

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Lancaster County
Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

Respondent,

v.

LAKEITHON M. HALL,

Appellant.

Appellate Case No. 2013-002616

**INITIAL BRIEF OF RESPONDENT AND
DESIGNATION OF MATTER**

RECEIVED

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SC Court of Appeals

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- I. Whether the lower court erred in denying appellant's request for a continuance.
- II. Whether the lower court erred in finding that the evidence offered was newly available evidence that could be used merely for impeachment and would not have changed the outcome of a trial?

STATEMENT OF THE CASE

Appellant, Lakeithon M. Hall, is confined in the S.C. Department of Corrections as a result of his 2002 Lancaster County guilty plea convictions for two (2) counts of murder, attempted armed robbery, and possession of a weapon during the commission of a violent crime before the Honorable Paul Short, Circuit Court Judge, and resulting combined sentences of thirty-eight (38) years confinement. (*Ind. #s 2001-GS-29-71, 346, 72, 73*). This is an appeal from the November 2013 denial of a Rule 29, SCRCrimP, Motion for a New Trial based on alleged after-discovered evidence by the Honorable Brian Gibbons, Circuit Court Judge. That Motion was not filed until July 2013 approximately eleven (11) years after appellant's guilty pleas. (Tr. Aug. 30, 2013, pp. 1-38, Order denying motion for a new trial, pp. 1-9).

RESPONDENT'S STATEMENT OF FACTS

On November 20, 2000, the victim, *Sheela* Jury, who was approximately eight (8) months pregnant, and her husband Thomas Jury were riding in their car in the City of Lancaster. Mr. Jury was driving. Mr. Jury had just cashed an insurance check, put the majority of the cash in the bank, and then paid a bill. On the way home, Mr. Jury realized he needed to return to the bank and obtain a money order to pay a bill. Mr. Jury took a short cut through a bad part of town and decided to turn around in an apartment complex parking lot. When he did, his path was blocked by a vehicle. Appellant, Lakeithon M. Hall, approached the Jury's car and attempted to rob the victims with a handgun. Appellant fired one (1) shot into the car which struck the victim Mrs. Jury in the shoulder. The bullet passed through her heart and lung but did not exit her body. She died from blood loss. Her unborn, but viable baby girl, *Sheila* Jury, died several days later as a result of the shooting after an emergency C-section was performed the day of the shooting due to the mother's

death. (Guilty plea Tr. pp. 16-22)

Police questioned an eyewitness/co-defendant of appellant, Calvin Peay (“Peay”). Peay initially denied any knowledge of the shooting. Peay *eventually* related **to police** that the victim’s husband was attempting to purchase drugs in the bad part of town, which Mr. Jury adamantly denies, when appellant decided to rob the family instead of selling drugs to the husband. Peay *eventually* admitted he handed appellant the revolver immediately before the murders. Peay also related that appellant fired the handgun into the victim’s car, and the victim’s husband sped away. Peay further related that, after the murder, he and appellant fled to Peay’s apartment where the revolver was placed under a mattress in Peay’s bedroom.¹ Based on the information Peay provided, police recovered the revolver under the mattress in Peay’s bedroom. Ballistics testing confirmed the gun appellant fired did in fact fire the bullet that was recovered from the victim, Mrs. Jury’s body, at autopsy. (Guilty plea Tr. pp. 16-22).

Mr. Jury also positively identified appellant from a photographic line-up as the person who murdered his wife and baby girl. Appellant was charged with the murders as well as attempted armed robbery and possession of a weapon during a violent crime.² (Guilty plea Tr. pp. 16-22).

Through further investigation and additional interrogation of appellant’s other friends/co-defendants, police were able to obtain statements from two (2) of appellant’s friends

¹ In his fifth (5th) and final statement to police, Peay later tried to recant that he actually handed the gun to appellant; however, police did not accept or believe this later statement. (Guilty plea Tr. pp. 13-22).

