ms. Concannon
February 19, 2015

1 is taking the money that they took in that day and taking
2 it to the bank. He grabs his keys, he grabs the mail and
3 he grabs that bank bag and he starts to walk to his
4 truck.

5 Well on his way to his truck he sees a small two-
6 door car backed into a parking spot. Everything seems
7 okay and he doesn't really think anything of it and then
8 all of a sudden he sees a large black male pop up from
9 the side of this car. The man approaches him and he
10 starts to feel a little bit uneasy. So the man
11 approaches him and starts asking him questions. These
12 questions seem to be appropriate to Mr. Snodgrass; he's
13 asking about movie times. Well, he's at a movie theatre;
14 of course he's going to be asking those questions.

15 But then everything changes. Mr. Snodgrass takes
16 his eyes off this man. The man reaches above his head,
17 first behind his back then over his head and strikes him
18 in the head. Another blow comes to Mr. Snodgrass and
19 he's knocked to the ground. He eventually blacks out.

20 He wakes up and comes to and gathers what's still
21 left around him and realizes that the piece of mail, this
22 package he was trying to deliver and the money bag
23 carrying roughly 2,400 dollars is missing. The victim
24 described the first hit as tremendous pain. He described
25 it as metal hitting his skin. It was so painful. He

1 knew it was metal that hit his skin. Eventually after
2 he's in the hospital for a couple of days he's able to
3 speak to Investigator Seifert and he tells Investigator
4 Seifert some names of employees that are working at the
5 movie theatre that night.

6 That brings us to Minor 1 I want to talk
7 to you briefly about Minor 1 and Jackie. You heard from
8 both of them yesterday. This is real life, these are
9 real events, these are real people. This isn't a movie,
10 this isn't a play, this isn't a T.V. show. I can't pick
11 and choose my characters that I put on that witness
12 stand. I have to deal with the cards I'm dealt and
13 that's Jackie and Minor 1 Had it been a movie or a T.V.
14 show it would have been different.

15 But we had to put Jackie and Minor 1 up there because
16 they knew the most about that night. Minor 1 told you
17 he's 17 years old, he's a student at Bluffton High
18 School, he was friends with Austin McQuarters and he was
19 friends with Jackie Perez. He said the night of October
20 20th he was working at the theatre that night.

21 Austin and Jackie came to the theatre that night.
22 They talked to him for a little bit. He gave some
23 information to Austin. He told him look, I can't give
24 you this money but if anyone is going to have money
25 tonight it's going to be that guy right there, my boss.

State v Austin McQuarters
Closing Argument-By Ms. Concannon
February 19, 2015

1 Minor 1 finishes up his shift for the night and he goes
2 home. But what's important is that he said that Jackie
3 and Austin were still backed in that parking spot when he
4 left.

5 He also told you how the next day he learned just
6 how brutal the attack on his boss was. He called Austin
7 and he asked him about it. Austin said yeah, I ran into
8 some money at your work. I robbed your boss and I used
9 brass knuckles. That was the metal that John Snodgrass
10 felt on his head was the brass knuckles hitting his skin.

11 Jackie Perez. She was charged with armed robbery.
12 She was arrested; same time and same facts. She still
13 has charges pending. She told you that she's testifying
14 because it's the right thing to do. She knew she had to
15 tell the truth because it was the right thing for her to
16 do was get on that witness stand and take you back to
17 that night.

18 So she took you back to that night. She said that
19 that night Austin came to her work. She was working at
20 McDonalds over in Bluffton. She said he came and they
21 talked a little bit and he asked her for a ride to the
22 movie theatre. So she said okay and she took him to the
23 movie theatre. She thought he was going to meet someone.
24 She said they both talked to Minor 1 separately. Minor 1
25 left and they stayed around. She was in her driver's

1 seat. Austin was crouched on the hood of her car by that
2 driver's side tire. She sees this man that she doesn't
3 know walking down the aisle toward them. All of a sudden
4 she sees Austin pop up approach the man and start talking
5 to him. He asked him a couple of questions then he
6 starts and he punches him repeatedly, knocks him out, he
7 grabs what he drops, jumps Jackie car. She specifically
8 remembered a grey bank bag and a postal envelope and they
9 leave.

10 Next you heard from Investigator Seifert. He told
11 you a little bit about the investigation and what the
12 Sheriff's Office did that day and the following days.
13 And he also told you he talked to Austin. And Austin
14 took you back to that night. That same exact night
15 October 20th, 2013 around closing time of the movie
16 theatre, he meets a girl that he doesn't know. He says
17 he doesn't know who she is but she has long brown hair
18 and she drives a small two-door red car.

19 Well, she takes him to the movie theatre. He talks
20 to his home boy **Minor 1** **██████████** tells him the movies that
21 are playing. They're playing, you can't go see them
22 anymore; sorry I can't get you in a free movie. **Minor 1**
23 leaves, Austin and Jackie leave but Austin knows nothing
24 about the robbery. He has nothing to do with it. You
25 heard a little bit from Doctor Snowman. He treated Mr.

State v Austin McQuarters
Closing Argument-By Ms. Concannon
February 19, 2015

1 Snodgrass at the hospital that night. He told you a
2 little about his injuries. He had linear lacerations.

3 [Whereupon, photos are shown]

4 MS. CONCANNON: These are the injuries that he
5 treated that night at the Hilton Head hospital. Here's
6 another one of Mr. Snodgrass's injuries. Mr. Snodgrass
7 told you that he lifted his hands in defensive mode after
8 the first blow came. Look at these injuries. Look at
9 these pictures and use your common sense.

10 Now you may be wondering why on earth should you
11 believe anything that came out of the mouth of any of
12 those people; especially the two, especially Jackie
13 Perez, especially **Minor 1** Why should you
14 believe them? You believe them because it makes sense.
15 You believe them because they all corroborated each
16 other. It makes sense.

17 John Snodgrass and Jackie both said that Austin
18 McQuarters was wearing dark clothing that night, he
19 didn't have a hat on. John Snodgrass described the man
20 who attacked him as a large man maybe 6 foot maybe 200 to
21 250 pounds and dark clothing. Austin said that night he
22 was wearing dark clothing. Mr. Snodgrass, Jackie,
23 **Minor 1** and Austin McQuarters all said it was a small
24 two-door car. Jackie drives a small two-door car. They
25 all said it was backed into the spot that night. This is

State v Austin McQuarters
Closing Argument-By Ms. Concannon
February 19, 2015

1 the car that was backed into the spot that night.

2 [Whereupon, photograph is shown]

3 MS. CONCANNON: That is the side where Austin was
4 sitting waiting. Jackie, Austin McQuarters, Minor 1 and
5 John Snodgrass all said that this happened late at night.
6 This was a night time event. The movies had already
7 begun showing. No other movies were starting for the
8 night. This happened around closing time.

9 Jackie says while she was sitting in her car she saw
10 Austin pop up and approach this man. She couldn't even
11 remember his name. John Snodgrass said the same thing.
12 He popped up out of nowhere and approached him. He asked
13 him some questions; questions that at the time seemed
14 reasonable.

15 Jackie says that's when the blows come. That's
16 exactly what Mr. Snodgrass said as well; that's when the
17 blows come. John Snodgrass said it was maybe one, two,
18 and then he doesn't remember anymore. Jackie says it was
19 more like three or four. He drops and he falls to the
20 ground. Jackie remembers Austin throwing a white with
21 red and blue postal envelope in her car as well as a grey
22 pouch or zip up bag in her car as well when he got in
23 that car. Those are the exact items that John Snodgrass
24 said were taken from him that night. You can believe
25 what they told you because it makes sense. Everything

State v Austin McQuarters
Closing Argument-By Ms. Concannon
February 19, 2015

1 flows together. Everything in combination makes sense.
2 Take it apart one by one maybe not. But you put it in
3 conjunction with each other it makes sense.

4 Austin McQuarters is charged with armed robbery and
5 assault and battery in the first degree. On the night of
6 October 20th of 2013 he robbed John Snodgrass of 2,400
7 dollars and he used brass knuckles to accomplish that
8 robbery. How do we know he used brass knuckles? John
9 said he felt metal. **Minor 1** said Austin told him he used
10 brass knuckles. And he took that bag with 2,400 dollars.

11 Assault and battery first degree; you heard about
12 the injuries sustained by John Snodgrass that night. He
13 was beaten bad. It was bad. It was so traumatic he had
14 to be transported to Savannah because he had bleeding on
15 his brain that night. And that assault and battery
16 happened during the robbery.

17 At the beginning of this trial Mr. Bax stressed this
18 is Austin McQuarters day in court. He's right. I one
19 hundred percent agree with him. He is right. Today is
20 Austin's day in court, not **Minor 1** It's not
21 Jackie Perez's day in court. It's Austin McQuarters day
22 in court. This trial is about that man [indicates] and
23 the actions he took the night of October 20th, of 2013.
24 So I ask that you remember that when you deliberate. You
25 remember everything you heard off of that witness stand

State v Austin McQuarters
Closing Argument-By Ms. Concannon
February 19, 2015

1 and you put it together. And I'm confident that when you
2 do you will not hesitate and you will find Austin
3 McQuarters guilty. Thank you.

4 THE COURT: Thank you, Solicitor. Mr. Bax you are
5 recognized for your closing argument.

6 MR. BAX: Thank you, Your Honor. May it please the
7 court?

8 THE COURT: Yes, sir.

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

State v Austin McQuarters
Closing Argument-By Mr. Bax
February 19, 2015

1 CLOSING ARGUMENT

2 BY MR. BAX:

3 Good morning ladies and gentlemen. First of all
4 thank you for your attention. We appreciate it;
5 everybody does. This -- hopefully we make it look easy
6 but it's not. As anyone can tell you and as I'm sure
7 you have experienced it's not always standing up and
8 talking to people you don't know. But I appreciate your
9 attention.

10 I feel like you've been a very good jury and that's
11 why we go through the process of picking. And I know
12 that you had better things to do than to be here
13 especially due to the fact that we can't seem to keep the
14 temperature right in here. I don't know what's up with
15 that. But I presume at this point it's warmer in here
16 than it is out there.

17 I talked to you at the beginning of this case about
18 the fact that the prosecution has described a story.
19 They talked about what happened to Mr. Snodgrass that
20 night. I talked to you about the fact that in a jury
21 trial in our system though it's not just about one story.
22 It's not just about one side and it's not for your
23 entertainment. And I think you've all seen that. But I
24 want to talk to you about stories again because what
25 you've seen here on the stand presented by the

1 prosecution is some stories. And I mean stories; you
2 know what I'm talking about. This case is based almost
3 one hundred percent on the stories of liars. It's based
4 on the stories of admitted proven liars.

5 Now Ms. Concannon indicated that these are the cards
6 that she's dealt. Well, they're cards all right. They
7 are cards with two faces on them if you look at it.
8 There's the face of get me out of trouble and then
9 there's the face of let me just tell enough to get
10 somebody else in trouble and get myself out of trouble.

11 Now Ms. Concannon said the reason we should believe
12 them is that they make sense. Well frankly I feel like
13 you're too intelligent to say that to you because they
14 didn't make sense and you saw it. In your mind do you go
15 up to the window and talk to somebody you know and say
16 where's the bread if you're not involved with a robbery
17 that is about to happen? Does that make sense? No.

18 Do you talk to somebody that you supposedly know
19 that you're friends with, somebody that you claim came up
20 and talked to you about money and say I'm not going to
21 take money out of the till but my manager he always has
22 the money. But I didn't have nothing to do with it. I
23 didn't do anything wrong. I don't know what you're
24 talking about. Does that make sense? No, not at all.
25 Do you have three and four interviews with an

State v Austin McQuarters
Closing Argument-By Mr. Bax
February 19, 2015

1 investigator and finally have an interview with your
2 father standing there outside of the car who brought you
3 there and finally say yes; okay I set it up and then come
4 to court and say I don't know what you're talking about.
5 I never said that. Does that make sense? No.

6 Well, let's talk about **Minor 1** You've
7 seen his testimony. And I think I don't even have to ask
8 you to look at it critically. You've seen it critically.
9 I can't imagine I really truly cannot imagine that any
10 member of this jury or any member of the people in this
11 courtroom that witnessed it believed him. I really
12 can't. It was that bad.

13 He continued even after you heard the testimony from
14 him as well as the testimony from Investigator Seifert
15 that he lied about this from the moment that he started.
16 And then he claims that he came clean but he comes into
17 court here in 2015 almost a year and a half later and
18 continues to lie; continues to lie on the stand under
19 oath in front of you.

20 Can you believe anything someone says when they say
21 that? Especially when you look at the fact that he
22 somehow managed to lie his way out of getting charged
23 with this. Even though there is no other explanation for
24 how this could have happened unless somebody in that
25 theatre set it up because no one else would know that Mr.

1 Snodgrass would come out of there with money. No one;
2 but yet he continues to claim he didn't have anything to
3 do with it and he refuses to acknowledge that he
4 confessed that he set this up to the investigator who had
5 to interview him multiple times. Had to threaten to
6 issue warrants for him, had to get his daddy to bring him
7 down there; still won't come clean to you.

8 Now this person has lied about his own involvement
9 from the beginning to this week on the stand and yet the
10 prosecution wants you to believe that his word about what
11 my client said in a phone call after the fact proves that
12 there was some weapon and that my client was present.
13 It's fine to disbelieve. You know okay, he lied before
14 that's fine but now we want you to believe this part.
15 Don't worry about the fact that he's lied before, don't
16 worry about the fact that he's lying now and still
17 denying his involvement but believe the part we need you
18 to believe.

19 That's why we have jury trials because you're not
20 here for us specifically and you're not here for them
21 specifically. You're here to decide the facts and if it
22 violates your sense of common sense to believe one part
23 that somebody asked but not believe another part then you
24 don't have to follow what that request is. You get to
25 decide do I believe anything this person says because

State v Austin McQuarters
Closing Argument-By Mr. Bax
February 19, 2015

1 he's parched it out. One of the other things that the
2 prosecution has argued is we put them up because they
3 know the most about what happened. I absolutely agree
4 with that. Minor 1 does know the most. Jackie Perez does
5 know the most but did they tell you what they know? No,
6 they didn't. They slipped you just enough to hopefully
7 either get a deal with the prosecution or stay out of
8 jail and not get charged but not put themselves in it.

9 Let's think about what went on what we know
10 happened. Minor 1 and Jackie Perez know each other.
11 Minor 1 is the only one of these people that's worked at
12 the theatre; was working there then. Investigator
13 Seifert testified under oath that in his investigation it
14 was indicated that Minor 1 had a problem with Snodgrass.

15 Now Mr. Snodgrass may not have known about this
16 problem. He thought that he was fine with Minor 1 but
17 that's what his investigation led him to Minor 1 That's
18 where he got to Minor 1 He didn't just go to Minor 1 and
19 just pick him out of the list. There was at least six or
20 seven people working there that night. Why did he go to
21 Minor 1 Because he was the one that had a problem with
22 the boss. There is a reason. That does make sense.
23 Look at Jackie Perez; Brooklyn. She was angry that she
24 was up there. Did you see that? She had an attitude the
25 whole time. She felt like this was an imposition on her

1 to have to come and testify. She'd do what she did and
2 it's just an imposition that she even had to be here.
3 But even she had to admit she's a snitch. She's
4 snitching to get herself out of trouble. She's so street
5 but she's snitching to get out of trouble and she's
6 saying what she needs to get herself out of trouble;
7 whatever that is.

8 Now if you believe that she told everything she
9 knows that night fine. But I certainly don't see how you
10 can reasonably think that. She gave every indication of
11 holding back. I also want to point out this. Ms. Perez
12 says she was friends with my client, Mr. McQuarters. But
13 yet when she gets on the stand I'm not friends with him
14 no more. He's your client. He's not my friend; he's
15 your client despite the fact that she has clearly decided
16 to say well dump that and save myself.

17 She still didn't come in here and tell you that she
18 saw any brass knuckles or anything of the sort despite
19 the fact that she's willing to cut that, come in here,
20 snitch to save her own butt she still didn't tell you
21 that. She didn't see nor did she ever testify to any
22 object. However I submit to you Mr. McQuarters wasn't
23 even in that car at all. Let's think about that. These
24 are the only two people that have lied and been involved
25 with this from day one. They have not been consistent.

State v Austin McQuarters
Closing Argument-By Mr. Bax
February 19, 2015

1 Mr. McQuarters is the only person in this little play
2 that has been consistent. He said I didn't do it. I
3 didn't have nothing to do with it. That's the only
4 statement he's ever made; I didn't do it. He hasn't
5 changed that story, he hasn't modified it, he hasn't come
6 back, he hasn't said well okay that was a lie. But they
7 have; he hasn't.

8 Now let's remember **Minor 1** in high school with Jackie
9 they had two weeks at least after this incident to come
10 up with a story, to come up with a fall guy. Now did you
11 hear any testimony presented by the State that alibied
12 **Minor 1** for that time? No, they said he left the theatre
13 before John Snodgrass and they just take his word for it.
14 Did they present any testimony from a girlfriend at the
15 girlfriend's house to say he was even there? Nope.

16 How many people can put on a bunch of black clothes?
17 It was nighttime, it was dark. The prosecution has even
18 said that; it was nighttime, it was dark, it was
19 Northridge Cinemas with trees hanging over, no lighting,
20 no surveillance cameras.

21 Now Mr. Snodgrass we certainly do not deny and I
22 don't think anybody does that no one deserves to be
23 attacked like that; absolutely. Mr. Snodgrass is a
24 victim. But the reason that we have this system is so
25 that we make sure the right person gets punished for the

1 crime; not the wrong person. And if it cannot be proven
2 our country is founded on the idea that we will not take
3 away someone's liberty, that we have had hundreds and
4 thousands of us die for if the State cannot prove it
5 beyond a reasonable doubt to each and every one of you,
6 to each and every one of you for each of the elements
7 every single one of them because we value that freedom
8 that much.

9 It is better to let someone that may be guilty go
10 than to imprison an innocent man. Thomas Jefferson.
11 That means something. We are not a country about
12 imprisoning someone just on suspicion, just on a maybe,
13 and on a bunch of lies.

14 I want to say one final thing. As the Judge is
15 going to instruct you on the law here in just a second
16 he's going to touch on this but I want to make sure that
17 I reiterate it. We have a jury system which involves
18 more than just one person. We don't pick a one person
19 jury because we do want jurors to all listen from all
20 different aspects of the community.

21 We want a cross section of the community, people
22 that are peers of those others that live in the community
23 that may be sitting at that table. But despite the fact
24 that we put 12 people on a jury there is no requirement
25 that you change your mind just because someone else in

State v Austin McQuarters
Closing Argument-By Mr. Bax
February 19, 2015

1 the jury says something. As you will be instructed by
2 the Judge deliberations are a part of the process. Your
3 opinions are valuable and so are the opinions of the
4 others on the jury. You can consider them just like you
5 consider the evidence that has been presented before you.

6 But there is no obligation for you to change your
7 mind. If in your heart and in your mind you feel like
8 the case has not been proven and you feel like you cannot
9 convict a man based on these lies then your duty is
10 clear. And after your deliberations I think that's what
11 you're going to all find in here [indicates] that you
12 cannot convict a man and sentence him to take away his
13 liberty based on what you've been presented here today.
14 Thank you.

15
16
17
18
19
20
21
22
23
24
25

1 THE COURT: Thank you Mr. Bax. Ladies and
2 gentlemen, I'm going to send you into the jury room. You
3 won't be back there long. I'll bring you back out and
4 I'll tell you the law. Don't discuss the case yet.
5 Follow the bailiff please.

