State of South Carolina
In The Court of Appeals

Appeal from York County
Court of General Sessions
John C. Hayes, III, Circuit Court Judge
Case No. 2013-000975

State of South Carolina,

Respondent,

v.

Antonio Gordon,

Appellant

Amended Pro Se Initial Brief

Antonio Gordon
610 Hwy 9 west
Bennettsville, SC 29512

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Statement of the Case

This matter comes before the Court by way of an appeal from an order denying the Appellant's motion for a new-trial based on after discovered evidence. The Appellant and his three co-defendant's, Monta Gordon, Terrance McCreary, and Gary Moffat, were all Prosecuted in connection with their involvement in the shooting of the victim Erik Krenn. The State's theory of the case was that the Appellant was the shooter. All of the Appellant's Co-defendant's eventually Cooperated with the State and intended to testify that the Appellant was the shooter. The Appellant ultimately Pleaded guilty on July 16, 1999, to murder, and attempted arm robbery, among other charges, and was sentenced to an aggregate forty-year imprisonment term. See FN1

The Appellant subsequently filed a Rule 29(b), Sccrimp, motion for a new trial based on after-discovered evidence. In this motion, the Appellant alleged that two of his co-defendant's - Monta Gordon and Terrance McCreary - had recanted their earlier statements and asserted that they were willing to tell the truth about the night of the incident. Principally, the appellant averred that Monta Gordon would admit to firing the shot that killed the victim See Transcript Page 43 line 5-6, and that McCreary would admit that Monta Gordon, not the Appellant as Previously stated, exited and reentered his vehicle with a firearm. See Transcript Page 87 line 2 pg 88 line 17-23. Diaz made a statement identifying Monta Gordon as the shooter. Exhibit 8

On March 4 and 8, 2013, the motion was heard by the lower Court. The Appellant, Monta Gordon, and Terrance McCreary all testified at the hearing, with both the Appellant and Monta Gordon testifying that Monta Gordon was the shooter and McCreary testifying Monta Gordon exited and reentered the vehicle he was driving with a firearm. On April 22, 2013, the lower Court filed an order denying the motion on several grounds.

FN1 Moffat is Appellant's 1st counsin and agreed to testify against appellant.

The lower Court abused it discretion and committed error of law when it erroneously found that Rule 29(b), sccrimp, motion cannot be filed by Appellant because he Plead guilty.

The lower Court abused it discretion and committed error of law when it categorically found that appellant could not file a Rule 29(b), sccrimp, motion because the Appellant's conviction was obtain through a guilty Plea. See Order at 18-19. However, in State V. DeAngelis, 256 S.C. 364, 182 S.E.2d 732 (1971), the supreme Court reviewed a motion for new trial based on after-discovered evidence on the merits even though the conviction was obtained through a guilty Plea. The supreme Court specifically held that "motions of this character should be entertained and granted in order that wrongs done may be remedied". Id. at 369, 182 S.E.2d at 734. See FN1 If the lower Court's ruling stand, Appellant's right to equal Protection of the law under the Fourteenth to the united states Constitution will be Violated. Appellant base his argument on the fact that, if Defendant's who "[P]led guilty" to offenses in Section 17-28-30(A)(SUPP. 2009) assert that they are innocent of the offense, may apply for forensic DNA testing of his DNA and Physical evidence, or biological material related to their Conviction Pursuant to section 17-28-30(b), and under section 17-28-100(A)(b) title "Disclosure and use of test"; if the results of the DNA, and Physical evidence test are exculpatory, the applicant may use the exculpatory results of the DNA, and Physical evidence test as grounds for filing a "motion for a new trial Pursuant to South Carolina Rules of Criminal Procedure"; but defendant's who "Pled guilty" under 16-1-20 and file

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FN1 Pursuant to S.C. Code Ann § 17-28-30(b) title "Access DNA test Act", a Person who "[P]led guilty" or nolo contendere to at least one of the offenses enumerated in subsection (A), was subsequently convicted of or adjudicated delinquent for the offense, and asserts he is innocent of the offense, may apply for a new trial under the "South Carolina Rules of Criminal Procedure", Pursuant to S.C. Code Ann § 17-28-100(A)(b) title "Disclosure and use of test".

a "motion for a new trial Pursuant to South Carolina Rules of Criminal Procedure" based on recantation testimony is barred is in violation of Barbier V. Connolly, 113 U.S. 27 (1885) (Holding all Persons similarly Situated "[S]hall" be treated alike.). and the equal Protection Clause of the Fourteenth Amendment that Provides that "[N]o state Shall . . . . deny to any Person within its Jurisdiction the equal Protection of the laws"! Personnel Admir V. Feeney, 442 U.S. 256, 271, 99 S.Ct 2282 (1979). The legislature will be forced to amend Section 17-28-30 (A)(B) - 17-28-100 (b) to eliminate defendant's who Pled guilty from filing a motion for a new trial Pursuant to the South Carolina Rules of Criminal Procedure if the lower Court Ruling Stand. Therefore, APPellant's Case is inopposit that of U.S. V. Lambert, 603 F.2d 808 (10th Cir. 1979); U.S. V. Forrest, 356 F. Sup. 343 (W. D. Mich. 1973); Roseborough V. State, 311 Ga. APP. 530, 716 S.E.2d. 530 (2011); State V. Turco, 108 S.W. 3d 244 (Tenn. 2003) at Footnote 2.

The lower court attempted to distinguished DeAngelis by finding that case was decided on the basis of the criminal defendant's failure to attach affidavits to his motion. Order at 18-19. APPellant assert that defendants that Plea guilty can file a Rule 29 (b), SCCrimP, motion. Therefore, by finding that Rule 29 (b), SCCrimP, motion does not apply to guilty Pleas, the lower Court erred in ignoring the fact that DeAngelis actually ruled on the merits of the motion and erred in ignoring DeAngelis clear directive that such motions " be entertained " by trial Courts 256 S.C. at 369, 182 S.E.2d at 734. Rule 29 (b), SCCrimP, motion can, therefore, be brought following guilty Pleas. The lower Court finding to the contrary should be reversed. DeAngelis, Id. at 369, 182 S.E.2d at 734.

The lower Court abused it discretion and committed error of Law when it did not understand the scope of review and did not complete analysis.

In State V. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009), the Supreme Court held that motion for a new-trial based on after-discovered evidence should not be denied simply because the witnesses supporting the motion lack Credibility " because a witness may lack Pursuasive credibility and still Create reasonable doubt". 381 S.C. at 170, 672 S.E.2d at 567. See FN2 The lower Court found Mercer language " Confusing and hard to work into its analysis", and then Proceeded to find that the motion should be denied simply because it did not find the Appellant's witnesses Credible. Order at 21.

The Appellant asserts that the lower Court Committed error of law and abused it discretion because Mercer directed the lower Court to look to the nature of the evidence supporting the motion and determine whether or not "reasonable doubt was created" by the nature of the testimony regardless of the credibility of the witness giving the testimony. By ignoring that directive and finding that the Appellant's motion should fail simply because his witness lack Credibility, the trial Court erred. State V. Mercer, 381 S.C. at 170, 672 S.E.2d at 567.

FN2 In this Post-trial setting, our Jurisprudence recognizes the gatekeeping role of the trial Court in making a credibility assessment. State V. Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977) (noting that the determination of whether new evidence is credible for Purposes of a new trial motion rests with the trial Court)... The Supreme Court in Mercer State that does not Complete the analysis. Id. 381 S.C. at 170, 672 S.E.2d at 567

The lower court abused it discretion and committed error of law when it found that Appellant's evidence was not after-discovered

The lower Court found that appellant's evidence was not after-discovered because the appellant had known from the day of the shooting that he was not the shooter. Order 22-23. In other words, the lower Court found that the evidence either (1) was discovered Prior to trial; or (2) "could . . . in the exercise of due diligence have been discovered Prior to trial". State v. Spann, Supra, 334 S.C. at 619, 513 S.E.2d at (1999). This finding is erroneous as a matter of law because the appellant's motion was not based upon his assertion that he was not the shooter but was based instead on the newly-discovered evidence that both Monta Gordon and McCreary, who were both set to testify against him and identify him as the shooter if he Proceeded to trial, would now essentially testify that Monta Gordon was the shooter. See FN1

Plainly, the fact that they would identify Monta Gordon as the shooter Could not have been known Prior to the trial because they were going to testify that the appellant was the shooter at his trial. See Transcript Page 63 Line 13-24; "Monta Gordon testify that he was gonna testify on appellant at his trial that appellant killed the victime. See Transcript Page 91 Line 20-Page 92 Line, Terrance McCreary testified that he was going testify on appellant at his trial that appellant was the shooter". . . It is difficult to envision a clearer example of after-discovered evidence than the recantation of Potential testimony. If the trial Court's ruling is followed, recanted

FN1 Monta Gordon testified that he would not come forward and tell the truth when he discovered that appellant would be treated as an adult because he wanted appellant to come down with him. Transcript Page 44 Line 15-17

testimony can never serve as the basis for after-discovered evidence because someone, either the criminal defendant or witness, would have known the truth before the witness testified falsely at trial. See State v. Parker, 153 S.E.2d 183, 249 S.C. 139 (S.C. 1967) (Holding Recanted testimony can be offered as ground for new trial.).

