STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
On Denial of Motion for New Trial
John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2013-000975

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SC Court of Appeals

THE STATE,

Respondent,

v.

ANTONIO GORDON,

Appellant

INITIAL BRIEF OF RESPONDENT AND DESIGNATION OF MATTER

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. Did the lower court abuse its discretion and commit error of law when it erroneously found that Rule 29 (b), SCCrimP motions cannot be filed by Appellant because he plead guilty?

II. Did the lower court abuse its discretion and commit error of law when it did not understand the scope of review?

III. Did the lower court abuse its discretion and commit error of law when it erroneously found that the Appellant's evidence was not after-discovered?

IV. Did the lower court abuse its discretion and commit error of law when it erroneously denied the motion on the merits?

RESPONDENT' S COUNTER QUESTIONS ON APPEAL

I. Whether the Lower Court's Conclusion that the Proffered Testimony was Fabricated and Therefore Not Worthy of Belief Defeats Any Entitlement to a New Trial?

II. Whether Rule 29(b), SCCrimP grants Appellant the right to file a motion for a new trial based on after-discovered evidence in a guilty plea setting because the General Assembly has not given circuit courts the authority and statutory jurisdiction to grant new trials for guilty pleas under S.C. Code § 17-23-110 (2014) which is the statutory authority for Rule 29, absent a jury trial, exonerating DNA evidence, or the filing of a PCR application?

III. As an additional sustaining ground, when the Appellant never filed an affidavit that the evidence was after-discovered, as required by State v. DeAngelis, 256 S.C. 364, 182 S.E.2d 732 (1971) should the appeal be dismissed. As an alternative sustaining ground, this Court should strictly construe the affidavit requirement to prevent abusive claims such as this one from being filed.

IV. Whether the interest of justice requires a new trial when the convictions were based upon an unconditional guilty plea with an admission of guilt and the alleged new evidence consists of evidence determined to be fabrications by the hearing judge?

STATEMENT OF THE CASE

The Appellant, Antonio Gordon, #259798, is presently confined in the Allendale Correctional Institution of the South Carolina Department of Corrections pursuant to the York County Clerk of Court's orders of commitment. On October 15, 1998, the York County Grand Jury indicted the Appellant for murder, three counts of possession of a firearm during the commission of a violent crime, two counts of attempted armed robbery, possession of a firearm by a person under twenty-one, and criminal conspiracy. Especially considering that all of this came from a guilty plea, the Appellant's history of filing is abusive and complex.[1]

On July 16, 1999, after a *Jackson v. Denno* hearing, the Appellant pled guilty as charged. App.p. 368-369. Daniel D'Agostino, Esquire, represented the Appellant. The record revealed that it was a negotiated plea where the state was dismissing the charge of carjacking and asking for a sentence of 40 years structured to run concurrent to the 30 year sentence for murder and have the attempted armed robbery run 10 years consecutive. App.p. 369. On July 19, 1999, the Honorable John C. Hayes, III, sentenced the Appellant to thirty years imprisonment for murder, five years for each count of possession of a weapon during the commission of a violent crime, ten years for each count of attempted armed robbery, five years for criminal conspiracy, and five years for possession of a weapon by a person under twenty-one years of age.

Present Action: Rule 29(b) Motion for a New Trial Based on After-Discovered Evidence

On November 19, 2012, Appellant, represented by counsel Jeremy Thompson, esquire, filed a Motion for a new trial based on after-discovered evidence pursuant to rule 29(b), SCRCrimP. Appellant attached two affidavits from co-defendants Monta Gordon (Monta) and

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[1] This may not be a complete history. Appellant has filed other motions that have not been moved on by state or federal courts.

Terrance McCreary (McCreary), his brother and second cousin, respectively. In the affidavits, they claimed for the first time that Antonio was not the shooter, Monta was. Appellant did not include an affidavit stating that the evidence was after-discovered. Monta and McCreary claimed that they had lied in 1999 because they believed that Antonio would get a lesser sentence as a juvenile. Based on the motion, Judge C. Hayes, III, held a hearing on March 4, 2013, and March 8, 2013. Solicitor Walter William Thompson represented the State at the hearing.[2] During the hearing, Monta, McCreary and Antonio testified as to the nature of the evidence, and Thompson vigorously cross-examined them. Judge Hayes entered an order on April 22, 2013, denying the motion for a new trial, calling the testimony a "complete fabrication."

Jeremy Thompson filed a notice of appeal for Appellant on April 30, 2013. Appellant filed a *pro se* initial brief of Appellant with this Court on October 17, 2013. This Court issued an order on February 24 that the Office of Appellate Defense provide Appellant with the transcript, and that Appellant shall serve and file an amended initial brief as well as a designation of matter. Appellant filed the amended brief on April 21, 2014. This Initial Brief of Respondent follows.

PRIOR PROCEEDINGS

In summary, Appellant has filed the following actions:

- Direct Appeal
- First State PCR Application
- First State PCR Appeal
- Second State PCR Application
- First Federal Habeas Corpus Application

[2] Solicitor Thompson and Jeremy Thompson, Esquire, are not related.

- First State Habeas Corpus Application
- Third State PCR Application
- "State Habeas Corpus Action in the Supreme Court's Original Jurisdiction"
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- Second Federal Habeas Corpus Application
- Rule 29(b), SCCrimP Motion for a New Trial
- Present Action: Appeal from Rule 29(b), SCCrimP Motion for a New Trial.
- Second State Habeas Corpus Application

The Direct Appeal

A timely Notice of Appeal was filed on Appellant's behalf and an appeal was perfected. The South Carolina Court of Appeals dismissed the appeal after considering the *pro se* brief and granted counsel's request to be relieved. State v. Antonio Gordon and Monta Gordon Op. No. 2000-UP-747 (S.C. Ct. App. filed December 6, 2000). App.p. 507-508. No petition for rehearing was made to the South Carolina Court of Appeals, nor certiorari to the South Carolina Supreme Court. The remittitur was entered on January 9, 2001.

***The First PCR Action:* 2000-CP-46-1414; 01-CP-46-1866.**

Prior to the conclusion of the direct appeal, an Application for Post-Conviction Relief was filed June 15, 2000. PCR App.p. 401. On August 18, 2003, a written order was entered. App.p. 496-505. The Appellant made an appeal from the denial of relief to the South Carolina Supreme Court. On July 21, 2005, the South Carolina Supreme Court entered its Order denying the petition and granting counsel's request to be relieved. On August 2, 2005, the remittitur was entered.

***The Second State PCR Proceedings* , 2004-CP-46-1700**

The Applicant filed another application for post-conviction relief on July 6, 2004. On December 30, 2004, the Honorable Lee Alford entered a Conditional Order of Dismissal concluding the application was successive and untimely. Gordon v. State, 2004-CP-46-1700, Conditional Order of Dismissal (Alford)(December 30, 2004). On May 20, 2005, Judge Alford entered a Final Order [of Dismissal]. Gordon v. State, 2004-CP-46-1700 , Final Order (Alford)(May 20, 2005). No appeal was taken from this order.

The First Federal Habeas Corpus Action, 2:05-3327-MBS-RSC

On November 22, 2005, Gordon delivered his first federal habeas action . Gordon Rushton, 2:05-3327-MBS-RSC. On October 16, 2006, the Honorable Robert S. Carr, United States Magistrate Judge entered a Report and Recommendation on the petition. *Gordon v. Rushton, et al*, 2:05-3327-MBS-RSC, Report (October 16, 2006). The Honorable Margaret Seymour entered a text order on February 15, 2007 granting Motion to Dismiss without prejudice to allow Appellant to exhaust all state remedies [Docket 23]. Judgment was entered on February 16, 2007.

Gordon v. State of South Carolina*, 2006-CP-46-010. *State Statutory Habeas Corpus

Appellant filed a *pro se* petition for writ of habeas corpus in York County, South Carolina on January 3, 2006. On April 28, 2006, the State made a Return and Motion to Dismiss Petition For Writ of Habeas Corpus. On June 1, 2007, in an Order dated April 30, 2007, the Honorable John Hayes entered an Order of Dismissal With Prejudice. *Gordon v. State of South Carolina*, 2006- CP-46-0010, Order of Dismissal With Prejudice (Hayes, June 1, 2007). The Appellant subsequently made a Rule 60 motion claiming that the language of the order might prejudice him from filing a state habeas petition in the original jurisdiction of the South Carolina Supreme

Court. On January 31, 2008, the Honorable Roger L. Crouch, presiding judge, entered and Order Granting the Rule 60 (b) motion amending and clarifying the original order "that Appellant is without prejudice to bring a Habeas Corpus Petition in the original jurisdiction of the South Carolina Supreme Court." Gordon v. State, 06-CP-46-010, Order Granting Rule 60(b) Motion (Couch, January 31, 2008). No appeal was taken from this action according to Respondent's records.

Gordon v. State,* 2008-CP-46-0495*: Third State PCR Action.

On December 19, 2008, the Appellant filed his third PCR application dated November 20, 2008. 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 Applicant 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 Applicant twenty (20) days to show why the order should not become final. The Respondent also filed a motion to restrict future filings on November 19, 2009 pursuant to In re Theron Maxton, 325 S.C. 3, 478 S.E.2d 679 (1996). The Appellant did not file a response to the conditional order of dismissal. A hearing into the Respondent's motion for summary dismissal was convened on December 1, 2009 before the Honorable Lee S. Alford, Circuit Court Judge. On January 4, 2010, filed January 25, 2010, the Honorable Lee S. Alford, Hearing Judge entered his written Order of Dismissal. *Gordon v. State of South Carolina*, 2008- CP-46-4951, Order of Dismissal (Alford, dated January 4, 2010).

