

23035

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

RECORD ON APPEAL

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MOTION HEARING

1 PROCEEDINGS

2 MR. BAX: Good afternoon, Your Honor.

3 THE COURT: Good afternoon. How are you
4 doing?

5 MR. BAX: I'm good.

6 THE COURT: I have got everything up here in
7 connection with your motion. I have looked at the
8 motion and I have had a chance to review the
9 State's response and the authority cited in it.
10 Mr. Bax, I'll be glad to hear from you.

11 MR. BAX: Your Honor, if I may.

12 Mr. McQuarters is here, so I would like to have
13 him brought out.

14 THE COURT: Sorry, I didn't realize that he
15 wasn't here.

16 MR. BAX: No, that's all right, Your Honor.
17 I left him back because I didn't know how you
18 wanted to handle things. I did want to let you
19 know as well, Mr. Bell is back there with
20 Mr. Ogletree. That is something that you can
21 handle as well.

22 THE COURT: Either way. Whoever is ready
23 first we can do.

24 MR. BAX: It is up to you. I'll let Mr. Bell
25 know to bring him out.

MOTION HEARING

1 MS. LEMPESIS: We can go ahead with
2 Mr. McQuarters' case. And, Your Honor, I have
3 talked to Mr. Bax too, and can I go ahead and make
4 this a Court's exhibit of the supplemental report
5 that is referenced and the facts are referenced in
6 my motion.

7 THE COURT: Okay. That will be fine.

8 *(Whereupon, Court's Exhibit No(s). 1 marked*
9 *for identification and received in evidence.)*

10 MR. BAX: Your Honor, they are bringing MR.
11 McQuarters out at this time.

12 (Pause.)

13 MR. BAX: Thank you, Your Honor. May it
14 please the Court.

15 THE COURT: Mr. Bax, yes.

16 MR. BAX: Thank you. And, Your Honor, I
17 believe that Ms. Lempesis has passed up the
18 supplemental incident report and witness statement
19 that gave rise to my motion that was filed on
20 July 28th. I certainly agree with that being made
21 a Court's exhibit and would have requested it
22 myself. So, the State and I are in agreement on
23 that being made a Court's exhibit.

24 And if you need any time to review that. I
25 wasn't sure if that was provided to you ahead of

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1 time or not. I know that we both discussed it in
2 our writings, but if you would like to have some
3 time to actually read the specific words of
4 Investigator Seifert and the witness, I'm more
5 than happy to.

6 THE COURT: Okay. If you will all give --
7 there is a handwritten page and two portions of
8 two typed pages. Are they different?

9 MR. BAX: One is -- the typewritten page,
10 Your Honor, is the incident report -- supplemental
11 incident report of Doug Seifert, so it is in his
12 view who he talked to. And the handwritten page
13 is written by Ms. Ross in the form of a witness
14 statement.

15 THE COURT: Okay. All right. Let me take
16 just a moment then to look at those.

17 MR. BAX: Certainly, Your Honor.

18 (Pause.)

19 THE COURT: All right. Thank you. I have
20 had a chance to read them.

21 MR. BAX: Thank you, Your Honor. First and
22 foremost, to make sure that I cover some of the
23 procedural elements that I think I need to in
24 order to protect my client's rights, I would first
25 ask that in the event that Your Honor denies in

MOTION HEARING

1 part or whole my motions in this case, that the
2 transcript from today's hearing be incorporated
3 into the trial transcript of the trial that was
4 held before Your Honor on the July 20th through
5 22nd.

6 THE COURT: Right. It would be incorporated
7 as part of it, yes, sir.

8 MR. BAX: Thank you very much, Your Honor.
9 Your Honor, moving to the arguments for the basis
10 for our motion. I would like to address --
11 obviously Your Honor has seen the argument that I
12 have proposed in my Motson (phonetic) motion and
13 motion to vacate the conviction. And the State's
14 response I have reviewed today. I was provided
15 that today and I have reviewed it. And I would
16 like to kind of address the case law cited by the
17 State, which I am familiar with.

18 I know that Your Honor is familiar with. It
19 is the Defendant's position, and it is my position
20 as counsel, that in fact we can meet all five of
21 the elements as it were of newly-discovered
22 evidence, and I would like to address those in
23 order.

24 First of all, number one, I understand in the
25 other cases it talks about this evidence having to

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1 meet the test of probability of changing the
2 result if a new trial were granted.

3 THE COURT: Right.

4 MR. BAX: And of course I would emphasize
5 "probability." This is not something that the
6 Defendant is required to show at 100 percent
7 surety, obviously. The probability that it would
8 change the result I think is evident and primarily
9 from a couple of different things.

10 Number one, Your Honor, as you are aware,
11 this was not the first time we tried the case. I
12 believe based on the arguments made at the first
13 trial, the questions asked by the jury in that
14 trial, that was a pivotal issue in the first trial
15 that resulted in a jury that hung and actually
16 sent out a note where they wrote that there was
17 seven for not guilty and five for guilty and they
18 never were not able to resolve those numbers, that
19 a pivotal issue in that dispute in those groups of
20 jurors was the culpability of Mr. Delaplane, his
21 credibility, and the fact that he wasn't charged.

22 So, it obviously is something that has
23 already affected the ability of one jury to reach
24 a decision.

25 Secondly, Your Honor, it was of such

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1 importance that it is the Defense's position, and
2 we argued this at trial, that Officer Seifert's
3 testimony changed. And that was an issue of
4 debate. We have all been through it, I don't need
5 to hash it out again. But it was one that was
6 argued both pretrial, in chambers, and in front of
7 the jury as an issue. And it was specifically
8 cited by Defense in our argument as well as our
9 questions that this went to addressing the
10 problem of Delaplane's testimony and credibility.

11 So it was an issue that was, obviously,
12 important enough in our position to have a change
13 in testimony from Officer Seifert. Additionally,
14 it was important enough for both parties to
15 address in openings and closings. It was
16 important enough additionally, Your Honor, for the
17 State to argue against to the point of, you know,
18 saying that I was desperately trying to distract.
19 So, this was an important issue. And in fact, I
20 would argue is the main issue.

21 The problem is, Your Honor, as you are well
22 aware from having heard the case, what we had at
23 the time was a dispute about whether or not he
24 confessed. We also had his testimony, which was I
25 gave this information to these other parties but I

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1 didn't have anything to do with the robbery. What
2 you see in the statements that have since been
3 found and -- Your Honor, I would go also to point
4 out that according to what I'm reading from that
5 discovery, the same as you have, it was actually
6 Mr. Snodgrass who took the time to go out after
7 the trial and speak with this individual and gain
8 this new information and then relayed that to
9 Officer Seifert and ask that he follow-up.

10 I, of course, made my motion as quickly as I
11 could. I was provided that information, actually,
12 the email said 4:59 on Friday. And it was always
13 a pleasure to have to write another motion while
14 on vacation, as I did. But, you know, this
15 information was important enough to relay -- for
16 Mr. Snodgrass to go seek it out and relay it to
17 Officer Seifert. I think that it goes directly to
18 the idea of whether or not Colton is actually --
19 has criminal intent and liability for what
20 happened.