Therefore, under Spann Principles the evidence was not discovered Prior to trial, and could not in the exercise of due diligence have been discovered Prior to trial and or guilty plea. Spann, supra, 334 S.C. at 619, 513 S.E.2d at 99 (1999). Consequently, the lower Court's ruling on this issue is controlled by error of law, Spann, and should be reversed.

The lower Court erroneously denied the motion On the merits

The lower Court found that the appellant's motion for a new trial should be denied because his witnesses were "fabricating testimony" in a concerted effort to give the appellant a new trial. Order at 23. The appellant asserts that this finding is erroneous for a number of reasons. First, the appellant asserts that the confession of a co-conspirator that he was the shooter would "create reasonable doubt" such that a new trial is warranted. State v. Mercer, 381 S.C. at 170, 672 S.E.2d at 567

See State V. Tripp, 130 S.E. 888 (Holding new trial should be granted if affidavits would lead any reasonable mind to inference that the newly-discovered evidence Probably would change result.)... The appellant Pled guilty to conspiracy charge with Monta Gordon. See FN2 However, if the appellant would have proceeded to trial, the Jury would had to find beyond a "reasonable doubt" that appellant conspired and was in agreement with Monta Gordon to rob and kill the victim before finding appellant guilty on the conspiracy charge because Gary Moffat and Terrance McCreary was no longer apart of the conspiracy to rob and Kill the victim. The new testimony offered by Monta Gordon that he did not discuss robbing the victim with appellant, See Transcript page 81 line 2-15, and the new testimony of Terrance McCreary that there were no discussion in the vehicle about robbing the victim, See Transcript 96 line 17-19, is material because if the Jury believe appellant is not guilty of murder he's not guilty of criminal conspiracy, appellant not guilty of anything. The hand of one is the hand of all does not apply when there is a sole actor involved that there is no conspiracy, there is no active enjoin concert. State V. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985). Therefore, the after-discovered evidence and testimony of Monta Gordon and Terrance McCreary is such that it would Probably change the result if a new trial were granted Mercer, 672 S.E.2d at 565, State V. Spann, 334 S.C. at 619, 513 S.E.2d at 99.. Second, the appellant asserts that the lower court's misapplication

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FN2 The criminal conspiracy charge were dismissed on Gary Moffat and Terrance McCreary.

of Mercer infects the factual findings such that the lower Court's reasoning for denying the motion cannot be upheld. Third, the appellant asserts that a review of the factual record, which show there are inconsistencies in the testimony by all three witnesses, making it difficult for the lower Court's conclusion of collusion to withstand serious scrutiny. See Monta Gordon testimony transcript Page 42 - Page 82, Terrance McCreary testimony Page 84 - Page 150 and Appellant's testimony transcript Page 151 - 207... After all, if the appellant, Monta Gordon, and Terrance McCreary all conspired to free the appellant through the giving of false testimony, their testimony should match word-for-word. It does not. See FN 3

To deny appellant a trial in the face of a confession by a co-conspirator who testified he acted alone and that appellant did not have anything to do with it would constitute a "denial of fundamental fairness shocking to the universal sense of Justice". Butler v. State, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990). Accordingly, the appellant asserts that this Portion of the lower Court's ruling is erroneous and should be reversed.

FN3 In the Order at 23 the lower court does not support its finding of all three witnesses "fabricating testimony" in a concerted effort to give the appellant a new trial with "[n]o evidence"...

Conclusion

Based on all of the above, the APPellant respectfully submits that this court should grant him a trial.

Respectfully submitted
Antonio Gordon

Antonio Gordon, 259798
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P.O. Box 1151
Fairfax, SC 29827

This 21 day of April, 2014

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
	)	2008-GS46-2847, 2849, 2850, 1998 mc 2851, and 2852
State of South Carolina	)	
	)	
v.	)	**ORDER DENYING MOTION FOR A NEW TRIAL**
	)	
Antonio Gordon,	)	
	)	
Defendant	)	

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DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

This matter comes before the Court by way of the Defendant's Motion for a New Trial Based on After-Discovered Evidence pursuant to Rule 29(b), SCRCrimP, filed November 21, 2012. An evidentiary hearing into the matter was convened on March 4, 2013, and March 8, 2013, at the Moss Justice Center in York County. The Defendant was present and represented by Jeremy Thompson, Esquire. The State was represented by Deputy Solicitor Willy Thompson.

At the hearing, counsel for both parties presented argument to the Court. The Court also had the opportunity to review the following records: The transcript of the pretrial hearings, the guilty pleas, and the sentencing of Antonio Gordon, Monta Gordon, and Terrance McCreary which occurred over a period of several days in July of 1999; all of the written sworn statements given by Antonio Gordon, Monta Gordon, Terrance McCreary, and Gary Moffatt to various members of the Rock Hill Police Department on July 23, 1998; the PCR transcript of the sworn testimony of Antonio Gordon from a hearing held on July 29, 2003; the PCR transcript of the sworn testimony of Monta Gordon from a hearing held on September 4, 2003; the written plea agreement entered into by Monta Gordon on July 16, 1999; the sworn written statement of Monta Gordon dated August 6, 2012, and provided by Antonio Gordon; the PCR transcript of the sworn testimony of Terrance McCreary from a hearing held on December 16, 2002; the

sworn written statement of Terrance McCreary dated July 13, 2012, and provided by Antonio Gordon; the PCR transcript of the sworn testimony of Daniel D'Agostino from a PCR hearing held on December 1, 2009; the Maxton Order dismissing Antonio Gordon's most recent PCR application signed by the Honorable Lee S. Alford and dated January 4, 2010; and other documents that will not be addressed in this order.

PROCEDURAL HISTORY

The Defendant is currently incarcerated in the South Carolina Department of Corrections. He was indicted in October of 1998 by the York County Grand Jury for Murder (1998-GS46-02847), three counts of Possession of a Firearm During the Commission of a Violent Crime (1998-GS46-02847a; 1998-GS46-01949a; 1998GS46-1950a), two counts of Attempted Armed Robbery (1998-GS46-02849; 1998-GS46-02850), Criminal Conspiracy (1998-GS46-02851), and Possession of a Pistol by a Person Under Twenty-One (1998-GS46-02852). Daniel D'Agostino, Esquire, represented the Applicant.

A hearing on the Defendant's motion to suppress was held on July 12, 14, and 16, 1999. On July 16, 1999, following the suppression hearing, the Defendant pled guilty as indicted. On July 19, 1999, the Honorable John C. Hayes, III, sentenced the Defendant to confinement for thirty (30) years for Murder; five (5) years for Possession of a Firearm During the Commission of a Violent Crime; five (5) years for Criminal Conspiracy; five (5) years for Possession of a Pistol by a Person under Twenty-One, all to run concurrently; and ten (10) years for each count of Attempted Armed Robbery, one running concurrent and one running consecutive to the thirty (30) year sentence for Murder. This was a negotiated guilty plea to a cumulative forty (40) years confinement.

The Defendant filed a timely notice of Appeal and an Anders brief was submitted on his behalf pursuant to Anders v. California, 386 U.S. 738 (1967). Of note, the Defendant filed a *pro se* brief in which he raised the issue of probable cause to arrest based on an "informant's" statement to law enforcement allegedly given without being advised of her rights. The "Informant" to whom the Defendant was referring was Chyneca Dixon, his girlfriend at the time he committed the murder. The Defendant also contended that both he and the informant were under age and should not have been questioned by law enforcement outside the presence of a parent or attorney. As a result, he argued, the informant's statement was inadmissible because it was obtained illegally and could not have established probable cause for his arrest. The South Carolina Court of Appeals dismissed the Applicant's appeal. State v. Gordon, 2000-UP-747 (S.C. Ct. App. Filed December 6, 2000). The remittitur was issued on January 9, 2001.