The Appellant filed a notice of appeal to the South Carolina Supreme Court on February

25, 2010 from the denial of post-conviction relief. Pursuant to SCACR Rule 243 (c),[3] counsel Blanchette was required to file an explanation concerning the existence of an arguable basis for determining the conclusion that the application was successive and untimely was improper. In her explanation, counsel claimed that the ruling was a ruling on the merits of his newly discovered evidence claim. The State made a Return to the Appellant's Explanation Pursuant to SCACR Rule 243(c) on March 1, 2010 in opposition to the untimely and successive application proceeding. On April 1, 2010, the South Carolina Supreme Court entered its Order of Dismissal. *Antonio Gordon v. State of South Carolina*, Order of Dismissal, (S.C.S.Ct. April 1, 2010). The remittitur was issued on April 19, 2010.

Antonio Gordon v. State of S.C. Petition of "Writ of Habeas Corpus," Original Jurisdiction, S.C. S.Ct - July 1, 2010.

On July 1, 2010, the Appellant, pro se made a pleading styled "Writ of Habeas Corpus, Article 5, Section 5 SC Constitution." On July 21, 2010 - without requiring a response from the Respondent- the South Carolina Supreme Court entered an order denying the petition, concluding the Appellant had not alleged any constitutional violation which in the setting constitutes a denial of fundamental fairness shocking to the universal sense of justice, " citing *Simpson v. State*, 329 S.C. 43, 496 S.E.2d 429 (1998). *Antonio Gordon v. State of South*

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[3] SCACR Rule 243(c) states as a condition precedent for an appeal in certain PCR actions the following:

(c) Explanation Required. If the lower court has determined that the post-conviction relief action is barred as successive or being untimely under the statute of limitations, the petitioner must, at the time the notice of appeal is filed, provide an explanation as to why this determination was improper. This explanation must contain sufficient facts, argument and citation to legal authority to show that there is an arguable basis for asserting that the determination by the lower court was improper. If the petitioner fails to make a sufficient showing, the notice of appeal may be dismissed.

Carolina, Original Jurisdiction, Order (S.C. S. Ct. July 21, 2010)(order denying petition for writ of habeas corpus).

***The Second Federal Habeas Corpus Action,* 8:10-2578-MBS[4]**

On October 5, 2010, Appellant filed a second petition for habeas corpus. The magistrate judge issued a report and recommendation on May 24, 2011. The magistrate judge's order was adopted by the District Court, who issued an order dismissing the second habeas petition on September 30, 2011. The district court also denied a certificate of appealability, holding that no reasonable jurist would find an assessment of a constitutional claim debatable or any dispositive issue debatable.

Nevertheless, Appellant appealed on the same day, September 30, 2011. The Fourth Circuit dismissed the appeal via an unpublished per curiam opinion on April 24, 2012, holding that Appellant failed to make a requisite showing that the procedural ruling was debatable and that the petition stated a debatable claim of the denial of a constitutional right. Appellant did not appeal, and a mandate was entered on May 16, 2012.

On September 23, 2013, Appellant filed a "Motion to Vacate Judgment Pursuant to Fed. Rules Civ. Proc Rule 60(b)(6)," stating that he was entitled to reopen the judgment under *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). That motion is currently pending before the federal courts.

"Belated Notice of Appeal"

On October 4, 2013, Appellant filed a "Belated Notice of Appeals", attempting to appeal the order denying his motion under Rule 59(e) from August 25, 2006. He attached an

[4] This case was originally filed as 2:10-2578-MBS-RSC. The case was transferred from Magistrate Judge Robert S. Carr to Magistrate Judge Jacquelyn D. Austin,

explanation pursuant to Rule 243, SCACR, as an explanation for why he was denied appellate review.[5] He also made a motion "Requesting Permission to file a belated PCR under Austin v. State, 409 S.E.2d 395 (19991)" On October 15, 2013, Appellant filed a *pro se* "Motion for Rehearing And/Or Motion for Reconsideration of Facts" from his first PCR, 2000-CP-46-1414. On March 6, 2014, The Supreme Court of South Carolina issued an order denying the requests.

[5] An explanation under Rule 243(c) should explain why the lower court's determination that the PCR was barred as successive or out of time was erroneous. Instead, Appellant used the motion to explain that the court did not rule on certain motions.

ARGUMENT

This appeal arises from the denial of a motion for a new trial on the basis of alleged after-discovered evidence fourteen years after a negotiated guilty plea[6] where the Antonio Gordon agreed to the correctness of the state prosecutor's recitation that the state's version of the case was that he was the trigger person and participant which resulted in the death of Eric Krenn in the July 23, 1999 incident and attempted robberies of Mr. Krenn and Mr. Christopher Diaz. App.p. 381-383 (Plea Tr. p. 187-189).[7] At the 1999 guilty plea, Antonio Gordon expressly waived his right to confrontation. Specifically, he waived the rights "to see the witnesses , to hear the witnesses, to have [his] attorney cross-examine the witnesses the state would call to testify against [him]" and to present witnesses in his defense. App.p. 379, l. 7-21. At the time of the guilty plea, it was represented that the state had evidence from the surviving victim identify Antonio Gordon and Monta Gordon as being at the window of the car with the gun, that Antonio's palm print was found on the window where the witness stated that the Appellant was touching it trying to open it and that the shot that killed Krenn was fired by Appellant. App.p. 382-383. In addition to his confession, the state reported the Appellant's girlfriend had reported that Appellant has stated to her that night that he had fired the shot. App.p. 382, l. 16-24. At that point of the plea, Antonio Gordon confirmed that he agreed with those facts. App.p. 382-383.

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[6] The state agreed to dismiss a carjacking charge and ask for a negotiated sentence of 40 years with a thirty year sentence on murder and a consecutive sentence of 10 years on attempted armed robbery and the remaining sentences to run concurrent. App.p. 369 (Plea Tr.p. 175).

[7] The references to "App." Are to the 567 page two volume post-conviction relief Appendix in the appeal from Judge Kinard's denial in *Gordon v. State*, 2001-CP-46-1414; 2001-CP-46-1866. This appeal was denied on July 21, 2005. The references to "Hearing Tr." are to the March 4, 8, 2013 motion hearing transcript before Judge Hayes.

Respondent submits that the hearing judge properly denied the motion for a new trial where the plea was freely and voluntarily entered, the Appellant had made solemn statements at the plea admitting his guilt and his involvement in the crimes at the time of the plea, including the confirmation that he was the shooter. Most importantly, the interest of justice cannot demand a new trial from a guilty plea where the basis of the request is founded upon testimony and affidavits which the hearing court, as a fact-finder, has determined in fabricated and not worthy of belief. The appeal must be denied.

The Court's Conclusion that the Proffered Testimony was Fabricated and Therefore Not Worthy of Belief Defeats Any Entitlement to a New Trial.

Against that earlier backdrop of contrition in 1999, Antonio Gordon in November 2012 made a motion for new trial based on alleged after discovered evidence claiming his co-defendants now have made affidavits their earlier statements to the police in 1998 now asserting that Monta Gordon, not Antonio Gordon was the trigger-person. Motion , ROA pp. __ - _ . However, when the hearing on the motion was held before Judge John Hayes and the proffered witnesses testified, Judge Hayes concluded that the 2012 statements (and hearing testimony) of Monta Gordon, Terrance McCreary and Antonio Gordon were complete fabrications. Order Denying Motion for New Trial, p. 12 ("It is the opinion of this Court that Monta Gordon's new "exonerating" testimony is a complete fabrication."), p. 13 ("It is an obvious fabrication for Terrence McCreary to deny entering a plea and attempt to change the facts of the case."), p. 14 ("This Court finds that Terrance McCreary's attempt to bolster his "new" testimony with his "juvenile" claim is also a complete fabrication."); p. 14-15 (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."). In addition, the PCR Court powerfully found:

> 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 PGR 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.**

Order Denying Motion for New Trial, p. 17 (emphasis added).

Judge Hayes further rejected the claims in finding:

> Antonio Gordon, Monta Gordon, and Terrance McCreary have each pursued their respective appeals and PGR 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.

Order, p. 18.

Additionally, Judge Hayes cogently declared:

> **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.

Order Denying Motion, p. 20 (emphasis added).

Judge Hayes found the credible testimony of the prior plea counsel of Antonio Gordon, Daniel D'Agostino during an earlier PCR hearing to be highly probative on the lack of credibility of Gordon's claims and why the guilty plea should not be vacated in the interest of justice because Antonio Gordon previously told his counsel of his actual guilt:.

> 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.

Order, p. 20.[8] Further, the hearing judge analyzed his reasoning as to credibility:

> 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.**

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[8] See *Gordon v. State*, 2008-CP-46-4951, Hearing Transcript – December 1, 2009 (Judge Alford), p. 75, l. 5-11. ("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 is no way to put him on the stand."), p. 75, l. 19-20 ("You have got his statement that he confessed. I couldn't put him on the stand because he confessed to me.") (testimony of Daniel D'Agostino).

Order, p. 22 (emphasis added).