6 [Whereupon, the jury exits at 10:45 a.m.]

7 THE COURT: Thank you. We're at ease.

8 [Whereupon, court is in recess from 10:45 a.m. until
9 10:57 a.m.]

10 THE COURT: Thank you. Be seated please. We're
11 in the charge. Please stay still and stay quiet. Don't
12 do anything to distract the jury absent an emergency.
13 All right bring the jury please.

14 [Whereupon, the jury enters at 10:58 a.m.]
15
16
17
18
19
20
21
22
23
24
25

State v Austin McQuarters
Jury Charge
February 19, 2015

JURY CHARGE

BY THE COURT:

Members of the jury all the evidence has been presented and you've heard the arguments of counsel and now it's time for me to instruct you on the law that applies to the case. Please continue to pay close attention during this next phase.

First we need to understand some basic ground rules. You the jury members are the sole judges of the facts. You alone decide all issues of fact. You alone evaluate the truth of the evidence, its effect, its value and its weight. You alone judge the creditability of witnesses, in other words whether or not a witness's testimony is believable.

In that regard you may believe all that a witness said or none of it. You may believe part of what a witness said and not believe the balance. You may believe one witness against many or many against one. You may consider any interest, bias, or prejudice that you feel that a witness has in the case.

You may consider the demeanor and the appearance of the witness and the opportunity for knowledge that the witness had. But you're not to exercise these considerations arbitrarily. What I want you to do is to use your common sense. Use your sense of logic and

State v Austin McQuarters
Jury Charge
February 19, 2015

1 reason and your good judgment. It's not proper for me to
2 give you a charge on the facts of the case. I'm not even
3 permitted to convey to you an impression as to what if
4 any personal opinions I may develop about a case as it
5 goes along. I cannot discuss the facts with you. If
6 during any stage of this trial you develop an impression
7 that I have a personal opinion about the facts you must
8 remove that belief totally from your mind. You're the
9 sole judges of the facts.

10 Now I am the judge of the law that applies to the
11 case and under your oath you must accept and apply the
12 law as I give it to you. That means if you have any
13 conflicting ideas about what the law is or what it should
14 be you have to abandon those. I give you the law and you
15 apply it to the facts as you determine them to be and in
16 that way you reach your verdicts.

17 It's also my job to decide what evidence is
18 admissible. If I have ruled something in admissible or
19 instructed you to disregard something you're not to
20 consider those things in arriving at your verdicts. Base
21 your verdicts on the competent evidence before you.
22 Consider the testimony of the witnesses and the exhibits
23 admitted in the trial. I remind you and emphasize once
24 again that the fact that Mr. McQuarters elected not to
25 testify is not a factor to be considered by you in any

State v Austin McQuarters
Jury Charge
February 19, 2015

1 way in your deliberations and in your consideration on
2 the question of whether he is guilty or not guilty; that
3 decision must not be considered by you in any manner
4 whatsoever against Mr. McQuarters. An accused has a
5 constitutional right to remain silent and the assertion
6 of that right cannot and must not be considered by you in
7 your deliberations.

8 Under your oath you are to reach no inference, you
9 are to draw no conclusion whatsoever from the fact that
10 Mr. McQuarters elected not to testify. His decision not
11 to testify should not be discussed by you in the jury
12 room. It should not enter your minds in making your
13 decision on whether he's guilty or not guilty. The
14 burden of proof is entirely upon the State to prove every
15 essential element of each offense charged beyond a
16 reasonable doubt and an accused has no obligation or
17 burden to prove anything at all.

18 The defendant in this case, Mr. McQuarters, is
19 presumed to be innocent. This is no mere legal theory.
20 It is a fundamental and substantial to which everyone is
21 entitled. It's been described as being like a robe of
22 righteousness that is placed around an accused and it
23 remains with him through every stage of the trial. It
24 continues to exist after you go back to your jury room to
25 deliberate so that he is presumed to be innocent unless

State v Austin McQuarters
Jury Charge
February 19, 2015

1 and until you, the jury, determine that the State has
2 proven him guilty beyond a reasonable doubt. A defendant
3 is not required to prove his innocence. He's not
4 required to prove anything. The burden is on the State
5 to prove the guilt of the defendant beyond a reasonable
6 doubt and it is required that every essential element of
7 each offense charged be proven by the State beyond a
8 reasonable doubt.

9 Now that does not mean that the State has to prove
10 the guilt of the defendant beyond all doubt or beyond
11 every doubt. The appropriate standard is proof beyond a
12 reasonable doubt. Some of you may have served as jurors
13 in civil court and if you have you know that the burden
14 of proof required in civil cases is to establish that
15 something is more likely than not; it's probable. And we
16 call that the greater weight or preponderance of the
17 evidence.

18 But in a criminal court setting such as we're in now
19 the standard is much higher and the proof must be much
20 stronger than what is required in civil court. The
21 burden of proof is proof beyond a reasonable doubt. So
22 what do I mean by that term? Proof beyond a reasonable
23 doubt is proof is that leaves you firmly convinced of the
24 defendant's guilt. There are few things in the world
25 that we know with absolute certainty. And in criminal

State v Austin McQuarters
Jury Charge
February 19, 2015

1 cases the law does not require proof that overcomes every
2 possible doubt. If based on your consideration of the
3 evidence you are firmly convinced that the defendant is
4 guilty of a crime charged then you are to find him guilty
5 of that crime.

6 If on the other hand you think there is a real
7 possibility that he is not guilty you must give him the
8 benefit of the doubt and find him not guilty. There is
9 no obligation on the defendant to raise any doubt or any
10 other possibility. He is presumed innocent and the State
11 has to prove the guilt of the defendant to the exclusion
12 of any other real possibility.

13 Now I need to explain to you that there are two
14 types of evidence that are generally presented during a
15 trial. There is direct evidence and there is
16 circumstantial evidence. Direct evidence directly proves
17 the existence of a fact and does not require deduction.
18 Circumstantial evidence is proof of a chain of facts and
19 circumstances indicating the existence of a fact.

20 Crimes may be proven by circumstantial evidence.
21 The law makes no distinction between the weight or the
22 value to be given to either direct or circumstantial
23 evidence. However, to the extent that the State relies
24 on circumstantial evidence all of the circumstances must
25 be consistent with each other and when taken together

State v Austin McQuarters
Jury Charge
February 19, 2015

1 point conclusively to the guilt of the accused beyond a
2 reasonable doubt. If the circumstances merely portray
3 the defendant's behavior as suspicious then the burden of
4 proof has not been met as to circumstantial evidence.
5 The State has the burden of proving the defendant guilty
6 beyond a reasonable doubt. This burden rests with the
7 State regardless of whether the State relies on direct
8 evidence or circumstantial evidence or a combination of
9 the two.

10 I also need to go over with you ladies and gentlemen
11 one of the issues in this case is the identification of
12 the defendant as the perpetrator of the crime. The State
13 has the burden of proving identity beyond a reasonable
14 doubt. Unless you are firmly convinced beyond a
15 reasonable doubt that the State has proven that the
16 defendant is the person who perpetrated the crime you
17 cannot convict this defendant of the charge.

18 Now identification testimony is an expression or
19 belief or impression by a witness. It's an expression of
20 belief or impression by a witness. You must determine
21 the accuracy of the identification of the defendant. You
22 must consider the reliability or believability of each
23 identification witness in the same way as you would with
24 any other witness. You may consider whether the witness
25 had an adequate opportunity to observe the offender at

State v Austin McQuarters
Jury Charge
February 19, 2015

1 the time of the offense and to make a reliable
2 identification later. And you should consider all the
3 factors that would be relevant to the issue of whether
4 the identification testimony proves that the
5 identification is credible and reliable.

6 Once again I instruct you that the burden of proof
7 is on the State. It extends to every element of the
8 crime and it specifically includes the burden of proving
9 beyond a reasonable doubt the identity of the defendant
10 as the person who committed the crime. If after
11 examining the testimony you have a reasonable doubt as to
12 the accuracy of the identification you must find the
13 defendant not guilty.

14 Now I also need to cover with you the law regarding
15 statements given to police by an accused. Testimony has
16 been given about a statement allegedly made by the
17 defendant to a law enforcement officer while in custody.
18 In order for you to consider that evidence in any way
19 against Mr. McQuarters you must be satisfied that the
20 State has proven beyond a reasonable doubt certain
21 things. First that the defendant in fact made the
22 statement, if not then you cannot consider that alleged
23 statement in any way against the defendant. The second
24 thing is whether the defendant was properly advised of
25 his Miranda Warnings prior to custodial interrogation.

State v Austin McQuarters
Jury Charge
February 19, 2015

1 Now the Miranda Warnings are that the person has the
2 right to remain silent, that any statement made can and
3 will be used against him in court. That he has the right
4 to have an attorney -- right to an attorney, and if he
5 does not have the resources to hire a lawyer the court
6 will appoint one at no expense.

7 That he has the right to consult a lawyer before
8 answering questions or making statements. That he has
9 the right to have the lawyer present at all times during
10 all interviews and interrogations and that he has the
11 right to stop answering questions or ask for an attorney
12 to be present at any time.

13 Now those exact words do not have to be communicated
14 but the substantial equivalent of them must. And the
15 State has to prove to you that the defendant was properly
16 warned of his constitutional rights, given his Miranda
17 Warnings prior to questioning and giving of the statement
18 in response to questioning by police while in custody.

19 The third thing that has to be proven is that the
20 State established that the defendant knowingly and
21 intelligently waived his constitutional rights and made
22 the statement to police. Now the final requirement is
23 that the statement in question must have been given
24 voluntarily. The State must prove that the statement was
25 the expression of the defendant's own free will and it

State v Austin McQuarters
Jury Charge
February 19, 2015

1 was not improperly induced by compulsion, duress, force
2 or fear or by the promise of some reward or hope of
3 reward. Unless the statement was given freely and
4 voluntarily you may not consider it against the
5 defendant.

6 So if a statement was made by the defendant while in
7 custody to a law enforcement officer in response to the
8 officer's questions I instruct you that you cannot use
9 that statement against the defendant unless you are
10 satisfied that the State has proven beyond a reasonable
11 doubt every requirement about which I've just instructed
12 you; that Miranda Warnings were given, that there was a
13 knowing and intelligent waiver of right, that the
14 statement in question was made by the defendant and it
15 was given freely and voluntarily.

16 Okay, those are the general things. I need to cover
17 now the specific charges that are lodged in this case.
18 As you know there are two separate indictments. They are
19 separate and distinct. Each of them must be evaluated on
20 its own merit or lack of merit. One indictment charges
21 armed robbery. Basically it alleges that on October the
22 20th, 2013 in Beaufort County Austin Lewis McQuarters
23 used force, threats, or intimidation while alleging
24 either by action or words that he was armed with a deadly
25 weapon and that he took and carried away goods or monies

State v Austin McQuarters
Jury Charge
February 19, 2015

1 from the person or immediate presence of John Snodgrass
2 with the intent to permanently deprive Mr. Snodgrass of
3 the possession of the property.

4 The other indictment charges assault and battery in
5 the first degree. It alleges that on or about October
6 the 20th, 2013 in Beaufort County Austin McQuarters
7 committed an assault and battery by unlawfully injuring
8 John Snodgrass during the commission of a robbery or
9 theft. Now I tell you again that an indictment has no
10 evidentiary value, it is a charging paper. It is the
11 formal means by which someone is charged and brought to
12 trial. Now let me go over with you the law about armed
13 robbery.

14 The law provides that a person who commits a robbery
15 while armed with a deadly weapon is guilty of armed
16 robbery. So armed robbery is what the name suggests; it
17 is a robbery while armed with a deadly weapon. To
18 establish the offense of armed robbery the State has to
19 prove to you beyond a reasonable doubt the following
20 elements:

21 First that the defendant took and carried away
22 personal property of another person named in the
23 indictment; Mr. Snodgrass and second that the defendant
24 did so with felonious intent; that is that he did so
25 willfully with a criminal intent to steal the property to

State v Austin McQuarters
Jury Charge
February 19, 2015

1 permanently deprive the owner of it and to convert it to
2 the defendant's own use, and third that the property was
3 taken from the person or presence of Mr. Snodgrass. Now
4 within the presence of a person refers to being within
5 his reach, inspection, observation or control so that the
6 person could retain possession of the property if not
7 overcome by violence or prevented by fear.

8 The fourth element is that the taking must have been
9 accomplished with violence or the threat of violence.
10 The fifth element is that the defendant was armed with a
11 deadly weapon while performing the robbery. Here the
12 deadly weapon is alleged to be brass knuckles.

13 The State has to prove that a deadly weapon was used
14 to obtain possession of the property either by violence
15 or by placing the victim in fear of violence. The State
16 has to prove all the essential elements beyond a
17 reasonable doubt in order for you to find the defendant
18 guilty of armed robbery.

19 One of those elements deals with a deadly weapon.
20 The State has to prove beyond a reasonable doubt that the
21 defendant was armed with a deadly weapon during the
22 robbery. A deadly weapon is defined as any article,
23 instrument, or substance which is likely to cause death
24 or great bodily harm. Whether an instrument has been
25 used as a deadly weapon depends on the facts and the

State v Austin McQuarters
Jury Charge
February 19, 2015

1 circumstances of each case. So whether or not something
2 is considered a deadly weapon depends on the facts of
3 each case. You may consider such things as the manner
4 and the means of its use, the wounds inflicted and other
5 relevant facts to decide if the State has proven beyond a
6 reasonable doubt that the offense involved the use of a
7 deadly weapon.

8 Now Mr. McQuarters is charged with armed robbery.
9 If you find that the State has proven that Mr. McQuarters
10 committed a robbery but you have a reasonable doubt as to
11 whether the State has proven that he was armed with a
12 deadly weapon you may then consider the lesser included
13 offense known as common law robbery. It's also sometimes
14 called strong arm robbery; not armed, strong arm robbery.
15 So in order to prove common law robbery the State has to
16 prove to you beyond a reasonable doubt all the elements
17 that I just explained to you except the element that the
18 defendant was armed with a deadly weapon.

19 So in order to prove common law robbery the State
20 has to prove beyond a reasonable doubt that the defendant
21 took the personal property from the person or presence of
22 Mr. Snodgrass without Mr. Snodgrass's consent and that
23 the property was carried away with the intent to deprive
24 the owner permanently of the property. The taking and
25 carrying away of the property must have been done with

State v Austin McQuarters
Jury Charge
February 19, 2015

1 violence or by putting the owner in fear of violence
2 though the use of a deadly weapon is not required in
3 common law robbery. Now the other indictment charges Mr.
4 McQuarters with assault and battery in the first degree.

5 Now before I tell you exactly what assault and
6 battery in the first degree involves I need to discuss
7 with you some general aspects of the terms assault and
8 battery. Now most people associate the term assault with
9 striking or hitting someone and actually that's not the
10 case. Actually it is not the assault but the battery
11 that is the unlawful touching of another person.

12 The battery is the hitting, the touching. A battery
13 is any touching of another person in a rude, insolent, or
14 angry manner. The touching does not have to be flesh to
15 flesh. It may be accomplished by some object put in
16 motion by a perpetrator. So if the battery is the
17 unlawful touching what is the assault.

18 The term assault refers to the threat to commit the
19 battery. Now the threat does not have to be spoken. It
20 does not require any words. It may be communicated by
21 actions or by posturing. But to constitute an assault
22 there has to be the present ability to carry forth with
23 the unlawful contact. In other words the perpetrator has
24 to be sufficiently close to the victim to carry out the
25 battery. Now there are various levels of assault and

State v Austin McQuarters
Jury Charge
February 19, 2015

1 battery in South Carolina. Here the State charges that
2 the defendant committed assault and battery in the first
3 degree. A person commits the offense of assault and
4 battery in the first degree if the person unlawfully
5 injures another person and the act occurred during the
6 commission of a robbery or theft.

7 So to prove this offense the State has to establish
8 beyond a reasonable doubt that Mr. McQuarters committed
9 an assault and battery upon Mr. Snodgrass, that he
10 unlawfully injured Mr. Snodgrass and that the injury
11 occurred during the commission of a robbery or a theft.

12 Now the final thing I have to go with you ladies and
13 gentlemen about the law is that the defendant is entitled
14 to every reasonable doubt arising in an entire case. If
15 upon any issue of fact essential to a conviction you have
16 a reasonable doubt as to how that issue should be
17 resolved you must resolve that reasonable doubt in the
18 defendant's favor.

19 If upon reviewing an entire case you have a
20 reasonable doubt as to whether the defendant has been
21 proven guilty he is entitled to that reasonable doubt and
22 a verdict of not guilty on that charge. If upon
23 reviewing an entire case you find that the State has
24 proven every essential element of its case against the
25 defendant beyond a reasonable doubt it is equally your

State v Austin McQuarters
Jury Charge
February 19, 2015

1 duty to find the defendant guilty of that charge. If you
2 have a reasonable doubt as to whether the defendant has
3 been proven guilty of a greater crime charged or a lesser
4 included offense you must find the defendant guilty only
5 of the lesser offense. But you cannot find him guilty of
6 any offense greater or lesser unless you're convinced
7 beyond a reasonable doubt that the defendant is guilty of
8 that offense. And that's the law.

9 Folks, when you go back to the jury room to decide
10 the case you're going to have with you all the exhibits
11 that have been admitted in the trial and you're going to
12 have these verdict forms. On these forms you're going to
13 tell us your decision. Now you have two different
14 verdict forms; one for each charge, one for each
15 indictment. And you'll see that the caption is at the
16 top, the case number is on the caption, and then I put in
17 and emphasized which one you're dealing with.

18 So this one reads as to the charge of armed robbery
19 we, the jury, unanimously find the defendant and you have
20 three options. You may find him not guilty, you may find
21 him guilty of the lesser included offense of common law
22 robbery or you may find him guilty of armed robbery. The
23 other indictment verdict form reads as to the charge of
24 assault and battery in the first degree we, the jury,
25 unanimously find the defendant and you have two options.

State v Austin McQuarters
Jury Charge
February 19, 2015

1 You may find him not guilty or you may find him guilty of
2 assault and battery in the first degree. Now ladies and
3 gentlemen I'm supposed to tell you that you're not to
4 infer from the order in which I stated your options that
5 I'm trying to suggest one over the other.

6 I have to put one thing first, one thing second, and
7 one thing third. So don't think I'm trying to suggest
8 anything to you by the order in which they're stated.
9 The truth is that I've got multiple versions of this in
10 the computer and I just pull one up and sometimes they're
11 in a different order. I actually did these at a computer
12 school in Nevada years ago.

13 Madame Foreman part of your job is to record the
14 verdicts. I think you will find the verdict forms self
15 explanatory. Just check the option chosen by the jury
16 and sign your name on the signature line please. How you
17 go about your deliberations, how you go about taking your
18 votes is all in your discretion subject to this
19 requirement; a verdict must be unanimous. All twelve of
20 you must agree in order for it to be a verdict.

21 When you have reached your verdict knock on the door
22 and the bailiff will respond to your knock when you've
23 reached your verdicts. Now I've told you I don't know
24 how many times not to discuss the case until I tell you
25 to. Well, it's not time yet. The law says that I have

State v Austin McQuarters
Jury Charge
February 19, 2015

1 to go over with the attorneys what I just told you. And
2 that's just common sense. We don't want you back there
3 deciding the cases using the wrong law. Now I actually
4 printed this out before I left yesterday and I gave it to
5 the attorneys and we met before you came in this morning.
6 We've been over it but I will tell you that I never read
7 the charge verbatim. Sometimes I say things I don't even
8 realize I said. The lawyers have to be given a chance to
9 point out to me anything they may disagree with me about
10 the law.