The Defendant subsequently filed a PCR application originally dated June 20, 2001, and amended on May 8, 2003 (2000-CP46-1414). An evidentiary hearing was held on July 29, 2003. Tara D. Shurling, Esquire, represented the Defendant, who was present at the hearing. Jeanette C. Vanginhoven of the South Carolina Attorney General's Office represented the State. The Defendant alleged his guilty plea was involuntary and that defense counsel was ineffective for failing to discuss with him evidence of a palm print found on the victim's car door. The Defendant specifically contended that defense counsel failed to investigate or discuss with him "the fact that the palm print on the victim's car door was unidentified until the time of pre-trial," and that the South Carolina Law Enforcement Division (SLED) never tested the palm print. On August 20, 2003, the Honorable J. Ernest Kinard issued an Order denying and dismissing the application. The Defendant subsequently made a "Motion for Rehearing /Motion for

Reconsideration of the Facts" on December 9, 2003. The Honorable J. Ernest Kinard dismissed the Defendant's motion by written Order filed December 15, 2003.

The Defendant filed a petition for writ of certiorari appealing the Order dismissing his first PCR action. On July 21, 2005, the South Carolina Supreme Court issued an Order denying the petition. The remittitur was issued on August 9, 2005.

On July 6, 2004, while his appeal from the denial of his first PCR action was still pending, the Defendant filed a second PCR application (2004-GS46-1700). The Defendant raised issues previously raised in his first PCR action, including allegations that his guilty plea was involuntary and that defense counsel was ineffective. On December 30, 2004, the Honorable Lee S. Alford issued a conditional Order of Dismissal in which he expressed the intent to summarily dismiss the application because the Defendant failed to comply with the filing procedures of the Post-Conviction Procedure Act as set forth in S.C. Code Ann. §17-27-45(A) and §17-27-90, and because the application was in improper successive action, but granted the Defendant twenty (20) days to show why the order should not become final. The Defendant did not respond to the conditional order of dismissal. Thereafter, by Order dated May 20, 2005, the Honorable Lee S. Alford denied and dismissed the Defendant's second PCR action.

The Defendant then filed a federal petition for writ of habeas corpus on December 22, 2005 (2:05-3327-MBS-RSC) and an amendment to his federal habeas corpus action on April 14, 2006. On October 16, 2006, Federal Magistrate Judge Robert S. Carr entered his Report and Recommendation that habeas relief should be denied. On October 30, 2006, the Defendant filed an "Objection to Report and Recommendation of Magistrate Judge." The Defendant raised the probable cause issue regarding his arrest. Specifically, the Defendant contended that his warrantless arrest was unlawful because law enforcement only found probable cause to arrest

him based on statements given to them "by a minor whose [sic] parents were not present during questioning." In essence, he asserted that law enforcement's reliance on Chyneca Dixon's statement to establish probable cause led to an unlawful arrest that violated his Fourth Amendment rights. He also claimed that defense counsel was ineffective for failing to advise him that by pleading guilty he waived his right to challenge the lawfulness of his arrest or the statements he made to law enforcement after he was arrested. On February 16, 2007, the Honorable Margaret B. Seymour entered an Order dismissing the Defendant's petition without prejudice to permit him to exhaust all State remedies.

Subsequently, the Defendant filed a state petition for writ of habeas corpus on January 3, 2006 (2006-CP46-0010). He then filed an amendment to the state habeas corpus action on January 23, 2007, to which he attached Chyneca Dixon's two statements given to law enforcement on July 23, 1998. The Defendant alleged that law enforcement did not have probable cause to arrest him because the police relied on Chyneca Dixon's statement to law enforcement that she gave as a result of being threatened outside the presence of her parents. The Defendant asserted that the police should not have questioned Chyneca Dixon ("the minor") outside the presence of her attorney or parents, and that because she was the "probable cause provider," both of their statements to law enforcement, as well as the Defendant's arrest, were all unlawful. The Honorable John C. Hayes, III, denied and dismissed the Defendant's state habeas corpus petition with prejudice by written order dated April 30, 2007, and filed on June 1, 2007.

The Defendant then filed a Rule 60(b) motion in which he alleged a conflict of interest with the Honorable John C. Hayes, III, who was original sentencing judge at the Defendant's guilty plea. The Defendant also claimed that the order dismissing his state habeas corpus action did not advise him of right to appeal the order. On January 31, 2008, the Honorable Roger L.

Couch granted the Defendant's Rule 60(b) motion to reconsider, amend, and clarify, and issued a written order finding that the Defendant was without prejudice to bring a petition for writ of habeas corpus in the original jurisdiction of the South Carolina Supreme Court.

On January 9, 2009, the Defendant filed his third PCR application. He amended the application on May 19, 2009. The Defendant attached two written statements given by Chyneca Dixon (hereinafter "Chyneca") and her mother, Geraldine Dixon (hereinafter "Ms. Dixon"), on January 20, 2008. The statements were given to an investigator who interviewed them on behalf of the Defendant. The Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. Newly Discovered Evidence;
2. Ineffective Assistance of Trial Counsel;
3. Prosecutorial Misconduct;
4. Brady Violation;
5. Involuntary Guilty Plea;
6. Defense counsel failed to challenge Defendant's statements on the ground that there was no probable cause for the arrest and that Defendant's "statement's was [sic] the fruit of the poisonous tree" with regard to the illegal arrest; and
7. Personal Jurisdiction

The State made its return and motion to dismiss on July 27, 2009, asserting that the application must be summarily dismissed as an improper successive action and as having been filed after the expiration of the applicable statute of limitations. The Honorable John C. Hayes, III, issued a conditional order of dismissal on August 24, 2009, in which Judge Hayes expressed the intent to summarily dismiss the application because the Defendant failed to comply with the filing procedures of the Post-Conviction Procedure Act as set forth in S.C. Code Ann. § 17-27-

45(A) and § 17-27-90, and because the application was an improper successive action, but granted the Defendant twenty (20) days to show why the order should not become final. The State also filed a motion to restrict future filings on November 19, 2009, pursuant to In re Theron Maxton, 325S.C. 3, 478 S.E.2d 679 (1996). The Defendant did not file a response to the conditional order of dismissal. A hearing into the State's motion for summary dismissal was convened on December 1, 2009. At the hearing, the State proceeded on a motion to dismiss all of the Defendant's claims as procedurally barred by the statute of limitations and successiveness. The State also argued that the two written statements included with the application were not newly discovered evidence, and that any alleged newly discovered evidence was nonetheless barred by the statute of limitations. The State also made a verbal motion to restrict the Defendant from filing another PCR application in the future under In re Theron Maxton, 325 S.C. 3, 478 S.E.2d 679 (1996).

At the hearing, the Defendant, through counsel, acknowledged that he filed a lengthy application in this case, and that he was only proceeding at the hearing with the newly discovered evidence claim and with an issue regarding the palm print found on the victim's car. Specifically, the Defendant asserted that he discovered new evidence that law enforcement coerced and threatened Chyneca into giving her initial statements, outside the presence of her mother, and that those statements implicated him in the crimes. He contended that because Chyneca's statements were threatened and coerced, they could not have established probable cause to arrest him. Therefore, the Defendant asserted, his arrest was unlawful and any incriminating statements he gave to law enforcement subsequent to his arrest were the "fruit of the poisonous tree."

The Defendant also raised an issue regarding the palm print obtained from the victim's car. He claimed that he has attempted to obtain certain documents from SLED regarding the palm print that allegedly show he was "not necessarily" the shooter, but that he has been unable to obtain those documents partly as a result of ineffective assistance of PCR counsel during his first PCR action. The Defendant also maintained that defense counsel was ineffective because he never had the palm print tested by his own expert. The Defendant also claimed that he attempted to raise this issue during his first PCR hearing, but he was "coerced into waiting the issue" at his first PCR hearing by PCR counsel.

After the December 1, 2009, hearing, the Honorable Lee S. Alford made the following findings:

1. Geraldine Dixon's testimony was not credible.
2. The evidence presented by Antonio Gordon was not newly discovered.
3. Chyneca Dixon's testimony was false and she was available to testify at trial.
4. Antonio Gordon's allegations regarding the palm print are not material or relevant.
5. The testimony of Antonio Gordon's defense counsel, Daniel D'Agostino, was credible, and any coercion or intimidation that may have accompanied Chyneca Dixon's statements to law enforcement was not a significant factor in Antonio Gordon's decision to plead guilty.

On January 4, 2010, the Honorable Lee S. Alford issued an order dismissing Antonio Gordon's application for post-conviction relief with prejudice. The Court further ordered that Antonio Gordon "is prohibited from filing any future application for post-conviction that raises the same grounds raised in this action, any grounds raised in a prior action, or any allegations the Applicant could have raised."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has also had the opportunity to hear the testimony of Antonio Gordon, Monta Gordon, and Terrance McCreary, as well as, the arguments of counsel presented at the hearings on March 4, 2013, and March 8, 2013.