The unassailable conclusion set by Judge Hayes in rejecting the dangerous and false showing before him reflects the proper and necessary application of this Court's precedent and is entitled to deference in this appeal as fact-finding.

> . . . 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 or as an innocent bystander.**

Order, p. 22-23. Plainly, where his claim for a new trial is based upon fabricated testimony, the "interests of justice" cannot require a trial de novo.

I. Rule 29(b), SCCrimP does not grant Appellant the right to file a motion for a new trial based on after-discovered evidence in a guilty plea setting because the General Assembly has not given circuit courts the authority and statutory jurisdiction to grant new trials for guilty pleas under S.C. Code § 17-23-110 (2014) which is the statutory authority for Rule 29, absent a jury trial, exonerating DNA evidence, or the filing of a PCR application (Appellant's Issue One).

The first issue is whether a circuit court has the power to entertain a motion for a new trial based on after-discovered evidence, when the motion is made by someone who pled guilty and there was no prior trial. Consistent with the decision of the Circuit Court in this case, the answer is no, because the General Assembly has given the circuit courts no such power under S.C. Code Ann. §17-23-110 or Rule 29(b) of the South Carolina Rules of Criminal Procedure. Those provisions limit such actions to trials by jury. Antonio Gordon's convictions were by guilty pleas, not a trial. The lower court did not err in dismissing the action.

Judge Hayes, in his order denying the motion for new trial, initially opined that such a motion cannot be used to challenge the validity of a guilty plea. Order Denying Motion for New Trial, p. 18-19. The Appellant relies in the appeal upon *State v. DeAngelis*, 256 S.C. 364, 182 S.E.2d 732 (1971) to contend that since the Supreme Court addressed a motion for a new trial appeal in a guilty plea setting, it must always be allowed in his guilty plea setting. However, a review of the issues presented in *DeAngelis* do not support Appellant's position because it concluded that he was unable to make a showing of a condition precedent to allow a new trial motion in failing to file a personal affidavit necessary to satisfy the showing, particularly noting the solemn statements made a the plea further defeated his claim. [As noted below, Gordon similarly has failed to satisfy this requirement]. DeAngelis does not support his assertion that Rule 29 is allowed in plea settings where that issue did not need to be addressed in the 1971 denial.

During the hearing below, Judge Hayes immediately questioned the propriety of a Rule 29 new trial motion when the conviction arises from a guilty plea rather than a trial. Motion Hearing Tr. p. 11-14. The Solicitor's office urged that Rule 29 does not apply in the guilty plea setting because there was no trial. Hearing Tr.p. 15- 17, p. 22 – 23, p. 33-35, p. 37-40. . The

Appellant asserted that the motion should be allowed in a plea setting. Hearing Tr. p. 30-32. Judge Hayes was correct in rejecting the applicability of Rule 29 in this setting.

Two sources of authority grant courts the ability to hear motions and grant relief: constitutional jurisdiction and statutory authority. The first is obvious: when a court has jurisdiction over the subject matter of a case, it may hear motions related to the case. S.C. Const. Art. V, § 11. After a final judgment has issued and the time for post-trial motions and notices of appeal has run, the trial court loses jurisdiction. See Rule 29(a), SCCrimP, Rule 203(b)(2), SCACR. At this point, the trial court has no more power to hear the matter except as provided by statute.[9]

Petitioner has filed a post-trial motion almost fourteen years after the guilty plea where Gordon waived his right to a jury trial and the potential to confront witnesses against him.[10]

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[9] This answers Appellant's assertion, made at the hearing, that if the State's position were true, than no post-verdict motions could be heard in any guilty plea context. [Hearing Tr. p. 32 lines 12-22.] While a court maintains jurisdiction, it may entertain any motions. Beyond that, they must be statutory in nature.

[10] In *State v. Munsch*, 287 S.C. 313, 338 S.E.2d 329 (1985) the Court held that by entering a plea waiving his right to jury trial the defendant waived any right to challenge the sufficiency of the evidence against him. *LoPiano v. State*, 270 S.C. 563, 243 S.E.2d. 448 (1978) (since we have determined that LoPiano's plea was entered voluntarily and understandingly, he does not now have the right, in post-conviction proceedings, to attack the plea upon the ground that the facts were insufficient to establish the offense to which he pled). See *Rivers v. Strickland*, 264 S.C. 121, 213 S.E.2d 97, 98 (1975) ("The general rule is that a plea of guilty, voluntarily and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea. **An accused also waives the right to trial and the incidents thereof** and the constitutional guarantees with respect to criminal prosecutions.") (citation omitted). However, "[g]iven the seriousness of the matter, the Constitution insists, among other things, that the defendant enter a guilty plea that is 'voluntary' and that the defendant must make related waivers 'knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences.' " *United States v. Ruiz*, 536 U.S. 622, 628, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002) (quoting *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)) (alterations in original). Specifically, "a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the

Petitioner cites Rule 29(b), SCCrimP as a basis for relief, asking the court for a new trial based on so-called "after-discovered evidence." Rule 29(b) provides that "A motion for a **new trial** based on after-discovered evidence must be made within one (1) year after the date of the actual discovered evidence...." (emphasis added). Read by itself, the rule has no applicability to "guilty plea" convictions because there was no trial – thusly there could be no "*new* trial." Stated another way, the rule is silent on whether it may be used by defendants who plead guilty (but had no trial because it was waived).

A. Section 17-23-110 new trial authority is limited to "trials by jury," not guilty pleas.

Any ambiguity in Rule 29(b) disappears when examining the source of the only statutory authority for this court rule, S.C. Code Ann. § 17-23-110 (2014). This statute states that "[A]ll the circuit courts of this State shall have power to grant new trials in cases in which there has been a **trial by jury** for reasons for which new trials have usually been granted in the courts of law of the United States." (emphasis added). This authority is therefore limited to trials by jury, not guilty pleas. Therefore, a motion for a new trial pursuant to Rule 29 and § 17-23-110 (2014) does not include guilty pleas which expressly waived a trial by jury.

The General Assembly has provided two very limited statutory exceptions, neither of which applies to Appellant's case. First, S.C. Code Ann. §§ 17-28-30 and 17-29-100(B)[11] allows a use of exculpatory DNA evidence in a motion for a new trial based on after-discovered evidence

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constitutional rights being waived." *Anderson v. State*, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000) (emphasis removed) (citing *State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980)).

[11] Appellant cites these sections to support his claim that it denies his equal protection rights. *Amended Pro Se Initial Brief* at 5-6. However, this argument was never presented to the trial court. *State v. McKnight*, 352 S.C. 635, 646, 576 S.E.2d 168, 174 (2003) (noting that an argument must be raised and ruled upon by a trial court to be preserved for appellate review). As it was never ruled upon by the trial court, the issue is unpreserved and must be dismissed.

under Rule 29(b) Rules. However, the does not expand those matters but allows their use. Those provisions also allow the results in either a trial of post-conviction relief proceedings when exculpatory DNA is discovered.

Second, a convicted defendant may obtain the relief through an after-discovered evidence claim raised in a post-conviction relief application which does apply to pleas as well as trials, if he satisfies the statute of limitations, successive application rules as threshold showings and the burden of proof. Particularly, S.C. Code Ann. § 17-27-20(A) (2014) specifically provides that:

> Any person who has been convicted of, or sentenced for, a crime and who claims...that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice...may institute...a proceeding under this chapter to secure relief. Authority to hear PCR applications and grant relief are vested in the circuit courts.

See S.C. Code Ann. §§ 17-20-30 & 17-17-90.[12] Recently, in a state post-conviction relief setting, the Supreme Court addressed the post-conviction relief after-discovered evidence standard in *Jamison v. State*, _ S.C._, _ S.E.2d _, 2014 Westlaw 5358729 (S.C. Oct. 22, 2014). Therein, the Supreme Court stated of the standard in a guilty plea PCR setting:

> Guided by the language of section 17–27–20(A)(4) of the PCR Act, we hold that, when a PCR applicant seeks relief on the basis of newly discovered evidence following a guilty plea, relief is appropriate only where the applicant presents evidence showing that **(1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the "interest of justice" requires the applicant's guilty plea to be vacated. In other words, a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of**

[12] The Uniform Post-Conviction Relief Act vests jurisdiction in the circuit courts in collateral post-conviction relief proceedings. S.C. Code Ann. § 17-27-30 provides that courts that had jurisdiction in state habeas actions shall have original jurisdiction in PCR actions. See also, § 17-17-90 provides that circuit courts in session shall be the courts of original jurisdiction for habeas corpus actions.

> **guilty and the compelling interests in maintaining the finality of guilty-plea convictions.** In so holding, we caution that it will be the rare case indeed where the interests of justice will require that a knowing and voluntary guilty plea be vacated through post-conviction relief on the basis of newly discovered evidence, for an unconditional guilty plea involving an admission of guilt and a waiver of trial and all defenses will generally preclude any subsequent challenge to factual guilt. Cf. Reise, 192 P.3d at 955 (finding a defendant may withdraw his guilty plea on the basis of newly discovered evidence only when necessary to correct manifest injustice). Such a determination will not be resolved in a formulaic manner, but will necessarily be context dependent.

Id. *Compare State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998) *with Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993).[13]

However, this power to hear a similar issue in statutory PCR cases pursuant to S.C. Code Ann. §17-27-10, et. seq., does not change the nature of the remedy available through a collateral Rule 29(b), SCCrimP motion. S.C. Code Ann. § 17-27-20(B) of the Uniform Post Conviction Relief Act states that "[t]his remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court …." However, it further states: "[E]xcept as otherwise provided in this chapter, it comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them."

