

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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SC Court of Appeals

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Appeal from Newberry County  
Honorable Clifton B. Newman, Circuit Court Judge

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Trial Court Case No 1994-GS-36-616

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THE STATE

Respondent

vs.

GARY LANE PREWITT

Appellant

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**FINAL BRIEF OF APPELLANT**

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## STATEMENT OF THE ISSUES ON APPEAL

1. Did the trial court err in holding that the recantation of Kimmie Shipes was not after-discovered evidence?
2. Did the trial court err in holding that the recantation of Kimmie Shipes would not probably have changed the result of a new trial?
3. Did the trial court err in determining that the recantation of Kimmie Shipes would not be admissible at a new trial?
4. Did the trial court err in holding that the recantation of Kimmie Shipes was not material?
5. Did the trial court err in determining that the recantation of Kimmie Shipes was successive in nature?

## STATEMENT OF THE CASE

### **A. Proceedings Below**

On August 10, 1994, the Appellant was arrested and charged with burglary, grand larceny, assault and battery with intent to kill and possession of a weapon during the commission of a violent crime. (R. p. 515, ll. 4-25; p. 516, ll. 1-12). The Appellant's trial took place on January 19, 1995 in front of the Honorable E.C. Burnett. (R. p. 507). On January 20, 1995, the jury returned with a verdict of guilty on all four counts. (R. p. 688, lines 15-18).

The Appellant received a sentence of 30 days for the charge of larceny. (R. p. 694, lines 24-25; p. 695, lines 1-4). The Appellant received a sentence of twenty (20) years for the charge of assault and battery with intent to kill. (R. p. 695, lines 5-8). For the charge of possession of a firearm during the commission of a violent crime, the Appellant received a sentence of five (5) years. (R. p. 695, lines 9-11). For the charge of burglary, the Appellant received a life sentence. (R. p. 695, lines 12-15).

On October 27, 2012, the Appellant, pursuant to Rule 29(b) of the South Carolina Rules of Criminal Procedure, filed a Motion for a New Trial Based on After-Discovered Evidence. (R. pp. 2, 16-58). On March 12, 2013, the Appellant's Rule 29(b) Motion was heard in front of the Honorable Clifton B. Newman. (R. p. 2). On July 9, 2013, the trial court issued an order denying the Appellant's Rule 29(b) Motion. (R. pp. 2-11).

The Appellant received notice of the Court's unfavorable decision on August 7, 2013. (R. pp. 12-15). The Appellant filed his Notice of Appeal on August 12, 2013, from which this Final Brief follows. Id.

## **B. Statement of the Facts**

### **I. Testimony at the Appellant's Original Trial**

The State's theory of the case was that the Appellant and an accomplice were in the process of burglarizing the home of Randy Tinsley when Joe Dixon, the victim, approached them and asked them what they were doing. (R. pp. 527-31; 560-61). The State argued that the Appellant then shot Dixon multiple times and fled with his accomplice in an old green Chevrolet. (R. p. 546, lines 13-14; p. 548, lines 2-6; p. 549, lines 2-19; pp. 561-63).

A short time after 10:00 a.m. on July 22, 1994, Christy McGuirt returned to her home on Highway 63 in the Kinards section of Newberry County to find Joe Dixon sitting on her front porch. (R. p. 545, lines 21-25; p. 546, lines 1-8). Ms. McGuirt lived across the road from Randy and Rhonda Sue Tinsley. (R. p. 545, lines 1-3). After arriving back at her home, Ms. McGuirt noticed a light green Chevrolet drive by. (R. p. 546, lines 13-14). About ten minutes later, Dixon told Ms. McGuirt that the car that had driven by was at Randy and Rhonda Sue Tinsley's house. (R. p. 546, lines 14-18).

Dixon then crossed Highway 63 to inform the occupants of the vehicle that the Tinsley's were not home. (R. p. 546, lines 19-25; p. 547, lines 1-3). As Dixon approached the back door of the Tinsley home, he saw a man run out the back door towards the green car and another man inside the home. (R. p. 560, lines 19, 16-25; p. 561, lines 1-3). Dixon asked the man running towards the car what he was doing. (R. p. 560, lines 17-18). Dixon then entered the home and asked the other man the same question, at which point Dixon was shot. (R. p. 561, lines 6-8, 10-14). Dixon was shot

three times, once in the shoulder, once between the shoulder and neck and once behind the neck. (R. p. 562, lines 21-25; p. 563, lines 23-25).

At 10:55 a.m., A.H. Walker, Jr., a neighbor who arrived at the scene, called 911 requesting both EMS and law enforcement. (R. p. 579, lines 11-13; p. 580, lines 9-12; p. 581, lines 6-14). The ambulance arrived fifteen minutes later, at 11:10 a.m. (R. p. 582, lines 5-7). The testimony established that Joe Dixon was initially transported to the emergency room at Newberry Hospital and subsequently moved to Richland Memorial Hospital in Columbia. (R. p. 601, lines 14-15; p. 612, lines 23-25; p. 614, line 1).

Randy Tinsley, the owner of the property on which the shooting occurred, testified that he had no personal knowledge of the incident, as he was not present at his residence when the burglary and shooting occurred. (R. p. 542, lines 23-25; p. 543, lines 1-3). Mr. Tinsley further stated that he had never seen the Appellant at or near his home. (R. p. 544, lines 6-8).