²Appellant’s plea took place on December 6, 2002. After the Solicitor recited the facts surrounding the murders and appellant’s role, appellant, under oath, agreed with the Solicitor’s recitation. Appellant admitted he committed the murders and attempted to rob the victims Mr. and Mrs. Jury. (Guilty plea Tr. Dec. 6, p. 11-22). Appellant also apologized to the victim’s family for what he had done at his sentencing on December 9, 2002. (Sentencing Tr. Dec. 9, p. 9).

and co-defendants. Brandon Cunningham (“Cunningham”)³ and Haywood Watts (“Watts”)⁴ both eventually gave statements to police in which they admitted to being present at the time of the murders and witnessing appellant shoot the victim Sheela Jury. (Guilty plea Tr. pp. 16-22). At his guilty plea, under oath, appellant admitted he committed the murders. (Guilty plea Tr., p. 11). Appellant also admitted he committed the crimes of attempted armed robbery and possession of a weapon during a violent crime. (Guilty plea Tr. p. 12).

RELEVANT PROCEDURAL HISTORY

The Original Charges

Appellant was indicted at the February 2001 term of the Lancaster County grand jury for two (2) counts of murder (*Ind. #s 2001-GS-29-71 & 346*), attempted armed robbery (*2001-GS-29-72*), and possession of a firearm during the commission of a violent crime (*2001-GS-29-73*). Appellant was subsequently indicted by the *Chester County* grand jury for burglary first (1st) degree, armed robbery, and kidnapping, unrelated to the Lancaster County charges.⁵ Ross A. Burton, Esquire, represented appellant on the charges. Solicitor Douglas A.

³ Cunningham, like Peay, in his first (1st) statement, initially told police he did not know anything about the murders. Cunningham then gave three (3) additional statements which were more incriminating, admitting appellant was the shooter.

⁴Watts initially refused to talk to police. He then came in to the police station and gave his one (1) and only statement implicating appellant as the trigger-man. Watts came forward to police with his attorney Lionel Lofton, Esq. and gave a detailed statement that appellant murdered Ms. Jury and her unborn child. Watts told police he was just a few feet away and saw appellant near the driver’s side door of the victim’s car. He saw appellant raise his arm, and then Watts heard a gunshot. Watts said the victim’s car then sped away. Watts said he could not see the gun because he believed another co-defendant’s body [Brandon Cunningham’s] was blocking his view. Watts said appellant and others who had been near the car, including Peay, then fled the scene toward Peay’s apartment. (See attached statement of Haywood Watts).

⁵In the Chester County cases, appellant was charged with the burglary of a home which occurred on August 12, 2002 in which fourteen (14) guns were stolen. According to the burglary

Barfield, Jr. represented the State.

The Guilty Pleas

On December 6, 2002, appellant **pled guilty** as charged to **two (2) counts of murder, attempted armed robbery, and possession of a weapon during a violent crime** (the Lancaster County charges) before Judge Short. (Guilty plea Tr. pp. 1-23). The Chester County indictments were *nolle prosequi* pursuant to the plea agreement.⁶ (App. pp. 67-68). At his guilty plea, appellant admitted he murdered both victims, attempted to rob one (1) victim [Mr. Jury], and possessed a .38 caliber revolver during the commission of the murder and attempted armed robbery. Appellant also agreed with the facts of the crimes as recited by the Solicitor. (Guilty plea Tr. pp. 1-23).

The Sentencing Proceeding

On December 9, 2002, a sentencing proceeding was conducted. Appellant apologized to the husband and father of the two (2) victims for the murders appellant committed and asked for Mr. Jury's forgiveness. Consistent with the negotiated plea and sentence, Judge Short sentenced

warrant, two (2) of the stolen guns were found in a vehicle appellant was operating, and the vehicle matched the description of a vehicle appellant was operating on August 9, 2002 when he came to the victim's residence asking for directions. Appellant was also charged with the separate armed robbery and kidnaping of a nightclub owner as he was closing his business. Apparently, when appellant was stopped in the above car by police, the car contained ski masks and gloves similar to those worn in the robbery of the nightclub owner.