First, Antonio Gordon proffered the testimony of Monta Gordon. Monta Gordon is the brother of Antonio Gordon. Monta Gordon testified that on August 6, 2012, someone visited him in the South Carolina Department of Corrections and took a sworn statement from him. Monta Gordon's statement reads as follows:

> I, Monta Gordon, having been duly sworn, depose and say that my brother Antonio "Tonio" Gordon and two others was together in July of 1998. I am the person who fired the shot that killed the man who died. I was the only person with a gun. My brother Tonio did not have a gun nor did he fire any gun that night. I alone am the only one who killed the victim. I told the police Tonio fired the shot because he was a juvenile and I was an adult. I was on probation. As a juvenile I figured Tonio would get a lesser sentence. I never discussed robbing or killing anybody with Tonio. I was the only person with a gun that night and I fired the only shot that night.

During his testimony Monta Gordon admitted that this August 6, 2012, statement was the first statement that he gave admitting to being the "shooter". He went on to testify that he would have given this statement back in 1999 if someone had asked him. However, Monta Gordon's prior sworn statements and testimony tell a completely different story.

Monta Gordon was arrested a few hours after the Murder of Erik Krenn and gave a sworn statement to the Rock Hill Police that same morning. In his statement dated July 23, 1998, Monta Gordon admitted he rode around in Antonio Gordon's car with Antonio Gordon, Terrence McCreary, and Gary Moffatt during the time leading up to the murder. Terrence McCreary was driving and they were all with McCreary when McCreary stopped to pick up his pistol. They then went to McCreary's grandmother's house to pick up more bullets for the pistol. According to Monta Gordon, McCreary thought the victims were in a stolen car and McCreary "was going

to steal the car from them." Monta Gordon's statement goes on to say that just after the victims pulled their car into a driveway, McCreary pulled up past the victims then backed up blocking the victim's car. Monta Gordon specifically told the police that McCreary gave the pistol to Antonio Gordon and told Antonio "that they were going to rob them." Monta's statement then states that McCreary and Antonio got out of their car, went over to the victim's car and tried to get the victim out of his car. Then Monta's statement details that when the victim tried to drive off, "my brother Antonio shot the driver one time."

During Monta Gordon's guilty plea to Murder, Attempted Armed Robbery (2 counts), and Conspiracy on July 16, 1999, Monta Gordon agreed with the facts as stated on the record by the solicitor which specifically included the fact that Antonio Gordon shot and killed Erik Krenn (Plea Transcript beginning at page 189, L 18, and ending on page 192, L 8). It should also be noted that these facts are the same facts to which Monta Gordon agreed to testify had any of his codefendants gone to trial (Written Plea Agreement dated July 16, 1999, and Plea Transcript page 179, LL 12-19).

At sentencing on July 19, 1999, when the Court gave Monta Gordon the opportunity to address the Court, Monta Gordon said,

> I'm sorry for the Krenn family for this accident that happened. We knowed that it was a big mistake in our life because as teenagers we had a lot to live for, but now since the indictment we have nothing to live for but to serve the time for the crime that we did. I want to say I'm sorry for my family for letting them go through the situation I'm in and all that. Hopefully Mr. Krenn will forgive us one day for the sin we did. (Plea Transcript page 202, LL 7-18

Monta Gordon's apology in his own words at sentencing certainly re-enforces his original statement and the original statements of his codefendant that they acted together in committing this horrible crime.

On September 4, 2003, Monta Gordon gave sworn testimony at his PCR hearing. When testifying about the statement he gave the police on the day of the murder, Monta Gordon confirmed that McCreary told Antonio Gordon to "just get" the victim's car and that Antonio Gordon got the pistol from McCreary and "jumped out" of Antonio's car. Monta also confirmed again that Antonio Gordon was the shooter (PCR Transcript page 39, L 6 to page 40, L 23). Monta Gordon's testimony at his PCR only differed when he claimed, "By the time I jumped out of the car to go stop him [Antonio], like I say, I was already, you know, on twenty years suspended on three years probation, so I wasn't looking for any trouble. When I jumped out, I jumped out to stop my brother, but it was too late." (PCR Transcript page 39, LL 6-18). (It should be noted that during the March hearing for Antonio Gordon, Monta Gordon admitted that he was only facing three year on a probation violation not twenty years as he had testified.) Monta Gordon bemoans to the PCR Court that, "I'm locked up for something I know I didn't do." (PCR Transcript page 50, LL19-20). Monta Gordon goes on to testify that Antonio has said "from day one that I [Monta] didn't have nothing to do with it, that I [Monta] was trying to stop him [Antonio]." (PCR Transcript page 51, LL 4-8).

Monta Gordon now claims that the reason he blamed Antonio was because Antonio was a juvenile and he thought Antonio would get a lesser sentence. I find this new claim to be completely without merit. Monta Gordon has an extensive juvenile record as noted in his plea transcript (Plea Transcript page 197, LL 10-24) and is intimately familiar with the juvenile court system. It was immediately obvious that none of the defendants in this case were treated as juveniles. Certainly, when the State sought to try all of the defendants together in 1999, there could be no mistake that no one was treated as a juvenile. Yet, Monta Gordon continued point to Antonio Gordon as the shooter at his plea, in his plea agreement and in his September 4, 2003,

PCR testimony after Antonio Gordon had been sentenced to 40 years. It is the opinion of this Court that Monta Gordon's new "exonerating" testimony is a complete fabrication.

Second, Antonio Gordon proffered the testimony of Terrance McCreary. Terrance McCreary is a cousin of Antonio Gordon. Terrance McCreary testified that on July 13, 2012, someone visited him in the South Carolina Department of Corrections and took a sworn statement from him. In this statement Terrance McCreary claims,

> I am not represented by counsel at this time. I am doing time in SCDC for a Murder that occurred in July 1998 in York County. At the time of the Murder I was driving Antonio Gordon's car. When we first encountered the victims, Monte + Antonio got out of the car. Monte had a gun, Antonio did not. The incident occurred behind me so I did not see what happened. I heard one or two shots. Monte + Antonio returned to the car. Monte still had the pistol. They got in the car. While in the York County Jail Monte + I discussed blaming Antonio for the shooting since he was a juvenile. At no time that night did I see Antonio with a gun. Antonio has never told me he did the shooting.

This July 13, 2012, statement is the first time Terrance McCreary insinuated Antonio Gordon might not be the shooter and the first time that he claimed Monta Gordon possessed the pistol during the robbery and murder. It should be noted that Terrance McCreary states the shooting occurred behind him and he did not see what happened. Terrance McCreary's prior sworn statements and testimony completely contradict this 2012 statement.

Like all of his co-defendants, Terrence McCreary gave a written sworn statement to a Rock Hill Police Detective on the day of the murder (July 23, 1998). In this sworn statement immediately after the crime, Terrance McCreary states, "I then said man if I had the gun I would rob them guys." He says Antonio Gordon and Gary Moffatt got out of the car and Antonio went over to the driver's side of the victim's car. According to McCreary, Antonio asked the victims if they had marijuana and money and whether their car was stolen. McCreary then says, "Monta and I was telling them [Antonio and Gary] to come on and lets go, then we heard the gun fire. Antonio and Gary then ran and got back in the car. We began asking Antonio why did he do

that, and he was pointing the gun at all of us." McCreary also talks about how he picked up the gun shortly before the crime—a fact that is confirmed in the original statements given to the Rock Hill Police Department by each of the four defendants in this case. However, when McCreary testified in Antonio Gordon's March 2013, hearing, McCreary denied ever touching the gun.

Terrance McCreary plead guilty on July 16, 1999, to Accessory before the fact to Murder and Accessory after the fact to Murder. In addition to waiving all of his rights and pleading guilty under oath, McCreary agreed to the facts of the case as stated by the solicitor. McCreary agreed that he obtained the gun and ammunition, that he gave the gun to Antonio Gordon, that he suggested they rob the victims, and that Antonio Gordon shot Erik Krenn (Plea Transcript page 171, L 13 to page 173, L 1). In addition, the record reflects that Terrance McCreary, as part of a plea agreement, agreed to testify against his co-defendants to facts as stated at the time of his guilty plea (Plea Transcript page 163, LL 5-19 and page 168, LL 10-19).