Christy McGuirt testified that after she heard shots emanate from the Tinsley home, she saw a faded green old model Chevrolet pull around from the back of the house to the front of the house heading towards Newberry. (R. p. 552, lines 23-25; p. 553, lines 1-19). Ms. McGuirt testified that there were two white boys in the Chevrolet, but that she could not identify who they were. (R. p. 553, lines 24-25; p. 554, lines 1-5, 13-16).

Joe Dixon, the victim in this case, testified that he was shot three times by the Appellant. (R. p. 565, lines 18-25; p. 566, lines 1-11). Dixon stated on cross-examination that he had never seen the Appellant prior to or since the day in which the shooting occurred, but later stated that he had picked the Appellant out of a photo lineup

while in recovery at Richland Memorial Hospital. (R. p. 570, lines 1-25; p. 575, lines 22-25; p. 576, lines 1-21).

Prior to Dixon's testimony during the State's case-in-chief, it was revealed that he was, in fact, mentally retarded. (R. p. 519, lines 12-13) Dixon testified to having only a first grade education. (R. p. 569, lines 5-10). Solicitor Betty Strom remarked that Dixon had a "mental deficiency." (R. p. 519, line 14). Though testifying that he "don't forget nothing," Dixon could not remember the day in which he was shot and had to be corrected by the Solicitor. (R. p. 558, lines 1-6; p. 565, lines 16-25; p. 566, lines 1-11).

On cross-examination, Dixon had difficulty differentiating photographs of people and automobiles. (R. pp. 573-77). Dixon originally testified that he had been shown two photographs of two men, neither of whom were the Appellant. (R. p. 574, lines 14-22). In addition, Dixon testified multiple times that his in-court identification of the Appellant was the first time he had seen him since the shooting. (R. p. 575, lines 3-21). However, Dixon, contradicting his previous statements, later testified that he had identified the Appellant from a "whole bundle" of pictures, all of which looked "almost like" the Appellant. (R. p. 575, lines 22-25; p. 576, lines 1-21).

Next to testify was Kimmie Shipes, a neighbor of the Tinsley's who lived on Highway 63 about half a mile from their home. (R. p. 587, lines 1-6). Around 10:00 a.m. on July 22, 1994, Shipes was awake in her bed when she heard someone on the back deck and patio of her home. (R. p. 587, line 25; p. 588, lines 1-10; p. 591, lines 17-19). Shipes testified that when she arrived at the back door, she saw a man standing at her back door. (R. p. 588, lines 16-17). Shipes described the man at her back door as taller

than she, with red hair and wearing a Washington hat with an emblem on it. (R. p. 594, lines 1-25; p. 595, lines 1-8).

Shipes then testified that after confronting the individual at her back door, the man asked her if Eddie was there (R. p. 588, lines 21-24). After she replied in the negative, the Appellant and another individual got into a faded green or blue vehicle and left her home. (R. p. 588, lines 22-24; p. 589, lines 1-12). Shipes testified that she reported the incident to law enforcement and assisted them in drawing a composite sketch of the individual. (R. p. 596, lines 2-7).

After reporting the incident, Shipes was visited by Detective Danny Gilliam, chief investigator for the Newberry County Sheriff's Department, where she looked through "tons of pictures." (R. p. 593, lines 1-9). Shipes testified that the "pictures" shown to her by Detective Gilliam all resembled the Appellant. (R. p. 593, lines 6-8). Regarding the pictures shown to her by Detective Gilliam, Shipes stated that "the ones that he showed -- the one that I picked out, I could almost assure you that that was him (Appellant) in that picture." (R. p. 593, lines 9-12).

Next to testify was Detective Danny Gilliam, who stated that the Appellant became a suspect through information obtained from a confidential informant. (R. p. 606, lines 13-24). Once the Appellant became a suspect, Detective Gilliam testified that he prepared a photographic lineup to show to Joe Dixon. (R. p. 600, lines 13-24; p. 601, lines 11-13). Detective Gilliam showed Dixon the lineup at Richland Memorial Hospital in the presence of SLED Agent William Jolly, Christy McGuirt and Connie Dixon. (R. p. 602, lines 3-12). Detective Gilliam testified that after Dixon looked at the photographic

lineup for a few minutes, Dixon identified the man who shot him as the Appellant. (R. p. 603, lines 8-14).

Detective Gilliam then testified that the same photographic lineup was shown to Kimmie Shipes at the Newberry County Complex. (R. p. 603, lines 21-25; p. 604, lines 1-4). Detective Gilliam stated that after Shipes had looked at the photographic lineup for five or six minutes, she stated that the Appellant was the man who came to her back door. (R. p. 604, lines 7-24). However, Detective Gilliam admitted that no live lineups were used, even though Newberry County has a two-way mirror, and even though live lineups had been done in previous cases. (R. p. 608, lines 12-25; p. 609, lines 1-4).

On cross-examination, Detective Gilliam testified that no stolen items from the Tinsley home had ever been recovered. (R. p. 605, lines 1-3). When asked of the whereabouts of the green Chevrolet identified by witnesses as the getaway car, Detective Gilliam testified that the car had not been located. (R. p. 605, lines 4-6). Detective Gilliam testified that the second suspect had never been arrested. (R. p. 605, lines 12-18). In addition, the fingerprints found on the guns in Randy Tinsley's home were not a match to the Appellant's. (R. p. 605, lines 19-24). When asked whether or not the Appellant had confessed to the crime, Detective Gilliam testified that he had not. (R. p. 607, lines 1-6).