⁶This was also a negotiated plea with regard to the Lancaster County charges. In exchange for the pleas of guilty, the State agreed the sentences on the four (4) indictments would run concurrently, and appellant would be sentenced under the statutory scheme for murder but *not to life in prison*. (Tr. Dec. 6, p. 2). Appellant was approximately sixteen (16) years old at the time of the Lancaster crimes. He was charged as an adult due to the nature of the charges. Appellant was nineteen (19) years old at the time of his plea. Prior to the plea, defense counsel and the Solicitor met privately with Judge Short and obtained a potential range of sentence, which was communicated to appellant, and he accepted. (App. p. 69). Appellant was ultimately sentenced in that range. (App. p. 69). The Solicitor agreed to dismiss the Chester charges as a result of appellant's pleas to the Lancaster charges and the strength of the Chester cases. (App. pp. 67-68).

appellant to thirty-eight (38) years for each murder, twenty (20) years for attempted armed robbery, and five (5) years for the weapon charge, and the sentences were ordered to run concurrently. Appellant did not appeal his guilty pleas or sentences. (Sentencing Tr. pp. 1-16).

The Post-Conviction Relief Action

Appellant filed an application for post-conviction relief (PCR) on October 14, 2003 (2003-CP-29-960). In his application, appellant alleged the following grounds:

1. Ineffective assistance of counsel
 - (a) Counsel was ineffective inasmuch as he failed to adequately investigate my case.
 - (b) Prior to my plea, counsel was ineffective inasmuch he failed to investigate and interview crucial witnesses.
 - (c) Prior to my plea, counsel was ineffective inasmuch he failed to adequately investigate exculpatory evidence of forensic reports to build possible defense to my case.
2. Involuntary Guilty Plea- My guilty plea was involuntarily, unknowingly, and unintelligently entered inasmuch counsel's pre-trial investigation of my case was inadequate, unreasonable, and prejudiced me into pleading guilty.

The State filed a Return and moved to dismiss all allegations except those of ineffective assistance of counsel. On March 1, 2006, a merits hearing was held at the Fairfield County Courthouse. The Honorable John C. Hayes, III. ("the PCR Court") presided. On March 2, 2006, in a written Order, the PCR Court granted Respondent's Motion to Dismiss appellant's allegation of involuntary guilty plea and denied appellant's application for post-conviction relief with prejudice.

Findings in the Order Denying Post-Conviction Relief pertinent to this Appeal

In the Order, the PCR Court noted appellant alleged: (1) Ineffective assistance of counsel; and (2) Involuntary guilty plea. After reviewing the applicable law, the Court found and concluded appellant was fully advised of his rights and under oath affirmed he knew and

understood the charges to which he was pleading guilty and the penalties applicable to the charges. (Referencing Plea Tr. at p. 6, l. 22 -T. at p. 9, l. 13). Appellant confirmed counsel had done all Petitioner had asked him to do. (Ref. Plea Tr. at p. 12, ll, 10-18) and he understood the Court's questions and did not desire further explanation of his rights, the charges against him, and the penalties to which he was exposed. (Ref. Tr. at p. 12, ll. 19-24). And, appellant confirmed, under oath, the underlying facts as to his commission of the murder of Mrs. Jury and her unborn child. (Ref. Tr. at p. 13, l. 224 - p. 22, l. 8).⁷ Consequently, the Court found and concluded appellant had failed to carry his burden of proof and was not entitled to relief on these allegations, i.e. appellant's guilty pleas to murder, attempted armed robbery and the weapon charge were not involuntary.

The Court noted appellant also alleged counsel was ineffective for failing to properly investigate and interview witnesses. The Court pointed out counsel testified he obtained and reviewed the discovery, spoke with one (1) co-defendant (Mr. Peay) and talked to the adult victim's surviving spouse. Counsel also discussed the case with appellant and did not coerce appellant to plead guilty. In its Order, the Court implicitly found counsel credible and appellant was not. This is clear because appellant testified at the PCR hearing counsel did not review the evidence in the case with him prior to his plea. Counsel testified to the opposite, that he did review the evidence or discovery with appellant prior to his guilty plea. The PCR Court found and concluded, given the above, appellant's assertion counsel was ineffective in failing to properly investigate and interview witnesses was without merit.⁸ With regard to the remaining allegations,

⁷ The Court also noted appellant complained he was not informed as to his parole eligibility, the existence of lesser included offenses, and "sentencing guidelines." The Court found there was no merit to these allegations.

⁸ In its Order Denying Relief, the PCR Court did not specifically address the testimony of the three (3) witnesses appellant offered at PCR, nor did the Court make a specific finding regarding any

the Court granted Respondent's motion to dismiss and appellant's application for post-conviction relief was denied. The Order was filed March 16, 2006.