On December 16, 2002, Terrance McCreary gave sworn testimony at his own PCR hearing. During his PCR hearing Terrance McCreary testified under oath that he did not understand what was happening at his guilty plea and he actually never plead guilty (PCR Transcript page 11, L 5 to page 15, L 17, and page 19, LL 10-15, and page 26, L 9 to page 27, L 6). Nowhere in the PCR transcript did McCreary mention anything about Monta Gordon being the shooter in this case. The Plea transcript and Court paperwork make it clear that Terrance McCreary freely, voluntarily, knowingly, and intelligently entered guilty pleas in this case and agreed to the facts stated on the record. It is an obvious fabrication for Terrance McCreary to deny entering a guilty plea and attempt to change the facts of this case.

Like Monta Gordon, Terrance McCreary also makes a new claim that he blamed Antonio for the shooting because Antonio was a juvenile. During his testimony in Antonio Gordon's March 8, 2013, hearing, Terrence McCreary claimed that about six months after his arrest, he spoke with Monta Gordon in the York County Detention Center and they decided to blame Antonio for the shooting because Antonio was a juvenile. However, both Monta Gordon and Terrace McCreary gave sworn statements long before this on the day of the murder implicating Antonio as the shooter. In addition, Terrance McCreary has an extensive juvenile record as noted in his plea transcript (Plea Transcript page 197, L 25 to Page 198, L 9). Like Monta Gordon, McCreary is intimately familiar with the juvenile court system. It was immediately obvious that none of the defendants were treated as a juvenile. Certainly, six months after arrest when this "blame it on the juvenile" discussion allegedly took place, neither McCreary nor Monta Gordon could have been of the opinion that Antonio would be prosecuted as a juvenile. Then, almost a year after the crime, when the State was trying the defendants together at same time in General Sessions Court, there is no way anyone could have thought that Antonio would be tried as a juvenile. Instead of telling this "new" story at that time, McCreary plead guilty confirming his original statement to the police and agreeing to testify against Antonio Gordon. This Court finds that Terrance McCreary's attempt to bolster his "new" testimony with this "juvenile" claim is also a complete fabrication.

Finally, Antonio Gordon proffered his own testimony during the March 8, 2013, motion for a new trial based on after discovered evidence. Antonio Gordon claimed for the first time that he was not the shooter. Instead he claimed his brother, Monta Gordon, was the shooter. In fact, Antonio Gordon claimed he tried to stop his brother from robbing and shooting the victims and that he had no idea Monta was going to try and rob or shoot anyone. Just like the "new"

testimony of Monta Gordon and Terrance McCreary, Antonio's "new" testimony is completely contradicted by his prior sworn statements and testimony.

Antonio Gordon gave two written sworn statements to the Rock Hill Police on the day of the Murder (July 23, 1998). The first statement was given that morning and the second was given that afternoon at the same time Terrance McCreary was giving his statement to a different Rock Hill Detective. In his first statement, Antonio claimed that during the robbery he went over to the victim's car with Monta and Terrance and that Terrance shot the victim. Later that same day Detective John Thickens of the Rock Hill Police Department spoke with Antonio Gordon and took Antonio's second statement. Detective Thickens told Antonio that there were some discrepancies in Antonio's first statement compared to the information the police had collected. Then, without telling Antonio what those discrepancies were, Detective Thickens asked Antonio if he wanted someone else to go to jail for what Antonio had done (Plea/pretrial hearing Transcript page 50, L 22 to page 51, L 3, John Thickens Direct Testimony). Antonio responded by telling Detective Thickens that he did not want anyone else to be penalized for something he did and Antonio agreed to give a second statement (Plea/pretrial hearing Transcript page 51, LL 5-11).

In his second written sworn statement, Antonio Gordon admitted that he was the shooter. He said that McCreary gave him the gun and told him "to get the BMW [victim's car]." He also described that Terrance McCreary was driving and pulled Antonio's car up into a position that blocked the victim's car in the driveway. Then Antonio says, "I went up to the drivers window and I told them I wanted their money. They say they din't [sic] have no money. I was holding the gun pointed at them sideways like. I told them to get out the car because my boy want [sic] the car. Monte was standing next to me and Gary got out and went around the other side of the

car. They wouldn't get out the car and started backing up. I had the gun pointed at them and then it went off." These pertinent facts match very closely with the facts Terrance McCreary gave in his original statement to a different detective at the same time that Antonio gave his statement.

On July 16, 1999, Antonio Gordon entered a guilty plea to Murder, Attempted Armed Robbery (2 counts), Conspiracy, Possession of a Pistol by a person under 21 years of age and Possession of a Firearm during the commission of a violent crime (3 counts) and received a negotiated sentence of 40 years. Antonio Gordon listened to the Court go over each indictment one by one and plead guilty to each indictment. Antonio Gordon then listened as the State relayed the facts to the Court, and Antonio Gordon agreed to the facts presented. Antonio Gordon agreed that he had discussed robbing the victim and stealing the victim's car with Terrance McCreary, that he used the pistol during the robbery attempt, that he and Monta went to the victim's car window and attempted to steal the car, that Antonio's palm print was lifted off the driver's door of the victim's car, that he fired the deadly shot, and that he admitted to his girlfriend, Chyenca Dixon, that he was the shooter (Plea Transcript page 187, L15 to page 189, L 5). Antonio Gordon also has a lengthy criminal record including a number of impeachable offenses (Plea Transcript page 192, LL 7-21). Like his co-defendants, Antonio Gordon was very familiar with the juvenile court system. Antonio Gordon undoubtedly knew immediately that he was not being treated as a juvenile.

At sentencing on July 19, 1999, when the Court gave Antonio Gordon the opportunity to address the Court, Antonio Gordon said, "I'm sorry for my actions that I, took place and the crime. I'm sorry for his family. And all the people that I done hurt during this situation." (Plea Transcript page 202, LL 1-6). At no time during the pretrial hearings or the plea hearing did

Antonio Gordon say anything denying he was the shooter or claiming that Monta Gordon was the shooter. However, Antonio Gordon's trial counsel, Daniel D'Agostino, testified on December 1, 2009, in one of Antonio Gordon's many PCR hearings saying, "Antonio, I couldn't put him on the stand. He confessed to me what happened. His whole—you know, he told me he did it. There was no way to put him on the stand." (PCR Transcript page 75, LL 9-11). As he continued to testify about Antonio, Mr. D'Agostino went on to say, "His testimony, if he would have testified, was he was high on marijuana and he shot the boy. Now, I don't know what I could have done at trial with that." (PCR Transcript page 76, L 25 to page 77, L 4). Not only did Antonio Gordon confess to the police that he was the shooter and admit at his guilty plea that he was the shooter, he confided in his attorney that he was the shooter.

The lengthy procedural history of this case details seemingly endless attempts by Antonio Gordon to overturn his guilty plea over the course of more than 13 years. This Court is obligated to point out that despite the many hearings and motions various courts have entertained on Antonio Gordon's behalf, this is the first time that Antonio Gordon has claimed he was not the shooter and that Monta Gordon was the shooter. In fact the same can be said regarding the "new" testimony of Monta Gordon and Terrance McCreary. Neither Monta nor Terrance made these claims before in any of their own PCR or appeal proceedings. It is a clear fact that Antonio Gordon knew whether he was the shooter the moment this crime occurred. It is inconceivable that Antonio Gordon would wait until now, over 14 years since the crime, to make this claim if he was truly not the shooter. This Court finds Antonio Gordon's new claims to be completely fabricated and unsupported by any reliable evidence.

Gary Moffatt is the fourth co-defendant in this case. He is the only co-defendant who is not a relative of Antonio Gordon. Gary Moffatt also gave a sworn written statement to the Rock

Hill Police on the day of the murder. In his sworn statement Gary Moffatt said that Terrance McCreary got the pistol, that McCreary and Antonio talked about robbing the victims, that McCreary gave the pistol to Antonio Gordon just before Antonio got out of the car to rob the victims, that Monta followed Antonio out of the car, that Antonio demanded money from the victims, and that Antonio shot the driver. Gary Moffatt entered into a plea agreement with the State and agreed to testify against the other defendants. During Antonio Gordon's March 2013 hearing, Antonio Gordon testified that Gary Moffatt would not change his statement and testify for Antonio. Each of the four defendants involved in this case have remained constant since 1998 in pointing out Antonio Gordon as the shooter until this current Motion by Antonio Gordon for a NewTtrial Based on After-Discovered Evidence.

Antonio Gordon, Monta Gordon, and Terrance McCreary have each pursued their respective appeals and PCR applications. Only now, when all other avenues have failed, do these three co-defendants and relatives make this fantastic new claim which contradicts all of their previous claims. It is obvious to this Court that these new claims are complete fabrications capping off a string of attempts to escape responsibility for the horrible actions of each of these defendants on July 23, 1998.