21 And so I think that that first element is
22 met, Your Honor. It has been discovered since the
23 trial. That one is kind of, I think, easy to say.
24 Even the State says that element has been met.
25 Number three I would like to address specifically

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1 because the State argues that we could have
2 discovered this through due diligence.

3 Your Honor, I have gone back and reviewed the
4 incident report that was initially filed in this
5 case by Officer Seifert. There is a number of
6 both witnesses and suspects listed, including my
7 client, and pretty much everybody that testified.
8 There are also other people listed that did not
9 testify. At least three listed that did not
10 testify.

11 Out of all of those, Ms. Ross is listed in
12 there. She is the only one out of all of those
13 people listed that is not referenced by
14 Investigator Seifert at all. Doesn't say that he
15 ever spoke to her, doesn't say anything about her
16 whatsoever, other than the fact that it is in the
17 boxes filled in at the front of the incident
18 report as in the party -- in the same listing as
19 the Defendants, the suspects, the employees and
20 all of the rest of them.

21 Everyone else in there, with the exception of
22 maybe one I think, there's a reference by
23 Investigator Seifert as to whether he tried to
24 talk to them, whether they were relevant or not.
25 All of that. Ms. Ross is not mentioned at all.

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1 Your Honor, I would argue that while there's
2 an element of due diligence that's been put in by
3 the Supreme Court, I think that there's a limit to
4 it that doesn't cross the burden shifting. In
5 other words, we still don't have the burden of
6 proving a case. We don't have the burden. We are
7 not required to put up a defense. We don't have
8 the burden to prove him innocent. The State bears
9 the burden to prove him guilty.

10 Your Honor, I think to basically follow the
11 idea that is proposed by the State in their
12 response would be to improperly shift the burden
13 to Defendants that they would have to, in the
14 future, go through every piece of discovery, find
15 any name that is mentioned, and if it's not
16 specifically addressed go out and investigate that
17 name or suffer the consequences of being -- you
18 know, being held to a standard that they did not
19 exercise due diligence.

20 Additionally, Your Honor, I think that I need
21 to put this on the record. Mr. McQuarters
22 qualified for a public defender, he did not have
23 the money to hire an attorney of his own. As Your
24 Honor is well aware, we in our office do our
25 absolute best to represent our clients as well as

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1 we possibly can under the circumstances, but I
2 have a current caseload that ranges from 185 to
3 205 from one week to the next. I haven't had it
4 drop below 180 since being at the Beaufort County
5 Public Defender's Office, and that has been over
6 two years, or it is somewhere around two years. I
7 forget now.

8 To put that on us, on an already overworked,
9 understaffed and underfunded department I think is
10 an unfair burden to us as attorneys, and certainly
11 an unfair burden to Defendants. So I would argue
12 that we did the due diligence that we could as
13 defense attorneys in this case, of reviewing all
14 of that discovery.

15 As Your Honor knows, I reviewed the discovery
16 in this case. I don't think that there's any
17 question. I wouldn't think that it would be
18 credible to say that I wasn't prepared as an
19 attorney in this case. So, I would argue that
20 that element is fulfilled because the due
21 diligence that would be required of the defense
22 attorney was met in this case.

23 I would argue, number four, and I kind of
24 already argued it. I think that it is material to
25 the issue of guilt or innocence, because that was

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1 the turning point of argument in this case. I
2 think it really goes to the idea that this could
3 be a third party guilt issue, and it was a third
4 party guilt issue. There was issues of
5 identification, issues of conspiracy, and
6 necessarily who all was involved. But it was the
7 Defense's contention from start to finish that
8 whoever was involved it wasn't Mr. McQuarters.

9 And that kind of leads us to number five.
10 Number five says that it's not merely cumulative
11 or impeaching. I would argue that while it would
12 be something that would most likely come up, maybe
13 they would address it in direct to kind of take
14 the sting out of it, but it would come up in
15 cross. I think that it's narrow to define it
16 impeaching. I think that it goes specifically to
17 the impeachment motive for a third party to
18 orchestrate it and motive for them to lay that
19 blame on another party other than themselves and
20 other than the guilty party.

21 Your Honor in this case, as I argued in my
22 written motion, this directly impacts the motive
23 of Mr. Delaplane to have orchestrated and/or
24 committed this offense. It also gives him a
25 specific intent when it comes to the injuries. I

MOTION HEARING

1 think a jury hearing this would have found
2 differently, I certainly know that if this
3 evidence had been available even to the first jury
4 I don't even know if it would have ever crossed
5 your desk, to be honest with you. Unfortunately
6 it was not. I would also cite the fact that in
7 this discovery, the reason that Ms. Ross is now
8 coming forward with this information is because of
9 her concern that Mr. Delaplane would get away with
10 it.

11 I would also like to point to the last bit of
12 what she relays. She doesn't actually put this in
13 her written statement, but she relays it to
14 Investigator Seifert. There was also an event two
15 weeks prior to the assault where Mr. Snodgrass,
16 according to what she relayed, had had a either
17 verbal yelling at, discussion, argument, whatever
18 you want to call it, to Mr. Delaplane about his
19 work responsibilities, and his response to that
20 was, I want to hit him in his face. I think that
21 is extremely relevant because that is exactly what
22 happened in this case, he was injured in his face.

23 I would also like to note, Your Honor, while
24 I didn't put it in my title, I did address it in
25 the writing of my motion, that it also impacts the

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1 sentencing in this case. I spoke, in my motion,
2 about the fact that the Court cited in addressing
3 the Defendant on the issue of sentencing, that the
4 brutality of the attack on the victim was part of
5 the consideration, as it should be, for the
6 sentence in this case. I would ask that this
7 motion also be considered that if Your Honor is
8 inclined to deny, you know, the motion for new
9 trial, that Your Honor would consider this a
10 motion for reconsideration of the sentence in the
11 alternative.

12 And I would argue on that issue that even if
13 we are to -- you know, if we are to argue that
14 Mr. McQuarters is involved, we have direct
15 evidence that the nature and severity of the
16 attack on Mr. Delaplane was the specific or --
17 excuse me, I am sorry, the attack on
18 Mr. Snodgrass, I apologize, was the specific
19 request of Mr. Delaplane.

20 And I think that goes to the idea that, from
21 a sentencing standpoint, there is a culpable party
22 who may have specifically wanted this and had
23 specific involvement in it. And I believe that
24 that affects the consideration by the Court of the
25 sentencing. And I would ask the Court, in the

MOTION HEARING

1 alternative, after consideration of the motion
2 for -- vacation of the conviction and new trial,
3 consider that as a reason to lower Mr. McQuarters'
4 sentence. Thank you.

5 THE COURT: All right. Thank you. Mr. Bax,
6 before I turn to Ms. Lempesis in this case, you
7 are not suggesting by your argument that
8 Mr. Delaplane is the one that attacked
9 Mr. Snodgrass in the parking lot, are you?

10 MR. BAX: Well, Your Honor, I know what the
11 evidence has shown is that Mr. Snodgrass has
12 testified that he saw an African-American male,
13 height -- African-American male that was, you
14 know, of a height, was bulky.