The Appeal from the Denial of Post-Conviction Relief

Appellant appealed from the denial of his PCR application by way of a Petition for Writ of Certiorari to the South Carolina Supreme Court raising only one (1) issue: Trial counsel erred in failing to investigate into and develop a third-party guilt defense in the case?⁹ The State filed a Return to Petition for Certiorari. The case was transferred to this Court by order of the Supreme Court. On May 22, 2008, this Court denied the Petition for Writ of Certiorari.

The Federal Habeas Action

Appellant then filed a petition for federal habeas corpus relief on July 7, 2008 (Docket No.: 09-7543) alleging the following:

Ground One: Petitioner was denied his constitutionally guaranteed right to the effective assistance of counsel.

Supporting Facts: (A): Failure to Adequately Investigate Petitioner's Case; (B): Counsel Failed to Investigate and Interview Crucial Witnesses; (C): Petitioner's plea was involuntary, unknowing, and unintelligent when counsel failed to do any

failure to pursue a "third party guilt" defense. The Court did state counsel testified he reviewed the discovery and discussed the case with appellant. Two (2) of the witnesses offered at PCR did give written statements to police and those were reviewed by counsel prior to the plea. One (1) of those witnesses named the third (3rd) witness [who testified at PCR] in her statement, so counsel and appellant would have been aware of the third (3rd) witness through the discovery process. This witness gave a verbal statement to police. Counsel testified he reviewed the evidence or discovery with appellant prior to the guilty plea. (App. p. 83). These three (3) witnesses, Takeisha Cunningham, Tara Evans, and Crystal Duncan were some distance from the murder of Mrs. Jury and her unborn child, were not as close as Mr. Jury, Haywood Watts, Brandon Cunningham, or Calvin Peay, and two (2) of these witnesses admitted they were not looking at Mr. Jury's car at the time of the murder. Consistent with their statements to police none of these witnesses identified appellant as being near the Jury's car. However, appellant knew of the availability of these witnesses at the time of his guilty plea.

⁹This specific allegation as worded is not mentioned in appellant's PCR application. Nor is there any mention of "failing to investigate into and develop a third-party guilt defense" in the PCR Court's Order Denying Relief.

reasonable pretrial investigation and in failing to do so prejudiced petitioner into pleading guilty; (D): Counsel was ineffective when counsel failed to investigate into and develop a plausible third-party guilt defense.

Respondent filed a Return and Motion for Summary Judgment on December 8, 2008. United States Magistrate Judge Bruce Howe Hendricks issued a Report and Recommendation recommending the Motion be granted. On July, 31, 2009, United States District Judge R. Bryan Harwell issued an Order adopting the Report and Recommendation and dismissed the federal habeas petition. Appellant filed a Notice of Appeal and sought an appeal to the 4th Circuit Court of Appeals in Richmond, Virginia, which was denied and dismissed on January 21, 2010. A Petition for Rehearing was submitted, which was denied. Appellant filed a Petition for Writ of Certiorari in the United States Supreme Court (Docket No. 10-5259), which was denied on October 4, 2010.

WHAT OCCURRED BELOW

The 2013 Motion for a New Trial

On July 17, 2013, appellant filed a Motion pursuant to Rule 29(b), SCRCrimP, for a new trial with the Lancaster County Clerk of Court. By way of attachments, the Motion included affidavits of appellant,¹⁰ and Calvin Peay (a co-defendant), and a notarized statement of Brandon Cunningham (a co-defendant).¹¹ In his affidavit, Peay recants his earlier statements to police incriminating appellant. The affidavit stated as follows:

“AFFIDAVIT OF CALVIN PEAY”

On November 20, 2000, I, Calvin Lamar Peay was present during the time of an attempted

¹⁰ Appellant’s affidavit was simply as required by State v. DeAngilis, 256 S.C. 364, 182 S.E.2d 732 (1971).