A Motion for a New Trial cannot be used to challenge the validity of a plea of guilty. 58 Am. Jur. 2d. New Trial § 18; U.S. v. Lambert, 603 F.2d 808 (10th Cir. 1979); U.S. v. Forrest, 356 F. Sup. 343 (W.D. Mich. 1973); Roseborough v. State, 311 Ga. App. 530, 716 S.E.2d. 530 (2011); State v. Turco, 108 S.W. 3d 244 (Tenn. 2003) at Footnote 2.

The South Carolina Supreme Court did not reach the issue of plea vs. trial in State v. DeAngelis, 256 S.C. 364, 182 S.E.2d 732 (S.Ct. 1971). In DeAngelis, the lower court was

affirmed based on its denial of DeAngelis' Motion for a New Trial on the insufficiency of DeAngelis' affidavits in support of his Motion for a New Trial.[1]

In Jamison v. State, Opinion 2012-UP-437 (Ct. App. 2012), the Court of Appeals strings out five cases in support of the Post-Conviction Relief trial judge's granting of post-conviction relief based on after-discovered evidence from a guilty plea. The Court's ruling does not confront and thus does not directly rule on the right of a defendant to seek a new trial from a guilty plea. In Jamison, the only issue raised on appeal was the State's argument that Jamison's post-conviction relief petition was successive. I find Jamison does not stand for the proposition that a defendant can seek a new trial of a guilty plea.

In Jamison, at the end of the string of cases, the Court cites this language from DeAngelis, "there are cases that motions of this character should be entertained and granted in order that wrongs done may be remedied." This statement follows this statement, "the courts do not look with favor upon applications for new trials on the ground of after-discovered evidence." The "character," the former quote addresses, is not a motion for a new trial from a guilty plea as in Antonio Gordon's case; rather, it is a motion for a new trial based on after-discovered evidence, where the defendant made a timely general sessions motion to withdraw his plea prior to his sentencing. This is not the case for Mr. Gordon, and he should not be awarded a new trial.

Even if a Motion for a New Trial based on after-discovered evidence was available to Antonio Gordon, he would still not be entitled to relief based on the merits of the motion.

Of note from DeAngelis is this language:

> It is the fixed rule that the credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for determination by the circuit judge to whom it is offered. In him; not this court, resides the power to weigh such evidence; and, his

[1] The Supreme Court notes the trial judge granted his denial on the voluntariness of the plea at the top of 256 S.C. 369. However, a reading of the case reveals the Court focused solely on the denial based on the lack of affidavits.

> judgment thereabout will not be disturbed except for error of law or abuse of discretion. (*citing* State v. Parker, 249 S.C. 139, 153 S.E.2d 183 (S.Ct. 1967), a trial case).

I find the issue of credibility lies with this Court and I find that neither Antonio Gordon, Monta Gordon, nor Terrance McCreary are worthy of belief.

I find Monta Gordon's testimony that he, not Antonio Gordon, was the shooter in the case at issue to be totally lacking in credibility. This is true not only because he is, in my opinion, innately not credible, but based on the evidence previously presented by all of the participants in this case through statements to law enforcement, testimony under oath, and colloquy with trial judges.

As to Terrance McCreary, even if he were worthy of belief, which he is not, his testimony would only be that Monta get out of and after he, Mr. McCreary, heard a shot, got back into the car holding a gun at both times.

Likewise, I find Antonio Gordon's testimony at the hearing on his motion to totally lack credibility. This is based on the observations below. Additionally, as the moving party, his testimony is self-serving and completely inconsistent with his own previous statements, testimony, and plea, as well as the previous statements, testimony, and pleas of Monta Gordon and Terrance McCreary.

Also, weighing against the believability of Antonio, Monta, and Terrance's testimony is the under oath testimony by Antonio Gordon's trial counsel, Dan D'Agostino, that Antonio Gordon confessed that "he did it." (PCR Trial Transcript page 75, LL 5-11). This not only reflects negatively on Monta and Terrance's credibility, along with reflecting negatively on Antonio Gordon's, it bolsters Antonio Gordon's plea of guilty and his confessions to law enforcement and the trial judge.

The Court must address language from State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (S.Ct. 2009), which the undersigned finds confusing and hard to work into its analysis. In Mercer, the court examined whether or not the trial judge had abused his discretion on ruling on a motion for a new trial based on after-discovered evidence. After affirming that the credibility determination lies with the trial judge, the Court states "... we are sensitive to the notion that a mere finding of a witness's lack of credibility does not complete the analysis, because a witness may lack persuasive credibility and still create reasonable doubt."[2] Credibility is "the quality that makes something (as a witness or some evidence) worthy of belief." Black's Law Dictionary, 7th Ed., p. 374. "Persuade" means "to induce to undertake a course of action or embrace a point of view by means of argument, reasoning on entreaty." The American Heritage College dic·tion·ar·y, 4th Ed., p. 1039.

The statement above seems to imply that there are degrees of credibility and that the Court must look at not only whether or not a witness is worthy of belief, but whether a witness is artful enough to lie effectively to the point of creating reasonable doubt. As shown below, that is not the case.

A Westlaw search finds nine cases using the term "persuasive credibility" in addition to Mercer. Turnbull v. Commissioner of Social Security, 2009 WL 688911, reported, W.D. Pa. 2009; Kershner v. Massanari, 16 Fed. App. 606 (Cal 2001); Santini v. Town of Ellington, unreported, 2000 WL 1918015; West v. State, 725 So. 2d 872 (Mass. 1958); Berry v. Stevinson Chevrolet, 74 F3d 980; People v. Manning, 156 A.D.2d 220 (N.Y.A.D. 1 Dept. 1989); U.S. v. Johnson, 713 F.2d 755 (C.A. Ga. 1983); U.S. v. Stein, 437 F.2d 755 (C.A. Ind. 1971). None of these cases defined the term, but rather, as noted below, seem to use the term for comparison.

[2] Franklin v. Lynaugh, 487 U.S. 164, 108 S. Ct. 2320, 101 L.Ed 2d 155 (1988) cited in the paragraph with the "persuasive credibility" statement deals with a jury instruction on "residual doubt" and not on the issue of credibility.

The above cases seem to establish that "persuasive credibility" is a weighing of credibility between witnesses, i.e. not whether or not one witness or others are credible but which of the credible witnesses is more credible. The weighing of credibility is an essential component of jury deliberation. However, here it is for the Court, sitting without a jury, to determine whether a witness is credible or lacks credibility. In the instant case the Court, at least as to the issues material to consideration of Antonio Gordon's motion, must first determine whether a witness has any credibility on the material issues. Here, the Court finds none of the three witnesses who testified before the Court in the hearing of Antonio Gordon's Motion for a New Trial based on after-discovered evidence have any credibility as to their testimony that Monta Gordon, not Antonio Gordon, fired the fatal shot in this case.

Antonio Gordon's claim is that, even though he has, since the day of the shooting, known he was not the shooter, the newly-surfaced exonerating testimony of Monta Gordon and Terrance McCreary is "newly discovered" evidence. That the two accomplices now have changed their versions of the events of the night of the killing is new. Though new, it is not new evidence. The new versions are dramatically opposed to all of the previous evidence presented by Antonio Gordon, Monta Gordon and Terrance McCreary. The Court has already established that it does not find Monta Gordon and Terrance McCreary credible and so affirmatively finds their recantations and current testimony to be fabrications. The exonerating testimonies of Monta Gordon and Terrance McCreary were not evidence available to Antonio Gordon at the time he entered his plea. However, Antonio Gordon knew the truth at the time of his plea, affirmed the truth to his attorney, affirmed the truth to law enforcement and affirmed the truth to the plea judge. That, for whatever reasons, Monta Gordon and Terrance McCreary are changing their

prior, numerous admissions, the change does not create evidence which did not exist at the time Antonio Gordon entered his plea of guilt.

Here, there is no after-discovered "evidence" of any nature. What is now on the table is two accomplices fabricating testimony in an effort to allow Antonio Gordon to attempt to flip 180 degrees from his own version of the events of the night of the shooting in hopes that he can be tried not as the shooter, but solely as an accomplice[3] or as an innocent bystander.

CONCLUSION

Based on the foregoing, this Court finds and concludes that Antonio Gordon's Motion for a New Trial Based on After-Discovered Evidence is hereby denied and dismissed because a Motion for a New Trial cannot be used to challenge the validity of a guilty plea. Furthermore, had a Motion for a New Trial been available to Antonio Gordon, this Court still finds and concludes the motion is without merit and must be denied and dismissed. This Court finds the new testimony of Antonio Gordon, Monta Gordon and Terrance McCreary to be fabricated and further finds each of these individuals to be wholly without credibility. In addition, the Court finds that the testimony and evidence presented by the defendant in support of his motion are not after-discovered evidence.