11 Here is the signal that you need to look for. If
12 I'm satisfied with what I told you I'm going to send the
13 verdict forms in, I'm going to send the exhibits in. The
14 bailiff will bring those to you. When he closes that
15 door and you have those things and it's just the 12 of
16 you in there you do not have to wait one more second.
17 But don't discuss the case until then. You may take your
18 notes with you now but don't begin your deliberations
19 until you have these things in the jury room with you.
20 Thank you so much for your attention.

21 [Whereupon, the jury exits at 11:24 a.m.]

22 THE COURT: Are there exceptions, additions, or
23 objections to the charge from the State?

24 MS. CONCANNON: No, Your Honor.

25 THE COURT: From the defense?

State v Austin McQuarters

Jury Charge

February 19, 2015

1 MR. BAX: No, Your Honor.

2 THE COURT: Were you preserving not charging
3 assault and battery second?

4 MR. BAX: Your Honor, I just preserved the reasons
5 why I didn't feel like legally I could request that.

6 THE COURT: Okay.

7 MR. BAX: That's just for the purpose of down the
8 road if they say I should have asked for it. I just
9 don't believe based on that aggravating factor being the
10 one for the basis that I can make the argument from that.

11 THE COURT: Folks, I need the attorneys to check
12 the verdict forms and check the exhibits. I think you've
13 already been given a copy of the verdict forms. The jury
14 has the toughest job in the courthouse. We'll put it in
15 their hands. I'm very impressed with the manner in which
16 the attorneys on both sides presented their cases. You
17 obviously were well prepared.

18 Despite Mr. McQuarters reservations I don't know how
19 you could have done a better job Mr. Bax with your own
20 preparation. That stuff just doesn't come out; you have
21 to prepare to do it. So hopefully any concerns have been
22 resolved. The State has done a great job with their
23 evidence and adjusting to my rulings. I appreciate the
24 respect you've shown the court. We'll put it in the
25 jury's hands. Thank you.

State v Austin McQuarters
Jury Charge
February 19, 2015

1 MS. CONCANNON: Thank you, Your Honor.

2 MR. BAX: Thank you, Your Honor.

3 [Whereupon, counsel and the court reporter review
4 all exhibits]

5 THE COURT: All right. The exhibits and the
6 verdict forms have been checked and it's in the hands of
7 the jury. We're at ease pending a verdict.

8 [Whereupon, evidence out to the jury at 11:26 a.m.]

9 [Whereupon, court is in recess]
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 THE COURT: I received a note from the jury with
2 six questions. First question are there phone records
3 from the defendant to Minor 1. Obviously that's an issue
4 of fact and I'll just have to tell the jury that they
5 have to decide the case based on the evidence that was
6 presented.

7 The second question how did Austin get home? Again,
8 same response, same issue. Third may we have a
9 transcript or audio? I guess they mean of the whole
10 trial. I will explain to them there is no transcript,
11 that if they wish to hear portions or all of the
12 testimony replayed we can play the backup but it has to
13 be done in the courtroom.

14 The fourth question I'm not sure what it was
15 intended to be. It reads where the money every found. I
16 don't know if that means was the money ever found or
17 where was the money found; I don't know exactly what that
18 means. Again, that's a fact issue.

19 The next one is they want to see Jackie transcript.
20 Again I don't know if they mean the testimony in court or
21 what they're talking about. And the sixth question is
22 they want to see Officer Seifert's transcript slash
23 interview. If they want to see the interview that was --
24 they have to decide the case based on the evidence that
25 was presented. If they want to hear Officer Seifert's

State v Austin McQuarters
Proceedings
February 19, 2015

1 testimony it would be the same answer as before with the
2 other transcript issues. Do y'all have any input about
3 this?

4 MS. CONCANNON: No, Your Honor. I agree with all
5 of that.

6 MR. BAX: I agree, Your Honor. I guess to some
7 degree just a clarification of how much of the testimony
8 they want to hear if they want to hear it; and that's it.

9 THE COURT: Can y'all bring them in please?

10 THE BAILIFF: Yes, Your Honor.

11 [Whereupon, court's exhibit number 5 is marked by
12 the court reporter]

13 [Whereupon, the jury enters at 2:16 p.m.]

14 THE COURT: Ladies and gentlemen of the jury I
15 received a note which has six questions on it. I think I
16 can answer some of these questions. Others I may need
17 some clarification from you. So Madame Foreman, the
18 first question is are there phone records from the
19 defendant to **Minor 1** I can't discuss facts with a jury.
20 I can't comment on facts but is that the question of the
21 jury; are there phone records from the defendant to
22 **Minor 1** Is that your question?

23 THE FOREPERSON: Yes.

24 THE COURT: You have to decide the case based on
25 the evidence that was presented to you. How did Austin

1 get home that's your next question?

2 THE FOREPERSON: [Nods affirmatively]

3 THE COURT: You need to speak your answer.

4 THE FOREPERSON: Yes.

5 THE COURT: That's a fact issue. I can't discuss
6 it. You have to decide it based on the evidence that was
7 presented in the case based on the evidence that was
8 presented. The third may we have a transcript or audio.
9 Now on that one I'm not sure what you're asking for.
10 There is no transcript. The lady is taking down what is
11 said in court. I'm sure it would take her a week or more
12 to put a transcript together. We have backup audio that
13 we can play for a jury if the jury requests it for some
14 or all of the testimony.

15 But unless you want to listen to the whole trial
16 again you're going to have to tell us what it is you want
17 to hear; what witness and things like that. You have to
18 listen to it out in the courtroom. We can't send the
19 backup tape back into the jury room. I'm sure it's all
20 digital; I don't think I've ever worked with this fine
21 lady before but they all have different means of
22 playback.

23 The next question about the money being found is
24 another issue of fact and you have to decide the case
25 based on the evidence that was presented. Now the next

State v Austin McQuarters
Proceedings
February 19, 2015

1 question is wanting to see Jackie's transcript. If
2 that's talking about the courtroom testimony, we can play
3 that back. If you want to see something that was done in
4 an interview prior to court you have to decide the case
5 based on the evidence that was presented to you.

6 And the same thing with Officer Seifert's transcript
7 or interview; if you're talking about his testimony we
8 can play back his testimony. But if you wanted something
9 from an interview that was conducted beforehand aside
10 from what he said in court about it you have to decide
11 the case based on the evidence that was presented.

12 So if you all could clarify for me if you want to
13 hear any of the testimony and how much and write that on
14 a note and send it to me we'll try to get it cued up as
15 best we can and play it back for you. If you want things
16 that were done prior to the court proceeding you have to
17 decide the case based on the evidence that was presented.
18 So just let me know all right? Thank you so much.

19 [Whereupon, the jury exits at 2:20 p.m.]

20 THE COURT: Any exceptions, additions or objections
21 to the instructions from the State?

22 MS. CONCANNON: No, Your Honor.

23 THE COURT: From the defense?

24 MR. BAX: No, Your Honor.

25 THE COURT: Thank you. We're at ease on this

1 case. Y'all might want to stick around to see if they
2 send a note.

3 [Whereupon, court is in recess]

4 THE COURT: Be seated. The jury wants to hear the
5 testimony of Investigator Seifert. My understanding is
6 the court reporter has it cued up. We'll stop it; there
7 is one break in there. So anything that took place
8 outside the presence of the jury will not be played.
9 Bring the jury in please?

10 [Whereupon, court's exhibit number 6 is marked by
11 the court reporter]

12 [Whereupon, the jury enters at 2:20 p.m.]

13 THE COURT: Ladies and gentlemen I understand you
14 want to hear Investigator Seifert's testimony. The court
15 reporter will -- you have to give us a couple of minutes.
16 She can only take down what I'm saying in one mode and
17 then she has to switch to the other mode to get it cued
18 up. As soon as she's got it cued up she's going to play
19 it in its entirety. There is one break in there where
20 you were sent out of the courtroom so there will be a
21 break where we stop it and then she will start back when
22 you came in. Let us know if you have trouble hearing it.
23 We will do the best we can. Thank you.

24 [Whereupon, the testimony of Investigator Seifert is
25 played back for the jury]

1 [Whereupon, the jury exits at 3:27 p.m.]

2 [Whereupon, court is in recess]

3 THE COURT: Thank you. Be seated please. I
4 received a note from the jury that I'm interpreting as
5 telling me that they are deadlocked. It gives me a
6 breakdown between not guilty and guilty, which I'm going
7 to instruct them not to do that in the future. But at
8 this point all I know to do is give an Allen charge.
9 I'll be happy to hear from the State or the defense on
10 that.

11 MS. CONCANNON: Your Honor, the State doesn't have
12 anything and feel an Allen charge is appropriate.

13 MR. BAX: Your Honor, after discussion with co-
14 counsel and my client and obviously as Your Honor said we
15 don't see them break it down in numbers very often. I
16 haven't seen that before and obviously no one told them
17 to do that. But after four hours with it being so close
18 to almost evenly deadlocked and I certainly respect the
19 court's ruling on it, but I think at this point just to
20 protect my client I would object to an Allen charge
21 because I don't think it's going to do any good at this
22 point. You're talking about having five people or seven
23 people jumping in different directions at 4 o'clock in
24 the afternoon.

25 THE COURT: I understand. I'm going to give the

1 Allen charge. Typically we don't want to know the
2 breakdown and juries do this sometimes; I've had this
3 happen numerous times in the past. They will send out
4 and say they're deadlocked eleven to one or ten to two.
5 Well then the concern is that that one person or those
6 two people might feel like that all this is being
7 directed to them.

8 When it's seven to five I don't feel that any of
9 that is present and that's what's showing on here. I
10 think an Allen charge is appropriate and that's what I am
11 going to give them. My Allen charge is kind of middle of
12 the road. It's not like some of them I've heard. I
13 don't think it is in any way overbearing. I don't think
14 it should be.

15 [Whereupon, court's exhibit number 7 is marked by
16 the court reporter]

17 MR. BAX: Your Honor?

18 THE COURT: Yes, sir.

19 MR. BAX: Co-counsel and I were just talking about
20 it and there is some concern I didn't express myself
21 properly to preserve the issue and just wanted to make
22 sure that I said on the record that as part of the
23 objection the remedy would be to just declare a mistrial
24 at this time. I didn't use that language and I want to
25 make sure that's on the record, Your Honor.

State v Austin McQuarters
Proceedings
February 19, 2015

1 THE COURT: Okay. Motion for mistrial is denied.

2 MR. BAX: Thank you, Your Honor.

3 THE COURT: Bring the jury in please.

4 [Whereupon, the jury enters at 4:19 p.m.]

5 THE COURT: Madame Foreman, I received a note from
6 the jury indicating what I'm interpreting is that you're
7 unable to reach a unanimous verdict at this time; you're
8 deadlocked is that correct?

9 MADAME FOREMAN: Yes, sir.

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

ALLEN CHARGE

THE COURT: Ladies and gentlemen, you stated that you are unable to reach a verdict in these cases and as I instructed you earlier the verdict of the jury must be unanimous. You have advised me that you've been able to reach a unanimous verdict. As I told you earlier you are the sole judges of the facts and I'm not permitted to give you any indication of what opinions, if any, that I might have about the facts of any case. So obviously nothing that I'm saying to you now or about to say to you should be construed in any way as indicating anything about my view of the facts.

Any time a jury sends out a note like the one you just sent to me I am required to give the jury an additional charge to see if the jury can make a further effort to reach a verdict if that can be done without a single juror doing violence to his or her own conscience. When a matter is in dispute it isn't always easy for even two people to agree. So when 12 people are asked to agree it often becomes correspondingly more difficult.

You have a duty to make every reasonable effort to reach a unanimous verdict. In doing this you should consult with one another, express your own view and list to the opinions of your fellow jurors. Tell each other how you feel and why you feel that way and discuss your

State v Austin McQuarters
Allen Charge
February 19, 2015

1 differences with open minds. Now although the verdict of
2 the jury must be unanimous every one of you has the right
3 to your own opinion. The verdict you agree to must be
4 your own verdict; the result of your own convictions and
5 you should not give up your firmly held beliefs merely to
6 be in agreement with your fellow jurors. The majority
7 should consider the minority's position and the minority
8 should consider the majority's position.

9 You should carefully consider and respect the
10 opinions of each other and evaluate your position for
11 reasonableness, correctness, and impartiality. You must
12 lay aside all extraneous matters and examine the
13 questions before you based on the law and the evidence in
14 these cases. If you do not agree on a verdict it does
15 not mean that anybody wins. It just means that at some
16 future time some other jury will come, they will sit
17 where you're sitting.

18 The same participants will come and presumably the
19 same questions will be posed and the witnesses will come
20 and the same answers given and we'll go through the whole
21 process again. You were selected in the same manner and
22 from the same source as any future jury might be. And
23 there is no reason for me to think that the case will be
24 submitted to 12 more intelligent, impartial,
25 conscientious, or competent jurors than you. So I ask

State v Austin McQuarters
Allen Charge
February 19, 2015

1 that you return to your deliberations to see if you can
2 reach a verdict. However, I remind you of what I said at
3 the outset that while it is important that litigation be
4 ended it should never be ended where a juror does
5 violence to his or her own conscious. No juror is
6 expected to give up an opinion that was reached after
7 proper deliberations fairly and impartially based on
8 reasoning that is satisfactory to that juror and just for
9 the purpose of being in agreement with the other jurors.

10 Now I'm going to ask you in a moment to please
11 retire to your jury room and make a further effort and
12 let me know whether or not you're able to reach a
13 verdict. If you're not, send me a note out telling me
14 that you're not able to reach a verdict. When you send
15 your note, if you send your note, again please do not
16 give me the breakdown; don't tell me the division.
17 Juries often do that, it's not unexpected but at this
18 point I'm supposed to tell you not to tell me your
19 division; how the vote is going.

20 If you're able to reach a verdict that's fine you
21 can let us know and we'll bring you out and publish the
22 verdicts. If you're not able to reach verdicts send me a
23 note telling me you can't do it; that you're hopelessly
24 deadlocked basically is what you're telling me. All
25 right. Thank you so much. Retire to your jury room

State v Austin McQuarters
Allen Charge
February 19, 2015

1 please.

2 [Whereupon, the jury exits at 4:24 p.m.]

3 THE COURT: Thank you. State for the record any
4 exceptions, additions, or objections to the Allen charge
5 from the State?

6 MS. CONCANNON: No, Your Honor.

7 THE COURT: Are there any additional objections
8 other than what you previously made Mr. Bax?

9 MR. BAX: No, Your Honor. Thank you.

10 THE COURT: Thank you. We're at ease on this case
11 pending a verdict.

12 [Whereupon, court is in recess]
13
14
15
16
17
18
19
20
21
22
23
24
25

1 THE COURT: Bring the jury please. I received a
2 note from the jury and I've shared it with the attorneys.
3 It says they're deadlocked.

4 [Whereupon, court's exhibit number 8 is marked by
5 the court reporter]

6 [Whereupon, the jury enters at 4:42 p.m.]

7 THE COURT: Madame Foreman, I received a note
8 indicating that you're unable to reach a unanimous
9 verdict is that correct?

10 MADAME FOREMAN: That's correct, sir.

11 THE COURT: Let me read a little more stuff to you.
12 We have a statute in South Carolina that provides that
13 when a jury returns the second time indicating that they
14 have not been able to agree on a verdict that the trial
15 Judge cannot send the jurors out again without the jurors
16 consent unless the jurors ask for further explanation of
17 the law.

18 And we have a case that interpreted that in 2000 and
19 I'm going to read the language from the case to you.
20 When a jury has twice indicated it is deadlocked the
21 trial judge should diplomatically discuss with the jury
22 whether further deliberations would be beneficial. The
23 juries consent to resume or to discontinue deliberations
24 is determined either expressly or impliedly by its
25 response to the trial judge's comments. The judge need

State v Austin McQuarters
Proceedings
February 19, 2015

1 not advise the jurors that their consent to further
2 deliberations is required but I've told you your consent
3 to further deliberations is required. The only way that
4 I can ask you to go back there again is if you tell me
5 that you feel it might be some benefit to it either by
6 taking a break or something of that nature. Madame
7 Foreman do you feel it would do any good to deliberate
8 any further?

9 MADAME FOREMAN: No, sir.

10 THE COURT: You think the jury is hopelessly
11 deadlocked?

12 MADAME FOREMAN: Yes, sir.

13 THE COURT: Do I hear any disagreement?

14 [Whereupon, no one responds]

15 THE COURT: Hearing none a mistrial is declared;
16 this manifest necessity based on the jury being
17 deadlocked.

18 Ladies and gentlemen of the jury I used to come back
19 and talk to the jurors take my robe off and let them have
20 at me. I would let them ask me questions or make
21 comments or give me any criticisms or complaints. We
22 used to be taught to do that. There were some problems
23 across the State and as a result of that we have been
24 instructed that we should avoid that. So I'm not happy
25 about that because I thought we got a lot out of it and I

1 thought the jurors typically once they heard why things
2 were done a certain way and what went on that it made
3 sense to them because there are reasons for everything we
4 do.

5 So now I'm not supposed to go back and meet with you
6 and talk to you about what happened. I do tell juries
7 this; if there is anything that has happened this week
8 about your jury service that is particularly bad or
9 particularly good and you want to call that to the
10 attention of someone if you will write me I will forward
11 it to the people here in the circuit.

12 I haven't been here in years. I'm supposed to be
13 back two more times before July but its both civil court.
14 But if you feel something particularly bad or
15 particularly good has happened and people ought to know
16 about -- and I'm talking about the jury service. I'm
17 talking about the process more than anything.

18 I'll tell you what. The only jury that has ever
19 taken me up on this was in Aiken County and they wrote me
20 a letter saying that they were upset because one of the
21 jury members was trying to sell Avon to them the whole
22 time. And I couldn't do anything about it but I
23 forwarded that to the chief judge in the second circuit
24 where Aiken is located and my understanding is the clerk
25 now tells people jury service is not an opportunity for

State v Austin McQuarters
Proceedings
February 19, 2015

1 you to try to make money off of your business. So we
2 appreciate your service very much. I told them when you
3 first went back about four hours ago I told them that you
4 have the most difficult job in the courthouse. We know
5 that. We all understand that. You approached your
6 duties seriously and you paid close attention and that's
7 all I can ask of you.

8 I thank you very much for your service. You have an
9 exemption for three calendar years. You don't have to
10 serve in 2015, '16, or '17. You're disqualified for one
11 year state court this level. They'll mail your little
12 checks to you. Thank you.

13 [Whereupon, the jury is excused and exits at 4:48
14 p.m.]

15 THE COURT: Do we have anything that needs to be
16 put on the record?

17 MS. CONCANNON: Your Honor, the State would just
18 ask that Mr. McQuarters bond be reinstated and that he
19 remain in custody until he can make that bond.

20 MR. BAX: Your Honor, the defense would ask that
21 the issue of bond be addressed. He's on a 135,000 dollar
22 cash surety bond. It's too high for him to be able to
23 make and we'd ask the court to reconsider it in light of
24 the fact that he's been in jail since his arrest on this
25 charge. Obviously he has come and sat through his trial

1 and he's cooperated with me during his defense. His
2 family has been here throughout the week Ms. McQuarters
3 and his brother Aaron so we'd ask Your Honor to consider
4 lowering that.