15 THE COURT: 6 feet, broad shoulders and
16 stocky were the words that he used in his
17 description.

18 MR. BAX: That's correct, Your Honor, and I
19 am aware of that. However, this evidence being in
20 the case, I am not -- I cannot say that if we were
21 to try this again that I would not argue that it
22 is possible that Mr. Delaplane wore a bunch of
23 clothes and went out there and committed the
24 offense. I mean, to some degree I know that I
25 have a tight rope to walk a lot of the times. And

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1 that is arguing the best that I can for my client
2 but at the same time not losing credibility. So,
3 that is a judgment call that I would have to make.
4 I can't say that I would actually go that road or
5 not, but it is kind of an awfully fishy question
6 to say that this individual has expressed a
7 specific desire to punch Mr. Snodgrass in the face
8 and that he didn't do it himself.

9 THE COURT: I think, as I read the
10 information, that threat or that desire, whatever
11 it happens to be -- it was not a threat because it
12 was not communicated to him -- was given when
13 Mr. Snodgrass apparently berated Mr. Delaplane for
14 not doing something he was supposed to, or doing
15 something he was not supposed to. And I was here.

16 I observed the relative sizes of
17 Mr. Delaplane and Mr. Snodgrass. Suffice it to
18 say that Mr. Delaplane is relatively a
19 slightly-built fellow, nice looking guy. He
20 doesn't appear that he spends a whole lot of time
21 in the gymnasium. I can say that as a person who
22 has not seen the inside of a gymnasium since I was
23 in high school. But, in addition to that, of
24 course, Mr. Snodgrass is somewhat larger. And so
25 I have to factor that statement into the calculus.

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1 This is something that he would like to have
2 happened, or is this something that he intended to
3 do himself. And just comparing the sizes of the
4 two, unless Mr. Delaplane just enjoys a fight,
5 from the looks of his face he has never been in
6 one in his life. It is not the sort of combat
7 that he would want to enter into with someone
8 stronger, larger, older than he.

9 And because Mr. Snodgrass in his testimony
10 was pretty specific about some things up to the
11 point that he got hit. He talked about what he
12 had done, he had looked out in the parking lot, he
13 left through the door, he had his bank bag, and
14 keys, and papers, and some gifts. He said exactly
15 where he was parked, second aisle, four spaces
16 back, 50 yards from the entrance. He saw a small
17 sedan backed into a space in the lot on his left.
18 There was a female in the driver's seat, somebody
19 else crouched by the car stood up. He was a black
20 male, 6 feet plus or minus, broad shoulders,
21 stocky, asked me what time the movies ended,
22 borrowed my cell phone, battery dead.

23 And when I looked at my watch he reached
24 behind him with his right arm and I drew my arm
25 out and at that time I was hit. That is pretty

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1 unequivocal as to the definition of the person who
2 actually struck him.

3 Now, I will say this, I was concerned during
4 the last trial as to how and why some action was
5 not taken in regard to Mr. Delaplane, based on his
6 own testimony. And based on the fact that the
7 incident report said that he had set up this
8 trial -- set up this robbery. However,
9 Investigator Seifert meant that it was clear that
10 Delaplane had had some part. And then after the
11 fact he got \$250 because Mr. McQuarters said, I
12 have come into some money. I mean, that is not
13 the sort of stuff that passes the smell test.
14 They lock up people and charge them for stuff, I
15 don't need to tell you, that by comparison is a
16 Willow in the wind to that. And I wondered that.

17 And I don't, you know, in my mind I could
18 conjecture, if I wanted to, a thousand different
19 reasons. I would hope that the reason that they
20 did not is for a well-founded reason, a fair
21 reason, but I don't know what it is. I notice on
22 this particular supplemental report they listed as
23 a suspect Mr. Delaplane. I don't know what that
24 means. I don't know if new charges are going to
25 come out of this in lieu of Ms. Ross' testimony.

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1 But if it doesn't, somebody needs to
2 investigated. I mean, somebody needs to answer as
3 to why, in the course of all of this,
4 Mr. Delaplane has not been called upon to at least
5 answer to some of these questions, has not been
6 put through the ringer and made to explain these
7 things about -- I don't recall a whole lot of
8 grilling in his statement that he made before.

9 It quite frankly would satisfy the scrutiny
10 that he should have been subjected to in my mind.
11 All I know is what I read. I don't know what was
12 going on, what was said behind the scenes. But I
13 offer that because I do question, as you do, why
14 he's not been called to task on some of these
15 things, or why he will not be now in the face of
16 this fact now. Certainly, this is supportive of
17 the fact that he was more than just a friend,
18 telling Mr. McQuarters, Yeah, that is the guy, he
19 has the money, this is where he's going to come
20 out. I know that you are not going to do anything
21 to hurt him.

22 Now, on the third party guilt issue, my
23 position on the third party guilt is that the
24 third party guilt evidence, first of all, cannot
25 merely raise a mere suspicion in somebody else.

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1 And secondly it has to be inconsistent with the
2 guilt of Defendant himself. I believe those are
3 the two. There might be other criteria, and I
4 should have looked it up. But I think those are
5 the two criteria. If that is a standard for third
6 party guilt, then how does this information
7 satisfy those two prongs? Does it do more than
8 just raise a mere suspicion of Mr. Delaplane's
9 guilt insofar as for the attack on
10 Mr. Snodgrass -- that is what we are talking
11 about, the attack on Mr. Snodgrass and the armed
12 robbery or -- and is that inconsistent with
13 Mr. McQuarters' own view? Can you help me with
14 that?

15 MR. BAX: Just a moment, Your Honor.

16 (Pause.)

17 MR. BAX: Your Honor, the argument that we
18 would have is that the motive here is not only --
19 what we think this evidence shows is that the
20 motive is not only to conceal that Mr. Delaplane,
21 his motive, was not only to conceal his role in
22 this, but also to lay blame on Mr. McQuarters.

23 Going to the two things that you have talked
24 about. This is not a mere suspicion. And I think
25 that the reason that I would argue that it's not a

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1 mere suspicion, Your Honor, is because the
2 confluence between the statement of the injury to
3 Mr. Snodgrass' face, saying that I want to punch
4 him in the face and the fact that that's
5 absolutely what happened. That is -- I would
6 argue, Your Honor, that rises above the level of
7 mere suspicion.

8 So, to meet that element I would argue that
9 you have a statement in one hand that occurred,
10 according to the evidence, two weeks prior to the
11 attack. Then you have the attack happening where
12 it is undisputed that the injuries suffered by the
13 victim were directly to his face.

14 THE COURT: Right.

15 MR. BAX: So, I think that rises above the
16 level of mere suspicion.

17 THE COURT: Well, it might if Mr. Delaplane
18 is accused of being in a conspiracy, and even if
19 he told Mr. McQuarters, I want you to bust him
20 good because he embarrassed me some time ago. And
21 that might have some logical nexus there.

22 But I don't see how that statement in itself
23 is going to make Mr. Delaplane a 6-foot tall black
24 man.

25 MR. BAX: I understand that, Your Honor. And

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1 I think that the second element that you talked
2 about is kind of what you are going to, the idea
3 of whether or not that's inconsistent with the
4 culpability of my client. And frankly, as an
5 officer of the Court, that is a difficult argument
6 for me to overcome. I think that it would be
7 without credibility for me to say otherwise.