The Appellant, Gary Lane Prewitt, testified that on the morning of July 22, 1994, he was at his home on Indian Creek Road with his wife and two children. (R. p. 618, lines 3-9; p. 620, lines 1-4). The Appellant testified that on that morning, his mother and father came to visit his children around 10:30 or 10:45 a.m., prior to them having to go into town to pick up a check in Clinton. (R. p. 618, lines 10-17). The Appellant's

parents, Sandra Prewitt and Gary Lawrence Prewitt, corroborated the Appellant's claim that he had been at home during the time in which the burglary and shooting occurred. (R. pp. 635-36, 642-43).

## **II. Testimony at the Appellant's Rule 29(b) Hearing**

For purposes of this appeal, the relevant testimony from the Appellant's Rule 29(b) hearing concerns only two witnesses: i) Detective Danny Gilliam; and ii) Kimmie Shipes Heaton, who between the Appellant's original trial and the Appellant's Rule 29(b) hearing had married and taken the last name of her husband. For purposes of this appeal she will be referred to as Kimmie Shipes.

Detective Danny Gilliam was first to testify at the Appellant's Rule 29(b) hearing. (R. pp. 83-104) In contradiction to his testimony at the Appellant's original trial, Detective Gilliam stated that the Appellant did not become a suspect through a confidential informant, but rather from an individual or individuals whom law enforcement was investigating regarding the very offenses for which the Appellant was ultimately convicted and incarcerated. (R. pp. 85-88; p. 89, lines 1-12; p. 90, lines 1-12; p. 100, lines 11-25; p. 101, lines 1-18; p. 103, lines 19-23). Corroborating this contradiction was Detective Gilliam's testimony during the State's cross-examination. (R. pp. 97-102).

On cross-examination, Detective Gilliam testified that, based upon the descriptions given by eyewitnesses, as well information known to law enforcement, he interviewed two potential suspects from Laurens County who had a reputation for burglary. (R. p. 100, lines 11-25; p. 101, lines 1-18). Detective Gilliam's testimony also confirmed that, during conversations with these two suspects, the brothers fingered the

Appellant for the crime. (R. p. 101, lines 6-15). During the Appellant's redirect examination, Detective Gilliam testified that the two initial suspects were Ernest Hannah and Robert Hannah. (R. p. 103, lines 19-23).

During the Appellant's direct examination, Detective Gilliam also testified that Kimmie Shipes immediately identified the Appellant as the man outside her home on the morning in which Joe Dixon was shot. (R. p. 92, lines 2-25; p. 93, lines 1-4). Counsel for the Appellant noted that Detective Gilliam's current testimony was in contradiction with his testimony at the Appellant's original trial, as Detective Gilliam had testified at the Appellant's original trial that it took Kimmie Shipes five to six minutes to identify the Appellant from the photo lineup. Id.

Detective Gilliam then testified that, while fingerprints were taken from the scene and analyzed, they were not the Appellant's fingerprints. (R. p. 95, lines 4-7). He also admitted that no physical evidence was found at the scene connecting the Appellant to the Tinsley home. (R. p. 95, lines 8-11). Detective Gilliam noted that the getaway vehicle had never been found, much less located in the Appellant's possession. (R. p. 95, lines 15-25; p. 96, lines 1-9). He also testified that the items stolen from the Tinsley home were never found in the Appellant's possession, even though the Appellant's home was thoroughly searched, pursuant to a search warrant. (R. p. 96, lines 10-25). Detective Gilliam's testimony revealed that, although the State's witnesses indicated that there were two men involved in the robbery of the Tinsley and the shooting of Joe Dixon, after the Appellant was arrested and subsequently convicted, the investigation was closed. (R. p. 95, lines 12-14; p. 96, line 25; p. 97, lines 1-3).

Following the testimony of Detective Gilliam, Kimmie Shipes took the stand. (R. pp. 134-53). Prior to the Appellant's Rule 29(b) hearing, Shipes, in signed correspondence, had recanted her previous identification of the Appellant as the man outside her home on the morning in which Joe Dixon was shot, citing her mental illnesses, and the resulting susceptibility to both coercion and suggestion by authoritative figures, as the reasons for her original incorrect identification. (R. pp. 696-97).

At the Appellant's Rule 29(b) hearing, Shipes maintained that, on the morning in which Joe Dixon was shot, she confronted two men outside of her home after hearing a car pull up in her front yard. (R. p. 135, lines 1-16). Shipes also maintained that, after her father reported the incident to law enforcement, she met with Detective Danny Gilliam, in order to review photographs and potentially identify the culprits. (R. p. 136, lines 3-11; p. 137, lines 23-25; p. 138, line 1).

In detailing the procedure surrounding her original identification of the Appellant, Shipes testified that she identified more than one photograph from Detective Gilliam's set prior to identifying the Appellant. (R. p. 138, lines 8-25; p. 139, lines 1-12). Shipes also testified that, after identifying a photograph that was not the Appellant, she was corrected by Detective Gilliam, who suggested she look at other photographs. *Id.* Shipes testified that, after suggestions and/or corrections by Detective Gilliam, she eventually identified the Appellant as the man outside of her home on the morning of the Tinsley burglary and Dixon shooting. *Id.*

Shipes, in explaining the reasons for her incorrect identification and subsequent recantation, first noted that, from 1991 to 1993, she had been institutionalized, as a result of hallucinations and hearing voices. (R. p. 140, lines 19-24). Shipes then stated that she

had dropped out of treatment in 1993 and subsequently refused medication. Id. Shipes testified that this mental fragility, combined with the pressure she felt from her family, law enforcement and the community at-large, was the reason for her incorrect identification of the Appellant. (R. p. 140, line 25; p. 141, lines 1-6; p. 150, lines 21-25; p. 151, line 1).