5 If we could get it around -- I would ask Your Honor
6 to consider a 70,000 or lower concurrent bond with a ten
7 percent option if you can to give him an opportunity to
8 be out pending the decision about how to deal with this
9 case in the future.

10 THE COURT: All right. Motion to lower bond is
11 denied. Thank you.

12 MS. CONCANNON: Thank you, Your Honor.

13 MR. BAX: Thank you.

14 [Whereupon, the jury trial concludes at 5:00 p.m.]
15
16
17
18
19
20
21
22
23
24
25

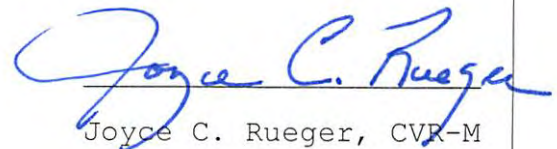
State v Austin McQuarters
Certificate of the Court Reporter
February 19, 2015

C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official
Circuit Court Reporter for the Ninth Judicial Circuit of
the State of South Carolina, do hereby certify that the
foregoing is a true, accurate, and complete Transcript of
Record of the proceedings had and evidence introduced in
the trial of the captioned case, relative to appeal, in
the Court of General Sessions for Beaufort County, South
Carolina on the 19th day of February, 2015.

I do further certify that I am neither of kin,
counsel, nor interest to any party hereto.

April 22, 2015



Joyce C. Rueger, CVR-M

Court Reporter



STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Thomas W. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AUSTIN MCQUARTERS,

APPELLANT

APPELLATE CASE NO. 2015-001814

FINAL BRIEF OF APPELLANT

Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES.....ii

STATEMENT OF ISSUE ON APPEAL..... 1

STATEMENT OF THE CASE.....2

ARGUMENT

 In this trial for armed robbery and assault and battery of John Snodgrass, the manager of a movie theatre, the trial judge abused his discretion in refusing to grant a new trial based on after-discovered evidence in the form of statements, taken after the trial, from another movie manager of the movie theatre that, two weeks prior to the robbery and assault, Snodgrass yelled at an employee of the theatre, Colton Delaplane, and in response, Delaplane stated that he wanted to hit Snodgrass in his face and later confessed that he knew about the money but did not know that Snodgrass was going to be hurt so badly during the robbery.....5

CONCLUSION.....11

TABLE OF AUTHORITIES**Cases**

<u>Giglio v. United States</u> , 405 U.S. 150, 92 S.Ct. 763, 31 L. Ed. 2d 104 (1972)	8,9
<u>State v. Caskey</u> , 273 S.C. 325, 256 S.E.2d 737, (1979).....	6
<u>United States V. Bageley</u> , 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)	9

STATEMENT OF ISSUE ON APPEAL

In this trial for the armed robbery and assault and battery of John Snodgrass, the manager of a movie theatre, did the trial judge abuse his discretion in refusing to grant a new trial based on after-discovered evidence in the form of statements, taken after the trial, from another manager of the movie theatre that, two weeks prior to the robbery and assault, Snodgrass yelled at an employee of the theatre, Colton Delaplane, and in response Deloplane stated that he wanted to hit Snodgrass in his face and later confessed that he knew about the money but did not know that Snodgrass was going to be hurt so badly during the robbery?

STATEMENT OF THE CASE

In January of 2014, the Beaufort County Grand Jury indicted Appellant McQuarters for armed robbery and assault and battery first degree, indictments #2013-GS-07-1844, 1845. On July 20, 2015, Appellant proceeded to jury trial before the Honorable Thomas W. Cooper, Jr. This was a re-trial as the first trial ended with a hung jury. This second jury returned verdicts of guilty as charged. Judge Cooper sentenced Appellant to twenty-five (25) years for armed robbery and ten (10) years concurrent for assault and battery. On August 12, 2015, Judge Cooper reduced the twenty-five (25) year sentence for armed robbery to twenty (20) years. A timely notice of intent to appeal was served on August 20, 2015. This appeal follows.

STATEMENT OF FACTS

On October 20, 2013, between 10:30 and 11:00 PM John Snodgrass, the general manager of a movie theatre on Hilton Head Island, was robbed and assaulted as he left the theatre with the bank deposit bag. (R. pp. 95-107). Snodgrass testified that he noticed a female in a small older Toyota and a six foot tall broad shouldered African American man crouched down by the driver's door. (R. p. 99, line 3 – p. 100, lines 1-6). The man approached Snodgrass and initially asked about movie times, then asked to borrow a cellphone, then asked for the time of day. When Snodgrass looked down at his watch, the man assaulted and robbed him. (R. p. 100, line 11 – p. 101, 102, lines 1-18).

Investigator Doug Seifert with the Beaufort County Sheriff's Department interviewed employees of the movie theatre who were working on the night of the robbery including employee Colton Delaplane. (R. p. 339, line 21 – p. 340, 341, lines 1-22). Based on the interview with Delaplane, Investigator Seifert obtained arrest warrants for Appellant McQuarters and Jacklyn "Brooklyn" Perez. (R. p. 343, lines 15-17). The investigator admitted that in his report he stated that Delaplane confessed that the entire robbery was set up by him, he was sorry and admitted that McQuarters gave Delaplane two hundred and fifty (\$250.00) after the robbery. (R. p. 364, lines 7 – 24). The investigator, however, testified that these were not Delaplane's exact words and explained that he was paraphrasing Delaplane when he wrote the report. (R. p. 345, line 9 – p. 346, lines 1-12). The investigator admitted that in the first trial that ended in a mistrial he did not explain that his report was his conclusion or a paraphrase and not Delaplane's exact words. (R. p. 366, lines 1-25). Delaplane was never arrested or charged in connection with the robbery and assault. (R. p. 345, lines 16-18).

Appellant admitted being at the movie theatre with a female on the night of the robbery but denied robbing and assaulting Snodgrass. (R. p. 357, line 9 – p. 358, lines 1-3). There was no forensic evidence linking Appellant to the robbery and assault. (R. p. 372, line 25 – p. 373, lines 1-25). Snodgrass was unable to identify Appellant in a photo line-up. (R. p. 122, lines 3-10). Both Perez and Delaplane testified against Appellant at trial. After Perez testified but before Delaplane testified these two witnesses violated the sequestration order. Appellant moved for a mistrial which the trial judge denied finding no prejudice. (R. pp. 209 – 225). Delaplane testified that he was working at the movie theatre on the night of the robbery and assault. (R. p. 294, lines 14-25). Delaplane testified that he saw both Appellant and Perez at the movie theatre that night. (R. pp. 295-296). Delaplane claimed that while he was working in the ticket booth, Appellant approached and wanted money from the drawer. (R. p. 295, lines 3-15). Perez admitted that she asked Delaplane, “Where is the bread?” but claimed she was referring to gas money Delaplane owed her. (R. p. 161, lines 4-21; p. 148, lines 13-19).

According to Delaplane, he again saw Appellant and Perez in the parking lot when he left work at 10:30 PM. (R. p. 295, line 21 – p. 296, lines 1-17). Delaplane claimed he left the movie theatre parking lot with his sister and girlfriend and went home. (R. p. 298, lines 11-19). Delaplane testified that about three hours later he met Appellant who handed him two hundred and fifty (\$250.00) dollars. (R. p. 299, lines 1-19). According to Delaplane, Appellant told him, “I ran into money at your work.” (R. p. 299, lines 14-15).

ARGUMENT

In this trial for the armed robbery and assault and battery of John Snodgrass, the manager of a movie theatre, the trial judge abused his discretion in refusing to grant a new trial based on after-discovered evidence in the form of statements, taken after the trial, from another manager of the movie theatre that, two weeks prior to the robbery and assault, Snodgrass yelled at an employee of the theatre, Colton Delaplane, and in response Delaplane stated that he wanted to hit Snodgrass in his face and later confessed that he knew about the money but did not know that Snodgrass was going to be hurt so badly during the robbery.

On July 28, 2015, six days after the jury returned verdicts of guilty, Appellant filed a motion to vacate conviction and order a new trial based on after discovered evidence. (R. p. 545 - Notice of motion and motion to vacate conviction and order a new trial). The State filed a response on August 12, 2015. (R. p. 547 - Response). The motion was based on information, not previously provided to law enforcement, from another manager at the movie theatre.

On July 24, 2015, the general manager who was robbed and assaulted, John Snodgrass, contacted Investigator Seifert of the Beaufort County Sheriff's Department and advised him that his manager, Chisti "Randi" Ross, had information indicating that an employee, Colton Delaplay, set up the robbery. (R. p. 540 - Court's Exhibit #1 – page 3). The investigator interviewed Ross and she provided a written statement. (R. p. 540 - Court's Exhibit #1 – pages 3-5). In her statement Ross wrote that on November 3, 2013, while working with Delaplane, he told her "I knew about the money but I didn't know John was going to get hurt like that." (R. p. 540 - Court's Exhibit #1 – page 5). Ross told the investigator that she did not provide this information to the police because she did not want to be involved in the investigation due to an unrelated criminal domestic violence incident. (R. p. 540 - Court's Exhibit #1 – page 3). Ross also told the

investigator that two weeks prior to the incident Snodgrass yelled at Delaplane. Delaplane told Ross that he wanted to punch Snodgrass in the face for yelling at him. Ross told the investigator that Delaplane stated, “If John ever screams at me in my face again, I’m going to punch him.” (R. p. 540 - Court’s Exhibit #1 – page 4). Ross was not called as a witness at trial.

On August 12, 2015, the Honorable Thomas W. Cooper, Jr. held a hearing on the motion to vacate conviction and order a new trial. Appellant argued that the statements of Ross about admissions made by Delaplane that he knew about the robbery, the prior incident between Delaplane and Snodgrass and Delaplane’s statement about wanting to punch Snodgrass constituted newly discovered evidence requiring a new trial. (Aug. 12, 2015 R. pp. 499-523). The judge denied the motion for a new trial finding that Appellant failed to meet the first and fourth elements required to grant a new trial based on after discovered evidence. (Aug. 12, 2015, R. pp. 531 – 534). The trial judge erred.

In State v. Caskey, 273 S.C. 325, 329, 256 S.E.2d 737, 738–39 (1979), the South Carolina Supreme Court wrote:

While a motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge, it is well settled that it may be granted only if the movant shows that the evidence upon which it is based:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and,
- (5) Is not merely cumulative or impeaching.

State v. Fowler, 264 S.C. 149, 213 S.E.2d 447 (1975); State v. Wells, 249 S.C. 249, 153 S.E.2d 904 (1967); State v. Mayfield, 235 S.C. 11, 109 S.E.2d 716, cert. den. 363 U.S. 846, 80 S.Ct. 1616, 4 L.Ed.2d 1728, reh.

den. 364 U.S. 857, 81 S.Ct. 36, 5 L.Ed.2d 81 (1959); State v. Clamp, 225 S.C. 89, 80 S.E.2d 918 (1954).

First, the statements by Ross meet the second, third and fifth elements required for a new trial. The statements were discovered after the trial and could not by the exercise of due diligence have been discovered before the trial, as correctly held by the trial judge. (Aug. 12, 2015, R. p. 529, line 15 – p. 530, lines 1-9). The statements were not merely cumulative or impeaching. The statement about the prior incident and Delaplane wanting to punch Snodgrass in the face goes to motive, especially in light of the fact that the injuries suffered by Snodgrass were to his face and head.

As to the first element, the statements probably would have changed the result if a new trial was had. The first trial ended in a mistrial because of a hung jury. In the second trial, unlike the first trial, Investigator Seifert equivocated about Delaplane's confession that he set up the whole robbery, although it was included in his written report. As to the fourth element, the statements were material to guilt or innocence because the State's case was based on the statements of Delaplane and Perez and the fact that Appellant was at the movie theatre on the night in question and more closely matched the description given by Snodgrass.

The trial judge questioned why Delaplane would blame Appellant stating, "And I offer that for this reason, if Mr. Delaplane were making this up you would think that he would choose somebody other than a schoolmate, get a stranger or just create a straw person out there somewhere rather than point to somebody he knows and get involved in that regard." (Aug. 12, 2015, R. p. 531, line 21 – p. 532, lines 1-2). Appellant admitted being at the movie theatre and became a logical choice to blame when Delaplane and

Perez realized they needed to curry favor with the police in order to avoid charges of any kind for Delaplane and to receive a lighter sentence or reduction or dismissal for Perez who was charged with armed robbery. (R. p. 172, lines 11-15).

The trial judge also stated:

So, I don't think that the new evidence in that regard rises to the level of third party guilt as being inconsistent with the guilt of Mr. McQuarters insofar as the armed robbery and the assault and battery charges are concerned. As between Mr. Delaplane and Mr. McQuarters, Mr. McQuarters is the only one who meets the description and is consistent with the story Mr. Snodgrass and Perez said about him. So, finding that those two elements have not been met I must respectfully deny your motion to vacate the conviction and order a new trial.

(Aug. 12, 2015 R. p. 533, line 24 – p. 534, lines 1-10). The trial judge erred, as a matter of law, in applying the third party guilt analysis requiring the new evidence to be inconsistent with the guilt of Appellant. Appellant was not necessarily arguing that Delaplane was the robber. Appellant simply denied that he was the robber, as testified by Delaplane and Perez. In order to grant a new trial based on after discovered evidence the new evidence is not required to be inconsistent with guilt. The new evidence must simply be material to guilt or innocence. Based on the specific facts of this case, where the State's case was based on the testimony of Delaplane and Perez, the new evidence in regard to the prior incident and the statements made by Delaplane is material to Appellant's guilt or innocence.

In determining materiality in the context of the non-disclosure by the prosecution of a promise of leniency the United States Supreme Court in Giglio v. United States, 405 U.S. 150, 153–54, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972), wrote:

Thereafter Brady v. Maryland, 373 U.S., at 87, 83 S.Ct., at 1197, held that suppression of material evidence justifies a new trial 'irrespective of the

good faith or bad faith of the prosecution.’ See American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function s 3.11(a). When the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within this general rule. Napue, supra, at 269, 79 S.Ct., at 1177. We do not, however, automatically require a new trial whenever ‘a combing of the prosecutors’ files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . .’ United States v. Keogh, 391 F.2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under Brady, supra, at 87, 83 S.Ct., at 1196, 10 L.Ed.2d 215. A new trial is required if ‘the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . .’ Napue, supra, at 271, 79 S.Ct., at 1178.

In United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed.

2d 481 (1985) the Court wrote:

We find the Strickland formulation of the Agurs test for materiality sufficiently flexible to cover the “no request,” “general request,” and “specific request” cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A “reasonable probability” is a probability sufficient to undermine confidence in the outcome.

Although the present case involves a motion for a new trial based on after discovered evidence rather than a Brady non-disclosure violation, the definition of materiality in these cases supports the materiality element of the new evidence in the present case. The new evidence went to Delaplane’s credibility and there is a reasonable probability that had the evidence been introduced at trial, the result of the proceeding would have been different. As discussed above, the first trial ended in a mistrial because of a hung jury. In the second trial, unlike the first trial, Investigator Seifert equivocated about Delaplane’s confession that he set up the whole robbery, although it was included in his written report. The State’s case was based almost entirely on the testimony of Delaplane and Perez and their

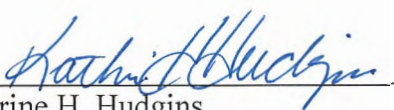
credibility was a critical factor for the jury to determine. The new statements from Ross regarding the prior incident between Delaplane and Snodgrass, the statement Delaplane made about punching Snodgrass and his admission are material to guilt or innocence.

The trial judge erred in refusing to grant a new trial based on after discovered evidence. The statements made by Ross would probably change the result if a new trial was granted, the statements were discovered after the trial, the statements could not have been discovered before trial by the exercise of due diligence, the statements are material to the issue of guilt or innocence and the statements are not merely cumulative or impeaching.

CONCLUSION

Based on the above argument, Appellant's conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of January, 2017.

CERTIFICATE OF COUNSELPRIVATE

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 17th, 2017


Kathrine H. Hudgins
Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Thomas W. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

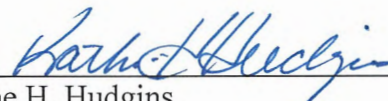
V.

AUSTIN MCQUARTERS,

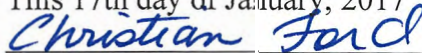
APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William F. Schumacher, IV, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 17th day of January, 2017.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
This 17th day of January, 2017
 (L.S.)
Notary Public for South Carolina
My Commission Expires: March 1, 2026

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions
Thomas W. Cooper, Circuit Court Judge

Appellate Case No. 2015-001814

THE STATE, ...RESPONDENT,

v.

AUSTIN MCQUARTERS, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3922

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

P.O. Box 1880.
Bluffton, SC 29910
(843) 255-5893

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Respondent's Statement of Issues on Appeal.....	1
Statement of the Case.....	2
Statement of Facts.....	3
Argument:	
The trial court properly denied Appellant's motion for a new trial based on after discovered evidence because Appellant failed to prove he acted with due diligence, the evidence was material to his guilt, or that the evidence would change the result of a new trial... ..	10
Conclusion	17

TABLE OF AUTHORITIES

Cases:

<u>Crane v. Kentucky</u> , 476 U.S. 683 (1986).....	10
<u>Holmes v. South Carolina</u> , 547 U.S. 319 (2006)	10, 11
<u>State v. Burgess</u> , 391 S.C. 15, 703 S.E.2d 512 (Ct. App. 2010).....	11
<u>State v. Cope</u> , 405 S.C. 317, 748 S.E.2d 194 (2013).....	11, 16
<u>State v. DeAngelis</u> , 256 S.C. 364, 182 S.E.2d 732	12, 13, 14
<u>State v. Gay</u> , 343 S.C. 543, 541 S.E.2d 541 (2001).....	11
<u>State v. Gregory</u> , 198 S.C. 98, 16 S.E.2d 532 (1941)	10, 11
<u>State v. Harris</u> , 391 S.C. 539, 706 S.E.2d 526 (Ct. App. 2011).....	12
<u>State v. Ivrin</u> , 270 S.C. 539, 243 S.E.2d 195 (1978).....	12
<u>State v. Jones</u> , 185 S.C. 274, 194 S.E. 11 (1937)	11
<u>State v. Mercer</u> , 381 S.C. 149, 672 S.E.2d 556 (2009).....	12, 13
<u>State v. Needs</u> , 333 S.C. 134, 508 S.E.2d 857 (1998)	12
<u>State v. Porter</u> , 269 S.C. 618, 239 S.E.2d 641 (1977).....	12, 16
<u>U.S. v. Scheffer</u> , 523 U.S. 303 (1998)	10

Other Authorities:

23A C.J.S. <i>Criminal Procedure and Rights of the Accused</i> § 2037 (2016).....	12
---	----

STATEMENT OF ISSUES ON APPEAL

The trial court properly denied Appellant's motion for a new trial based on after discovered evidence because Appellant failed to prove he acted with due diligence, the evidence was material to his guilt, or that the evidence would change the result of a new trial.

STATEMENT OF THE CASE

On January 23, 2014, the Beaufort County Grand Jury indicted Appellant for armed robbery and first-degree assault and battery. On July 20, 2015, Appellant proceeded to jury trial¹ before the Honorable Thomas W. Cooper, Jr. Arie Bax, Esquire and James Bell, Esquire, represented Appellant; Assistant Solicitor Mary Jordan Lempesis, Esquire, represented the State. The jury found Appellant guilty as indicted and sentenced him to twenty-five years' imprisonment for the armed robbery and a concurrent ten year sentence for first-degree assault and battery. On August 12, 2015, at Appellant's motion hearing for a new trial, the trial judge reduced Appellant's armed robbery sentence to twenty years' imprisonment.