8 However, Your Honor, I don't give up that
9 argument. The reason being is purely this: My
10 client's contention from day one, and there's
11 absolutely no evidence, no statement from my
12 client and no evidence to the contrary is, I
13 wasn't that guy. And that is -- the thing is that
14 is one of the reasons why, Your Honor, we don't
15 require Defendants to prove their innocence.

16 I have actually argued this in trials before.
17 You know, it is funny, I first started arguing it
18 and I called it the three-nuns defense. None of
19 us walk around with three nuns all day long hoping
20 that if someone ever accuses us of doing something
21 we would have three nuns to testify for us that we
22 didn't do it.

23 Now, of course, we have got video cameras, so
24 I changed it to the video camera defense. And
25 these days maybe it is more feasible to walk

MOTION HEARING

1 around with a video camera on you all day. I know
2 that we are putting body cameras on the officers,
3 so in a way we are getting to that point. But
4 it's still not feasible to ask the common citizen
5 to walk around with a video camera on them at all
6 times. The reason for that is sometimes we run
7 into a situation where we are accused of a crime,
8 we don't have direct evidence that we weren't
9 involved other than to say that we didn't do it.
10 And I think at this point in time that is what I
11 can rest on. And I wish that I had something else
12 to give you. As an attorney, I always wish that I
13 had a better smoking gun to point to.

14 But on the issue of inconsistency with the
15 guilt of my client, I can only point to the fact
16 that Mr. McQuarters contends, then and now, that
17 whatever other individual Mr. Delaplane might have
18 been in conspiracy with, it wasn't him.

19 THE COURT: All right. Thank you.
20 Ms. Lempesis.

21 MS. LEMPESIS: Thank you, Your Honor, may it
22 please the Court. Your Honor, I did provide to
23 the Court several different cases. There is State
24 versus Spann, Sterling Spann, and that is a 1999
25 South Carolina Supreme Court Case. And State

MOTION HEARING

1 versus Harris, which is a Court of Appeals case
2 from 2011. State versus Irvin, which is a 1978
3 case from the South Carolina Supreme Court. And
4 State versus Mercer, which is a 2009 Supreme Court
5 case.

6 Your Honor, I will go through the five
7 requirements that Mr. Bax has just touched on as
8 well that are required in order for a new trial to
9 be ordered. Your Honor, as you know, the moving
10 party must show five things. First, that the
11 evidence would probably change the result if a new
12 trial were granted.

13 Your Honor, as to this issue, we have talked
14 again, today, a lot about Colton Delaplane. It's
15 something that we talked a lot about in the first
16 trial. But again, we are talking about the case.
17 Mr. McQuarters was the one on trial. This new
18 information doesn't pertain at all to Austin
19 McQuarters. As Your Honor pointed out, perhaps it
20 makes the case against Colton Delaplane stronger
21 as to conspiracy or his involvement in this
22 matter. But it doesn't pertain to Mr. McQuarters.

23 Mr. Delaplane did testify during the first
24 trial, and Your Honor will recall that his
25 testimony was -- he was vigorously impeached by

MOTION HEARING

1 Mr. Bax during his cross-examination. This
2 information, perhaps a jury would further discount
3 Colton Delaplane's testimony. But they already
4 had plenty of reasons that Mr. Bax gave them to
5 discount his testimony.

6 As such, I don't think -- I think this would
7 be further information for Mr. Bax to use against
8 Colton Delaplane to attack him on the stand but
9 wouldn't change the result if a new trial were
10 granted. Again, we are not talking about Colton
11 Delaplane's role in this case.

12 Your Honor, as to the second element, we have
13 no dispute against that. Obviously, this is
14 information that was discovered after the trial.
15 Investigator Seifert contacted me that Friday. I
16 think that his report even has the time,
17 12:20 p.m. And I provided the information to
18 Mr. Bax that same afternoon, as soon as I had the
19 formal report from the Sheriff's Office, the
20 supplemental report, so that is not in dispute.

21 As to the third element, that the evidence
22 could not have been discovered before the trial by
23 the exercise of due diligence. I did note in my
24 memo to Your Honor that Ms. Ross, this witness
25 that Mr. Snodgrass spoke to and then Investigator

MOTION HEARING

1 Seifert spoke to after the trial, her information
2 is in the original report.

3 Corporal Sally Irvin interviewed her after
4 the attack on Mr. Snodgrass and her information is
5 listed, her name is listed, her contact
6 information I believe is also listed in the
7 original report. I think, by Mr. Bax suggesting
8 that I'm attempting to shift the burden suggesting
9 that they could have interviewed this witness is
10 hardly the case.

11 Her information is there. She was not called
12 as a witness because, frankly, we didn't see that
13 she had anything to add. And until this
14 information arose after the trial, we didn't think
15 that she did. So, to suggest that we are trying
16 to shift the burden is hardly fair. I'm just
17 mentioning that her information was included so it
18 wasn't a totally random person never approached by
19 law enforcement originally.

20 Your Honor, as to number four, as to whether
21 or not the evidence is material to the issue of
22 guilt or innocence, I think that it is absolutely
23 clear that it is not material to the issue of
24 guilt or innocence. Perhaps it is material to
25 Colton Delaplane's guilt or innocence but not

MOTION HEARING

1 Austin McQuarters'. You have already discussed,
2 Your Honor, but Mr. Snodgrass identified his
3 attacker as a larger built, African-American male.
4 That man was not wearing a mask. Mr. Snodgrass
5 was never able to identify him, but he certainly
6 gave a physical description of him.

7 And as you have also noted, Colton Delaplane
8 is a smaller in stature white male. It is
9 important to note I think also that Colton
10 Delaplane worked for Mr. Snodgrass. If it was
11 Colton Delaplane attacking Mr. Snodgrass that day
12 we certainly would presume that Mr. Snodgrass
13 would have been able to identify him.

14 Your Honor, Mr. Bax mentioned that his client
15 never made a statement. His client did make a
16 statement. He made a statement saying that he
17 didn't know the girl that he got in the car with
18 at Kroger and rode to the movie theater with. He
19 put himself at the movie theater with Jacquelyn
20 Perez. We know Jacquelyn Perez and she testified
21 and she was an eye witness to the attack.

22 Your Honor, furthermore, as to the fifth
23 requirement, which is also not met, the evidence
24 has to be not merely cumulative or impeaching.
25 The State contends that this is further

MOTION HEARING

1 impeachment evidence that could have been used
2 against Colton Delaplane. It is nothing more than
3 impeachment evidence. It does not pertain to the
4 guilt or innocence of Mr. McQuarters and it
5 simply -- if it were known before, during the
6 trial, it could have been used to further impeach
7 Mr. Delaplane.

8 THE COURT: All right.

9 MS. LEMPESIS: Your Honor, just one last
10 thing. The new evidence and this statement that
11 has been turned over is Mr. Delaplane apparently
12 saying to Ms. Ross after the incident that he knew
13 about the money, but he didn't know that
14 Mr. Snodgrass was going to be beaten so badly.
15 Again, I don't know how that would have been
16 interpreted at trial. But it's not, again, a very
17 clear statement.

18 I think that it certainly could have been
19 used against Colton when he testified, but it's
20 not as if Mr. Delaplane is saying that he
21 committed this robbery. Thank you, Your Honor.