As to her current mental stability, Shipes testified that, at the time of her recantation and the Appellant's Rule 29(b) hearing, she was properly medicated and receiving mental health treatment. (R. p. 140, lines 8-10; p. 150, lines 21-25; p. 151, line 1). As a result of this mental clarity, Shipes, when asked by the Appellant's counsel if she would be able to identify the Appellant as the man outside her home, replied that would she would not. (R. p. 140, ll. 3-7; p. 152, lines 21-25; p. 153, lines 1-2).

In support of Shipes's testimony, the Appellant introduced into evidence a letter from Harold C. Morgan, M.D., dated May 5, 1998. (R. pp. 698-99). In this correspondence, Dr. Morgan noted that, on December 12, 1997, he had conducted a psychiatric examination and psychological testing on Kimmie Shipes. Id. Dr. Morgan also detailed Shipes's continuous and persistent history of mental illness from 1991 to the date of the correspondence, specifically noting that she had been previously diagnosed with "Major Depression with psychotic features." Id.

Based upon his examination of Shipes, Dr. Morgan concluded that her "contact with reality is fragile." Id. Dr. Morgan then wrote that Shipes "has a chronic mental illness, which requires treatment with antidepressants and antipsychotic medication." Id. Dr. Morgan's correspondence indicated that, without treatment, Shipes's thinking, judgment and behavior would be significantly impaired. Id.

## ARGUMENT

### Standard of Review

In determining whether to grant a new trial based on after-discovered evidence, appellate courts will affirm the trial court's denial unless the trial court committed an error of law or abused its discretion. State v. Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977). Similarly, in determining the credibility of witness testimony, appellate courts must "affirm the trial court if reasonably supported by the evidence." State v. Mercer, 381 S.C. 149, 167, 672 S.E.2d 556, 565 (2009).

For the Appellant to prevail on his Motion, he must show that the after-discovered evidence: i) is of a nature that it would probably change the result if a new trial were granted; ii) has been discovered since the trial; iii) could not in the exercise of due diligence have been discovered prior to trial, iv) is material; and v) is not merely cumulative or impeaching. State v. Spann, 334 S.C. 618, 619-20, 513 S.E.2d 98, 98 (1999).

### Issues

#### **I. The trial court erred in holding that the recantation of Kimmie Shipes was not after-discovered evidence.**

In its denial of the Appellant's Rule 29(b) Motion, the trial court, referencing the recantation of Kimmie Shipes, held that "[t]his potential recantation is not after-discovered evidence and she can be impeached with her previous testimony." (R. p. 9).

The Appellant's original trial took place in January 1995. (R. p. 507). Shipes's recantation letter was not written until March 2011, over sixteen years after the Appellant's original trial. (R. pp. 696-97). Furthermore, neither the Appellant nor his

counsel was aware of this recantation until the Appellant, his then-counsel and Pete Skidmore met in May 2012. (R. pp. 23-25).

Similarly, Dr. Morgan's correspondence diagnosing Kimmie Shipes with various mental illnesses was written on May 5, 1998, over three years after the Appellant's original trial. (R. pp. 698-99). Just as the case with Shipes's recantation letter, neither the Appellant nor his then-counsel was aware of its existence until the previously-mentioned May 2012 meeting took place. (R. pp. 24-25).

In determining that Shipes's recantation was not after-discovered evidence, the trial court confuses the first and fourth prongs of the Spann test with the second prong of the Spann test. Spann, 334 S.C. at 619-20, 513 S.E.2d at 98. A witness's recantation of trial testimony, by its very nature, is after-discovered evidence. In order for a recantation to occur, the witness must refute or modify testimony previously given. Because the recanting witness must have previously testified, any subsequent recantation or modification of said witness's testimony is necessarily after-discovered evidence.

As such, the Appellant asserts that the trial court committed an error of law and an abuse of discretion in determining that the recantation of Kimmie Shipes and the correspondence from Dr. Morgan were not after-discovered evidence.

**II. The trial court erred in holding that the recantation of Kimmie Shipes would not probably change the result of a new trial**

In denying the Appellant's Motion, the trial court referenced the credibility of Kimmie Shipes, stating that "her testimony at the original trial is more credible than her testimony at the hearing" and "this potential recantation would not likely change the outcome if a new trial were held" (R. p. 9).

South Carolina courts have long held that the “[r]ecantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as grounds for a new trial.” Porter, 269 S.C. at 621, 239 S.E.2d at 643 [citing State v. Whitener, 228 S.C. 244, 261, 89 S.E.2d 701, 709 (1955)]. The Appellant stipulates that this is a high burden. However, the Appellant asserts that the evidence of record indicates that high burden has been satisfied, as the hearing testimony of Kimmie Shipes is objectively more credible than her testimony at the Appellant’s original trial.