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

¹ This was a retrial, as Appellant's first trial ended with a hung jury.

STATEMENT OF FACTS

Arrest

On October 20, 2013, John Snodgrass, the general manager of Northridge Cinemas on Hilton Head Island was robbed and assaulted as he left the theater for the night. Snodgrass, the last employee at the theater, left sometime between 10:30 p.m. and 11:00 p.m. with a bank deposit bag containing approximately \$4,500. As he walked toward his car, he noticed a separate vehicle with a female driver and a man crouched down next to its driver's door. The man approached Snodgrass and asked him questions regarding movie times, borrowing his cell phone, and a final query about the time. As Snodgrass looked down at his watch, Appellant attacked him with a hard object, knocking Snodgrass unconscious after several blows. When he awoke, he discovered the bank bag and its contents had been stolen. (R.p.96, line 2–p.106, line 14).

When Snodgrass met with Investigator Doug Seifert of the Beaufort County Sheriff's Office, he informed the officer that his attacker was approximately 6 feet tall, male, two hundred pounds, "very broad shouldered," possessed curly hair, and was African American. Sometime after the attack, he provided officers with the names and information for everyone working at the theater that night and the full dollar amount stolen that night. (R.p.107, lines 8–17; R.p.119, lines 13–23; R.p.337, line 14–p.338, line 17).

Investigator Seifert began interviewing the theater's employees, including Colton Delaplane. Delaplane initially disclaimed any involvement in the crime, but later identified Appellant and Jacklyn Perez as the two people who robbed Snodgrass and admitted that after the robbery, Appellant gave him \$250. He also admitted to telling Appellant that Snodgrass was in possession of the movie theater's cash. When he interviewed Perez, she identified Appellant

from a photo lineup as the man who attacked and robbed Snodgrass. Based on this information, he obtained arrest warrants for Appellant and Perez. He also concluded Delaplane was involved in the crime. (R.p.339, line 21–p.346, line 18; R.p.364, lines 20–24; R.p.369, line 4–p.370, line 17).

Trial

At trial, Investigator Seifert testified he believed, based on interviews with Delaplane and both defendants, Delaplane was also involved in the crime. On cross-examination, trial counsel pointed out that Investigator Seifert wrote in his incident report that Delaplane "confessed to [him] that the entire robbery was set up by [Delaplane]," even though Delaplane did not confess to the crime. Investigator Seifert clarified Delaplane did not directly confess to receiving cash for setting up the robbery, but Delaplane admitted to telling Appellant that Snodgrass was in possession of money and to receiving \$250 from Appellant a few hours after the robbery. He also testified he did not obtain a warrant for Delaplane for "anything related to the [robbery]." (R.p.364, line 7–p.366, line 13; R.p.369, line 7–p.370, line 21; R.p.372, line 5–p.373, line 2).

Delaplane testified that on the night of the robbery, he had worked at the theater for half a year and had known Appellant for approximately the same length of time. He and Appellant were good friends who hung out "about every other day." He claimed that on the day of the incident, approximately an hour and a half before the end of his shift, Appellant and Perez approached him at the ticket booth and Appellant requested money from the drawer. Delaplane denied the request but did inform Appellant that Snodgrass was the manager of the theater, stating "if you want money, that's the manager. He's the one who's going to have money." (R.p.293, line 5–p.295, line 20; R.p.297, line 15–p.298, line 10; R.p.303, line 21–p.304, line 6).

Delaplane again ran into Appellant in the parking lot of the theater at the end of his shift and exchanged pleasantries before leaving. Three to four hours after the parking lot conversation, Appellant called Delaplane and they agreed to meet near the house of Delaplane's girlfriend. Appellant handed Delaplane \$250, said "Merry Christmas," and claimed he "ran into money" at the theater. The following day, Appellant admitted to Delaplane he had robbed Snodgrass outside of the theater and had assaulted him with brass knuckles. Delaplane claimed he did not go to the police because he was scared. (R.p.295, line 21–p.297, line 11; R.p.298, line 11–p.300, line 24).

On cross-examination, Delaplane stated Perez asked him, "Where's the bread?" during the same conversation in which Appellant asked him for money from the cash register. He admitted he thought the statement was a reference to money, but that Perez was asking for gas money because she had given Delaplane a ride the week before. He admitted he was not truthful in his initial interviews with Investigator Seifert and he had not been charged with any crimes related to the robbery, despite telling Appellant that Snodgrass had the money. Trial counsel pointed out the suspicious circumstances regarding Delaplane's meeting with Appellant hours after the robbery, noting: (1) he met with Appellant outside between 1:30 a.m. and 2:30 a.m.; (2) Appellant gave him \$250; and, (3) Appellant said "Merry Christmas" when handing Delaplane the money. (R.p.307, line 15–p.309, line 3; R.310, line 12–p.315, line 21).

Paola Labrador, a theater employee, testified she saw Delaplane with a large, African American male in the theater's parking lot as the staff was leaving on the night of the robbery. (R.p.377, line 23–p.380, line 7).

Perez testified she was good friends with Appellant and they were both friends with Delaplane. On the night of the robbery, she was working at McDonalds until 9:00 p.m.

Appellant was waiting for her, and asked for a ride to Northridge Cinemas. At that time, she believed Appellant wished to meet up with a girl at the theater. When they arrived, Appellant told Perez he was going inside the theater to talk to Delaplane. Both Appellant and Perez spoke with Delaplane, and then sat in the parking lot. They spoke with Delaplane as he left the theater and then continued to wait in the parking lot. Perez, who had to return to work by midnight, asked Appellant why they were waiting in the parking lot and Appellant told her he was waiting to see what time the movies let out. A short time later, Snodgrass exited the theater. Perez testified Appellant approached him, asked what time "the movie [got] out," and then began hitting Snodgrass when he looked down at his watch. Appellant took the money, and ordered Perez to drive him back towards Bluffton. During the drive, Appellant "reminded" Perez he had known her for a long time and he also knew her mom and sister. Perez dropped Appellant off about halfway into the trip and went back to work. (R.p.141, line 15–p.156, line 25).

Perez admitted she failed to initiate contact with law enforcement and report the armed robbery and that she was facing charges for armed robbery due to her participation in the crime. She claimed she did not report the crime and did not initially disclose the facts of the crime to Investigator Seifert because she was concerned she may be charged with a crime and also feared Appellant may retaliate against her because of the violent behavior he demonstrated during the robbery and the veiled threats against her family. (R.p.158, line 12–p.159, line 10; R.p.172, line 11–p.180, line 20).

After-Discovered Evidence Hearing

On July 23, 2015, Snodgrass contacted Investigator Seifert and advised him a theater employee, Christi Ross, had information indicating that Delaplane planned the robbery. On July 24, Investigator Seifert obtained a written statement from Ross in which she described a

conversation she had with Delaplane after the robbery. She claimed Delaplane knew the robbery would occur, but he did not know Snodgrass was going to get beaten so badly and was "very apologetic and stunned" about the extent of the attack. She did not disclose this information during her initial interview with law enforcement on October 22, 2014, as she had recently been a victim in an unrelated criminal domestic violence incident and feared contacting the police could put her in danger, but her identifying information was in the sheriff officer's incident report provided to Appellant during discovery. (R. pp. 542-544).

In his notes about the conversation, Investigator Seifert noted Ross also claimed to have had a conversation with Delaplane two weeks before the robbery in which Delaplane stated, "If [Snodgrass] ever screams at me in my face again, I'm going to punch him." (R. p.543).

On July 28, 2015, Appellant filed a motion to vacate conviction and order a new trial based on after-discovered evidence. A hearing was held on August 12, 2015. No witnesses or affidavits were presented. Trial counsel argued Ross's statements would have probably changed the result of the trial because: (1) Appellant's first trial ended in a hung jury, with Delaplane's credibility and culpability in the crime playing crucial roles in that result; (2) Officer Seifert's testimony regarding his belief that Delaplane was involved in the crime "changed" between Appellant's two trials, as Officer Seifert initially testified Delaplane confessed to the crime, but at the second trial stated Delaplane only admitted to receiving \$250 and to identifying Snodgrass to Appellant; (3) Ross's statement is direct evidence of Delaplane's criminal intent and liability for the crime, especially given Delaplane threatened to hit Snodgrass in the face; (4) counsel had no reason to believe Ross possessed this information until the solicitor informed them about her statement; (5) Ross's information was material to the guilt or innocence of Appellant because "it could be a third party guilt issue . . . ," and counsel argued throughout the trial that Appellant was

not the attacker; (6) the evidence was not cumulative as it speaks to Delaplane's motive in claiming Appellant committed the crime; (7) Delaplane was one of only two witnesses who identified Appellant as the perpetrator of the crime, both of whom had credibility issues; and (8) the fact that someone else orchestrated the attack and gave Appellant instructions to commit the crime should, at the very least, be a consideration in resentencing Appellant as the brutality of the attack was one of the reasons the trial judge gave Appellant such a serious sentence. Trial counsel admitted he could not actually say whether, in a new trial, he would attempt to argue Delaplane was the person who committed the attack and it was "difficult" to argue Ross's statements made Delaplane's guilt inconsistent with Appellant's. (R.p.505, line 8–p.516, line 8; p.520, line 17–p.522, line 7; p.530, lines 10–22).

The State argued the information about Delaplane demonstrated he could have been a member of the conspiracy to rob Snodgrass, but that fact did not impact Appellant's conviction. The State argued: (1) Delaplane does not match the physical description of the man who attacked Snodgrass, as Delaplane was a "smaller in stature white male," and looked nothing like the person Snodgrass described to police; (2) Snodgrass knew Delaplane and could have easily identified him if he were the attacker; (3) Ross's statements were cumulative impeachment evidence as various evidence presented at trial impeached Delaplane's credibility, including his own admissions and Investigator Seifert's assertions that he believed Delaplane was involved; (4) Appellant had Ross's contact information, and if he had contacted her Appellant may have discovered the information she possessed; (5) the evidence was not material to Appellant's guilt, only Delaplane's; and (6) Perez, an eyewitness to the robbery, identified Appellant as the perpetrator. (R.p.523, line 21–p.528, line 21).

The trial judge noted: (1) Perez's testimony was consistent with Snodgrass's memories of the robbery; (2) Appellant's testimony was inconsistent with both Perez and Snodgrass's testimonies; (3) Delaplane already incriminated himself by testifying he received \$250 from Appellant after the robbery; (4) Delaplane's testimony was cumulative to Perez's, and, even if the jury disregarded his testimony in its entirety, Perez clearly identified Appellant as the culprit; (5) Delaplane's alleged guilt in orchestrating the robbery was not inconsistent with Appellant's guilt of the crime; and (6) Delaplane does not match the physical description of the attacker. Accordingly, the trial judge found trial counsel failed to prove the after-discovered evidence would probably not change the result if a new trial were granted and the evidence was immaterial to the issue of Appellant's guilt or innocence. However, the trial judge reduced Appellant's sentence for armed robbery to twenty years' imprisonment, based on Appellant's age at the time of the attack. (R.p.532, line 3–p.537, line 25).

ARGUMENT

The trial court properly denied Appellant's motion for a new trial based on after discovered evidence because Appellant failed to prove he acted with due diligence, the evidence was material to his guilt, or that the evidence would change the result of a new trial.

Appellant argues the trial judge abused his discretion in denying his motion for a new trial based on after-discovered evidence because Appellant's statements to Ross satisfied all five elements of the test to determine the admissibility of such statements. The State disagrees with Appellant's allegation of error: (1) Appellant's alleged statements were inadmissible statements of third-party guilt; (2) he failed to file an affidavit showing he was unaware of the existence of the evidence or that he could not have discovered it by the exercise of due diligence; and (3) Appellant failed to prove the evidence was material to the issue of his guilt, could not have been discovered by the exercise of due diligence prior to trial, or that it would have changed the result of a new trial.

The United States Constitution guarantees a criminal defendant a meaningful opportunity to present a complete defense. Holmes v. South Carolina, 547 U.S. 319, 324 (2006); Crane v. Kentucky, 476 U.S. 683, 690 (1986). However, the right to introduce even relevant evidence "is not unlimited, but rather is subject to reasonable restrictions." U.S. v. Scheffer, 523 U.S. 303, 308 (1998).

In Holmes, the United States Supreme Court articulated its approval of the rule adopted by this Court in State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941), for the admission of evidence of third party guilt. Holmes, 547 U.S. at 328. In Gregory, this Court explained:

[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are **inconsistent**

with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.

State v. Gregory, 198 S.C. 98, 104–05, 16 S.E.2d 532, 534–35 (1941) (internal citations omitted) (emphasis added).

The Court of Appeals addressed the standard to apply in State v. Burgess, 391 S.C. 15, 703 S.E.2d 512 (Ct. App. 2010). The Court specifically acknowledged the United States Supreme Court in Holmes rejected the analysis of State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001), and instead, "specifically stated that the rule of State v. Gregory is the type of rule that does not deny a defendant his right to present evidence." Burgess, 391 S.C. at 23, 703 S.E.2d at 516–517 (citing Holmes, 547 U.S. at 328). In Burgess, the defendant sought to admit testimony the murder victims received threats related to their drug debts in the months leading up to their murder. The Court of Appeals affirmed the trial court's refusal to admit the testimony because it was remote and was not inconsistent with Burgess' guilt. Burgess, 391 S.C. at 22–23, 703 S.E.2d at 515–16. The South Carolina Supreme Court confirmed the propriety of the Gregory standard in State v. Cope, 405 S.C. 317, 341, 748 S.E.2d 194, 206 (2013).

In State v. Jones, 185 S.C. 274, 194 S.E. 11 (1937), the Supreme Court set out five requirements a party must show to prevail on an after-discovered evidence claim after a criminal conviction:

- (1) That the evidence is such as will probably change the result if a new trial is granted; (2) . . . has been discovered since the trial; (3)

... could not have been discovered before the trial by the exercise of due diligence; (4) ... is material to the issue [of guilt or innocence; and] (5) ... is not merely cumulative or impeaching.

"A motion for new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge." State v. Ivrin, 270 S.C. 539, 545, 243 S.E.2d 195, 197 (1978). The credibility of newly discovered evidence is a matter for the trial court's determination. State v. Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977) ("In [the trial court], not this court, resides the power to weigh [newly discovered] evidence"). "Only the trial court and not the appellate court has the power to weigh the evidence; the trial court's judgment will not be disturbed except for error of law or abuse of discretion." State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011) (citing Irvn); see State v. Needs, 333 S.C. 134, 158, 508 S.E.2d 857, 869 (1998) (noting the granting of a motion on after-discovered evidence is not favored and reviewing courts will not disturb the trial court's denial absent an error of law or abuse of discretion). "In this post-trial setting, our jurisprudence recognizes the gate-keeping role of the trial court in making a credibility assessment." State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) quoted in Harris.

When filing a motion for a new trial based on after-discovered evidence, it is "essential to consideration of [the] motion" that such motion be supported by an affidavit of the accused himself. State v. DeAngelis, 256 S.C. 364, 371, 182 S.E.2d 732, 735; also 23A C.J.S. *Criminal Procedure and Rights of the Accused* § 2037 (2016) (stating motions for a new trial must be accompanied by proof, "either in the motion itself or by affidavits"). "Unless a valid and sufficient reason for the omission to file such an affidavit is shown, the affidavit of the accused must show that he did not know of the existence of such evidence at the time of the trial and that he used due diligence to discover such evidence, or that he could not have discovered it by the

exercise of due diligence." Id. The affidavit must be from the appellant himself; an affidavit from appellant's counsel discussing these matters is not sufficient. Id.

In Mercer, the defendant was convicted of murder, armed robbery, and possession of a firearm during the commission of a violent crime. He filed a motion for a new trial based, in part, on after-discovered evidence. Id. at 165–66, 672 S.E.2d at 564–65. The newly discovered evidence was a letter from the cellmate (Fuller) of Mercer's codefendant, Thompson, claiming Thompson admitted to him that he shot the victim. In the State's theory of the case, Mercer was the triggerman, but Thompson's participation in, and first-hand knowledge of, the crime was known to Mercer and the State at the time of trial. The trial judge conducted a hearing and denied the motion for a new trial on the basis of after-discovered evidence.

The South Carolina Supreme Court upheld the trial judge's decision, finding no abuse of discretion. The Supreme Court noted Mercer had met four of the five requirements for the new trial, but had failed to prove the newly discovered evidence would probably change the result in a new proceeding. The only information Fuller's testimony provided was Thompson's identity as the triggerman. The Supreme Court pointed out Fuller had numerous credibility issues, including his own extensive criminal record and the inconsistencies in his story and the fact that another cellmate denied Fuller's account of Thompson's confession. Fuller's story was also inconsistent with the facts of the case, including: (1) a witness providing a description of the triggerman that closely matched the "much bigger" Mercer, not the "slender" Thompson; (2) the location of the murder; (3) the distance of the murderer from the victim at the time of the shooting; and other details of the crime. Given these numerous issues, the Supreme Court affirmed the trial judge's determination that there was "essentially no chance" the jury would believe Fuller's testimony.

Failure to File Affidavit and Due Diligence

Initially, the State notes Appellant failed to comply with the procedural requirements of a motion for a new trial based on after-discovered evidence. Appellant failed to file a personal affidavit stating: (1) the facts to which Ross would testify; (2) he did not know of the existence of Ross's information at the time of trial; (3) he had used due diligence to discover such evidence; or (4) he could not have discovered the evidence by exercising due diligence. Thus, Appellant's motion was not proper for the trial judge's consideration. See DeAngelis, 256 S.C. at 371, 182 S.E.2d at 735 ("Unless a valid and sufficient reason for the omission to file such an affidavit is shown, the affidavit of the accused must show that he did not know of the existence of such evidence at the time of the trial and that he used due diligence to discover such evidence, or that he could not have discovered it by the exercise of due diligence.").

Without the affidavit or other comparable evidence, Appellant failed to demonstrate he could not, acting with due diligence, have discovered the evidence before the trial. Appellant and trial counsel were well aware of Delaplane's connection to the crime and his identification of Perez and Appellant to Investigator Seifert. In fact, trial counsel did his best to prove to the jury Delaplane was not a disinterested witness and was responsible in some capacity for the crime. Knowing this, Appellant failed to interview or even contact Ross, who was listed as a witness in the incident report. If Appellant had acted with due diligence, he would have contacted the listed employees to see if they had any information implicating Delaplane's guilt.

Additionally, there is some issue as to what Ross's testimony would be in a new trial. Neither Ross nor Investigator Seifert provided affidavits or testified at the motion hearing. Notably, Ross's claim that Delaplane made a comment about punching Snodgrass in the face is absent from her written statement to police and is only found in Investigator Seifert's typed notes

of the interview. Ross never claimed in her statement that she would not have revealed the information if questioned by Appellant or trial counsel. Similarly, while Investigator Seifert's notes state Ross did not initiate contact with law enforcement because of a fear of retaliation, he failed to give any indication that Ross would not have cooperated with Appellant or police if questioned about the crime. In fact, he noted Ross's reason for coming forward was that she felt very strongly that Delaplane should be punished for his involvement in the crime. If anything, the limited information available indicates Ross would have cooperated if questioned by trial counsel.

Accordingly, Appellant's motion for a new trial was improperly filed due to his failure to file his personal affidavit or any comparable evidence.