¹¹ Appellant *obtained* and submitted the two (2) affidavits [one (1) from appellant and one (1) from Peay] and the notarized statement of Cunningham. Appellant gave no explanation at the hearing why he was able to obtain an affidavit from Peay but only a notarized statement from Cunningham.

armed robbery of Mr. and Mrs. Jury in which Mrs. Jury lost her life. I am giving this statement because I lied about Lakeithon Hall's involvement in this crime. Mr. Hall was not out there when the crime took place. I lied and by me lying I allowed an innocent man to be charged, convicted and sent to prison. The statement I am giving is that Mr. Hall did not attempt to rob nor kill Mrs. Jury because he was not there. , I did not see him out there. Mr. Hall did not do it; I lied because I was afraid of going to prison so I said the first name that came to my mind. The statement that I am giving today id [sic] that Mr. Hall is innocent and this is the truth.

(See attached Affidavit of Calvin Peay). Peay's affidavit is dated June 11, 2013.

In his notarized statement, Cunningham recants his earlier statements to police incriminating appellant.

[STATEMENT OF BRANDON CUNNINGHAM]

On November 20, 2000, I Brandon R. Cunningham was present during the time of an attempted armed robbery of Mr. & Mrs. Jury in which Mrs. Jury loss [sic] her life[.] I am giving this statement because I lied about Lakeithon Hall's involvement. Mr. Hall was not even out there when the crime took place. I only said his name because I heard someone else mention his name that's how I came up with the name to give the police. And when the time came to go to court for the charges Solicitor Barfield made me a deal that if I testify that he would give me time served and probation so I agreed to testify against Mr. Hall. Mr. Barfield told me that if Mr. Hall did not go to trial and pled [sic] to the charges he would still give me probation and time served because of the deal that we made. I received probation for the charges and Mr. Hall went to prison for a crime he did not commit. If not for the promise of the solicitor's office of the offer of probation and time served I Brandon R[.] Cunningham would have not agreed to testify to send an innocent man to prison. The statement that I Brandon R Cunningham is giving today that Lakeithon Hall is innocent of all charges and I Brandon R Cunningham was coerced [sic] into giving false testimony is order for Solicitor Barfiled to get a conviction of Mr. Hall and this statement is true. The reason I am giving this statement is because my testimony allowed an innocent man to go to prison and the truth of the matter is Montinyo Stevens is the one who attempted to rob Mr. & Mrs. Jury and this led to Mrs. Jury's death.

(See attached Statement of Brandon Cunningham). Cunningham's statement was witnessed and notarized, but it was not sworn. (See attached Statement of Brandon Cunninham). Cunningham's statement is dated January 28, 2013.

By way of the Motion, appellant requested that counsel be appointed for Peay and

Cunningham. On August 12, 2013, the Honorable J. Ernest Kinard, Jr., issued an Order Granting Appointment of Counsel for Peay and Cunningham.

The Motion Hearing

On August 30, 2013, a hearing on the motion was held before the Honorable Brian M. Gibbons, Circuit Court Judge, at the Lancaster County Courthouse. Appellant was present and represented by Tricia Blanchette, Esquire. The State was represented by Solicitor Douglas A. Barfield, Jr. Appointed counsel for Peay and Cunningham were present; however, Peay and Cunningham failed to appear even though they had been subpoenaed. Appellant moved for a continuance of the hearing, which Judge Gibbons denied. (Tr. 8/30/13 p. 5-6). Judge Gibbons considered the motion for a new trial based on the affidavits submitted by appellant and considered Cunningham's notarized statement as an affidavit. (See Order denying motion for a new trial). During the hearing, arguments were made and documents were introduced by both appellant and the State. These included the numerous prior statements by the two (2) witnesses who provided the affidavit and notarized statement in support of the motion, and these included the Appendix and appellate briefs from the PCR action. At the conclusion of the hearing, Judge Gibbons took the matter under advisement so he could review all of the materials provided. Following the hearing, Judge Gibbons instructed the State to submit a proposed Order. On November 12, 2013, Judge Gibbons issued an Order denying the motion for a new trial.

The Order Denying the Motion for a New Trial

[Verbatim]¹²

This is a motion for a new trial based upon after discovered evidence pursuant to Rule

¹² For the convenience of the reader, Respondent has set forth the Order denying the motion for a new trial verbatim. The signed Order will be included in the Record on Appeal.