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[13] To obtain a new trial based on after discovered evidence, the party must show that the evidence:
(1) would probably change the result if a new trial is had;
(2) has been discovered since the trial;
(3) could not have been discovered before trial;
(4) is material to the issue of guilt or innocence; and
(5) is not merely cumulative or impeaching.
See e.g., Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983) (citing *State v. Caskey*, 273 S.C. 325, 256 S.E.2d 737 (1979).

South Carolina Constitution Article V, § 4 provides that "**[s]ubject to statutory law**, the Supreme Court shall make rules governing the practice and procedure in all such courts." (Emphasis added). In other words, a court rule cannot be read to be broader than the statutes that govern its function. As S.C. Code Ann. § 17-23-110 only allows new trials from jury verdicts—**not guilty pleas**—and none of the statutory exceptions apply, Rule 29(b), SCCrimP cannot be read to authorize a motion for a "new trial" from a "guilty plea" as asserted by Appellant. The trial court ruled correctly and should be affirmed.

B. As an additional sustaining ground, the Appellant never filed an affidavit that the evidence was after-discovered, as required by *State v. DeAngelis*, 256 S.C. 364, 182 S.E.2d 732 (1971). As an alternative sustaining ground, this Court should strictly construe the affidavit requirement to prevent abusive claims such as this one from being filed.

Appellant cites *State v. DeAngelis*, 256 S.C. 364, 182 S.E.2d 732 (1971), stating that as this Court heard a Rule 29(b), S.C.Crim.P. motion from a guilty plea in that case, they have decided they could hear them in any situation. However, the *DeAngelis* Court never ruled on whether it had the power to hear a Rule 29(b), SCCrimP motion for a new trial based on after-discovered evidence. Neither party raised the issue in that case, and Appellant concludes too much from this decision.[14] However, *DeAngelis* is additionally dispositive to this case for another reason. As an alternative sustaining ground, the State submits that relief could not have been granted in this case because Appellant never presented a personal affidavit supporting his motion for a new trial that the "evidence" presented was "after-discovered" to him.

According to *DeAngelis*, a convicted defendants moving for a new trial must also submit as a condition precedent, a personal affidavit supporting the motion, declaring that "he did not

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[14] According to the opinion in *DeAngelis*, the motion for new trial was filed in August 1970. The Uniform Post-conviction Relief Act was passed in 1969, effective May 1, 1969. 1969 Acts and Joint Resolutions, Act No. 164, p. 158.

know of the existence of such evidence *at the time of the trial* and that he used due diligence to discover such evidence, or that he could have discovered it by the exercise of due diligence." *State v. DeAngelis*, 256 S.C. at 371, 182 S.E.2d at 735. In *DeAngelis*, the Court held that an affidavit of counsel was insufficient. The Court stated : " [I]t is essential to the consideration of a motion for a new trial based on after-discovered evidence that such motion shall be supported by an affidavit of the accused himself. Unless a valid and sufficient reason for the omission to file such an affidavit is shown, . . .". Here, in the court below, no such showing was made.

Antonio Gordon never submitted a personal affidavit averring to these necessary conclusions that "he did not know of the existence of such evidence at the time of the trial and that he used due diligence to discover such evidence, or that he could not have discovered it by the exercise of due diligence. An affidavit of the appellant's counsel showing these matters is not sufficient." *DeAngelis*, *supra*.

Of course, he could not have submitted such an affidavit in this case based upon his solemn statements made at the time of his guilty plea where he admitted that he was the shooter and the statement he had given was the truth. See PCR App.p. 246-248, Plea Transcript, pp. 52-54.[15]. In particular, at the plea, the following factual basis was presented:

> This occurred July 23, 1998, here in York County in Rock Hill at South Jones Street. The Defendant in this case was involved, and of course, sitting in the Court are the other defendants. I had discussed with Terrance MacCreary before getting out of the car that they would rob Mr. Krenn and try to take the ca. As well as when he got out he took the pistol with him. He witnessed Mr. Diaz putting him and Monta Gordon at the window of the victim's car trying to steal it. As a matter of fact, Mr. Diaz would have testified that this defendant had or

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[15] According to the July 23, 1998 statement Antonio Gordon made to the law enforcement officers admitting being the sole shooter, Gordon stated, in pertinent part: "I had the gun pointed at them and then it went off. I had only shot the gun once before and I don't really know how it works. I wish I could have got the bullets out, but it went off. I thought the guy got hit in the leg. . ." PCR App.p. 247, l. 20-, p. 248, l. 1. Plea Transcript, pp. 53-54.

that the Defendant at the window had put his hand on the car door trying to open it while pointing the gun at Mr. Krenn. The window of the car being down at that time. This defendant's palm print was lifted off of the door exactly where the witness stated he would have been touching it trying to open it and it was matched and we would have testimony to that effect.

The shot fired by this defendant [Antonio Gordon]. He took the gun back in the car and ran off at that point in time. He's under 21 years of age. And even after his girlfriend Chyneca Dixon did admit to me when I interviewed her to prepare for this trial that Mr. Gordon had admitted to her that night he was the one who fired the shot and she said if she was called she would have testified to that.
The State would have produced those things at trial and that is the basis for his guilty plea at this time.

App.p. 381, l 20- p. 383, l. 2. Plea Tr.p. 187-189. At that point of the plea, Antonio Gordon declared to the plea judge:

Q. Do you agree with those facts Mr. Gordon.

A. Yes, sir.

App.p. 383, l. 3-5; Plea Transcript, p. 189, l. 305. At the sentencing proceeding the following Monday, July 19, 1989, counsel declared that Antonio Gordon always wanted to apologize to Mr. Krenn and declared he was sorry for what he had done. App.p. 387, Guilty Plea Tr.p. 193. At the sentencing, Antonio Gordon personally stated:

"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."

App.p. 396, l. 1-6; Plea Tr.p. 202.

Without any credibility in light of his affirmations at his guilty plea, Antonio Gordon testified at the Rule 29 hearing that he did not know of this so-called "after discovered evidence" at the time of his guilty plea. [Tr. at p. 205, line 13-p. 207, line 16.]. At the motion hearing, the Appellant correctly acknowledged that at the time of his plea he believed that his co-defendant's were going to testify against him and that he was the shooter. Tr.p. 205, l. 13-20. However,

contrary to his own statement to the police and his affirmations in open court, Gordon claimed that if he knew that at that plea that Monta Gordon would testify that he (Monta) was the shooter and that Terrance McCreary would testify that that Monta got out of the car with the gun and that no one had discussed the robbery, that he would have gone to trial rather than plead guilty. Tr.p. 205-206. However, this evidence was considered by the hearing judge to be fabricated – thus non-existent. Therefore, he could never satisfy this affidavit requirement because of his knowledge of the fabricated evidence. It was his own speculation in 1999 about whether they would testify against at trial which was at issue – speculation Gordon resolved when he intentionally waived his right to confront the witnesses and pled guilty! However, the witnesses never testified at trial because there was no trial. Antonio Gordon in 1999 admitted to the police, his counsel and to the plea and sentencing court that he was involved and that he was the shooter. It is for this reason that such an affidavit is required as a condition precedent in Rule 29 proceedings.

The affidavit requirement assists judges in ensuring that unnecessary and frivolous litigation it prevents. Strictly enforcing this mandate in *DeAngelis* guideline prevents frivolous and time-wasting litigation—such as what occurred here. No affidavit should mean no hearing, and should also mean no new trial – particularly when his right to confront the same witnesses was waived at the time of the plea.

For each of these initial jurisdictional reasons, the appeal must be affirmed. Rule 29 should not be applied in a guilty plea setting where there is no statutory authority for its application. Similarly, the failure to provide a personal affidavit satisfying the requirements for a condition precedent under *DeAngelis* further preclude consideration of the new trial claims.

II. The Trial Court applied the correct legal standard to this case and should be affirmed on appeal. (Appellant's Issues Two through Four)

Appellant asserts three issues that amount to a contention that the trial court did not correctly apply the legal standard in this case. These three sections are consolidated into one issue in this brief, as they all have the same answer: the trial court applied the correct legal standard in this case. This issue will first set out the legal standard for a Rule 29(b), SCCrimP motion, the *Jamison* standard applicable in guilty plea post-conviction relief cases, then the trial court's factual findings and orders, and finally a discussion of how the trial court correctly applied the standard. As noted above, when the evidence relied upon is found to be fabricated and not worthy of belief, a new trial motion must be denied "in the interest of justice." Since Judge Hayes made such findings as alternative grounds for the denial of the new trial motion as set forth previously, the appeal must be denied.