The New Evidence Would Not Change the Result of a New Trial and Was Immaterial to Appellant's Guilt

Assuming *arguendo* Appellant had complied with the affidavit requirement and adequately proven Ross would testify to hearing both of Appellant's statements in a new trial, such evidence would not change the result. The State notes Appellant's statements are inadmissible as those statements are not inconsistent with Appellant's guilt. Delaplane's two alleged statements to Ross were: (1) he knew "about the money," but was unaware the attack would be as violent as it was; and (2) he stated he would punch Snodgrass in the face if he ever screamed at him again. Admittedly, Delaplane's alleged statements do appear to indicate, especially considered in conjunction with Delaplane's trial testimony, that he may somehow have been involved in planning the crime.

However, the statements do not exclude Appellant's participation in the crime and do not challenge the trial evidence identifying him as the perpetrator. In fact, the trial evidence is wholly inconsistent with Delaplane being the actual robber. Snodgrass, who worked with and

knew Delaplane testified the person who attacked him was a larger, African American male. Delaplane is a smaller, Caucasian male. Perez's testimony is consistent with Snodgrass's and she specifically identified Appellant as the man who committed robbery. Delaplane's statements to Ross do not, in any way, contradict Snodgrass's or Ross's testimonies. Thus, Appellant's statements to Ross were inadmissible evidence of third-party guilt and the trial judge properly found the new evidence would not have impacted Appellant's conviction. See Cope, 405 S.C. at 341, 748 S.E.2d at 206; Porter, 269 S.C. at 621, 239 S.E.2d at 643.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

BY: 

William F. Schumacher, IV
Bar # 100231
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3922

ATTORNEYS FOR RESPONDENT

January 5, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions
Thomas W. Cooper, Circuit Court Judge

Appellate Case No. 2015-001814

THE STATE, ...RESPONDENT,

v.

AUSTIN MCQUARTERS, ...APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Bar # 100231
Office of the Attorney General

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

P.O. Box 1880
Bluffton, South Carolina 29910
(843) 255-5893

BY: 

William F. Schumacher, IV

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

January 5, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions
Thomas W. Cooper, Circuit Court Judge

Appellate Case No. 2015-001814

THE STATE, ...RESPONDENT,

v.

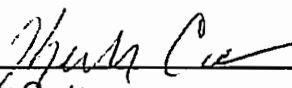
AUSTIN MCQUARTERS, ...APPELLANT.

PROOF OF SERVICE

I, Keely Carter, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.
This 5th day of January, 2017.



Keely Carter
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-7239

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Austin McQuarters, Appellant.

Appellate Case No. 2015-001814

Appeal From Beaufort County
Thomas W. Cooper, Jr., Circuit Court Judge

Unpublished Opinion No. 2017-UP-320
Submitted May 1, 2017 – Filed August 2, 2017

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General William Frederick Schumacher, IV,
both of Columbia; and Solicitor Isaac McDuffie Stone,
III, of Bluffton, all for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following
authorities: Rule 29(b), SCR CrimP ("A motion for a new trial based on after-

discovered evidence must be made within one (1) year after the date of actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence."); *State v. Irvin*, 270 S.C. 539, 545, 243 S.E.2d 195, 197 (1978) ("A motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial [court]."); *id.* at 545, 243 S.E.2d at 197-98 ("The granting of a new trial because of after-discovered evidence is not favored, and this [c]ourt will sustain the [trial] court's denial of such a motion unless there appears an abuse of discretion."); *State v. Spann*, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999) (providing a party moving for a new trial must show the after-discovered evidence: "(1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to the trial; (4) is material; and (5) is not merely cumulative or impeaching"); *State v. Harris*, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011) ("The credibility of newly-discovered evidence is for the trial court to determine."); *State v. Pierce*, 263 S.C. 23, 32-33, 207 S.E.2d 414, 419 (1974) (noting the trial court should specify the elements not established by the moving party when denying a motion for a new trial based on after-discovered evidence); *State v. Mercer*, 381 S.C. 149, 167, 672 S.E.2d 556, 565 (2009) (stating this court "may not make [its] own findings of fact" and must "affirm the trial court if reasonably supported by the evidence").

AFFIRMED.¹

LOCKEMY, C.J., and HUFF and THOMAS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

FORM 5

STATE OF SOUTH CAROLINA)

BEAUFORT)

County of _____)

2018-CP-07-158
IN THE COURT OF COMMON PLEAS

AUSTIN McQUARIERS)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

2018 JAN 29 AM 11:05
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT**INSTRUCTIONS B READ CAREFULLY**

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Leiber Correctional Institute
2. Name and location of Court which imposed sentence BEAUFORT COUNTY GENERAL SESSIONS PO Box 1128 102 RIBAUT ROAD BEAUFORT, SC 29901
3. Name(s) of co-defendant(s) (if any) JACKLYN PEREZ, COLTON DELAPLANE
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed: 2013GS0701844 and 2013GS0701845
 - (a) _____

- (b) _____
- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) TWENTY FIVE YEARS _____
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty TRIAL _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES _____
8. If you answered Ayes@ to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. DENIED _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered Ano@ to (7), state your reasons for not so appealing:
- (a) _____

- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) VIOLATIONS OF THE FOURTH, SIXTH AND FOURTEENTH _____
- (b) AMENDMENTS OF THE UNITED STATE CONSTITUTION _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) ILLEGL SEARCH AND SEIZURE OF EVIDENCE _____
- (b) VIOLATION OF THE CONFRONTATION CLAUSE _____
- (c) INEFFECTIVE ASSISTANCE OF COUNSEL _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO
13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

~~YES~~ NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) NEWLY DISCOVERED EVIDENCE UNDISCOVERABLE AT TRIAL
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? _____
- (b) your trial, if any? YES
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES
18. If you answered Ayes@ to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Arie Sax, Assistant Public Defender
- OFFICE OF THE PUBLIC DEFENDER-1905 DUKE STREET P.O.Box
- ii. 525 BEAUFORT, S.C. 29901
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. TRIAL AND APPEAL
- MOTION TO VACATE CONVICTION AND ORDER NEW TRIAL
- ii. _____
- iii. _____

19. State clearly the relief you seek in filing this application:
 EVIDENTIARY HEARING TO ESTABLISH A PRIMA FACIE SHOWING
 OF PROCEDURAL VIOLATIONS, INEFFECTIVE ASSISTANCE OF COUNSEL
 AS WELL AS DUE PROCESS VIOLATIONS
20. Are you now under sentence from any other court that you have not challenged?
 NO

Revised 3/2003

STATE OF SOUTH CAROLINA)
)
 County of BEAUFORT) VERIFICATION

I, AUSTIN McQUARTERS, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

A. McQuarters

SWORN to and subscribed before me this 23th
 day of January, 2018.

Linda K. B. (L.S.)
 Notary Public

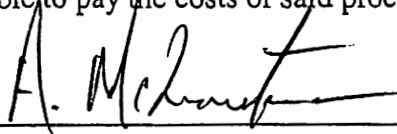
My Commission Expires: 6-20-26

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

AUSTIN MCQUARTERS

I, _____, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.



Applicant

SWORN or affirmed to and subscribed before me this

23rd day of January, 2018.


Notary Public

My Commission Expires: 6-20-26

2018 JAN 29 AM 11:05
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	
	)	
Austin McQuarters, #364854,	)	Case No.: 2018-CP-07-0158
	)	
Applicant,	)	
	)	RETURN AND PARTIAL
v.	)	MOTION TO DISMISS
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

Respondent, making its Return to the application for Post-Conviction Relief ("PCR") filed on January 29, 2018, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. In January 2014, the Beaufort County Grand Jury indicted Applicant for armed robbery (2013-GS-07-1844) and assault and battery, first degree (2013-GS-07-1845). The charges resulted from an October 2013 incident in which Applicant beat and robbed a movie theater employee with brass knuckles as the victim approached his automobile after closing time. Tr. p. 144, l. 1 – p. 147, l. 6. Arie Bax, Esquire, and James Bell, Esquire, represented Applicant. Assistant Solicitors Mary Jordan Lempesis and Brian Holland prosecuted the case. On July 21, 2015, Applicant proceeded to trial before the Honorable Thomas W. Cooper, Jr. The jury found Applicant guilty as indicted. On July 22, 2015, Judge Cooper sentenced Applicant to imprisonment for twenty-five years for armed robbery and ten years for assault and battery, first-degree, to be served concurrently.

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, of the Office of

Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction in an unpublished opinion filed August 2, 2017. State v. McQuarters, Op. No. 2017-UP-320 (Ct. App. 2017). The remittitur was returned to the circuit court on August 18, 2017.

Attached to this Return and incorporated by reference are the records of the Beaufort County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
 - a. "Violation of the 4th, 6th, and 14th Amendments of the United States Constitution."
2. "Illegal search and seizure of evidence."
3. "Violation of the Confrontation Clause."

III.

Respondent submits Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

As to Applicant's allegations regarding illegal search and seizure and the Confrontation Clause, these allegations raise direct appeal issues that are procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues

that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant could have raised these issues at trial or on appeal. His failure to do so has waived the allegations as grounds for relief. Therefore, these allegations should be summarily dismissed with prejudice.

V.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCP. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCP. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCP.

VI.

Respondent also hereby moves for a more definite statement. Applicant has failed to set forth any facts to "support each ground" or to explain with any specificity whatsoever the facts upon which his claims are based. The Uniform Post-Conviction Procedure Act requires the Applicant to "*specifically set forth the grounds upon which the application is based.*" S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Respondent respectfully submits that it is incumbent upon Applicant, through counsel, to amend his application to set forth specific facts upon which his allegations are based so that Respondent may adequately prepare for an evidentiary hearing. Therefore, Respondent

requests that Applicant be required to amend his application to set forth specifically the grounds on which his claims are based.

VII.

Respondent therefore requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to § 17-27-70 of the South Carolina Code of Laws on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VIII.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

[Signature block on following page]

IX.

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claims of ineffective assistance counsel.

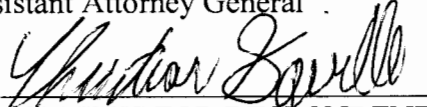
Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

CHRISTIAN SAVILLE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

05/01, 2018

1 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
2 COUNTY OF BEAUFORT) TRANSCRIPT OF RECORD

3 -----x
4 AUSTIN McQUARTERS,)
5 Plaintiff,)
6 vs.) Case No. 2018-CP-07-00158
7 STATE OF SOUTH CAROLINA,)
8 Defendant.)
9 -----x

March 10, 2022

10 B E F O R E:

11 The Honorable Robert J. Bonds, Presiding Judge

12 A P P E A R A N C E S:

13 James Falk, Esq.
14 Attorney for the Plaintiff

15 Lauren Mims, Esq.
16 Attorney for the State

17
18
19
20
21
22
23 Recorded by: Court Monitor/DCRP

24 Transcribed by: Bobbi Fisher
25 SC Official Court Reporter III

<u>WITNESS/DESCRIPTION</u>	<u>I N D E X</u>	<u>PAGE</u>
ARI BAX		
Direct Examination By Mr. Falk		5
Cross-Examination By Ms. Mims		20
Redirect Examination By Mr. Falk		27
Recross-Examination By Ms. Mims		28
AUSTIN McQUARTERS		
Direct Examination By Mr. Falk		29
Closing Argument by Ms. Mims		30
Closing Argument by Mr. Falk		32

E X H I B I T S

(None.)

COURT REPORTER LEGEND

Dash (--)	Indicates an interruption in speech
Ellipses (...)	Indicates trailing off in speech
(ph)	Indicates phonetic word
[Verbatim]	Indicates the word is said as written
(Indiscernible)	[Transcription] Indicates word(s) is not known due to audio recording quality

P R O C E E D I N G S

(Whereupon, the following proceedings started at 9:48 a.m.):

THE COURT: Attorney General, I'm happy to hear from you.

MS. MIMS: This is the matter -- may it please the Court?

THE COURT: Yes.

MS. MIMS: This is the matter of Austin -- PCR matter of Austin McQuarters, a CP case -- Common Pleas Case No. 2018-CP-07-00158. This is an evidentiary hearing. Would the Court like a brief evidentiary -- a brief procedural history of the facts?

THE COURT: Yes, ma'am, I would.

MS. MIMS: All right. So during this -- during the 2014 term, the Beaufort County grand jury indicted Applicant for armed robbery and assault and battery, first degree. Applicant proceeded to trial in front of the Honorable William Keesley. That trial resulted in a mistrial.

Applicant was then tried again on January -- or July 21st, 2015. Applicant proceeded to trial before the Honorable Thomas W. Cooper, Jr. The jury found Applicant guilty as indicted.

On July 22nd, 2015, Judge Cooper sentenced Applicant to imprisonment for 25 years for the armed robbery and 10 years for the assault and battery, first degree, to be served concurrently.

Counsel for Applicant filed a Rule 29 motion to vacate

1 conviction and for a new trial due to after-discovered
2 evidence of a statement provided to the defense after the
3 trial.

4 On July 26th, 2015, Judge Cooper heard arguments on the
5 motion for a new trial. In that hearing, the State did
6 (indiscernible) evidence was discovered after the trial. The
7 Court found that it was not a lack of due diligence in this
8 matter. He denied the motion for the new trial but reduced
9 Applicant's sentence to 20 years, instead of 25, for armed
10 robbery.

11 Thereinafter, Applicant filed a timely notice of appeal.
12 It was perfected by Katherine H. Hudgins of the office of
13 appellate defense. South Carolina Appeals confirmed the
14 decision of the lower court, stating that the Rule 29 motion
15 was properly denied. Remittitur was issued on August 28,
16 2017.

17 Timely filed a PCR application on January 28, 2018,
18 challenging his sentences and conviction due to ineffective
19 assistance of counsel, illegal search and seizure of evidence,
20 and violation of the confrontation clause. The State made its
21 return and requested an evidentiary hearing on the ineffective
22 assistance of counsel and a partial motion to dismiss on the
23 allegations of illegal search and seizure.

24 James Falk was appointed to represent Applicant on
25 March 2, 2022. Mr. Falk indicated that Applicant would only

1 be going forward on the allegation that trial counsel was
2 ineffective for failing to call or investigate Christy (ph),
3 known Randy Rossi (ph), whose statements triggered trial
4 counsel to file a motion for after-discovery evidence.

5 THE COURT: All right. Thank you.

6 Mr. Falk, I'm happy to hear from you, sir.

7 MR. FALK: Yes, Your Honor. I mean, most of what we're
8 going to be talking about today is really in Appendix 2 of
9 the -- I'm sure you have gotten the whole record.

10 THE COURT: Yes, sir.

11 MR. FALK: And, at this time, I'd like to call Mr. Bax to
12 the stand.

13 THE COURT: All right. That's fine.

14 ARI BAX,

15 after having been duly sworn, was examined and testified
16 to as follows:

17 THE WITNESS: Good morning, Judge.

18 THE COURT: Good morning, sir.

19 All right. Would you state your name, sir, for the
20 record.

21 THE WITNESS: Yes, sir. My name is Ari David Bax. Last
22 name is B-a-x.

23 THE COURT: Thank you.

24 Your witness, sir.

25 DIRECT EXAMINATION

1 BY MR. FALK:

2 Q Mr. Bax, you were -- at the time you were representing
3 Mr. McQuarters, you were a public defender in the Fourteenth
4 Circuit?

5 A That's correct.

6 Q And you represented him on both his first trial that
7 ended in a mistrial and this current trial; is that correct?

8 A That's correct.

9 Q You have -- can you characterize why you think the first
10 trial might have ended in a mistrial?

11 A Well, I mean, the jury deadlocked. There was a note sent
12 out to Judge Keesley, who was the presiding judge in the first
13 trial, that I'll never forget was -- they listed their
14 numbers. It was seven for not guilty, five for guilty. They
15 couldn't resolve -- and that was after several hours of
16 deliberation.

17 I believe that Judge Keesley did give some form of Allen
18 charge, but it was to no avail. I do recall also that the
19 sheriff's department told me later that the two groups of
20 jurors were so -- had so much animus towards each other over
21 their disagreement that they had to be escorted to their cars
22 separately in order to avoid any scuffles.

23 Q Can you tell me how an individual named Colton Delaplane
24 fit into the case against Mr. McQuarters?

25 A It was our contention at both trials -- and supported by

1 the facts and actually addressed by Judge Cooper in the
2 post-trial motion -- that there was quite a bit of basically
3 uncontroverted evidence that Colton Delaplane had planned and
4 orchestrated this entire crime as it were -- this alleged
5 crime. And the problem was, he had never been charged with
6 anything. He was a young white male who lived, I believe, in
7 the Hilton Head area, worked at this movie theater, had a
8 disagreement with one of his managers, who was ultimately the
9 victim of this incident.

10 And back-and-forth-wise, there was -- you know, he denied
11 it, I think, to some degree on the stand, but his admissions
12 to various people implicated that he set this whole thing up
13 and had motive to and benefitted from it, but he was never
14 charged. And I felt like that was an issue that a lot of
15 people would take exception to.

16 And I think the first jury very much did. I know Judge
17 Cooper very much did, and he was very displeased. And, to
18 this day, Colton's never been charged with this, ever.

19 Q Okay. And can you tell me how you came -- I mean, it's
20 in the record but just so you can paraphrase. How did you
21 come to knowledge about Rossi's (ph) statement?

22 A The same way everybody did. The solicitor sent me the
23 information when she got it after our second trial. That
24 individual was just one of the people listed as being an
25 employee of the movie neither, but there was no indication in

1 any of the discovery that she had ever given any statements to
2 police or ever claimed to have any information about it.
3 There wasn't even any information that she was on duty at any
4 of the times that were relevant.

5 But, after the fact -- you know, and frankly, when this
6 issue got brought up to me by the AG, I actually had no
7 independent recollection of this after trial, but I have gone
8 back and I have read the transcript and reminded myself of it.
9 I believe this was something that the victim, Mr. Snodgrass,
10 actually found. He went out and had this conversation after
11 the trial, and my belief and my understanding was he was kind
12 of just as upset as everybody else that Mr. Delaplane never
13 got charged with anything. And so this additional information
14 was provided. It made no difference, but, obviously, I had to
15 bring it forward to the Court because I believed that it was
16 enough to give us another trial. At the very least, it gave
17 me an argument for a reduction in sentence, which was
18 successful.

19 Q And you said "made no difference." What did you mean by
20 that?

21 A I meant it made no difference to Mr. Delaplane being
22 charged.

23 Q Oh, I see.

24 A It never -- like, it didn't result in -- I don't believe
25 it resulted in what many people, including Mr. Snodgrass

1 hoped, which was maybe Mr. Delaplane having some culpability
2 that was pursued, but it never was.

3 Q Have you had a chance to review her statement?

4 A I -- I have read the transcript of the hearing. I recall
5 that the statement was substantially that she had had a
6 conversation with Mr. Delaplane at some point prior to the
7 incident. Or, excuse me, no, after the incident but prior to
8 the trial, that he knew Mr. Snodgrass was going to get robbed,
9 but he didn't know that he was going to get hurt that bad.
10 And then there was some other statement that may have been
11 made at a different time that he, at one point, was so upset
12 with Mr. Snodgrass about something that he made him do at the
13 theater or said to him that he wanted to, quote, "punch him in
14 the face."

15 You know, and the fact that a lot of Mr. Snodgrass's
16 injuries were directly to his face, I think was more than a
17 coincidence, which is what I argued.

18 MR. FALK: Your Honor, this statement is pages 542 and
19 543.

20 THE COURT: All right. That's on 542 and 543?

21 MR. FALK: Yes.

22 THE COURT: All right.

23 Veronica, see if you can find me that.

24 MR. FALK: May I approach? Because it's in part 2.

25 THE COURT: Oh, it's in part 2? I'm not sure if I have

1 part 2. But, yes, please.