29(b) of the South Carolina Rules of Criminal Procedure. A hearing was held before me on August 30, 2013. The State was represented by Solicitor Douglas Barfield, Jr., who prosecuted the defendant when he was convicted as set forth below. The Defendant was present with his attorney, Tricia A. Blanchette. The motion is based upon affidavits of Brandon Cunningham and Calvin Lamar Peay, both of whom were codefendants of the Defendant and who implicated the Defendant in statements to the police when the case was investigated. Both Cunningham and Peay were served by the Defendant with subpoenas to testify at the hearing. Neither appeared. The Defendant moved for a continuance. The State objected. The motion was denied. The Defendant moved to be allowed to argue the matter based upon the affidavits of Cunningham and Peay. The State objected. The objection was overruled, and the hearing proceeded.

FINDINGS OF FACT

On November 20, 2000, at approximately 4:20 p.m., Thomas Jury and his wife Sheila Jury entered the parking lot of Pardue Street apartments in the City of Lancaster in their automobile. Thomas was driving, and Sheila was in the front seat passenger. Sheila was approximately eight months pregnant with a female child. Thomas gave investigators a written statement in which he said the couple had been to the bank and to McDonald's but determined they needed to return to the bank to conduct other business. Thomas drove into Pardue Street Apartments as a short cut. Thomas had his window rolled partially down. He had an encounter with three males, who were standing in the roadway. One of the males reached his hand inside his jacket and demanded money from Thomas. When Thomas said he had no money, that male produced a handgun from under his jacket and fired one shot through Thomas' open window. Thomas was not struck, but Sheila was as she sat in the front passenger seat. Thomas drove out of the apartment complex. Thomas

subsequently picked the defendant out of a photographic lineup as the person who shot into the automobile.

Sheila died at Springs Memorial Hospital as the result of a single gunshot wound to her left shoulder which penetrated her left lung and her heart. The baby was delivered by caesarean section and was transferred to Carolinas Medical Center, where she died two days later of hypoxic encephalopathy as the result of the death of her mother from the gunshot wound.

The Lancaster Police Department and the South Carolina Law Enforcement Division investigated this case. Six people, including the Defendant, were charged in the case. The defendant was charged with two counts of Murder, Attempted Armed Robbery, and Possession of a Firearm during the Commission of a Violent Crime. Cunningham was charged with one count of Murder, Attempted Armed Robbery, and Misprision of a Felony. Peay was charged with one count of Murder, Attempted Armed Robbery, Possession of a Firearm during the Commission of a Violent Crime, Possession of a Pistol by a Person under 21 Years of Age, and Accessory after the Fact of Murder.

The Defendant did not give a statement implicating himself in these crimes.

Cunningham gave investigators four statements. The first statement was given shortly after the crime occurred. In that statement Cunningham disclaimed any knowledge of the shooting of Sheila Jury. The second statement was given later that evening. In the second statement Cunningham said Sheila got out of the automobile but Thomas did not. Cunningham said he struck Thomas with his hand as Thomas sat in the automobile. Cunningham said as Thomas was driving away shots were fired. Cunningham denied knowing who fired the shots. Cunningham's third statement was given two days later. In it Cunningham said the Defendant shot at Thomas but

missed and hit Sheila. Cunningham's fourth statement was given the same date and just after the third. In this final statement, Cunningham told investigators he was standing on the street with the Defendant, Peay, Montinyo Stevens, and Heywood Watts. The Jurys drove by, turned around, backed up, and parked. Cunningham said he approached the automobile, and Thomas inquired of him about buying drugs. Cunningham returned to his group and related to them his conversation with Thomas. The Defendant approached the driver's side of the automobile and leaned in. Cunningham heard a single gunshot as the Defendant leaned into the automobile.

Peay also gave investigators four statements. The first statement was given shortly after the crime occurred. In that statement Peay disclaimed any knowledge of the shooting of Sheila Jury. The second statement was given later the night of the shooting. It was recorded. Peal told investigators he was with the Defendant, Cunningham, Watts, and Delrico Stevens in the street. When Thomas first drove into the complex, the Defendant told the others, "I might try to get them." Thomas drove back by the group and stopped. The Defendant told the group Thomas was looking for drugs. The Defendant approached the driver's side window of the automobile and pulled a gun. As Thomas attempted to drive away, the Defendant shot one time. All in the group ran. Peay ran to his home in the complex followed by the Defendant. The Defendant hid a gun under the mattress of Peay's bed in Peay's bedroom. Peay's third statement was given the next day and was also recorded. Peay told investigators the gun used to shoot Sheila Jury was his and that he found it on a path in the woods near his home a day before the shooting. Peay said when Thomas drove into the complex, the Defendant stopped him. The Defendant told the group Thomas wanted drugs and said he was going to "try to get them." The Defendant asked for and received the gun from Peay and approached the automobile. The Defendant attempted to rob