Standard of review

The credibility of newly-discovered evidence is for the trial court to determine. *State v. Harris*, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (S.C.App. 2011), citing *State v. Porter*, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977). Only the trial court and not the appellate court has the power to weigh the evidence; the trial court's judgment will not be disturbed except for error of law or abuse of discretion. Id. "In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment." *State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009). "On review, we may not make our own findings of fact. The deferential standard of review constrains us to affirm the trial court if reasonably supported by the evidence." *Id.*

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

Legal Standard for a Claim of After-Discovered Evidence

Assuming *arguendo* that the appeal for a guilty plea is proper, the burden at the hearing was on the movant to show he is entitled to a new trial, subsequent to the hearing in this case, while the appeal was pending in this case, in the post-conviction appeal *Jamison v. State*, _ S.C._, _ S.E.2d _, 2014 Westlaw 5358729 (S.C. Oct. 22, 2014), following a guilty plea, relief is appropriate only where the applicant presents evidence showing that (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the "interest of justice" requires the applicant's guilty plea to be vacated.[16] In other words, a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions.[17]

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[16] In the jury trial setting, pursuant to *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998), 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; and (5) the evidence is not merely cumulative or impeaching.

[17] At the motion hearing, the hearing judge in Gordon's case rejected the showing on the basis of *Jamison v. State*, 2012-UP-437 (Ct. App. 2012). The Court of Appeals opinion had affirmed

Further, recantation testimony is unreliable and should be subjected to the closest scrutiny when offered as a ground for a new trial. *Parker*, 249 S.C. at 142, 153 S.E.2d at 184. "To hold such affidavits sufficient to require the granting of a new trial would be to open the door to fraud and perjury, as well as to invite interminable delays in the disposition of causes." *Id.*

Monta Gordon

As stated previously, which is incorporated herein by reference, Judge Hayes made findings on Monta Gordon's lack of credibility, noting that Monta had filed an affidavit with this court now claiming he, not Antonio, was the shooter, and he testified at the hearing that he would have given the statement back in 1999 if someone had asked him. Order at 9. The record supports the rejection of Monta Gordon's testimony and 2012 affidavit as a basis for the granting of the motion as a fabrication not worthy of belief.

At the hearing below, Monta Gordon testified that he made the affidavit because he was tired of having Antonio suffer for what Monta says he did when he "shot and killed someone." Hearing Tr. p. 43, ll. 3-6. He testified that his statement to the police that his brother Antonio shot and killed someone was not the truth and that he said was because he was a juvenile and I already had an adult record" he thought his brother would get a lighter sentence. Hearing Tr.p. 44. He stated he got older and because his family was dying off he needed someone out there

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the grant of post-conviction relief. The Supreme Court reversed the granting of PCR in the case cited above. However, the lower court here rejected the Appellant's reliance upon initial Jamison unpublished opinion concluding it did not stand for the proposition that a defendant can seek a new trial from a guilty plea. *State v. Gordon*, Order Denying Motion for New Trial, p. 19. Judge Hayes then concluded that "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." Order Denying Motion for New Trial, p. 20. See also Order, id., at pages 20-23.

for his children was the reason Monta gave the 2012 statement. Tr.p. 44. He stated that first time he told the truth was on July 6, 2012 when he wrote his brother. Tr.p. 44, l. 21- p. 45, l. 4. However, on cross-examination by the Solicitor, Monta Gordon testified that on August 6, 2012, he made a sworn statement which read:

> 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.

Monta Gordon Statement, August 6, 2012. ROA p. _ See also Hearing Tr.p. 46-47.

Monta initially denied that anyone from the defense helped him write the July 2012 letter to his brother or the affidavit which he claimed he typed himself. Tr.p. 46-47. Monta denied ever telling anyone that he was the shooter under July 2012. He stated that it was his decision to pin it on his brother because he was a juvenile. In reference to his July 23, 1998 statement, Monta admitted that he placed the blame in it at 11:30 am on his brother. In this statement Monta Gordon admitted he rode around in Antonio Gordon's car with Antonio Gordon, Terrence McCreary (a/k/a/ "June Bug"), 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. Motion Hearing Tr.p. 50 – 52. He had stated they then went to McCreary's grandmother's house to pick up more bullets for the pistol. According to Monta Gordon's July 1998 statement, McCreary thought the victims were in a stolen car and McCreary "was going to steal the car from them." Monta Gordon's statement continues and asserts that just after the victims pulled their car into a driveway, McCreary pulled up past the victims then hacked up

blocking the victim's car. Monta Gordon specifically told the police in the statement that McCreary gave the pistol to Antonio Gordon and told Antonio "that they were going to rob them."[18] Monta's 1998 statement then states that McCreary and Antonio got out of their car, went over to (he 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." Tr.p. 53-54. Monta Gordon Statement, p. 2. AT the hearing, Monta stated that he already had the gun and that he was the only one who got out of the car, went up to the window of the victim's car and shot the gun. Tr.p. 55. Monta contradicted his earlier testimony when he said that the Appellant and McCreary had the discussion with the victim about marijuana when he then claimed only himself had the discussion. Compare Hearing Tr.p. 53, l. 8-21 with Tr.p. 56. ll. 6-23. Monta claimed that he shot the victim as an accident caused by the victim pulling off and his hand hitting the window sill as he had pointed it inside the car and it went off. Tr.p. 57, l. 17-21. He denied that portion of his statement that McCreary and the Appellant entering the car after the shot. Tr.p. 57-58.

Solicitor Thompson pointed out that Monta had already pled guilty to these crimes with a July 16, 1999 plea agreement for thirty years and that "he's also agreed to testify truthfully and honestly." Tr.p. 61 -63. State v. Monta Gordon, July 16, 1999 Plea Agreement. AT the hearing, Gordon admitted that pursuant to this agreement that he sat down with his attorney and the Solicitor and told them that Antonio was the one that shot and killed the Crandall boy and agreed that would be his testimony. Hearing Tr.p. 63, l. 9-24. Further, Gordon admitted that during his plea on July 16, 1999, he agreed with the facts stated on the record as the factual basis

[18] At the hearing, Monta Gordon denied that it was correct that June Bug gave Antonio the pistol and told him that they were going to rob them. Tr.p. 53, l. 22-25.

for the plea which included that Antonio Gordon shot and killed Eric Krenn. Hearing Tr.p. 65, l. 3-14. See Guilty Plea Transcript, p. 189, l. 18-192, l. 8; Antonio Gordon v. State, PCR App.p. 189-190. As the lower court noted, these facts were similar to the facts that he had agreed to testify about in his meeting with the prosecution. See Monta Gordon Plea Tr. p. 179-180. Antonio Gordon PCR App.p. 179-180. See Monta Gordon , Written Plea Agreement dated July 16, 1999. Order Denying New Trial, p. 10.

Monta Gordon testified that he pled guilty in 1999 for thirty years and did not care what happened to his brother at that time. Hearing Tr.p. 65-66. He claimed he was not aware that his brother was not being treated as a juvenile. Tr.p. 66-68.

The lower court found that this assertion in favor of his brother contradicted his prior sworn statements. The lower court found that in his original version of the event, Monta told police that McCreary gave the pistol to Antonio Gordon and told Antonio that they were going to rob the victims. Order at 10. The hearing court also noted that this earlier statement to the police was reinforced by Monta's own apology at sentencing as well as those of his three codefendants, who agreed at the time that they had acted together in committing the crime:

> 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 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.

Order at 10, citing *State v. Antonio Gordon; Monta Gordon.* Plea Tr. p. 202, ll. 7-18; App.p. 396, ll. 9-18. See Hearing TR, p. 68-69. The lower court also found that Monta also claimed at the current hearing that he blamed Antonio because Antonio was a juvenile and he thought Antonio would get a lesser sentence. Order at 11. The hearing court found this claim to be

completely without merit, because Monta has an extensive juvenile record and was intimately familiar with the juvenile court system. *Id., citing State v. Monta Gordon,* Plea Tr.p. 197, l. 20-24; App.p. 391, ll. 10-24. Judge Hayes found that "it was immediately clear that no one in this case was treated as a juvenile." *Id.* Based on the contradictions, the hearing court concluded that Monta Gordon's new 'testimony' "is a complete fabrication." Order at 12.

In rejecting the this showing, Judge Hayes additionally found support in Monta Gordon's prior inconsistent state post-conviction relief testimony in his own PCR case in September 4, 2003. Order Denying Motion for New Trial, p. 11-12. As presented at the motion hearing before the lower court, at Monta Gordon's own post-conviction relief hearing in 2003 hearing, Monta Gordon confirmed that in the statement he gave to the police, he stated that Terrance McCreary had 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, and that Antonio was the shooter – a completely different version that his 2012 statement and new trial hearing testimony. *Monta Gordon v. State*, PCR Testimony, pp. 39-40. Accord Motion Hearing, Tr.p. 71-73, 75. In reviewing the difference between Monta's 1998 statement and 2003 PCR testimony, Judge Hayes found the only difference to be that Monta had testified in 2003 that when he jumped out of the car, Monta claimed he "jumped out to stop his brother, but it was too late." *Monta Gordon v. State*, PCR Testimony, p. 39, ll. 6-18. Order Denying New Trial, p. 11. As he self-supporting stated at the PCR hearing: Monta Gordon testified to the PCR Court that, "I'm locked up for something I know I didn't do." (Monta Gordon v. State, PCR Transcript page 50, ll. 19-20). 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 Tr. p.

51, LL 4-8). The lower court found this inconsistency compelling in finding the present showing to be fabricated. Order, p. 11.