22 THE COURT: Thank you. All right. Mr. Bax,
23 you have the last word. It is your motion.

24 MR. BAX: Thank you very much, Your Honor.
25 Very quickly, I would just like to respond on the

MOTION HEARING

1 issue of Ms. Ross. As I have said before, we
2 don't have the burden. And additionally, in her
3 argument the assistant solicitor mentioned that an
4 Officer Erwin, if I remember that correctly,
5 interviewed Ms. Ross. I'm looking kind of
6 desperately looking through my information to see
7 their words from closing. I have got absolutely
8 no information about Investigator Erwin.

9 MS. LEMPESIS: Irvin.

10 MR. BAX: I am sorry, Investigator Irvin.

11 THE COURT: While your mind rests on that,
12 Mr. Bax, if you are talking about the third
13 element, due diligence element.

14 MR. BAX: Yes, sir.

15 THE COURT: I don't find that there was any
16 lack of due diligence in this case. So I agree
17 that it is not your responsibility to go through
18 there and fetter all of those witnesses, it is the
19 State's responsibility to reveal to you any
20 impeachable evidence of any of the witnesses or
21 their case, any exculpatory information as it
22 bears on your client. That is pure Brady stuff,
23 they are supposed to do it. And -- if they know
24 about it. And, of course, the law says that they
25 are held accountable. And I have no doubt, if

MOTION HEARING

1 Ms. Lempesis knew about it you would have gotten
2 it. Unfortunately, she is vicariously responsible
3 for whatever the agencies down the road will give
4 to her. But I agree, I think given what you knew
5 there was a list of witnesses there that you had
6 no reason to believe that this witness was going
7 to help your case because it wasn't revealed to
8 you in that fashion. So, that is not an adverse
9 finding as far as I'm concerned.

10 MR. BAX: Thank you, Your Honor. Well, then,
11 in light of Your Honor's comments, I will move to
12 just my final comment and I am going to sit down
13 and be quiet. Which I think that everyone will be
14 glad about.

15 I think, as to the issue of whether this is
16 mere impeachment or rises above that level, the
17 Defense would once again contend as we did in both
18 trials in this case, that there were only two
19 witnesses that actually put responsibility on
20 Mr. McQuarters. And one of those witnesses was
21 Mr. Delaplane. Both of which had obviously
22 credibility issues, both of which knew each other.

23 Additionally, during the course of the trial
24 Your Honor unfortunately had to deal with the fact
25 that these witnesses were talking to each other in

MOTION HEARING

1 contradiction to the sequestration order. I think
2 because of that, the issue of Mr. Delaplane's role
3 and what it bears on his credibility rises above
4 mere impeachability. It goes to the idea that the
5 less -- the more that Mr. Delaplane is shown to
6 have bias and reason to lie to cover his own role
7 in a crime that could result in his lack of
8 freedom the more that my client is entitled to a
9 not guilty verdict in the eyes of the jury. And
10 that would be the position of the Defense.

11 THE COURT: All right. Thank you.

12 (Pause.)

13 THE COURT: I was checking my notes. You
14 refreshed my memory, it was true all three of
15 these folks, as I understand it, knew each other
16 from school. That Delaplane was the younger of
17 them, as I recall. But they all knew each other.
18 Am I incorrect in that regard?

19 MS. LEMPESIS: That is correct, Your Honor.

20 MR. BAX: That is correct, Your Honor.

21 THE COURT: And I offer that for this reason,
22 if Mr. Delaplane were making this up you would
23 think that he would choose somebody other than a
24 schoolmate, get a stranger or just create a straw
25 person out there somewhere rather than point to

MOTION HEARING

1 somebody that he knows and get involved in that
2 regard.

3 The fact that Ms. Perez testified that she
4 knew him, she knew Mr. McQuarters and that they
5 had gone over there, ostensibly to the movie, for
6 whatever reason. Of course that's inconsistent
7 with what Mr. McQuarters told in his statement.
8 He said that he didn't know the name of that girl
9 that he picked up at the supermarket who said she
10 wanted to go see a movie. The fact that those
11 stories are consistent; that is, Ms. Perez's story
12 is consistent with Mr. Snodgrass' recollection as
13 to what happened. She testified as to the size of
14 her car, where it was parked, and that is
15 consistent with what Mr. Snodgrass is saying.

16 And of course, Mr. McQuarters' description,
17 as we have already said, is consistent with what
18 Mr. Snodgrass mentioned. Mr. Delaplane, as far as
19 that's concerned I think is oddly, is somewhat
20 cumulative. And what Mr. Delaplane does bring
21 that seems to incriminate Mr. McQuarters even more
22 is that he got \$250. Of course, when he said that
23 he incriminated himself as well, I'm yet not sure
24 why something hasn't been done about that. I may
25 never know. But all of those things in my mind

MOTION HEARING

1 deals with the first and fourth elements that are
2 required to grant a new trial on the basis of that
3 discovered evidence.

4 It would probably change the result if a new
5 trial were granted. And probably, of course, you
6 are right, is not the highest standard in the
7 world and it shouldn't be. If it were to do that
8 then the jury would have to disregard
9 Mr. Delaplane's testimony in its entirety, which
10 they have a right to do. They would also have to
11 discount Mr. Snodgrass' testimony that is
12 consistent with Ms. Perez and others, and that
13 would be in my mind pure conjecture.

14 Now, if a jury were to do what you suggested
15 they may have done in the first place, hang up
16 because they were wondering why Mr. Delaplane had
17 not been charged with something. And another jury
18 may get hung up for that same reason. And it is a
19 hang up. It was a hang up for me. Still is. But
20 now if they were to disregard the proof against
21 Mr. McQuarters because Mr. Delaplane was not
22 charged, then I'm not sure that that would be
23 justice either.

24 So, I don't think that the new evidence in
25 that regard rises to the level of third party

MOTION HEARING

1 guilt as being inconsistent with the guilt of
2 Mr. McQuarters insofar as the armed robbery and
3 the assault and battery charges are concerned. As
4 between Mr. Delaplane and Mr. McQuarters,
5 Mr. McQuarters is the only one who meets the
6 description and is consistent with the story Mr.
7 Snodgrass and Perez said about him. So, finding
8 that those two elements have not been met I must
9 respectfully deny your motion to vacate the
10 conviction and order a new trial.

11 Thank you ladies and gentlemen.

12 MS. LEMPESIS: Thank you.

13 MR. BAX: I am sorry, Your Honor. One thing
14 that I would just like to ask, because I know that
15 I need to make sure I cover it. I would just ask
16 Your Honor if you would be willing to -- if you
17 would put something on the record as to whether or
18 not you would consider the alternative argument
19 for any reduction in the sentence for my client.

20 THE COURT: All right. Tell me, and I am
21 sorry, I don't have the sentence sheet in front of
22 me, what was it?

23 MR. BAX: It was 25 years, Your Honor.
24 Twetny-five is on the armed robbery, and then five
25 on the weapons charge to run concurrent I believe.

MOTION HEARING

1 MS. LEMPESIS: It was assault and battery.

2 MR. BAX: Oh, assault and battery. I
3 apologize, it was the assault and battery, which
4 was a 10-year concurrent sentence, if I'm not
5 mistaken.