IT IS THEREFORE ORDERED:

1. That the Defendant's motion for a New Trial Based on After-Discovered Evidence must be denied and dismissed; and
2. That the Defendant must be remanded to the custody of the State to serve his sentence.

AND IT IS SO ORDERED this 22nd day of April, 2013.

John C. Hartley

Judge

JCH:tb

[3] The Court need not, based on its ruling herein, further comment on accomplice liability and its possible application to the facts which are undisputed.

THE HONORABLE JOHN C. HAYES, III
Chief Administrative Judge
Sixteenth Judicial Circuit

York, South Carolina

18 (182) Room

COPY

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA,	)	CRIMINAL NO.: 98-GS-46-2847; 2849; 2851
v.	)	MOTION FOR A NEW TRIAL BASED ON AFTER-DISCOVERED EVIDENCE PURSUANT TO RULE 29(b), SCRCrimP
ANTONIO GORDON,	)	
Defendant.	)	

NOW COMES the Defendant in the above-captioned matter, acting by and through undersigned counsel, respectfully moving this Honorable Court to grant a Motion for a New Trial Based on After-Discovered Evidence Pursuant to Rule 29(b), SCRCrimP. In support of this motion, the Defendant would show unto this Court the following.

PROCEDURAL HISTORY

The Defendant was charged with murder, two counts of attempted armed robbery, criminal conspiracy, possession of a pistol by a person under the age of twenty-one, and three counts of possession of a firearm during the commission of a violent crime in connection with the shooting death of Eric Peter Krenn on July 23, 1998. On July 16, 1999, the Defendant pleaded guilty as charged. On July 19, 1999, the Honorable John C. Hayes, III, presiding circuit court judge, sentenced the Defendant to thirty years' imprisonment for murder, five years' imprisonment for the firearms charges, five years' imprisonment for the conspiracy charge, and ten years' imprisonment for each attempted armed robbery charges. The sentences were to each run concurrently, with the exception of one ten-year attempted armed robbery sentence, which was to run consecutively to the remaining sentences.

ARGUMENT

"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." Rule 29(b), SCRCrimP. To prevail on a motion for a new trial based on after discovered evidence, a defendant must show: (1) the evidence is such as will probably change the result if a new trial is granted; (2) the evidence has been discovered since the trial; (3) the evidence could not have been discovered prior to trial by the exercise of due diligence; (4) the evidence is material to the issue of guilt or innocence; and (5) the evidence is not merely cumulative or impeaching. State v. Needs, 333 S.C. 134, 157-158, 508 S.E.2d 857, 869 (1998).

The State's theory of the case was that on the night of the incident, the Defendant and his co-defendants, Monta Gordon, Terrance McCreary, and Gary Moffatt, were in a vehicle together when they saw the victim's BMW, which was occupied by the victim and his friend Christopher Diaz. The Defendant and Monta Gordon then went up to the vehicle under the guise of asking for marijuana but with the purpose of robbing the victim and stealing the vehicle. The Defendant then shot the victim, which was a wound that caused his death.

Following the incident, all of the co-defendants, including the Defendant, gave statements identifying the Defendant as the shooter. The Defendant challenged his statement prior to his guilty plea on the ground that it was not knowingly or intelligently made inasmuch as he was easily manipulated into making the statement and that he could not have understood his Miranda rights due to his mental deficiencies. This challenge was denied by this Court. Additionally, Diaz gave a statement identifying Monta Gordon as the shooter. Prior to pleading guilty, all of

the co-defendants pleaded guilty and intended to testify against the Defendant if he proceeded to trial.

The Defendant has attached to this motion two affidavits from two of his co-defendants: Monta Gordon and Terrance McCreary. Monta Gordon's affidavit states that he, not the Defendant, fired the shot that killed the victim. Attachment A. Furthermore, Monta Gordon's affidavit states that the Defendant did not have a gun the night of the incident, and that he did not discuss robbing or killing anyone with the Defendant. Attachment A. Finally, Monta Gordon's affidavit states that he told the police that the Defendant fired the shot because he believed that the Defendant would be treated less harshly because he was a juvenile at the time of the crime. Attachment A. McCreary's affidavit states that Monta Gordon, not the Defendant, had the gun the night of the crime. Attachment B. McCreary further states that Monta Gordon got out of their vehicle with the gun, shots were fired, and that Monta Gordon got back in the car with the gun. Attachment B. Finally, McCreary states that he discussed implicating the Defendant for the shooting with Monta Gordon while they were both housed at the York County Detention Center due to the Defendant's age and the likelihood that he would not be treated harshly because he was a juvenile. Attachment B.

The Defendant contends that the evidence presented in these affidavits satisfies all of the requirements for granting a new trial based on after-discovered evidence. The primary evidence against the Defendant was going to be his co-defendants' testimony. The Defendant's trial attorney has testified on numerous occasions that the Defendant pleaded guilty because his co-defendants were going to testify against him. Consequently, this new evidence would have changed the result of the plea. More importantly, this new evidence would have very likely resulted in a not guilty verdict at trial. The Defendant's primary defense would have been that he

did not shoot the victim; Monta Gordon did. Monta Gordon's affidavit admits to shooting the victim, and McCreary's affidavit supports that conclusion. Diaz's statement given shortly after the incident also identifies Monta Gordon as the shooter. The impact of the Defendant's confession would have been minimalized with the evidence that both Monta Gordon and McCreary decided to blame the Defendant with the crime due to his young age. Finally, the Defendant could have presented the evidence that he was easily suggestible, was easily led into saying things that weren't true, and that he could not have understood his Miranda rights. Given this new evidence, it is extremely likely that the result at trial would have been a not guilty verdict.

Additionally, the new evidence has been discovered since the trial; the affidavits are dated July 13, 2012 (McCreary), and August 6, 2012 (Monta Gordon). The new evidence could not have been discovered prior to trial because both co-defendants planned on lying at the Defendant's trial to receive a lesser sentence and the Defendant could not have called either co-defendant to testify in a manner favorable to him. The new evidence is also extremely material to the issue of guilt or innocence, as the identification of the shooter would have been paramount to the jury's determination of guilt. Finally, the new evidence is not cumulative or merely impeaching, as the new evidence is a full recanting of potentially damaging testimony that both co-defendants would have given, and this testimony was the most damaging evidence against the Defendant. Given all of the above, the Defendant respectfully submits that he has met all five of the Needs factors and that this Court should grant him a new trial.

CONCLUSION

WHEREFORE, having set forth his grounds, the Defendant respectfully requests that this Court grant the Defendant a new trial pursuant to Rule 29(b), SCRCrimP.

Respectfully submitted,

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Attorney for the Defendant.

This 15th day of November, 2012.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA,	)	CRIMINAL NO.: 98-GS-46-2847; 2849;
	)	2851
	)	
v.	)	CERTIFICATE OF SERVICE
	)	
ANTONIO GORDON,	)	
	)	
Defendant.	)	
	)	

The undersigned hereby certifies that a true copy of the Motion for a New Trial Based on After-Discovered Evidence Pursuant to Rule 29(b), SCRCrimP in the above matter has been served on opposing counsel this 19th day of November, 2012, by mailing one (1) copy in a stamped envelope properly addressed to:

Walter William Thompson, Assistant Solicitor
Sixteenth Circuit Solicitor's Office
1675-1A York Highway
York, SC 29745

The original having been sent to the York County Clerk of Court for filing.

Jeremy A. Thompson
Attorney for the Defendant

SWORN TO BEFORE ME this 19th day of November, 2012.

(L.S.)
Notary Public for South Carolina

My Commission Expires: 7/10/2022

ATTACHMENT A

State of South Carolina)
)
Lee County)

Statement of Monta Gordon

I, Monta Gordon, having been duly sworn, depose and say that my brother Antonio "*Tonio*" Gordon and two other was together in July of 1998. I am the person who fired the shot that killed the man who died. I was the only person with a gun. My brother Tonio did not have a gun nor did he fire any gun that night. I alone am the only one who killed the victim. I told police Tonio fired the shot because he was a juvenile and I was an adult. I was on probation. As a juvenile I figured Tonio would get a lesser sentence. I never discussed robbing or killing anybody with Tonio. I was the only person with a gun that night and I fired the only shot that night.

This statement is honest and truthful. I have received a copy of this one (1) page statement.

Sworn to before me this 6th day of ~~July~~ August 2012.