At the Appellant’s Rule 29(b) hearing, Shipes presented three explanations concerning her initial incorrect identification and subsequent recantation: i) the lack of medical treatment regarding her severe mental illnesses, both prior to and during the Appellant’s original trial; ii) her resulting susceptibility to coercion and suggestion by authoritative figures; and iii) her incarceration and subsequent medical treatment following the Appellant’s conviction. (R. pp. 134-153). The Appellant contends that the evidence of record indicates that all three of these explanations are verifiably true.

As to Shipes’s first explanation, the evidence of record clearly indicates that, at the time of her original identification of the Appellant, Shipes was not undergoing medical treatment for her mental illnesses, despite having previously been institutionalized for a two-year period. (R. p. 140, lines 8-12; pp. 696-97). While her testimony alone would likely be insufficient to withstand the close scrutiny standard applied to witness recantations, Shipes’s testimony is buttressed and corroborated by the medical diagnosis of Dr. Harold Morgan. (R. pp. 698-99).

Dr. Morgan’s diagnosis of Shipes indicated that she was suffering from severe mental illnesses. Id. These illnesses had been diagnosed as far back as 1991, and from

1993 until her incarceration had remained untreated. (R. p. 140, lines 8-12; pp. 698-99). This period of time includes the dates in which she testified at the Appellant's original trial. (R. p. 507). Dr. Morgan clearly indicated that, without proper treatment, Shipes's contact with reality was fragile. (R. pp. 698-99). Dr. Morgan also indicated that, without proper treatment, Shipes's thinking, judgment and behavior were significantly impaired. Id.

Dr. Morgan's statements, in conjunction with Shipes's hearing testimony, clearly indicate that, at the time of the Appellant's original trial, Shipes was suffering from a series of mental illnesses that called into question not only her thinking and judgment, but also her contact with reality. (R. pp. 140-41, 698-99). The evidence also indicates that, during the period of time between 1993 and Shipes's incarceration, she was not taking any antidepressants or antipsychotics, medication deemed necessary by Dr. Morgan for Shipes to function normally. Id. This is prima facie evidence that, at the time of her testimony at the Appellant's original trial, Kimmie Shipes was mentally unstable and severely impaired.

As to the third explanation concerning Shipes's incorrect identification and subsequent recantation, the evidence of record indicates that, subsequent to the Appellant's conviction and incarceration, Kimmie Shipes was incarcerated. Shipes's testimony at the Appellant's Rule 29(b) hearing also indicates that, as a result of her incarceration, she has received, and is currently receiving, proper medical treatment for her mental illnesses. (R. p. 140, lines 8-24; p. 143, lines 7-25; pp. 698-99).

This testimony, when viewed in conjunction with Dr. Morgan's correspondence, is prima facie evidence that Shipes's mental state had significantly improved in the time

between her original identification and subsequent recantation. Based on this fact, the only conclusion to be drawn from this increased mental clarity is that the veracity of her recantation is greater than that of her original identification. Therefore, the trial court's determination that Shipes's trial testimony is more credible than her testimony at the Appellant's Rule 29(b) hearing is not reasonably supported by the evidence of record.

As to the second explanation concerning Shipes's incorrect identification and subsequent recantation, Shipes also testified that her lack of medical treatment at the time of her initial identification made her especially susceptible to coercion and suggestion. (R. p. 140, line 25; p. 141, lines 1-6). While Shipes's testimony alone would likely be insufficient to withstand the close scrutiny standard applied to witness recantations, the credibility of her hearing testimony is buttressed by the inconsistencies in the trial and hearing testimony of Detective Danny Gilliam. (R. pp. 83-104, 598-609).

At the Appellant's Rule 29(b) hearing, Kimmie Shipes testified that, prior to identifying the Appellant from the set of photographs provided by Detective Gilliam, she identified individuals other than the Appellant. (R. pp. 138-39). Shipes testified that after selecting the photographs of individuals who were not the Appellant, Detective Gilliam suggested to her that the selections were incorrect. Id. Shipes testified that she eventually identified the Appellant after her previous selections were suggested by Detective Gilliam to be incorrect. Id. In his hearing testimony, Detective Gilliam denied any impropriety concerning the suggestive nature of Shipes's original identification. (R. p. 93, lines 5-17).

In order for Shipes's second explanation regarding her incorrect identification and subsequent recantation to be credible, there must be evidence of coercion and suggestion

by an authoritative figure that resulted in her incorrect identification. Because Shipes's allegations of coercion, suggestion and manipulation concern the actions of Detective Danny Gilliam, his credibility is directly relevant in determining whether or not Shipes's allegations concerning the existence of coercion and suggestion are credible.

At the Appellant's original trial, Detective Gilliam testified that the Appellant initially became a suspect through information obtained from a confidential informant. (R. p. 606, lines 13-20). However, at the Appellant's Rule 29(b) hearing, Detective Gilliam indicated that the information concerning the Appellant came not from a confidential informant, as Detective Gilliam had previously testified, but rather from two men, Ernest and Robert Hannah, who themselves were not only suspects regarding the very crimes for which the Appellant was ultimately convicted, but were also known burglars in and around Laurens County. (R. pp. 85-88; p. 89, lines 1-12; p. 90, lines 1-12; p. 100, lines 11-25; p. 101, lines 1-18; p. 103, lines 19-23).