6 MS. LEMPESIS: That is right.

7 MR. BAX: So, 10 years concurrent with 25,
8 Your Honor, I am sorry.

9 MS. LEMPESIS: That is correct.

10 THE COURT: Well, Ms. Lempesis, what do you
11 say to that? The ten-year sentence is an
12 appropriate sentence given the nature of the
13 damages to Mr. Snodgrass. What about the sentence
14 on the armed robbery? I don't have his record
15 here in front of me. You will have to refresh my
16 memory.

17 MS. LEMPESIS: I'm happy to, Your Honor.
18 I'll have to refresh my own memory as well. I
19 handed up his prior convictions, certified prior
20 convictions. I know that it was a charge of
21 unlawful. I believe that it was unlawful carrying
22 of a weapon that he had been sentenced to just a
23 month prior to this incident.

24 THE COURT: I think that was a significant
25 point in my decision as well.

MOTION HEARING

1 MS. LEMPESIS: Yes, Your Honor. Yes, it was
2 unlawful carrying or unlawful possession of a
3 weapon that he had plead guilty to. Also a
4 possession of a stolen firearm. I believe there
5 were two separate convictions from the same
6 incident.

7 And Your Honor, as far as the reduction, the
8 State's position is that your original sentence of
9 25 years was more than appropriate given the
10 violent nature of this attack on Mr. Snodgrass.
11 Whether or not -- this new information from Ms.
12 Ross, the witness, has no bearing on what
13 Mr. McQuarters' role in this crime was. And he
14 was the only one who was there and violently
15 attacked Mr. Snodgrass with brass knuckles causing
16 permanent damage to his vision and to his face
17 that he will suffer for the rest of his life.

18 THE COURT: Right.

19 MS. LEMPESIS: We ask that the Court not
20 alter Mr. McQuarters' sentence. Thank you.

21 THE COURT: I'm looking at the notes now on
22 that, Mr. Bax. Mr. Snodgrass is here, of course,
23 right?

24 MS. LEMPESIS: He is present, Your Honor. I
25 am sorry, I failed to mention that.

MOTION HEARING

1 THE COURT: That is all right. I noticed him
2 back there.

3 MS. LEMPESIS: Thank you.

4 THE COURT: And I recall Mr. Snodgrass
5 testifying about the extent of his injuries and
6 damages of course. I would be willing, quite
7 frankly, in view of the fact that this is a no
8 parole 85 percent sentence to provide some minimal
9 relief. It may seem like minimal today, but it'll
10 be significant at the end of the sentence. I'll
11 be willing to reduce the sentence on the armed
12 robbery to 20 years rather than 25 years taking
13 into account solely Mr. McQuarters' age as the
14 sole factor in that regard. And I don't think
15 that Mr. -- frankly, I don't think that
16 Mr. McQuarters was responding to Mr. Delaplane's
17 request that Mr. Snodgrass be beat up.

18 I think that he was doing what he thought he
19 needed to do to steal the money. I recognize that
20 this is an 85 percent, no parole offense, and it
21 is not like it is 25 years parolable. 25 years
22 means almost all 25 years. I'll amend the
23 sentence to reflect ten years for the assault and
24 battery first and 20 years for the armed robbery
25 to run concurrent with each other. Thank you all.

MOTION HEARING

1 MR. BAX: Thank you, Your Honor.

2 MS. LEMPESIS: Thank you.

3 MR. BAX: Thank you for giving us this
4 opportunity, Your Honor.

5 THE COURT: I'm glad that it worked out and
6 that I was here and could hear it.

7 (Whereupon, the hearing concluded.)

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MOTION HEARING

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CERTIFICATE

STATE OF SOUTH CAROLINA:

COUNTY OF BEAUFORT:

I, MONA L. MANLEY, Court Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 10th day of March, 2016.

/s/ Mona L. Manley

MONA L. MANLEY
Official 14th Circuit Court Reporter
(850) 893-6662
mmanley@sccourts.org

Is this report a General Sessions Case which needs to go to the US Court Coordinator? YES NO

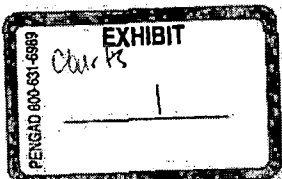
Supplemental Report

Agency ID: SC 0070000

Case Number 201310200508

Available for Records Section 07/24/2015 Section Juvenile:

<input checked="" type="checkbox"/> Modifies Original	<input type="checkbox"/> Add'l Victims	<input type="checkbox"/> Add'l Stolen Property	NCIC Inq.	DIS	
<input type="checkbox"/> Case Status Change	<input type="checkbox"/> Add'l Offenders	<input type="checkbox"/> Add'l Recovered Property	NCIC Ent'd		
Incident Type	[Faded text]				
Incident Type	[Faded text]				
Incident Location	435 William Hilton Parkway (Northridge Cinema 10), Hilton Head Island, SC, 29926.				
Reporting Officer	[Faded text]				
Complainant	Same as Victim				
Victim	Snodgrass, John / Northridge Cinemas				
Suspect	McQuarters, Austin / Perez, Jacklyn / Delaplane, Colton				
Assigned Officer	[Faded text]				
Reporting Officer	Date	Unit #	Shift Supervisor	Date	Unit #
[Faded]	07/24/2015	[Faded]	[Faded]	07/24/2015	[Faded]
Division Supervisor	Date	Unit #	Reviewed By Investigator	Date	Unit #
[Faded]	07/24/2015	[Faded]	[Faded]	7/24/2015	[Faded]
Case Dispo.	Reason for Ex-Clear	Follow Up Inv. Officer Assigned		Unit #	
[Faded]	[Faded]	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		[Faded]	



ADDITIONAL VICTIM/SUSPECT/WITNESS/ETC:

Person Type	Last Name	First Name	Middle Name	Suffix	DOB	Sex	Race
	Ross	Christi	Maria		[REDACTED]		
Age	Eth.	Ht.	Wt.	Hair	Eyes	J.S.O.U.	Relationship to Suspect
50		509	135				

Facial Hair/Scars/Tattoos/Etc _____ * J-This Jurisdiction S-State O-Out of State U-Unknown

St #	Street Name	Unit	Subdivision/Complex	City	St.	Zip
[REDACTED]	[REDACTED]			Hilton Head		29926
Home Phone		Work Phone		Cell Phone		
				[REDACTED]		

FOR VICTIMS	Visible Injury	Explain	Complaint	Non-Visible Injury				
	<input type="checkbox"/> Yes <input type="checkbox"/> No			<input type="checkbox"/> Yes <input type="checkbox"/> No				
	Victim Using Subst. Type	Alcohol: <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Unknown	Drugs: <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Unknown					
FOR SUSPECTS	Type	<input type="checkbox"/> Suspect	<input type="checkbox"/> Runaway	<input type="checkbox"/> Wanted	<input type="checkbox"/> Warrant	<input type="checkbox"/> Arrest	<input type="checkbox"/> Jail	<input type="checkbox"/> Summons
	Identified	Arrested Near Scene	#Arrested	Date/Time of Incident		Date/Time of Arrest		
	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No						
	Located	Suspect Using Subst. Type	Alcohol: <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Unknown	Drugs: <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Unknown				
	<input type="checkbox"/> Yes <input type="checkbox"/> No							

Investigator's Actions:

On 07-24-2015 at approximately 0858 hours, John Snodgrass contacted me via telephone and advised me that his current manager (Christi "Randi" Ross) for the Northridge Cinema 10 told him yesterday that she had information regarding Colton Delaplane possibly setting up the robbery on the evening of 10-20-2013. Snodgrass advised me that Ross didn't come forward about this information when she was first approached by BCSO after this reported incident because she was afraid of any possible retaliation. Snodgrass stated Ross was a victim regarding a brutal domestic violence incident between her and her ex-husband before this reported incident and she is really scared for her safety. Snodgrass advised me Ross doesn't want anything to happen to her but feels that Delaplane shouldn't get away with his involvement of the armed robbery. I thanked Snodgrass for contacting me and our interview ended.