There is factual support based upon the inconsistencies to support Judge Hayes' finding of fact that the evidence from Monta Gordon was a fabrication. The witness acknowledged that this was done to get someone to care for his children. Plainly, his attempt to suggest that the earlier statement and information in 1998 and 1999 was merely because Antonio was a juvenile and would get a lighter sentence defies logic where there does not find credible support in light of the forensic evidence that suggested the shooter did not act alone and the self-contradicting statements made at the guilty pleas of both Antonio and Monta Gordon concerning their roles and his earlier testimony in 2003 when he claimed to suggest that Antonio was acting on his own in shooting and that Monta wanted to stop him, but it was too late. In light of this conflict, the interest of justice does not support vacating a valid unconditional guilty plea with an admission of personal guilt which occurred in Antonio Gordon's case. There is a sound basis for the rejection.

Terrance McCreary

As noted earlier, the hearing judge also recorded findings on Terrance "June Bug" McCreary's credibility, holding that the affidavit he filed and his testimony were also fabrications and not worthy of belief in this setting. Order Denying New Trial, p. 12-14. A reasoned review of the record before the lower court supports the conclusion that the Judge Hayes's findings of fabrication is the appropriate.

In the July 13, 2012 hand-written statement, McCreary claimed for the first time that Antonio was not the shooter, and that he had not seen the shooting. *Id.* 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 My 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 + 1 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.

Statement of Terrance McCreary, July 13, 2012.

Like Antonio Gordon and Monta Gordon, this 2012 statement is inconsistent with the statement McCreary gave law enforcement in 1998. [19] McCreary confirmed this during the motion hearing. During the hearing McCreary testified that he was driving the night of the incident and Monta had a gun. Hearing Tr.p. 85. He claimed that Monta had it the whole day. He stated that after they had stopped, McCreary and Gary Moffitt remained in the car. He said that Monta and Antonio got out of the car while Monta had a gun and approached the victim's car and got behind it where McCreary was unable to see them. Hearing Tr.p. 88. McCreary testified that he heard one shot fired. Hearing Tr.p. 89. When he asked the Gordon's what happened, it was like "let's go." Hearing Tr.p. 89, l. 21.

McCreary testified at the motion hearing that he thought he had told the police that Monta had done the shooting. Tr.p. 90, l. 22. However, he stated that he had tried to get his

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[19] In this July 23, 1998 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 [Antonio] was pointing the gun at ail 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. *Statement of Terrance McCreary*, July 23, 1998. ROA, p. ____ . See also Hearing Tr.p. 114-128.

statement suppressed at before he pled guilty in 1999 but could not. Tr.p. 91. He stated that he had agreed to testify against Antonio Gordon and state that he was the killer or shooter because "he was a juvenile and he'd get off with a lesser sentence." Tr.p. 92, l. 3-5. He claimed that he had discussed this with Monta. Tr.p. 92. McCreary denied that he ever told Antonio about making a new statement. Tr.p. 92-93. He stated that he told Monta, however, that he was going to change the statement. Tr.p. 93, l. 20-23. McCreary claimed that his July 2012 affidavit was the truth and that Monta had the gun and left the vehicle and denied that there was any discussion about robbing the vehicle. Tr.p. 96. He claimed that what he was prepared to testify against Antonio in 1999 was lie. Tr.p. 98.

On cross-examination, McCreary stated that he have the 2012 statement after an investigator just showed up at the prison and asked him what happened that night. Tr.p. 100. McCreary confirmed that he had signed a plea agreement for thirty years in 1999 and that he had agreed that his testimony would be that Antonio was the shooter. Tr.p. 104, l. 5-8. McCreary stated that before the discussion with Monta, he would have said that Monta was the shooter back then. Tr.p. 105. However, he also initially denied that he had taken possession of the gun, got the bullets for the gun that night, the gun back and let the girls shoot it after he got the gun. Tr.p. 106-107. He claimed that the victim's car was stopped because there was almost a collision. Tr.p. 109. He claimed he thought it was a good idea to set up Monta's brother Antonio as the shooter when he wasn't because he was a juvenile. Tr.p. 112. McCreary testified that it could have been up to six months after the incident when he spoke with Monta about setting up Antonio as the shooter. Tr.p. 113, l. 11-19.

However, as noted earlier, McCreary was confronted with the statement to the police on July 23, 1998 shortly after the incident. Tr.p. 114. At the hearing McCreary admitted that in his

1998 statement that he went and got the gun that night with Moffitt and it was then given to Monta. Tr.p. 116-117. He denied the portion of the statement when he was quoted as saying "if I had a gun I would rob them guys" after he had seen a white BMW pass them with their headlights off. Tr.p. 118, l. 9-25. McCreary further denied the portions of his July 1998 statement that the BMW pulled up in a driveway, that they were blocked in, that Antonio asked the people in the BMW if they wanted some weed, or that there was a comment that if they had weed they were going to rob them, that Antonio had jumped out of the car and ran up to the driver's side and asked if the car was stolen, though he admitted that Antonio jumped out of the car. Tr.p. 120-121. McCreary also denied that Gary had gotten out of the car, now claiming it was Monta. Tr.p. 122. Similarly, it was not true, according to McCreary, the portion of his 1998 statement when he stated that Gary and Antonio were being told to come on back to the car when there was gunfire and he denied that they were asking Antonio why did he do that or that Antonio was pointing the gun at them when he returned. Tr. p. 123-125. He confirmed that Gary Moffitt got the pistol back. Tr.p. 127. McCreary confirmed that he had sworn his 1998 statement was true, although he claimed he had not proofread it. Tr.p. 128.

McCreary admitted that when he gave this statement he had not talked with anyone about blaming Antonio as being the shooter. He claimed that in 1998 he was not asserting that anyone was the shooter, though he did state he was asking Antonio why he did it , but denied he said that Antonio was waving the gun around in the car. Tr.p. 129 - 130.

McCreary admitted that he plead guilty and that he had stated that he would testify that Antonio was the shooter. However, he denied that accuracy of the factual basis set forth during his guilty plea (Plea Tr. p. 171, l. 13- 173, l. 1.) that Antonio was the shooter. Hearing Tr.p. 133. McCreary stated that he placed blame on Antonio up through the plea because he thought

he would get a lighter sentence. Tr.p. 135-136. McCreary also admitted that during his own PCR action when he claimed he never plead guilty, that he also never claimed that Monta was the shooter. Tr.p. 138-142.[20]

The hearing judge found that McCreary's prior sworn statements and testimony completely contradicted this new 2012 statement and testimony. Order, p. 1-14. *Id.* In his prior sworn statements, McCreary admitted that he had picked up the gun shortly before the crime, which was originally corroborated by each of the four defendants in this case. Order at 13. But when he testified in the current hearing, McCreary suddenly denied every touching the gun. *Id.* Like Monta, McCreary also testified that he wanted to blame Antonio because he was a juvenile. Order at 14. But like Monta, the trial court found that McCreary was intimately familiar with the juvenile system, and that neither Monta nor McCreary could have been of the opinion that he would have been prosecuted as a juvenile. Order, p. 14. A review of the sentencing transcript and motion hearing supports those conclusions.

During his testimony 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, possibly up to six months after the incident. However, both Monta Gordon and Terrace McCreary had given 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. State v. Terrance

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[20] See *McCreary v. State* , PCR Transcript, December 16, 2002, p. 1-28. 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 (McCreary PCR Transcript page 11, L 5 to page 15, l. 17, and page 19, ll. 10-15, and page 26, l. 9 – p. 27, l. 6). As the hearing court found, nowhere in the PCR transcript did McCreary mention anything about Monta Gordon being the shooter in this case. Order Denying New Trial , p. 13.

McCreary, Plea Transcript p. 197, l. 25 - p. 198, l. 9; PCR App.p. 391-392).[21] Like Monta Gordon, McCreary was 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.

The lower court's finding that Terrance McCreary's attempt to bolster his "new" testimony with this "juvenile" claim was "a complete fabrication" is supported by the record and entitled to deference in this appeal.

Antonio Gordon's Hearing Testimony Lacked Credibility

The hearing court also made extensive findings on Antonio Gordon's credibility and that his current version was a fabrication. Like the other Monta Gordon and Terrance McCreary, Antonio's testimony was completely contradicted by his prior sworn statements and testimony. The hearing judge listed the statements and how they contradict the current argument in detail. Order Denying New Trial Motion, p. 15-17. These conclusions related directly to Mr. Gordon's admissions of guilt as the shooter in 1998 and at the plea and sentencing in 1999 have been set

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[21] During the sentencing, it was revealed that McCreary's had a juvenile and adult criminal record. His juvenile record began in 1992 with burglary – 2nd degree, grand larceny, and malicious injury to property. In 1993 he had grand larceny, shoplifting, and driving without a license. As an adult in 1994, McCreary had petty larceny, breaking and entering an automobile, and shoplifting. In addition, he had in 1994 use of vehicle without owner's consent. In 1995, he had possession crack cocaine. In 1996, McCreary had strong armed robbery. App.p. 392; Plea Tr.p. 198.

forth in the earlier portion of this brief supporting the rejection of his claims. At his plea, Antonio agreed that his palm print was found on the driver's door of the victim's car,[22] that he had used the pistol during the robbery attempt,[23] that he and Monta went to the victim's car window and attempted to steal the car, that he fired the deadly shot, and that he had admitted to his girlfriend that he was the shooter. Order at 16. During sentencing, Antonio declared that he was "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." Order at 16. The trial court found that Antonio's claims were completely fabricated and unsupported by any reliable evidence.