Detective Gilliam's motive concerning his testimony at the Appellant's original trial is clear: by stating that the Appellant became a suspect through information obtained from a confidential informant, Detective Gilliam would not have to state that two men with checkered pasts initially fingered the Appellant as the culprit in the crimes for which he was on trial. This inconsistency between Detective Gilliam's trial testimony and his testimony at the Appellant's Rule 29(b) is evidence of not only a deliberate attempt to mislead and manipulate the jury, but also of considerable dishonesty.

Detective Gilliam's hearing testimony was also inconsistent with his trial testimony concerning the time lapse in Kimmie Shipes's initial identification of the Appellant from a six-pack lineup. At the Appellant's original trial, Detective Gilliam

testified that, after developing the Appellant as a suspect, he presented the six-pack lineup to Kimmie Shipes. (R. pp. 603-04; p. 606, lines 4-12). Detective Gilliam stated that he wanted Shipes “to take as much time as possible and see if she recognized anyone in the pictures.” (R. p. 604, lines 9-11). Detective Gilliam then testified that Shipes, after studying the photographs for five to six minutes, identified the Appellant as the man outside of her home on the morning in which the Tinsley home was burglarized and Joe Dixon was shot. (R. p. 604, lines 17-19).

At the Appellant’s Rule 29(b) hearing, Detective Gilliam testified that Kimmie Shipes immediately picked the Appellant’s photograph out of the six-pack lineup. (R. pp. 92-93). When pressed by the Appellant’s then-counsel as to the inconsistencies between his trial and hearing testimony concerning the timeline of Shipes’s identification, Detective Gilliam eventually stated that he believed five or six minutes to be an immediate identification. Id.

Detective Gilliam’s inconsistencies in the timeline of Shipes’s identification also serve to diminish his credibility as a witness. At the Appellant’s original trial, Detective Gilliam testified that he showed Kimmie Shipes a six-pack photographic lineup. (R. p. 603, lines 21-25). Detective Gilliam testified that Shipes took five or six minutes to identify the Appellant, specifically using the word “studied.” (R. p. 604, lines 7-19).

At the Appellant’s Rule 29(b) hearing, Detective Gilliam asserted that Shipes’s identification of the Appellant was immediate. (R. p. 92, lines 2-6). Detective Gilliam’s hearing testimony, when viewed in conjunction with his testimony at the Appellant’s original trial, demonstrates an intent to bolster Shipes’s initial identification by

insinuating that, because such a small time period elapsed between observation and identification, Shipes's initial identification was that much more credible.

Detective Gilliam's trial testimony, which established the five to six minute timeline for Shipes's identification, cannot be construed as "immediate", as said timeline would mean that Shipes observed each photograph in the six-pack lineup for approximately one minute before selecting the Appellant's photograph. (R. p. 604, lines 5-19). Furthermore, Detective Gilliam's use of the word "studied" in his trial testimony to describe Shipes's identification clearly indicates that Shipes's decision was not an immediate one. Id.

Shipes's testimony at the Appellant's Rule 29(b) hearing is consistent with Detective Gilliam's trial testimony concerning the timeline of Shipes's identification of the Appellant. The allegations made by Shipes at the Appellant's Rule 29(b) hearing concerning Detective Gilliam could have reasonably taken place over a period of five to six minutes. However, if Shipes's identification was described as immediate, it stands to reason that no impropriety could reasonably be inferred and that Shipes was extraordinarily confident in her initial identification. Thus, it would appear that Detective Gilliam, and not Kimmie Shipes, has a greater motive to obfuscate the time frame in which Shipes identified the Appellant, which consequently diminishes his credibility.

The last factor diminishing Detective Gilliam's credibility concerns the manner in which the Newberry County's Sheriff's Department conducted its investigation regarding the crimes for which the Appellant was incarcerated.

At both the Appellant's original trial and Rule 29(b) hearing, the evidence clearly established that two men participated in the burglary of Randy Tinsley's home and the

shooting of Joe Dixon. (R. p. 605, lines 12-16). However, Detective Danny Gilliam, chief investigator concerning the crimes for which the Appellant was incarcerated, testified that, once the Appellant was arrested, incarcerated and convicted, his investigation ceased, even though all the evidence indicated that another individual was involved in the underlying offenses. (R. p. 95, lines 12-14; p. 96, lines 23-25; p. 97, lines 1-3). This fact is consistent with Shipes's hearing testimony, where she described the pressure she from both law enforcement and the community at-large to provide a resolution to the crimes for which the Appellant was convicted. (R. p. 141, lines 2-6).

Because Detective Gilliam's investigation ceased upon the Appellant's arrest and subsequent trial, even though all evidence up to that point indicated that there were two culprits, one could conclude that law enforcement's goal was not to seek justice, but rather to assuage a frightened public via the Appellant's conviction. As such, these facts bolster Shipes's hearing testimony that law enforcement engaged in both coercion and suggestion in order to obtain an identification needed to convict the Appellant.

Given that the explanations cited by Kimmie Shipes for her incorrect identification and subsequent recantation are either verifiable by an independent source or supported by the evidence of record, the Appellant would assert that her recantation is both reliable and more credible than her testimony given at the original trial. However, in order to determine if said recantation would probably change the result if a new trial were granted, it is necessary to determine what admissible evidence both the State and the Appellant would possess in a new trial.