Notary Public for South Carolina

My Commission expires: 4-26-2014

Monta Gordon

Monta Gordon

ATTACHMENT B

STATE OF SOUTH CAROLINA)
)
COUNTY OF LANCASTER)

STATEMENT OF

TERRANCE E. McCREARY

I, TERRANCE MC CREARY, HAVING BEEN DULY SWORN DEPOSE AND SAY THAT I AM A RESIDENT OF SCDC - KERSHAW CI, ~~COUNTY.~~

I AM NOT REPRESENTED BY COUNSEL AT THIS TIME. I AM DOING TIME IN SCDC FOR A MURDER THAT OCCURRED IN JULY 1998 IN YORK COUNTY. AT THE TIME OF THE MURDER I WAS DRIVING ANTONIO GORDON'S CAR. WHEN WE FIRST ENCOUNTERED THE VICTIMS, MONTE + ANTONIO GOT OUT OF THE CAR. MONTE HAD A GUN, ANTONIO DID NOT. THE INCIDENT OCCURRED BEHIND ME SO I DID NOT SEE WHAT HAPPENED, I HEARD ONE OR TWO SHOTS, MONTE + ANTONIO RETURNED TO THE CAR, MONTE STILL HAD THE PISTOL. THEY GOT IN THE CAR. WHILE IN THE YORK COUNTY JAIL MONTE + I DISCUSSED BLAMING ANTONIO FOR THE SHOOTING SINCE HE WAS A JUVENILE.

AT NO TIME THAT NIGHT DID I SEE ANTONIO WITH A GUN. ANTONIO HAS NEVER TOLD ME HE DID THE SHOOTING

THIS STATEMENT IS HONEST AND TRUTHFUL TO THE BEST OF MY KNOWLEDGE. IT IS MADE FREELY AND VOLUNTARILY WITHOUT COERSION OR COMPENSATION.

I HAVE RECEIVED A COPY OF THIS 1 PAGE STATEMENT.

SWORN TO BEFORE ME THIS

13th DAY OF July 2012

NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: 12/15/18

TERRANCE MCCREARY

AFFIANT

18

STATE OF SOUTH CAROLINA)
CITY OF ROCK HILL :
ROCK HILL POLICE DEPARTMENT)

PERSONALLY appears before me: Christopher N. Diaz, who after being duly sworn deposes and says: "My name is Christopher N. Diaz.
Date of Birth: 06-05-81 Social Security Number: 113-66-5586.
My address is 1954 Franklin St.RHSC.
Place of Employment: Sonic Drive Inn.
Home Phone Number: 981-9315. Work Phone Number: 325-7838.
I completed 11 years in school and I can (X) cannot ( ) read and write."

On 07-22-98 I was over at Mount Gallant Apartments with some friends.The morning of the 23rd about 12:45A I left there with Eric Krenn and Richard Ashworth.We left in Eric's car a BMW,that was gray and blue.We were on our way to drop Richard off at home.Eric knew where Richard lived as he had taken him home before.Eric was driving and Richard was in the front passenger's seat I was in the back seat.When we got to Richard's house on S.Jones Ave.Eric pulled in front of his house and turned the headlights off.Richard got out and I got in the front seat at this ti We were only there for a couple minutes and Richard went on to his house.We pulled off.As we were pulling off there was a car headed up Walnut St.that was stopped at the stop sign.This c was headed towards Saluda St.We passed right in front of this car and went up S.Jones a little and pulled into a driveway to turn around.This car then pulled behind us,but just a little pas us.It then backed up and was blocking us from backing out.This car was blue in color and looke like a Buick Regal and it was a 4 doof model.There was 3 black guys in the car that I could se The one in the front passenger's seat started asking Eric where were we from and why were we o this side of town.Eric told them we were from Oakwood Acers and he told him that he had droppe off his friend and was trying to get home.This car then pulled up to let Eric back out of the driveway.Eric then backed into the road and was getting ready to put the car in 1st gear and 2 f the black guys jumped out of the car.One of the guys got out of the front passenger's side d the other one got out of the back passenger's side.Both came up to Eric's window,which he had down.One of them had a gun in his hand.The gun was chrome and he was pointing it towards me and Eric and he started telling us to give him our money.We told him that we didn't have any money.Eric started to drive on off and the guy with the gun reached into the car with his left hand and grabbed the steering wheel and told Eric not to do it,meaning not to drive off.While Eric was trying to leave I grabbed him and pulled him towards me and this guy fired the gun on time and Eric took on off.Eric started telling me that he was shot and he drove to E.Main St. He was trying to make the left turn onto E.Main St.,but he passed out and I had to help him ma the turn by turing the wheel to the left.We made it up Main St. a little and I reached over an mashed the brake with my hand and the car stalled out.I jumped out of the car and ran around t the back of the car and pulled Eric out and laid him at the rear of the car.I started yelling and trying to flag down a car.It was only about 3 minutes later when a burgandy colored Chevy pulled up and stopped with 4 guys in the car.I told them I needed some help and that my friend had been shot.One of the guys ran to a house to try to call for help,but it was the guy inside the house that I think made the call.

On Friday,July 24th,1998 I got the Herald Newspaper and I saw all 4 of the guys pictures in th paper.I recognized 2 of them that were the ones that approached Eric's car.The 2 Gordon brothe are the ones that came up to the car and it was Monta Gordon that had started talking to us and then came up to the car with the gun and shot Eric.His brother Antonio was standing there beside him.Monta Gordon was the only one I ever saw with the gun and there is no doubt in my mind that he is the one that shot Eric and tried to rob us!

On 07-25-98 I came to the Rock Hill POlice Depr. and I was asked if any of the photos that I saw on a computer screen where involved in this case.I picked out Antonio Gordon's photo and I told Det.Herring that he was the one standing beside his bother when Eric was shot.

Christopher Diaz
Signature of person giving statement

5:00 p.
7-25-9
Christopher

EXH. 101 (8)

STATE OF SOUTH CAROLINA)
CITY OF ROCK HILL :
ROCK HILL POLICE DEPARTMENT)

PAGE 2

PERSONALLY appears before me: Christopher N. Diaz
who deposes and says: "I make this statement of my own free will and accord without reward or hope of reward. I have not been mistreated or threatened in any way. All of the above is the truth, the whole truth, and nothing but the truth so help me God.

I have read or had read to me the above statement consisting of 2 pages and have received a copy of the same."

x Christopher Diaz
Signature

Witness

SWORN TO AND SUBSCRIBED TO BEFORE ME
THIS 25 DAY OF July, 1998

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES ON 9-18-2002

Exhibit B

STATEMENT TAKEN ON 07-25-98 AT 5:10 ~~AM~~PM
STATEMENT SIGNED ON 07-25-98 AT 6:00 ~~AM~~ PM

STATEMENT FROM: TAPE ( ); WRITTEN NOTES ( ); DICTATED ( );
INTERVIEW (X).

STATEMENT PREPARED BY: L.R. Herring

State of South Carolina
In The Court of Appeals

Appeal from York County
Court of General Sessions
John C. Hayes, III, Presiding Judge

Appellate Case No. 2013-000975

State of South Carolina, Respondent,

v.

Antonio Gordon, Appellant.

Designation of matter to be included in the Record on Appeal

Appellant proposes the following be included in the Record on Appeal:

1. Order Denying Motion For A New Trial dated April 22, 2013
2. Motion For New Trial Based on after-discovered evidence dated November 15, 2012
3. Transcript of Proceeding. PP. 43, 87, 63, 91, 92, 81, 96, 42-82, 84-150, 151-207
4. Appellant's Exhibits A and B, and 8

I certify that this designation contains no matter which is irrelevant to this appeal.

This 21 day of April, 2014

Antonio Gordon

Antonio Gordon, 259798
ACI SMU B 242
P.O. Box 1151
Fairfax, SC 29827

State of South Carolina
In The Court of Appeals

Appeal from York County
Court of General Sessions
John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2013-000975

State of South Carolina, Respondent,

v.

Antonio Gordon, Appellant.

Certificate of service

The Appellant Antonio Gordon, hereby certifies that one copy of the amended initial brief and designation of matter to be included in the Record on Appeal in the above-entitled case has been served upon opposing Counsel, Salley W. Elliott, Assistant Deputy Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with Proper Postage, this 21 day of April, 2014

Antonio Gordon

I Antonio Gordon certify that under Penalty of Perjury that the above was Placed in the Mail on April 21, 2014. 28 U.S.C. § 1746

RECEIVED
APR 24 2014
SC Court of Appeals

End

RE: State of South Carolina v. Antonio Gordon, Appellate Case No. 2013-000975

Dear Clerk:

Please find enclosed the Appellant's Amended initial Brief and the designation of matter to be included in the record on Appeal. Opposing counsel has been served. I am,

Sincerely,

Antonio Gordon

April 21, 2014

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APR 24 2014
SC Court of Appeals