These conclusions of fabrication are supported by evidence presented before the hearing judge. During the motion hearing, it was presented that Gordon had given prior inculpatory statements. Tr.p. 164-189. Antonio Gordon gave two written sworn statements to the Rock Hill Police on July 23, 1998 which was the day of the Murder. 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. Tr.p. 170, l. 3-7. See Tr.p. 164-173. However, at the hearing, the Appellant denied the accuracy of the initial statement. Tr.p. 171.

The second statement was taken later that same day. Tr. 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

[22] Under Monta's version, this would be impossible since only Monta left the vehicle.
[23] Under Monta and McCreary's versions, this would be inaccurate because only Monta held the weapon.

what Antonio had done. State v. Antonio Gordon, Plea Transcript, p. 50, l. 22 - p. 51, l 3; PCR App.p. 244-245, (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. State v. Antonio Gordon, Plea Transcript, p. 51, ll. 5-11; PCR App.p. 245, ll. 5-11.

In his second written sworn statement made at 3:30 PM on the afternoon of the crime, Antonio Gordon admitted that he was the shooter. PCR App.p. 246-247; State v. Antonio Gordon, Plea Transcript, p. 52-54; Hearing Tr.p. 180 – 182, 185-186. Antonio stated that McCreary gave him the gun and told him "to get the BMW [victim's car]." App.p. 247, l. 9-10. 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 stated, "I went up to the driver's window and I told them I wanted their money. They say they din't [sic] have no money. 1 was holding the gun pointed at them sideways like. I told them to get out the car because my boy want [sic] the car. Monta 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." PCR App.p. 247, l. 12- 21; Plea Transcript, p. 53. As the hearing judge found, these facts given close in time to the incident 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. However, at the motion hearing, Antonio Gordon repudiated the statement claiming he was coerced into saying it. Hearing Tr.p. 187-188.

The hearing judge also considered other factual sources in the case beyond that of the testimony presented to verify its possible veracity. As stated above, Antonio's trial counsel testified at Antonio's first PCR hearing that "[Antonio's] 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." Order at 17, citing Antonio Gordon v. State, 2008-CP-46-4951, December 1, 2009 Hearing Tr. p. 77, l. 1-4. Also Tr.p. 75, l. 20. The hearing judge also found Antonio's "seemingly endless" procedural history, which details his 13 years of attempts to overturn his guilty plea. Order at 17. Yet despite all these hearings and motions, this motion hearing was the first time that Antonio has claimed that Monta was the shooter, not him. The hearing judge also noted that Gary Moffatt, the only co-defendant who was not a relative of Antonio, did not testify at the hearing. In his sworn statement to police, Gary Moffatt said that McCreary got the pistol, that McCreary and Antonio and McCreary discussed robbing the victims, that McCreary gave Antonio the pistol right before he got out of the car, that Monta followed Antonio out of the car, and that Antonio demanded the money and shot the driver. Order at 18. Finally, the trial court noted that the testimony presented contradicted Christopher Diaz's testimony, a victim of the robbery who was in the car with the deceased. Ultimately, the hearing judge found:

> 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.**

Order at 17.

During the motion hearing, Antonio Gordon suggested that he learned from his brother Charles that Monta shot and killed the man. Hearing Tr.p. 151-153. Antonio stated that until

Monta and McCreary gave affidavits to his defense counsel's investigator Dave MacDougall, that he thought they would probably kept saying that he was the triggerman. Hearing Tr.p. 153-154, p. 158. Antonio claimed that he told the police he shot and killed the man, but asserted that the police promised him something and told him that if I would tell the truth that he would never see the streets again, but that he would be able to go home and see his son if he admitted that he shot and killed a man. He asserted that they showed him the statements of Monta, Terrance and Gary Moffitt and threatened him with the death penalty if he did not tell the truth and that he was the shooter. Tr.p. 155-156, 174, 187. He stated that he was initially scared to tell them the Monta was the shooter because he always would beat him up when he was little "so II told them Terrance did it cause I always been afraid of him." Tr.p. 156.

On cross-examination, Antonio claimed that he never received a letter from Monta claiming he was changing his testimony. Tr.p. 169. Gordon claimed that he had initially hired Pete Skidmore, Jr. to investigate his case and later retained Dave MacDougall after he fired Mr. Thompson to do his federal habeas action in 2012. Tr.p.161. After going through each of his inculpatory statements and repudiating them based upon assertions that he was coerced, the Appellant also claimed denied that he ever told his counsel, Dan Agostino that he was high on marijuana when he shot the boy. Hearing Tr. p. 190, l. 12-21. He denied the significance of his apology to the victim's family. Tr. p. 191-193. Antonio further denied that he had agreed with the state's version of the facts at the guilty plea when asked. Hearing Tr. p. 192. 194. He claimed his counsel had told him to answer exactly as McCreary did. Tr. p. 194. Antonio admitted that he knew he was not the shooter when the crime happened, but asserted it previously because he had no evidence to support it. Tr.p. 198. He stated that he had asked no

one to come in and lie for him. Tr. p. 199. He could not explain why Gary Moffitt had not come to support his new version. Tr.p. 199-200. [24]

This "new" evidence, in its shocking connection away from the truth by each recanting co-defendant, reveals that it is based upon a complete fabrication by actors who deemed themselves unrestrained to tell the truth. The fabricated evidence was wisely recognized by Judge Hayes because it was presented after the actors had completed their own attempts to undermine their earlier pleas and sentences. As the hearing judge concluded : " only now when all avenues have failed, do these three co-defendants and relatives make this fantastic new claim which contradicts all 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 . . ." Order, p. 18. The conclusion is well-founded and entitled to deference. As set forth in the initial portions of this brief, Antonio Gordon has failed to present evidence worthy of belief to support any claim for a new trial.

After completing the fact-finding, the Court began its legal analysis. It noted the above language from *State v. Parker* (cited in *DeAngelis*) that courts do not look with favor upon applications for new trials on the ground of after-discovered evidence. Order at 19. The court determined that each of the three witnesses lacked credibility, noting that Monta specifically was

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[24] Gary Moffatt is the fourth co-defendant in this case. His 1998 statement and plea were before the hearing judge. Judge Hayes noted the significance that Moffitt had not changed his position that Antonio was the shooter in his order. Order Denying New Trial, p. 17-18. 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.

"innately not credible." It based this conclusion not just on the evidence presented at the hearing, but the corroborating evidence surrounding this case, the previous statements, testimony and pleas of each of the individuals. Order at 20. It noted that Appellant's trial counsel testified at the PCR that Antonio told him that he had shot him. *Id.* This did not just reflect negatively on Monta and McCreary's credibility, but also bolstered Antonio Gordon's plea of guilty and his confessions to law enforcement and the trial judge. *Id.*

The hearing judge then expressed some confusion over whether dicta from Mercer applies.[25] Order at 21-22. It then held that none of the evidence is "newly discovered," as Antonio Gordon knew the truth at the time of his plea – whether he was a shooter or not. The court ultimately found that no "after-discovered evidence" was found in this case at all. Order at 23. It declined to reach the issue of accomplice liability. *Id.* at footnote 3.[26]

Discussion

As should be clear from above, the trial court did not simply find that Petitioner's evidence failed to meet the above test, but that Petitioner failed to present any credible evidence at all. The trial court found that each of the three witnesses lied, and supported its conclusion with evidence of various contradictions between each other and the other evidence available. As noted in *Parker*, recantation testimony is subject to the closest scrutiny, and that the trial judge

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[25] Despite its confusion, the hearing judge applied the correct analysis, as will be discussed below.

[26] To the extent this issue is reached, the statements by all four co-defendants at their sentencing as well as their agreement with the statement of facts outlined above shows that Appellant would be just as liable under the hand of one, hand of all theory even if he were not the shooter. Appellant claims in his brief that he did not know of the robbery, but the contradictory evidence presented by his co-defendants and his trial counsel refutes that. [Tr. p. 54, line 15-p. 55, line 14;] [Tr. p. 88, line 6-p. 89, line 6;] [Tr. p. 123 line 10-p. 124 line 11;] [Tr. p. 168 line 8-p. 169 line 6;] Order at 17.

has the exclusive power to weigh the evidence. *State v. Parker*, 249 S.C. at 140, 153 S.E.2d at 184. The trial judge is vested with exclusive jurisdiction over questions of credibility absent an error of law or abuse of discretion, and his findings of credibility will not be disturbed on appeal. *Id.* The trial court has made a finding of credibility that none of the three witnesses presented were credible, and accordingly denied the motion. Therefore, the ruling should be affirmed.

A. The trial court did not err in applying *State v. Mercer's* analysis to this case because the issue was not whether the witnesses merely lacked credibility, but the conclusion by the hearing judge that the evidence from the witnesses also were fabrications.

Appellant claims that the court did not complete its analysis for a new trial, citing *State v. Mercer*, 381 S.C. 149, 672 S.E.2d 556 (2009). Amended *Pro Se* Brief of Appellant, p. 7. True, the trial court expressed some confusion about how *Mercer* applied, but Appellant misunderstands *Mercer*. This is the relevant language:

> The question before us, then, is whether the trial court's denial of the post-trial motion amounts to an abuse of discretion. We hold it does not. In so ruling, 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. This sensitivity forms part of our consideration.