In the Appellant's original trial, the State's entire case rested on the identification of the Appellant by Joe Dixon and Kimmie Shipes. (R. pp. 556-579, 586-97). No

physical evidence tied the Appellant to the crime scene. (R. p. 605, lines 1-24). The fingerprints found at the Tinsley home were not the Appellant's. (R. p. 605, lines 19-24). The items stolen from the Tinsley home were never recovered, much less found in the Appellant's possession. (R. p. 605, lines 1-3). The getaway vehicle described by all the State's witnesses was never recovered, much less traced to the Appellant. (R. p. 605, lines 4-6). Lastly, the Appellant presented an alibi defense during his case-in-chief. (R. pp. 616-633). He testified that, at the time of the Tinsley burglary and Dixon shooting, he was at his home in Laurens County. *Id.* The Appellant's parents both testified on his behalf, corroborating his alibi. (Trial Transcript, pp. 634-640, pp. 641-645).

Were the Appellant to be granted a new trial, the State would have no physical evidence connecting the Appellant to the crime scene. Because of Shipes's recantation, the State would not be able to place the Appellant in the immediate vicinity of the Tinsley home prior to the burglary and shooting and driving a similar vehicle to the getaway car as described by all the State's eyewitnesses. The only evidence the State would possess would be the identification testimony of Joe Dixon, a man who the State previously conceded had a mental deficiency, and who multiple witnesses have described as being either slow or mentally retarded (R. p. 519, lines 12-14).

The Appellant would also be able to present evidence, via cross-examination of Detective Danny Gilliam, that he became a suspect through information obtained from two men who were suspects regarding the very same offenses for which the Appellant is being tried. (Hearing Transcript, pp. 85-88; p. 89, lines 1-12; p. 90, lines 1-12; p. 100, lines 11-25; p. 101, lines 1-18; p. 103, lines 19-23). The Appellant, via cross-examination of Detective Danny Gilliam, would be able to elicit from Detective Gilliam

that these two suspects had a history of committing burglaries in and around Laurens County. Id.

In his case-in-chief, the Appellant would be able to again present an alibi defense, which would be corroborated by both his mother and father. (Trial Transcript, pp. 634-49, 641-45). Lastly, for the reasons argued below, the Appellant would be able to call Kimmie Shipes as a witness in his case-in-chief. Shipes' testimony, admissible via the doctrine of third-party guilt, would establish that two men, neither of whom were the Appellant, were in the immediate vicinity of the Tinsley home prior to the burglary and shooting and that those same two men left her home in a vehicle matching the description of the getaway car identified by all the State's witnesses.

**III. The trial court erred in determining that the recantation of Kimmie Shipes would not be admissible at a new trial**

The trial court, in its order denying the Appellant's Motion, determined that Shipes's recantation would not be admissible as evidence of third-party guilt, pursuant to the holding in State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (S.C.App. 2000).

Even if Shipes's recantation were not admissible in the Appellant's case-in-chief, the State would nonetheless lose its star identification witness if the Appellant was granted a new trial. However, in analyzing the burden required for Shipes's testimony regarding third-party guilt to be admissible in the Appellant's case-in-chief, the Appellant would assert that Shipes's recantation meets that burden.

In State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941), the court held that "evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence." Gregory, 198 S.C. at 104,

16 S.E.2d at 534. The court then stated that “before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.” Gregory, 198 S.C. at 104-05, 16. S.E.2d at 535

Shipes’s testimony in the Appellant’s case-in-chief would establish facts inconsistent with the Appellant’s guilt. (R. pp. 134-53, 586-97, 696-97). Shipés’s testimony would indicate that she was at her home, only one-half mile from the scene of the crime, on the morning of the Tinsley burglary and Dixon shooting. Id. Her testimony would primarily establish that two men, the exact number of culprits as described by all the State’s witnesses, neither of whom were the Appellant, were outside of her home immediately prior to the Tinsley burglary and Dixon shooting. Id. Shipés’s testimony would establish that the two men, neither of whom were the Appellant, left in a vehicle matching the description of the getaway car given by all the State’s witnesses. Id. Because the above-referenced set of facts, which would be the bulk of Shipés’s testimony in the Appellant’s case-in-chief, clearly tend to establish that two men distinct and separate from the Appellant committed the crimes for which he is currently incarcerated, her testimony would be admissible evidence of third-party guilt. Id.

#### **IV. The trial court erred in determining that the recantation of Kimmie Shipés is not material**

The trial court, in its order denying the Appellant’s Motion, determined that Shipés’s recantation was “not material to the issue of innocence or guilt.” (R. p. 10). The Appellant contends that, based upon binding judicial precedent in existence at the time of the Rule 29(b) hearing, the trial court committed an error of law in determining that Shipés’s recantation testimony was not material to the issue of innocence or guilt.

The United States Supreme Court, in United States v. Agurs, 427 U.S. 97, 112 (1976), described the “materiality” standard as existing where “the omitted evidence creates a reasonable doubt that did not otherwise exist.” South Carolina appellate courts have since applied the Agurs standard in determining whether or not evidence is material. State v. Freeman, 319 S.C. 110, 119-20, 459 S.E 2d 867, 873 (S.C.App. 1995).

In order for Shipes’s recantation testimony to be deemed material, the court must determine whether or not Shipes’s recantation creates reasonable doubt that otherwise did not exist. Applying the Agurs standard in the present case, it is clear that Shipes’s recantation testimony creates reasonable doubt where none previously existed.