2 Hold on one second. I'm trying to make sure I have
3 got -- this is 546?

4 MR. FALK: 542 and 3.

5 THE COURT: 542? All right. This is a --

6 MR. FALK: It's in appendix 2 of 2.

7 THE COURT: Somehow my pages aren't --

8 THE WITNESS: That may be transcript pages versus
9 pagination pages.

10 THE COURT: All right. Maybe it's further down. You
11 have got a copy of that that I can look at, Attorney General?

12 MS. MIMS: Yes.

13 THE COURT: All right. That will be fine. If you could
14 bring that up. Hand that to the clerk. All right. Thank
15 you. Go ahead.

16 MR. FALK: I'm just going to give him another minute to
17 refresh his recollection.

18 THE COURT: Yes, sir.

19 MR. FALK: Can I grab that back from you?

20 THE COURT: Sure.

21 BY MR. FALK:

22 Q So it's fair to say that, based on this statement, there
23 was evidence of prior animosity between Mr. Delaplane and the
24 victim as well as prior knowledge that something was going to
25 happen?

1 **A** Correct.

2 **Q** How would you have used that information at his second
3 trial or at his first trial?

4 **A** Well, obviously, I would have probably had her as a
5 witness -- subpoenaed her as a witness, but most likely -- and
6 of course this is subjective, me looking back and thinking
7 what I would have -- might have done. I mean, it would have
8 to determine, like, how the testimony came out in trial, but
9 most likely, I would have tried to see if Mr. Delaplane would
10 deny making such a statement. I think that probably, just as
11 I'm thinking about it now, make for the best argument of
12 admissibility of prior inconsistent statement. Otherwise,
13 you'd run into a hearsay argument if you tried to introduce it
14 before Mr. Delaplane had testified.

15 And, obviously, if he didn't deny saying, I would have it
16 from his mouth. But that's, you know, just me guessing about
17 what would happen that's kind of hard to say what -- how the
18 trial would have gone had I had that. I think that, if I had
19 had that in the first trial, maybe it would have gone from 7
20 to 5 to 12 for not guilty.

21 Unfortunately, based on a different jury, which is just
22 like a different day -- you know, I mean, juries are as
23 different as night as day -- as well as the change in Doug
24 Siefert's testimony, which I took great exception to, the
25 second jury -- I'm not sure whether it would have made a

1 difference. I can't say.

2 Q You could have also called her as a witness. Did you-all
3 put up a defense?

4 A We did not put up any witnesses so that I could have last
5 argument, and really, the entirety of our case, which was,
6 obviously, effective, based on the first trial's results, was
7 the impeachment of the State's witnesses. The -- everything
8 that we needed, we got through the State's witnesses, and
9 Mr. McQuarters agreed with that.

10 Really the only other person that could have testified
11 would have been Mr. McQuarters. There were certain statements
12 of his that were already in the record, but the most important
13 of which was him denying that he had anything to do with it,
14 which he had always done. And so there wasn't any point of
15 putting him on the stand to deny it further but open him up to
16 cross-examination.

17 And I do believe there was at least some concern about
18 the standard prior record issues, as to whether any of that
19 would come in against him. So with Mr. McQuarters' agreement,
20 that's what we determined to do each time.

21 Q So this statement, obviously, came to you after the fact.

22 A Yes.

23 Q You also could have gone to Mr. Delaplane's place of
24 employment and Mr. Snodgrass's place of employment and spoken
25 to some of the other people there; is that correct?

1 **A** That's correct, but, at the same time, I have to make a
2 determination about what efforts that I can use that are going
3 to be the most efficient. At the public defender's office at
4 the time -- and this is, you know, the better part of ten
5 years ago -- we had two investigators. Unfortunately, I know
6 one of them is not with us anymore, a great guy named Rick.
7 And I think Bob was the other investigator at the time.

8 We had two investigators. We had approximately eight
9 lawyers just for this circuit, and not including the circuit
10 public defender himself at the time, Gene Hood. And when you
11 can imagine two investigators shared between eight lawyers,
12 and I was running anywhere from 185 cases to 205 cases, you
13 know, from week to week at that time, it wasn't a situation
14 where I had the resources to have them go interview every
15 single person listed in discovery unless there was something
16 in there that indicated they might have some information that
17 was going to be helpful to me in my case or if my client said,
18 "Go talk to this person, they have got something helpful."
19 Neither of those things were present when it came to
20 Ms. Rossi.

21 **Q** But it does show in this statement that Ms. Rossi was the
22 manager at that location.

23 **A** Yes. But there was no indication -- other than that fact
24 that she was a manager and an employee, there was no
25 indication that she had any relevant information to this case.

1 **Q** So another way this could have played out is, obviously,
2 if you -- this statement didn't exist prior to -- if this
3 piece of paper did not exist prior to the trial, it would have
4 been (indiscernible). But another way it could have played
5 out, if you could have gotten -- you could have interviewed
6 Ms. Rossi or had your investigator go get a statement from
7 Ms. Rossi.

8 **A** It's certainly possible I could interview everybody on
9 Hilton Head if I had those kind of resources, but I did not.
10 So, I mean, your supposition is could I.

11 Number one, she didn't want to tell the cops this when
12 they first came around, and they have badges and guns. My
13 investigators have a plastic card and no badges, and they
14 don't move too quick.

15 So the idea that she would have told them versus what she
16 didn't want to tell the police, I think that's also somewhat
17 of a reach. I think she felt bad that Mr. Snodgrass had what
18 had happened to him and that the person that was ultimately
19 responsible for that, certainly in large part, was never held
20 responsible. And that's the reason she gives, I believe --
21 and I don't see a signature at the end of that incident
22 report, but I believe that was something that was submitted by
23 Doug Siefert. It was either that or that Detective Urban.
24 But, I mean, it indicates in there that this was something she
25 only said afterwards because she felt bad about how it had

1 gone down, and that was something that my understanding was
2 Mr. Snodgrass had -- she had told him after the fact, I would
3 assume in response to him telling her how the trial went and
4 who -- and what got found guilty and who did not get charged.

5 Going to her with my investigators prior to any trial
6 happening, I can't say she would have even told us about this.

7 MR. FALK: One moment, Your Honor.

8 THE COURT: Yes, sir.

9 BY MR. FALK:

10 Q But just as far as the importance of the statement, you
11 would agree that that possibly would have helped.

12 A Would have loved to have it.

13 Q And it would have funded -- I mean, it would have
14 supported a third party guilty, possible?

15 A Well, there was contention about that. I think really
16 the central problem with the argument about her testimony -- I
17 think I would have been able to get it in at trial if I had it
18 before the fact, but the issues of after-discovered
19 evidence -- I think the tripping point you run into is whether
20 it's merely impeachment or cumulative. I was able to, in both
21 trials, bring out a lot of problems with Delaplane's
22 credibility. I was also, if I recall correctly, able to bring
23 out the fact that he had motive to have set this up, that he
24 had animosity towards Mr. Snodgrass.

25 So those facts were in evidence. This would have

1 strengthened those. This would have confirmed things out of
2 his mouth through an independent witness that he denied. So I
3 would have loved to have had it. But the fact that Colton
4 Delaplane had a reason to have a problem with Mr. Snodgrass
5 and set this up, I was able to argue that at trial.

6 As I said before, I think in the first trial, having
7 another brick in that wall, may have meant that we would have
8 had a vote of 12 instead of 7, but after Doug Siefert
9 fundamentally changed his sworn testimony in the second trial,
10 I don't know that that would have worked.

11 **Q** I was just kind of going through some of the arguments
12 that you made at the motion for a new trial, and I'm looking
13 at page 508 of the transcript, and that's where sort of lines
14 17 to 22 or so. That's where you refer to the fact, at the
15 first trial, there was an issue with Colton Delaplane's
16 possible involvement in this case. And so if you can just
17 read this. Read the paragraph and the last line on page 506.
18 (Indiscernible). Last line on (indiscernible). Just read it
19 to yourself.

20 **A** Okay.

21 **Q** And then I'll ask you if you still believe those issues.

22 **A** (Witness complies.) And then it's kind of the same thing
23 I'm saying now.

24 **Q** You would have possibly changed your opening and closing
25 argument?

1 **A** Well, I mean, I would have added her -- that element to
2 it, but it didn't change the fundamental story that we were
3 telling, the fundamental interpretation of the facts that we
4 were putting out there.

5 Now, one area that was a bit sticky was, if there was any
6 way I possibly could have argued that Colton Delaplane was, in
7 fact, himself the one that assaulted Mr. Snodgrass, as I said
8 in that hearing, I would have. However, factually, that was a
9 very difficult thing considering Mr. Snodgrass's description
10 of his assailant was very specific. It involved describing
11 someone who was very tall, very broad shoulders, large
12 individual, and Colton Delaplane was this tiny little guy who
13 was as slender as you could be, and, as Judge Cooper said,
14 didn't look like he had ever been in a fight in his life and
15 probably wouldn't survive the first one.

16 So just from a common sense standpoint -- and that was
17 something that Judge Cooper broached to me in that after-trial
18 hearing or post-trial motion hearing -- and I can't -- you
19 know, like I said, maybe I could have argued that he put on a
20 bunch of clothes to bulk himself up, but, I mean, that would
21 have been a real reach.

22 So, fundamentally, it wasn't changing the story of what
23 happened. It would not have really been fundamentally
24 possible from a credibility standpoint to suddenly argue that
25 Colton was the one throwing the punches.

1 We had always argued that, whoever did throw the punches,
2 was not Austin. I mean, that was our argument from day one.
3 We never changed that. And the issue was that Colton
4 Delaplane had reason to lie about whoever did throw the
5 punches. And, you know, our argument to the jury was that he
6 was throwing my client under the bus. I don't think that
7 would have changed, even with her additional testimony. It
8 just would have strengthened those arguments.

9 **Q** You had made a comment at the beginning as far as
10 affecting sentences, because you did get a sentence reduction
11 in this case.

12 **A** Yes, yes.

13 **Q** I'm going to show you transcript page 537.
14 (Indiscernible) the section I have marked.

15 **A** Mm-hmm.

16 **Q** Is it fair to say from that section that judge
17 (indiscernible) Judge Cooper?

18 **A** Yes. Thomas W.

19 **Q** Judge Thomas W. Cooper said that he was modifying the
20 sentence from 25 years to 20 years based on his relatively
21 young age.

22 **A** Austin's age, yes.

23 **Q** Yes.

24 **A** He was basically saying he was not doing it because of
25 the facts of the case or deciding that his role was in some

1 way lesser than he originally had believed. It was his stated
2 belief that the assault was still mostly from Mr. McQuarters
3 and not necessarily a specific instruction from Mr. Delaplane.

4 However, earlier in that transcript -- and he went on a
5 couple of pages. Judge Cooper made it very clear that he was
6 disappointed in the fact that Mr. Delaplane never faced any
7 charges, was never investigated, was -- nothing was ever
8 pursued. And he said, based on what I have seen, I have seen
9 many -- you know, many defendants come in front of me on
10 trials or pleas with evidence that came nowhere near what was
11 against Mr. Delaplane. He made those statements on the
12 record, which I thought was a very strong statement from the
13 bench. But he was not willing to believe that the level of
14 assault fell directly from Mr. Delaplane, per se.

15 **Q** Do you think his testimony would have made a difference?

16 **A** Well, that was his statement after reading Ms. Rossi's
17 statement. Like, that was him taking her evidence into
18 account. So, obviously, it didn't change his mind. Now, like
19 I said, I think maybe it would have changed the first jury's
20 mind because they were almost there. And that was based on
21 Doug Siefert's first set of facts he testified to under oath.
22 But based on Doug Siefert's second set of facts, which were
23 directly in contradiction to his first set of facts that he
24 testified to, I can't say.

25 MR. FALK: Your Honor, I have no further questions at

1 this time.

2 THE COURT: All right. Attorney General Mims, do you
3 have any cross-examination?

4 MS. MIMS: Yes.

5 THE COURT: All right.

6 CROSS-EXAMINATION

7 BY MS. MIMS:

8 Q You testified, Mr. Bax, that a large portion of the -- of
9 your defense where your client was to impeach the State's
10 witnesses; right?

11 A That's correct.

12 Q And what types of evidence did you present to impeach
13 those witnesses out of these statements?

14 A Well, a lot of what I impeached Mr. Delaplane on was the
15 various kind of contradictory statements he made to Doug
16 Siefert throughout the investigation as well as to some other
17 officers. I know also we had some contrary evidence from
18 Ms. -- and I forget; I apologize. I think it was Ms. Perez --
19 about the set of events. And also just the fact that there
20 was a strong implication here that these two were happily
21 throwing my client under the bus in exchange for -- you know,
22 she basically got a deal to probation. You know, they had
23 done what is pretty typical in State solicitor's offices where
24 they had said, you know, we're not going to give you a
25 specific deal until after you testify. But it was clear that

1 that was the case. At least that's my recollection; I haven't
2 gone back and read that testimony.

3 But I was able to impeach her both times on the fact that
4 she was not facing what Mr. McQuarters was facing on charges
5 alone, despite the fact that under "hand of one is hand of
6 all" they could have charged her with the entire offense, if
7 they wanted to, which they didn't.

8 And, so, I kind of argued based on that with the
9 witnesses themselves that they were distancing themselves
10 despite the fact that, by their admission, they were involved.

11 Q And is it your testimony that you believe that
12 impeachment evidence was fairly strong, as you indicated in
13 the first trial that the first trial was a hung jury?

14 A That's correct.

15 Q And, so, you were provided discovery in this case;
16 correct?

17 A Yes.

18 Q And in that discovery, you were given a list of
19 witnesses; correct? You testified to that?

20 A Well --

21 Q A list of names.

22 A Well -- and let me just be clear. You still have to dig
23 through this stuff. I mean, the thing is, they don't just
24 give you a list and say, "These are all the people that may be
25 relevant." In the incident report, you will have -- after the

1 incident information where it gives the date, time, location,
2 you'll have a Complainant, you'll have any suspects listed as
3 suspects. You will have also just other individuals that they
4 gather their names and boxes, and that just goes after
5 incident reports. And it can be in -- obviously, in
6 situations like this, the lead investigator is usually the
7 last person to show up. There's usually any number of
8 uniformed patrol officers that are your first responders.
9 They're the ones that start gathering names to start, then
10 they pass it off to whoever gets assigned as the lead
11 investigator. Sometimes there will be other investigators
12 that show up, and they'll do a little bit and pass off. It's
13 kind of a jigsaw puzzle.

14 And, from that, you have to find who gave any information
15 that was in any way relevant. And, of course, you also
16 discuss it with your client so if they say, "Well, this person
17 knew something," you can go after that.

18 She was just one of those names listed at the bottom of
19 an incident report, and there was absolutely nothing else
20 listed beside the fact that she was an employee, I think maybe
21 her position, and that was that.

22 **Q** And it was your testimony that Mr. McQuarters gave you no
23 indication that this may be a helpful witness.

24 **A** Mr. McQuarters didn't have any idea of that, and neither
25 did I. And I'm sure that Austin would have told me. We

1 communicated quite a bit, and we went over the facts together
2 a number of times.

3 He didn't work at this theater. It was a small theater
4 out on Hilton Head. And like a lot of things on Hilton Head,
5 it has a weird and small parking lot with lots of shade and
6 trees and kind of a maze. It's a little bit back from the
7 road because everything on Hilton Head and Bluffton they want
8 it put back from the road. They don't want it to be
9 commercial. It just makes it very hard to find everything, in
10 my opinion.

11 But he had never worked there, and I don't know that I
12 recall him ever saying he knew any other employees. The other
13 indication from the evidence was that he knew Mr. Delaplane
14 from high school.

15 **Q** And it was your testimony that you explained the lack of
16 ease, I guess you could say, in investigating large discovery
17 in your public defender's office; correct?

18 **A** Mm-hmm.

19 **Q** And you told that to the judge in the motion's hearing;
20 correct?

21 **A** Well, I knew that -- you know, I was familiar with the
22 elements that are required in asserting after-discovered
23 evidence if you want to get the relief you're asking for. If
24 you want a new trial. And of course, as one would expect,
25 it's a high standard. You have got five, if I recall,

1 elements that you have to address. And I tried to address all
2 of them that I could.

3 I knew that they would try to raise due diligence. They
4 would try to say, "Oh, he had the names, so that's his fault,"
5 which is standard. And they do that all the time. Not just
6 to public defenders but private attorneys. But that's kind of
7 the Monday morning quarterbacking of being a trial lawyer is
8 everybody wants to talk about what you didn't do after the
9 fact.

10 But I can't send my investigators to talk to every single
11 person in discovery. It's just impossible. My investigators
12 in that case, I knew both of them well. They were overworked,
13 and getting them to go look into somebody that didn't want to
14 talk, you better have a reason for them to do it and you
15 better ask them about 15 times before you expect them to do it
16 once.

17 Q And in that motion's hearing, Judge Cooper found no due
18 diligence; correct?

19 A That's correct. He made an affirmative finding that I
20 had exercised all proper due diligence and that was not a
21 fault of mine and specifically ruled that he did not believe
22 that we needed to fetter out, in his words, every single
23 witness or every single name in discovery.

24 Q And you testified earlier that this was after-discovered
25 evidence.

1 **A** That's right.

2 **Q** And you testified that you found out after the trial.

3 Can you go into that?

4 **A** I believe that I received an email from Mary Jordan with
5 the information. I believe it was sometime in mid August.

6 And I only remember this because I read the transcript and it
7 reminded me -- I was on vacation when I got this, and so I
8 then had to draft a motion while on vacation. If there's
9 anything more frustrating than a public defender's salary,
10 it's having to work while on vacation.

11 **Q** And is it your recollection that, in the motion hearing,
12 the State stipulated that this evidence was, in fact,
13 after-discovered evidence?

14 **A** Yeah, that was not controverted by them because they're
15 the ones that discovered it.

16 MS. MIMS: Beg the Court's indulgence.

17 THE COURT: Yes, ma'am.

18 MS. MIMS: Just briefly, Your Honor.

19 BY MS. MIMS:

20 **Q** What is your general practice, determining whether or
21 whether or not to call witnesses?

22 **A** Well --

23 THE COURT: I'm sorry. What was the question? Your
24 question again?

25

1 BY MS. MIMS:

2 Q Your general practice on your determination of whether or
3 whether or not to call witnesses.

4 THE COURT: Thank you.

5 A Unfortunately, as I tell my children all the time, a
6 simple question with a very complicated answer. That could
7 take me quite a while to go through. I mean, that's a number
8 of factors. I mean, I have to know whether or not they have
9 got admissible evidence, number one, because if I put a
10 witness up that's going to immediately go into hearsay that
11 there's no exception for, I'm just drawing an objection. Now,
12 that strategically, that may be necessary in some limited
13 circumstances, but admissible I have to look at. I have to
14 look at relevance. You know, a lot of times, I have witnesses
15 that are given to me by my clients or given to me through
16 discovery, but their testimony is just not relevant to the
17 issue.

18 You know, in order to get prior drama into cases, you
19 have to be able to link it to the incident involved. I mean,
20 we certainly had that here, and if I had the information about
21 Ms. Rossi, that she was unwilling to provide to cops before,
22 yeah, I think she would have been potentially a witness I
23 would have called if Mr. Delaplane had denied in any way the
24 statements that she attributed to him. But I didn't have that
25 information at all. I had zero statements.