Mercer, 381 S.C. at 170, 672 S.E.2d at 567. The *Mercer* court's statement addressed the type of situation that arose in *Johnson v. Catoe*, 345 S.C. 389, 548 S.E.2d 587 (2001). In *Johnson*, the witness who claimed that she had done the shooting instead of Johnson had over 5,000 pages of mental health history. The hearing judge in *Johnson* heard testimony of several psychologists who dealt with the witness on a regular basis. The trial court concluded that, while the witness was competent to give the affidavit in question, her credibility, based on the corroborative evidence of the psychologist's testimony and her mental health history and her history of lying for reasons known only to her, made her credibility suspect. The trial court then compared the

witness's affidavit to the known facts from more reliable sources and concluded that the witness was not credible. The Supreme Court affirmed.

A witness's personal appearance of credibility (their persuasive credibility) is one factor in the analysis of whether the evidence they present is credible, not the complete analysis. The hearing judge correctly performed the analysis by reviewing not just the three witness's persuasive credibility, but by comparing their "testimony" against the other evidence presented in the trial to determine its substance and whether it was fabricated. It found that the new statements contradicted each other as well as the evidence from other, more reliable sources, including their own statements, particularly in a guilty plea setting. Thus, there was no error in how the trial court applied the standard from *Johnson* .

B. There was no after-discovered evidence in this case.

Appellant also claims that the evidence was after-discovered because Monta and McCreary recanted. Amended Brief of Appellant, p 8-9. The hearing judge concluded that there was no "after-discovered evidence" because the evidence was a fabrication by the three witnesses. Order, p. 22-23. The trial court correctly assessed that since Antonio was a participant in the crime, he knew whether or not he was the shooter and whether Monta Gordon was the shooter since 1998. Because this could have been discovered by due diligence, it should not satisfy the after-discovered evidence standard, particularly in a situation where by his guilty plea he waived his right to present a defense that Monta, not Antonio was the shooter at a trial in 1999 and to confront Monta with his version. The reasoning for this inadequate showing undermine the claim because in 1999, Antonio Gordon had advised his counsel that he was the shooter – not Terrance (as suggested in his first statement) and not Monta (as he only suggests in

2012). To the contrary, by his guilty plea he legitimately waived that right to confront Monta[27] and the other potential accusers who identified him and the forensic evidence of his palm print that additionally undermines the veracity of the fabrications.

Appellant has presented no evidence that the evidence was after-discovered. To the contrary, Appellant testified that he had actual knowledge of the witnesses at the time of the proceeding:

> Q: Did you know at the time that you were going to plead guilty that both Monta Gordon and Terrance McCreary were going to testify against you?
>
> A: Yes Sir.
>
> Q: And testify that you were the shooter?
>
> A: Yes sir.

Tr. at p. 205, lines 13-20.) This testimony makes it impossible that the evidence was after-discovered when he is waiving his right to confront them.[28]

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[27] In his testimony at the September 4, 2003 PCR hearing before Judge Alford in his own PCR case, Monta Gordon testified that he was locked up for something he did not do and claimed that he was not able to stop his brother from shooting. Monta Gordon v. State, PCR Transcript, p. 50; Monta Gordon PCR App. P. 467. However, Monta Gordon also testified that although he had entered a plea agreement to testify truthfully, he was not going to testify truthfully that his brother was the shooter.

> Q. You wouldn't have done it? You would have signed this agreement and then lied?
> A. No.
> Q. So Antonio never shot the gun?
> A. Yes.

Monta Gordon v. State, PCR Transcript, p. 51, l. 19- p. 52, l. 3. Monta Gordon v. State , PCR App. P. 469-469.

[28] Appellant claims that, yes, he had known the "truth" in this case at the time of the plea, but he had believed that both McCreary and Monta would testify against him. (Tr. at p. 205, line 13-p. 207 line 30). Appellant's opinion on whether his co-defendants would testify against him is not evidence, regardless of whether Appellant discovered his opinion was mistaken later on.

Appellant could have exercised his right to trial by jury in 1999, and brought out the alleged lies on cross-examination, because he now claims what he would have known in 1999 on who was the triggerperson. Instead, he made a knowing and voluntary decision to plead guilty. Appellant may not rescind his knowing and voluntary waiver of his right to trial by jury merely because he has now changed his mind about the consequences. A guilty plea is binding against this evidence and should not be opened in the interest of justice under *Jamison*.

State v. Parker, which Appellant cites to support his argument on page 9 of his brief, also holds that recantation testimony is unreliable and should be subjected to "the closest scrutiny" when offered as a ground for a new trial. *Parker*, 249 S.C. at 142, 153 S.E.2d at 184. "To hold such affidavits sufficient to require the granting of a new trial would be to open the door to fraud and perjury, as well as to invite interminable delays in the disposition of causes." *Id.* The type of fraud and perjury contemplated in *Parker* is what occurred at this hearing, and the trial court was correct in refusing to grant a new trial. Appellant, even if he had not waived his right to a trial by jury, has no right to present fabricated testimony. The hearing judge was correct in its determination that fabricated testimony has no weight and is of no probative value in new trial motions.

C. Petitioner is not entitled to a rehearing on issues of credibility.

Finally, Appellant contends that the lower court erroneously denied the motion on the merits. Amended Brief of Appellant 9-11. Essentially, he wants this Court to engage in a separate finding of credibility and come to its own conclusions about the testimony presented. The standard of review does not make this Court as evaluator of the credibility of the evidence in an appeal from a motion for a new trial. This rests with the circuit court judge who has the ability to evaluate the witnesses as they are presented to them. There is no basis in law for this

request. *See State v. Harris*, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct.App.2011) ("The granting of a new trial because of after-discovered evidence is not favored, and this court will affirm the trial court's denial of such a motion unless the trial court abused its discretion." (internal quotation marks omitted)); id. ("The credibility of newly-discovered evidence is for the trial court to determine."); id. ("Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial."); id. at 545–46, 706 S.E.2d at 529 (finding the trial court did not abuse its discretion in denying the motion for a new trial after it found the recantation testimony was not credible); *State v. Parker, supra* (circuit judge has exclusive ability to judge credibility, not the appellate courts). This claim is without merit.

CONCLUSION

It respectfully requests that the trial judge's ruling be affirmed, that this Court determine that circuit courts have no authority to grant a rule 29(b) motion based on a guilty plea, and that the State's motion to restrict Appellant's future filings with this Court be granted.

Respectfully submitted,

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Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

BY: _____
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ATTORNEYS FOR RESPONDENT

November 3, 2014
Columbia, South Carolina.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

NOV 0 6 2014

SC Court of Appeals

Appeal from York County
On Denial of Motion for New Trial
John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2013-000975

THE STATE,

Respondent,

v.

ANTONIO GORDON,

Appellant

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Respondent proposes the following to be included in the Record on Appeal:

PRESENT PROCEEDINGS

1. State v. Gordon, Motion for New Trial based on After Discovered Evidence Pursuant to Rule 29(b), SCRCrimP, dated November 15, 2012 and attachments.
2. State v. Gordon, Order Denying Motion for New Trial, (Judge John Hayes – April 22, 2013)
3. State v. Gordon, Motion Hearing, Transcript of Testimony pages 1-224 March 4-8, 2013)

MATERIALS BEFORE HEARING JUDGE

1. Transcript of pretrial hearings, guilty pleas and sentencing transcripts of Antonio Gordon, Monta Gordon and Terrance McCreary, July 1999.
    a. Antonio Gordon v. State, PCR Appeal Appendix (Judge Kinard – 2001-cp-46-1866) – two volumes - 567 pages.
    b. Monta Gordon v. State, PCR Appeal appendix, 2001 –CP-46-2217 , p. 419-469; PCR transcript, p. 452-469.

2. Written Statements of July 23, 1999 to Rock Hill Police Department by Antonio Gordon, Monta Gordon, Terrance McCreary, and Gary Moffitt.
3. Antonio Gordon v. State – transcript of PCR testimony of Antonio Gordon – Hearing July 29, 2003.
4. Antonio Gordon v. State, 2008-CP-46-4951, PCR Hearing Transcript (Alford – December 1, 2009) – Transcript pages 72-84 (testimony of Daniel D'Agostino
5. State v. Monta Gordon , Written Plea Agreement, July 16, 1999.
6. Written Statement of Monta Gordon, August 6, 2012,
7. McCreary v. State, PCR Testimony, Terrance McCreary – December 16, 2002 PCR Proceeding.
8. Written Statement of Terrance McCreary, July 13, 2012.
9. Antonio Gordon v. State, Order of Dismissal and Maxton Order, (Judge Alford, January 4, 2010).

#2

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

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

November 3, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2013-000975

THE STATE,

Respondent,

v.

ANTONIO GORDON,

Appellant

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served **Initial Brief of Respondent and Designation of Matter** on:

Antonio Gordon, #259798
Allendale Correctional Institution
P.O. Box 1151
Fairfax, S.C. 29827

by depositing copies in the Mail with sufficient postage this 3rd day of November, 2014.

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

ALAN WILSON
ATTORNEY GENERAL

November 3, 2014

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SC Court of Appeals

Honorable Jenny A. Kitching
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Antonio Gordon
Appellate Case No. 2013-000975

Dear Ms. Kitchings:

Enclosed please find the **Initial Brief of Respondent and Designation of Matter** in the above-captioned matter for filing in your office. By copy of this letter, I am serving Appellant with same.

Sincerely,

Lonetta B. Brawley
Legal Assistant to Donald J. Zelenka
Senior Assistant Deputy Attorney General

/lbb
Enclosures

cc: Antonio Gordon, #259798
Kevin S. Brackett, Solicitor
Trisha Allen, Victims Assistance