Shipes’s identification was the most damning piece of evidence offered against the Appellant in his original trial. In her closing argument to the jury, Solicitor Betty Strom remarked that “Kimmie Shipes is not related to any of these parties, doesn’t know them. She just lives up the road from them.” (R. p. 661, lines 23-25). Later in the State’s closing argument, Solicitor Strom, again referencing Shipes’s testimony, emphasized the importance of her identification in corroborating the testimony of other State’s witnesses. (R. p. 530, lines 23-25; p. 531, lines 1-25; p. 532, lines 1-13). Because Shipes, by all appearances, was a disinterested third-party and reasonably intelligent young woman at the time of her identification, it is undisputed that her identification was the most crucial piece of State’s evidence used to convict the Appellant.

Without Shipes’s identification of the Appellant, the State’s sole evidence in favor of conviction is the testimony of Joe Dixon, a man whom the State even referred to as being mentally deficient, and whose testimony at trial would most likely be called into question on the grounds of competency. (R. p. 519, lines 12-14). And just as Solicitor

Strom remarked that Shipes's original identification supported the testimony of all other State's witnesses, so too does her recantation testimony support the bulk of the Appellant's case. Based on these facts, Shipes's recantation testimony satisfies the Agurs materiality standard, therein satisfying the fourth prong of the Spann test.

**V. The trial court erred in determining that the recantation of Kimmie Shipes was successive in nature**

The trial court's order denying the Appellant's Rule 29(b) Motion held that Appellant's Motion was successive to his second PCR Application. (R. p. 10). As previously stated, the Appellant has limited the scope of this appeal to cover only the recantation testimony of Kimmie Shipes.

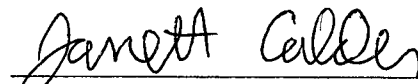
The Appellant's second PCR hearing took place on October 9, 2003. (R. pp. 395-462). The transcript of that hearing clearly reveals that the Appellant did not raise Kimmie Shipes's recantation of her trial testimony as grounds for a new trial. Id. Furthermore, the Rule 29(b) hearing testimony of both Nichole Edwards and Pete Skidmore establish that Shipes's recantation was not documented until March 2011, over seven years after the Appellant's second PCR hearing. (R. pp. 165-183). As such, the trial court erred in holding that Shipes's recantation testimony was successive to the Appellant's second PCR Application.

## CONCLUSION

Based on the facts and legal arguments detailed above by the Appellant's counsel, the trial court's denial of the Appellant's Motion for a New Trial Based on After-Discovered Evidence cannot be affirmed. Because the recantation testimony of Kimmie Shipes taken at the Appellant's Rule 29(b) hearing satisfies the five requirements for a new trial, pursuant to Spann, the trial court's denial of the Appellant's Motion constitutes both an error of law and an abuse of discretion. As such, the trial court's holding must be overturned by the Court of Appeals.

Dated this 16<sup>th</sup> day of September, 2014.

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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from the Newberry County Court of General Sessions

Honorable Clifton B. Newman, Circuit Court Judge

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Appellate Case No. 2013-001728

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State of South Carolina,

Respondent,

v.

Gary Lane Prewitt,

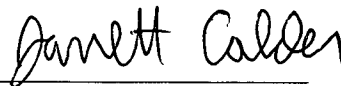
Appellant.

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**CERTIFICATE OF APPELLANT'S COUNSEL**

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The undersigned certifies that the Final Brief complies with Rules 211 and 267, SCACR.



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September 16, 2014

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from the Newberry County Court of General Sessions  
Honorable Clifton B. Newman, Circuit Court Judge

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THE STATE

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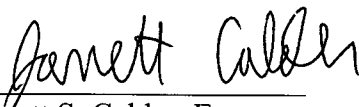
GARY LANE PREWITT

Appellant

\_\_\_\_\_  
**PROOF OF SERVICE**  
\_\_\_\_\_

I certify that I have served fourteen (14) bound copies and one (1) unbound copy of Appellant's Final Brief, along with the Certificate of Counsel and the Proofs of Service on the Clerk of the South Carolina Court of Appeals, by depositing a copy via United States Mail, postage prepaid, on September 16, 2014, addressed to the following:

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IN THE COURT OF APPEALS

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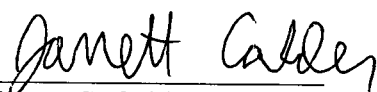
GARY LANE PREWITT

Appellant

\_\_\_\_\_  
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I certify that I have served Appellant's Final Brief, Certificate of Counsel and Proof of Service on The Honorable Alan Wilson, Esquire, by depositing a copy via United States Mail, postage prepaid, on September 16, 2014, addressed to the following:

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Re: State of South Carolina v. Gary Lane Prewitt  
Appellate Case No. 2013-001728

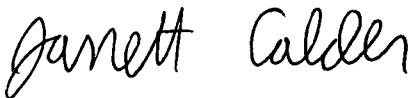
To Whom It May Concern:

Enclosed you will find the following:

- 1) Fourteen (14) bound copies of Appellant's Final Brief;
- 2) One (1) unbound copy of Appellant's Final Brief;
- 3) Certificate of Counsel; and
- 4) Two (2) Proofs of Service

If you need my assistance or have any questions or concerns, please do not hesitate to contact me.

Sincerely,



Jarrett S. Calder, Esq.

GRAND STRAND LAW GROUP, LLC

Enclosures

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