On 07-24-2015 at approximately 0930 hours, I met with Christi "Randi" Ross at the Northridge Cinema 10 and conducted an interview. Ross advised me that on November 3rd of 2013 she and Colton Delaplane were cleaning up the parking lot in front of the movie theater. Ross advised Delaplane about Snodgrass' serious injuries because of the brutal attack. Ross advised me that Delaplane stated, "I knew about the money, but I didn't know John was going to be hurt like that". Ross stated when Delaplane said this comment to her that he had a blank stare and was in shock. I asked Ross why she didn't come forward when we first approached her about this at the end of October of 2013. Ross stated she was a victim in an unrelated domestic violence incident and was badly beaten. Ross stated she didn't want anyone else after her and was afraid of her safety. I asked Ross if she would come to the BCSO Hilton Head Office for a taped interview and she agreed. I drove Ross straight to my office and conducted a taped interview.

I advised Ross that I would be audio/video taping our interview. I asked Ross about the conversation between her and her boss, John Snodgrass. Ross stated that she advised Snodgrass yesterday morning between 0730 and 0800 hours about Colton Delaplane's statement. Ross stated Delaplane worked a few days after the robbery incident with her in the parking lot in front of the movie theater. Ross advised me the owners of Northridge Cinema 10 wanted numerous tree limbs cut down because of the limited lighting in the parking lot due to the robbery. Ross then admitted to me Delaplane was a good worker and she really did like him while he worked at the movie theater. Ross stated on November 3rd of 2013 sometime after 1330 hours, she and Delaplane were taking down tree limbs and hauling them into the wooded area near the movie theater. Ross advised Delaplane about the injuries that Snodgrass acquired when he was brutally attacked. Ross advised me that Delaplane stated, "I knew about the money, but didn't know John was going to be hurt like that". Ross advised me when Delaplane advised her about this he looked stunned. Ross advised me she didn't work on the night when Snodgrass was assaulted. Ross stated she talked with Paola Labrador (current Northridge Cinema 10 employee) right after the robbery and Labrador advised her that she observed Delaplane talking to a black male in the movie theater parking lot after they left work on the evening of October 20th of 2013. Ross stated Delaplane never came back to work after that day on November 3rd.

I asked Ross if she benefits for telling me this new information and she advised me that she doesn't. Ross did advise me 2 weeks before Snodgrass was assaulted that Snodgrass yelled at Delaplane for breaking down empty boxes and some of the boxes he needed to save for repackaging. Ross stated Delaplane advised her that when Snodgrass yelled at him for breaking down the boxes he wanted to punch him in the face. Ross advised me Delaplane stated, "If John ever screams at me in my face again, I'm going to punch him". Ross then advised me again when Delaplane stated to her while they were cleaning up the parking lot on the afternoon of November 3rd of 2013 he was very apologetic and appeared to be stunned. Ross voluntarily completed a written statement which will be attached to this report.

On 07-24-2015 at approximately 1220 hours, I contacted Solicitor Mary Jordan Lempeis via telephone and advised her my updated information. After issuing her my information, I completed a video request form regarding my interview of Christi "Randi" Ross.

Attachments:

01-Written Statement Form

Case Status: Arrested Over 17.

20131020-508

Date July 24, 2015 Page No. 1

STATEMENT OF:

Name: Christi M Ross DOB: [REDACTED] H: [REDACTED]Add: [REDACTED] WHI, SC 29926 SSN: [REDACTED] C: 843 - [REDACTED]W: 843 - [REDACTED]

On Sunday, November 3, 2013 and sometime after 1:30 and before 4:00pm Colton and I were outside the movie theater parking lot cleaning debris raking and hauling away pine straw leaves and limbs I spoke to Colton while outside. I had heard that another employee Paola had said that the night John was Robbed and injured she had seen Colton speaking with a large black man, so while I was outside with Colton and we were doing the cleaning of the parking lot I asked him about it I basically said "John is really bad off" ^(John) he had returned to work by thistime but very limited and I said to Colton "John is really bad off do you or are you everyone says you know about it" and Colton said to me "I knew about the money but I didn't know John was going to get hurt like that." he said that and looked stunned sort of staring down at the ground then he walked off to the woods to dump the trash can full of pine straw and debris and I got called inside, we never spoke about it again and after that night Colton never came back to work.

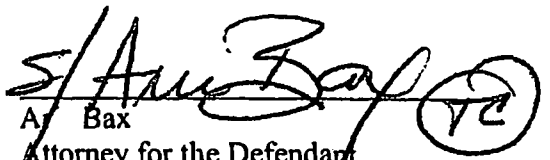
This is a voluntary statement I have no gain by the omission

Christi M Ross

the attack on the victim as a reason for the sentence imposed. The newly discovered evidence reveals a previously unknown witness who reveals that Mr. Delaplane had expressed a specific desire to "punch" the victim "in the face" PRIOR to the attack on and robbery of the victim. This clearly shows that, even if one were to believe Mr. Delaplane and Ms. Perez that the Defendant was their chosen muscle in this plot, the injuries inflicted on the victim were inflicted at the specific order of Mr. Delaplane. All of the above factors revealed by the newly discovered evidence mandate that the verdict and subsequent conviction of the Defendant that occurred on July 22, 2015 be vacated in its entirety and a new trial in this matter be ordered.

The Defendant request this Honorable Court schedule a hearing on this matter at its earliest convenience at which time the Defendant will present arguments addressing the reason for reopening this matter and ask this Honorable Court for an order granting the requested relief.

Respectfully submitted,


S. Ann Bax
Attorney for the Defendant
Assistant Public Defender
Beaufort County Public Defender's Office
Post Office Box 525
Beaufort, South Carolina 29901

Beaufort, South Carolina
7/28, 2015

STATE OF SOUTH CAROLINA)	IN THE COURT OF GENERAL SESSIONS
)	
COUNTY OF BEAUFORT)	Indictments No(s): 2013-GS-07-1844
)	2013-GS-07-1845
STATE OF SOUTH CAROLINA)	2013A071035463
)	464
vs.)	
Austin McQuarters)	RESPONSE TO DEFENDANT'S MOTION
)	TO VACATE CONVICTION AND ORDER
Defendant.)	NEW TRIAL
)	

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 BEAUFORT COUNTY
 CLERK OF COURT

COMES NOW Assistant Solicitor Mary Jordan Lempesis in response to the Defendant's Motion to Vacate Conviction and Order New Trial in the above-captioned case. In response to the Defendant's Motion, the State submits the following to the Court:

STATEMENT OF FACTS

Defendant, Austin McQuarters, was convicted on July 22, 2015, of the offenses of Armed Robbery and Assault and Battery 1st Degree. He was sentenced by the Honorable Tommy Cooper to twenty-five (25) years in prison. This was the second trial of the Defendant. The first trial resulted in a hung jury.