1 And, so, without any other information, I had to go with
2 what I had. And I typically don't find that witnesses who
3 have not given the cops any information are going to do
4 differently with my investigators or with my office unless my
5 client tells me. And that has happened. My clients have told
6 me, "Go talk to this person. They'll talk to you as long as
7 they know that you're here on my behalf and not here on law
8 enforcement's behalf." I had no indication that that was the
9 case with Ms. Rossi. And neither did my client.

10 MS. MIMS: No further questions, Your Honor.

11 THE COURT: Any redirect?

12 MR. FALK: Just briefly, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. FALK:

15 Q Just to clarify your testimony, you didn't -- you never
16 knew that she was unwilling to make a statement? Your
17 investigators never even called her on the phone and got a
18 response from her saying she was not willing to make a
19 statement; is that correct?

20 A That's correct. But, as a general practice, I did not
21 and could not and would not be able to even know, if I went
22 back to work there, which I won't, is have them call everybody
23 listed and find out if they're willing to talk to us. I just
24 don't have those resources.

25 MR. FALK: No further questions. Oh, one more thing.

1 BY MR. FALK:

2 Q You would admit that, had this not been after discovery,
3 this would clearly be a Brady violation, would it not? If
4 this existed prior to the trial in their file, this would be a
5 Brady violation, wouldn't it?

6 A Absolutely. And if I had any knowledge that that was the
7 case, I would have argued that to Judge Cooper in the
8 post-trial motion and moved to dismiss the case in addition,
9 you know, obviously.

10 Q So the State's, obviously, motivated to stipulate that
11 it's after-discovered evidence.

12 A Well, the State had already shown -- I'm sorry to say
13 this, but the State had already shown that they were willing
14 to cross quite a few lines in this case.

15 Q Thank you.

16 THE COURT: All right. Anything else from this witness?

17 MS. MIMS: Just briefly, if I can --

18 THE COURT: Okay. Go ahead.

19 MS. MIMS: No, just give me one second.

20 THE COURT: All right.

21 RECROSS-EXAMINATION

22 BY MS. MIMS:

23 Q It was your testimony earlier that it was your
24 understanding that the statement that Ms. Rossi provided was
25 given to the State after Mr. Snodgrass, after the trial,

1 stated to them; correct?

2 **A** That's what was in the information provided to me, yes.

3 MS. MIMS: No further questions.

4 THE COURT: All right. Thank you, sir.

5 THE WITNESS: Thank you very much, Your Honor.

6 THE COURT: You can step down.

7 You can call your next witness.

8 MR. FALK: Just briefly, I'll call Mr. McQuarters to the
9 stand.

10 THE COURT: Sure.

11 AUSTIN McQUARTERS,

12 after having been duly sworn, was examined and testified
13 to as follows:

14 THE CLERK: State your name and spell it.

15 THE WITNESS: My name is Austin McQuarters. A-u-s-t-i-n.
16 McQuarters, M-c-Q-u-a-r-t-e-r-s.

17 THE COURT: All right. Your witness, yes, sir.

18 DIRECT EXAMINATION

19 BY MR. FALK:

20 **Q** All right. Mr. Bax -- Mr. McQuarters, Mr. Bax has
21 already testified to this, but I think you ought to hear it
22 from the horse's mouth. Did you know any employees at that
23 movie neither?

24 **A** Other than Colton Delaplane, I had no knowledge of any
25 other employees.

1 Q And, to your knowledge, you knew Colton Delaplane not
2 from that movie neither but from --

3 A From being in school.

4 MR. FALK: No further questions.

5 THE COURT: Do you have any cross-examination of this
6 witness?

7 MS. MIMS: I do not.

8 THE COURT: Thank you, sir.

9 THE DEFENDANT: Thank you, Your Honor.

10 THE COURT: All right. Mr. Falk, you can call your next
11 witness.

12 MR. FALK: We'll rest.

13 THE COURT: Okay. All right. And Attorney General Mims,
14 do you have any witnesses to call?

15 MS. MIMS: I do not.

16 THE COURT: Okay. All right. Is there any closing
17 statement or motions or anything that anyone wants to put on
18 the record and make to the Court from Assistant Attorney
19 General Mims?

20 MS. MIMS: Yes. I'd like to do a brief closing.

21 THE COURT: Okay. That's fine.

22 CLOSING ARGUMENT

23 MS. MIMS: Your Honor, we ask that the Court deny relief
24 to the Applicant's claims. I think counsel was ineffective
25 for failing to interview or investigate Christy Rossi.

1 Strategic choices made after thorough investigation of law of
2 fact are relevant to plausible options are generally
3 unchallengeable under Strickland. Strategic choices made
4 after (indiscernible) investigation are reasonable precisely
5 to the extent that reasonable and professional judgment
6 supports the limitations on an investigation.

7 Here, we have Mr. Bax's testimony that it would have been
8 unreasonable to interview every single witness that was
9 presented in the State's evidence. On top of that, the
10 specific statement that Ms. Rossi made was made after the --
11 after the trial had ended and was after discovered evidence.
12 Once he found that evidence that could have been helpful to
13 Mr. McQuarters' trial, he did his due diligence and filed a
14 motion for a new trial based upon this.

15 And, at that hearing, Judge Cooper found that there was
16 no lack of due diligence on Mr. Bax's -- there was no lack of
17 due diligence from Mr. Bax.

18 And generally now, this is mere speculation, so mere
19 speculation as to how the alleged lack of preparation
20 prejudiced Applicant is not sufficient to support and granted
21 relief. And, as I stated, trial counsel could have not have
22 discovered this information before the trial, as that specific
23 information did not exist, and Mr. -- as Mr. Bax stated, any
24 statement that Christy Rossi could have made could have went
25 only to the culpability of the State's witness, Colton

1 Delaplane. It did not absolve Applicant of any guilt. And
2 there was evidence presented, as Mr. Bax stated, at the trial,
3 that already placed the credibility of Mr. Colton Delaplane
4 into question. So for those reasons, Your Honor, I ask the
5 Court to deny relief at this time for Mr. McQuarters.

6 THE COURT: Thank you.

7 Mr. Falk, anything from you, sir?

8 CLOSING ARGUMENT

9 MR. FALK: Your Honor, there was testimony that there
10 was never even a telephone call made (indiscernible) manager
11 at the location. I mean, I can appreciate the strategic
12 decision -- the strategic trial decision, but the strategy or
13 the strategic decision that I believe Mr. Bax testified to
14 and, granted, you know, we all can appreciate that the public
15 defender's office may have limited resources, but I'm not sure
16 that necessarily should be the standard for whether or not my
17 client had effective counsel in this case.

18 This was a manager of the location, and they never made
19 any attempt to contact this person. The person did make --
20 did ultimately make a statement. Mr. Bax testified that the
21 statement would have been valuable. He could have
22 (indiscernible) impeached Colton Delaplane, and certainly, had
23 he had the statement prior to the first trial, he was pretty
24 clear that he thought it would have made a huge difference at
25 the end of the first trial, so...

1 I mean, I can appreciate that you can't call every
2 witness, but maybe you can call the witnesses that are
3 managers, you know, supervisors of the location that he
4 (indiscernible).

5 THE COURT: All right. Thank you.

6 I'm going to have an order that's going to be signed by
7 me that will be to y'all today or tomorrow, and it's going to
8 call for probably a more formal order to be forthcoming. But
9 I'll have that information -- that order to you tomorrow at
10 the latest. All right?

11 MR. FALK: Thank you, Judge.

12 THE COURT: Thank you, sir.

13 (At 10:35 a.m., the above hearing concluded.)

14

15

16

17

18

19

20

21

22

23

24

25

1 CERTIFICATE OF TRANSCRIBER

2 CASE NAME/NUMBER: Austin McQuarters v. State of SC

3 2018-CP-07-00158

4 DATE OF HEARING: 3/10/2022

5 COURT REPORTER/MONITOR: DCRP

6
7 I, Bobbi Fisher, do hereby certify that the foregoing
8 transcript is a true and correct record of the recorded
9 proceedings; that said proceedings were transcribed to the
10 best of my ability from the audio recording and supporting
11 information, and that I am neither counsel for, related to,
12 nor employed by any of the parties to this case, and I have no
13 interest, financial or otherwise, in its outcome.
14

15 17 _____
18 Bobbi Fisher, Certified Transcriber19 Date Prepared: July 4, 2022
20
21

22 NOTE: PURSUANT TO RULE 607(h)(1)(B), SCACR, "A COURT REPORTER
23 SHALL RECEIVE THE FEE OF \$1.00 PER PAGE FOR FURNISHING A COPY
24 OF A PREVIOUSLY PREPARED TRANSCRIPT." ALL REQUESTS FOR COPIES
25 OF THE ATTACHED TRANSCRIPT (FORM 800) FROM OPPOSING PARTY OR
NON-PARTIES MUST BE SENT TO THIS REPORTER AT
BFISHER@SCCOURTS.ORG.

Respondent.

ORDER OF DISMISSAL

RECEIVED
CLERK OF COURT
APR 27 AM 11:56
JEROME ANN ROSENEAU
BEAUFORT COUNTY, S.C.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. In January 2014, the Beaufort County Grand Jury indicted Applicant for armed robbery (2013-GS-07-1844) and assault and battery, first degree (2013-GS-07-1845). Arie Bax, Esquire, and James Bell, Esquire, represented Applicant. Assistant Solicitors Mary Jordan Lempesis and Brian Holland prosecuted the case. Applicant proceeded to trial on February 17, 2015 in front of the Honorable William P. Keesley. After three days of trial, the jury indicated that they were unable to come to a unanimous decision. Accordingly, Judge Keesley declared a mistrial. On July 21, 2015, Applicant proceeded to trial again before the Honorable Thomas W. Cooper, Jr. The jury found Applicant guilty as indicted. On July 22, 2015, Judge Cooper sentenced Applicant to imprisonment for twenty-five years for armed robbery and ten years for assault and battery, first-degree, to be served concurrently.

Hearing on Motion to Vacate Conviction and New Trial

On July 28, 2015, Applicant filed a motion to vacate conviction and order new trial based on newly discovered evidence of a statement from Christi (Randi) Ross, a manager at the movie theater where the crime occurred. Her statement revealed that she had a conversation with Colton Delaplane, where he admitted to knowing that the robbery would occur. A hearing on the motion convened on August 12, 2015. The Honorable Thomas W. Cooper, Jr denied the motion to vacate conviction and order new trial. Judge Cooper ruled that trial counsel failed to prove the after-evidence would probably change the result if a new trial were granted, and the evidence was immaterial to the issues of Appellant's guilt or innocence. Specifically, Judge Cooper noted that the information given in the statement was cumulative to another State Witness, Jacklyn Perez, who identified Applicant as the culprit. Additionally, he noted that the statement did not absolve

Applicant of any culpability, and Colton Delaplane did not match the victim's description of the attacker. However, Judge Cooper lowered Applicant's sentence for armed robbery to twenty years, based solely on his age at the time of the attack, and not the new evidence presented.

Direct Appeal

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, of the Office of Appellate Defense perfected the appeal. The sole issue on appeal was whether the trial court properly denied Applicant's motion for a new trial based on after-discovered evidence. The South Carolina Court of Appeals affirmed Applicant's conviction in an unpublished opinion filed August 2, 2017. *State v. McQuarters*, Op. No. 2017-UP-320 (Ct. App. 2017). The remittitur was returned to the circuit court on August 18, 2017.

II. FACTS GIVING RISE TO CHARGES

On October 20, 2013, John Snodgrass, the general manager of Northridge Cinemas on Hilton Head Island was robbed and assaulted as he left the theater for the night. Snodgrass, the last employee at the theater, left sometime between 10:30 p.m. and 11:00 p.m. with a bank deposit bag containing approximately \$4,500. As he walked toward his car, he noticed a separate vehicle with a female driver and a man crouched down next to its driver's door. The man approached Snodgrass and asked him questions regarding movie times, borrowing his cell phone, and a final query about the time. As Snodgrass looked down at his watch, Applicant attacked him with a hard object, knocking Snodgrass unconscious after several blows. When he awoke, he discovered the bank bag and its contents had been stolen. (Tr.Vol.III.p.167, line 2–p.177, line 14).

III. ALLEGATIONS

In his application for post-conviction relief, Applicant alleges that he is being held in

custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
 - a. "Violation of the 4th, 6th, and 14th Amendments of the United States Constitution."
2. "Illegal search and seizure of evidence."
3. "Violation of the Confrontation Clause."

At the evidentiary hearing, counsel for Applicant stated that the sole issue for consideration was that counsel was ineffective for failing to interview Christ "Randi" Ross as a potential witness.

IV. SUMMARY OF FACTS ADDUCED AT THE EVIDENTIARY HEARING

Applicant called trial counsel, Arie Bax. Counsel testified that he has been practicing law for eighteen years, and a large portion of that has been criminal. Counsel further testified that he was appointed to Applicant's case as a public defender at the Fourteenth Circuit Public Defender's Office. When asked what was the overall theory of defense was for Applicant's case, Counsel testified that he wanted to represent to the jury that the suspect in the crime was not Applicant. Moreover, Counsel testified that in addition to proving that his Applicant was not the attacker in the crime, he wanted to diminish the credibility of the State's witnesses – Colton Delaplane and Jacklyn Perez-- as much as possible, as they were either not charged with the crime or cooperated with the State. Counsel testified that the State provided a list of potential witnesses, full discovery including investigative reports and identifying information of individuals who the Beaufort County Sheriff's Office had spoken with. When asked what informed his decision to call or contact potential witnesses, counsel testified that there were several things that determined whether to contact witnesses. First, he evaluated whether or not they would be helpful to Applicant's case. Secondly, he weighed that against his office's ability to investigate the witness. He testified that while he was an attorney at the Fourteenth Circuit Public Defender office, there were only two

investigators that were available to interview witnesses. With that in mind, Counsel testified that only sent his investigators to interview witnesses that he felt would be useful to Applicant's defense.

Furthermore, Counsel contended that when he found out about Christi Randi Ross in discovery, she had no information regarding the robbery, and had no intention on speaking with the police. Counsel testified that he concluded that if Christi Ross did not want to speak with investigators and police from the Beaufort County Sheriff's Office that she would not want to speak with an investigator from his office. Therefore, he did not speak with her in preparation for Applicant's trial.

Trial Counsel subsequently testified that he was sent an e-mail on the Friday following Applicant's trial, which contained a statement from Christi Randi Ross, detailing information regarding one of the State's witnesses, Colton Delaplane's, involvement in the robbery. Trial Counsel testified that as soon as he was able, he filed a motion to vacate Applicant's conviction and for a new trial based on after-discovered evidence. When asked whether or not this would be useful evidence, trial counsel contended that this evidence would have been helpful to put the credibility of Colton Delaplane further into question. However, trial counsel agreed that there was substantial evidence that was introduced that would lowered the credihility of Colton Delaplane despite the newly discovered evidence. When asked whether or not the evidence would have cleared Applicant of culpability, trial counsel stated that the victim identified a large, African American male with curly hair. He continued to say that Mr. Delaphane was a white male with a small huild, so it would not change anything regarding Applicant's culpability. Counsel agreed that during the hearing on Applicant's motion for a new trial, that Judge Cooper determined that trial counsel did his due diligence regarding handling the new evidence from Christi Randi Ross.

Lastly, trial counsel testified that although he could've found out this information before trial, it would not have been reasonable because this specific information was not apparent before the trial

Furthermore, Applicant testified briefly on his behalf. He testified that he did not know Christi Randi Ross. He also stated that the only person who knew who worked at the movie theater was Colton Delaplanc, whom he met while attending the same high school.

V. STANDARD OF REVIEW

An applicant may seek PCR upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises

a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

The reviewing court applies the two-part test outlined in *Strickland v. Washington* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Id.* at 687–88; *accord. Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The applicant has the burden of establishing both deficiency and prejudice in order to be entitled to relief. *Hughes v. State*, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRPC. To prove deficient performance, the applicant must establish that, in light of all the circumstances, the acts or omissions complained of "were outside the wide range of competence" demanded of attorneys in criminal cases. *Strickland*, 466 U.S. at 688. To prove prejudice, the applicant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.* Significantly, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696.

VI. FINDING OF FACT AND CONCLUSIONS OF LAW

This Court has heard the testimony and evidence presented at the evidentiary hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After the testimony presented and considering the legal arguments by counsels, as well as the record in this action incorporated by way of the State's return, this Court proceeds to the claim raised the evidentiary hearing and find that it is without merit.

Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

Failure to Investigate Facts of the Case

Applicant asserts that Counsel was ineffective by failing to investigate and interview Christi Ross. At the hearing, Applicant focused on counsel's failure to interview Christi Ross before trial, who was a manager at the movie theater where the crime occurred. This allegation is without merit.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.*

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id.* "Counsel's actions are usually based, quite

properly, on informed strategic choices made by the defendant and on information supplied by the defendant.” *Id.* “In particular, what investigation decisions are reasonable depends critically on such information.” *Id.*

In order to prevail upon a claim that counsel did not investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. *Harris v. State*, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. *Id.* (citing *Davis v. State*, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); *Skeen v. State*, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. *Id.*, 377 S.C. at 75, 659 S.E.2d at 145 (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

This Court finds Applicant failed to meet his burden of proving that Counsel’s preparation or investigation was deficient. Counsel demonstrated through his testimony a thorough command of the facts and circumstances of Applicant’s charges, and credibly testified to fully reviewing and investigating the evidence against Applicant that was reasonable. The information brought forward by Christi Ross would not have been available to Applicant at trial, as Ms. Ross did not initially speak with law enforcement due to fear of retaliation and for her safety. Counsel credibly testified that because of her unwillingness to speak with law enforcement, it would have been unreasonable to investigate her any further as a witness. Moreover, it was only after Applicant was convicted that Ms. Ross came forward with new information regarding Colton Delaplane, who had not been charged in the crime. Additionally, when Counsel received the new evidence, he filed a motion for

a new trial and vacation of conviction on Applicant's behalf. At that hearing, Judge Cooper denoted that there was no lack of due diligence in counsel's representation regarding the evidence, because Ms. Ross was not presented as a witness that would have exculpatory information regarding his client. Furthermore, Applicant testified that he did not know Christi Ross, so he could not have informed trial counsel about her existence to help with his defense. Accordingly, Applicant has failed to meet his burden of proving deficient representation.

Moreover, Applicant has failed to show prejudice in that the discoverable matters would have changed the outcome of his trial. Counsel credibly testified that Ms. Ross' statement was cumulative and would have only been helpful in diminishing the credibility of one of the State's witnesses, and would not have changed or cast doubt on Applicant's role in the crime, as he was a closer match to the victim's description of the attacker than Colton Delaplane was. Furthermore, he was identified as the attacker by co-defendant Jacklyn Perez. Therefore, this Court finds that Applicant has failed to produce any evidence that Ms. Ross' statement would have changed the outcome of his trial.

Applicant has produced no probative evidence towards meeting his burden as to either prong of *Strickland*, and accordingly his demand for relief by way of this allegation is **DENIED**.

VII. CONCLUSION

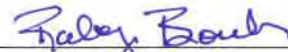
Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. This Court finds Counsel was not deficient in any manner, nor was Applicant prejudiced by Counsel's representation. Therefore, this Court denies relief on all allegations and dismisses this PCR action with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice

AND IT IS SO ORDERED this 20 day of April, 2022.



THE HONORABLE ROBERT BONDS
Presiding Judge
Fourteenth Judicial Circuit

Walterboro, South Carolina