The facts that the State presented showed that Defendant robbed the victim, John Snodgrass, of approximately \$4,000, and beat him with brass knuckles on October 20, 2013, outside of the victim's work place (Northridge Cinemas on Hilton Head Island). A co-defendant, Jacklyn Perez, witnessed the crime and testified during the trial about her involvement and the Defendant's actions that night. Colton Delaplane, the Defendant's friend, testified during the trial that he provided the Defendant with the information he needed to commit the robbery, but denied knowing that the robbery was going to happen. Delaplane was employed by the victim at the movie theater and was working on the night of the incident. Delaplane testified that after the incident the Defendant gave him \$250 and told him that he ran into some money at his work.

Delaplane also testified that the Defendant told him that he used brass knuckles when he beat and robbed the victim.

Dr. Patrick Snowman testified at the trial as an expert in emergency medicine and explained to the jury that the injuries suffered by the victim were caused by a blunt object and something other than a fist.

On Thursday, July 23, 2015, John Snodgrass contacted Investigator Doug Seifert with the Beaufort County Sheriff's Office ("BCSO") and informed him that one of the other managers at the theater provided him with additional information regarding Delaplane's role in the robbery. On July 24, 2015, Investigator Seifert interviewed that manager, Christ Ross, and obtained a statement from her in which she described a conversation she had with Delaplane after the robbery. She told the investigator that Delaplane said he knew about the money, but he did not know he (John Snodgrass) was going to get beaten so badly. Ross said that she did not previously tell the police about this statement because she did not want to become involved in the investigation. She was interviewed by Cpl. Sally Irvin with BCSO on October 22, 2013, and she did not disclose this information to law enforcement. Ross was not called as a witness at trial, however, her identifying information was in the BCSO incident report, which was provided to the Defense by the State through discovery.

LAW AND ANALYSIS

The requirements for obtaining a new trial based on after-discovered evidence were set out by the South Carolina Supreme Court in *State v. Spann*, 334 S.C. 618, 513 S.E.2d 98 (1999). The Court held that in order to obtain a new trial on the basis of after-discovered evidence, the moving party must show that the evidence:

1. would probably change the result if a new trial were 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.

State v. Spann, 334 S.C. 618, 619, 6513 S.E.2d 98, 99 (1999). “A motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge.” *State v. Harris*, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011); citing *State v. Irvin*, 270 S.C. 539, 545, 243 S.E.2d 195, 197 (1978). “The granting of a new trial because of after-discovered evidence is not favored and this Court will sustain the lower court’s denial of such a motion unless there appears an abuse of discretion.” *State v. Irvin*, 270 S.C. at 545, 243 S.E.2d at 198. Furthermore, in *State v. Harris*, the South Carolina Court of Appeals held that “[t]he credibility of newly-discovered evidence is for the trial court to determine.” *Harris*, 391 S.C. at 545.

In *State v. Mercer*, the Defendant, Kevin Mercer, was convicted of murder, armed robbery, and possession of a firearm during the commission of a violent crime. Mr. Mercer was sentenced to death. *State v. Mercer*, 381 S.C. 149, 672 S.E.2d 556 (2009). Mr. Mercer filed a motion for a new trial based, in part, on after-discovered evidence. *Id.* The newly discovered evidence was a letter the Solicitor received from a cell mate (Fuller) of Mr. Mercer’s co-defendant, Thompson, who said that Thompson admitted to him that he shot the victim. *Id.* Notably, the State’s theory was that Mr. Mercer was the triggerman. *Id.* at 165, 672 S.E. 2d at 564. Based on this information, the trial court conducted a hearing, and the Defendant’s motion for a new trial on the basis of after-discovered evidence was denied. *Id.* The South Carolina Supreme Court upheld the trial court’s decision and found no abuse of discretion by the trial judge. *Id.* The Supreme Court recognized, and the State conceded, that all but one of the

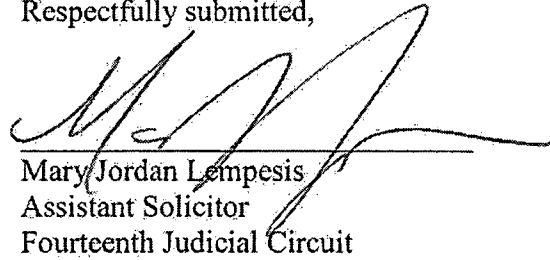
elements for a new trial set was met. *Id.*, 672 S.E.2d at 565. The only element that was not met was the fact that the newly discovered evidence would probably change the result if a new trial were granted. *Id.* The Court found that “[t]he after-discovered evidence is limited to Fuller’s testimony that Thompson admitted to being the triggerman,” and, “Thompson’s participation in, and first-hand knowledge of, the crime, was clearly known to Mercer and the State from the beginning.” The Court went on to find that the trial court’s determination was based, in part, on the credibility of Fuller, and acknowledged again the gatekeeping role in post-trial after-discovered evidence motions. *Id.* at 168.

In the case at hand, only one of the five requirements for a new trial has been met. The second requirement, that the evidence has been discovered since the trial of the case, is the only element that has been met. The information received from Ms. Ross would not change the result if a new trial were granted, it is not material to the guilt or innocence of Mr. McQuarters, and is merely impeachment evidence. Furthermore, the evidence could have been discovered by the defense before the trial as Ms. Ross’ information was listed in the incident report. As such, the defense could have attempted to speak with Ms. Ross and presumably could have discovered this information prior to the trials of Mr. McQuarters by exercising due diligence.

In contrast with the *Mercer* case, where all of the requirements for a new trial were met except for one, and where the new evidence actually pointed to a different triggerman in a death penalty case, the new evidence of Colton Delaplane’s statement to Ms. Ross wherein he admits to knowing about the money, satisfies only one of the five requirements for a new trial. This information goes only towards impeachment of the witness, Colton Delaplane, and does not negate Mr. McQuarters’ role in the robbery and assault of the victim. Mr. McQuarters acted alone when he assaulted Mr. Snodgrass with brass knuckles and robbed him of \$4,000.

Therefore, because only one of the five requirements for a new trial has been established, the Defendant's Motion to Vacate Conviction and Order a New Trial should be denied.

Respectfully submitted,



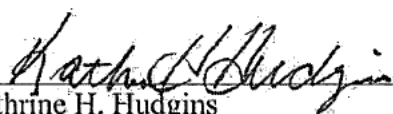
Mary Jordan Lempesis
Assistant Solicitor
Fourteenth Judicial Circuit

Beaufort, South Carolina
August 12, 2015

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with 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."

Respectfully Submitted,


Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
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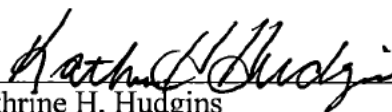
ATTORNEY FOR APPELLANT

This 28th day of December, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with 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."

Respectfully Submitted,



Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
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ATTORNEY FOR APPELLANT

This 28th day of December, 2016.