Thomas and pointed and fired the gun into the automobile as Thomas attempted to drive away. Peay ran to his home. The Defendant followed and busted in the door to Peay's home. The Defendant gave the gun back to Peay, who put it under his mattress. Peay sent investigators a note and was questioned again the following day. In a written statement Peay changed his story about the gun and told investigators the Defendant got the gun from Montinyo Stevens.

A Smith & Wesson .38 caliber revolver was found by investigators under Peay's mattress as he described. A fired bullet was recovered from the body of Sheila Jury. A firearms examiner with SLED test fired the revolver and determined it fired the bullet recovered from Sheila's body.

On December 9, 2002, the Defendant appeared before Judge Paul E. Short, Jr., and entered pleas of guilt to two counts of Murder, Attempted Armed Robbery, and Possession of a Firearm during the Commission of a Violent Crime. He received sentences of 38 years on the Murder charges, 20 years on the Attempted Armed Robbery charge, and five years on the Possession of a Firearm during the Commission of a Violent Crime charge. All sentences were concurrent. The Defendant was represented by Public Defender Ross Burton.

On December 9, 2002, Cunningham pled guilty to Misprision of a Felony and was sentenced to five years suspended upon the service of two (2) years followed by two (2) years of probation. The indictments charging Cunningham with Murder and Attempted Armed Robbery were dismissed.

On December 6, 2002, Peay pled guilty to Accessory before the Fact of Attempted Armed Robbery in lieu of Attempted Armed Robbery and Possession of a Pistol by a Person under 21 Years of Age. He received concurrent sentences of eight and five years, respectively. The indictments charging Peay with Murder, Possession of a Firearm during the Commission of a

Violent Crime, and Accessory After the Fact of Murder were dismissed.

This motion is based upon the affidavits of Cunningham and Peay. Cunningham provided an affidavit dated January 28, 2013. In the affidavit, Cunningham admitted being present when Sheila Jury was shot and stated, in part, "I am giving this statement because I lied about Lakeithon Hall's involvement. Mr. Hall was not even out there when the crime took place ...the truth of the matter is Montinyo Stevens is the one who attempted to rob Mr. and Mrs. Jury and this led to Mrs. Jury's death."

Montinyo Stevens is now deceased. He died after Sheila Jury was shot and killed but before Cunningham provided the above affidavit.

Peay's affidavit is dated June 11, 2013. In the affidavit Peay also admitted being present when Sheila Jury was shot and stated, in part, "I am giving this statement because I lied about Lakeithon Hall's involvement in this crime. Mr. Hall was not out there when the crime took place."

CONCLUSIONS OF LAW

Pursuant to Rule 29(b), the Defendant must make a motion for a new trial based on after discovered evidence within one year after the date of the actual discovery of the evidence. An affidavit of the Defendant indicates he discovered the Cunningham information on January 27, 2013, and the Peay information on July 23, 2012. The Cunningham affidavit was obtained on January 28, 2013, and the Peay affidavit was obtained on June 11, 2013. The motion was filed on July 19, 2013. The Defendant filed the motion within one year after the discovery of the evidence.

In order to prevail on a motion for a new trial based on after-discovered evidence, the Defendant must show the evidence (1) is such that it would probably change the result if a new trial

were granted; (2) has been discovered since trial; (3) could not in the exercise of due diligence have been discovered prior to trial; (4) is material; and (5) is not merely cumulative or impeaching. **State v. Spann**, 334 S.C. 618, 513 S.E.2d 98 (S.C. 1999).¹³

The affidavits of Cunningham and Peay are not “after discovered” evidence. “[A] court must exercise great caution in considering evidence to be ‘newly discovered’ when it existed all along and was unavailable only because a co-defendant, since convicted, had availed himself of his privilege not to testify.” **United States v. Jacobs**, 475 F.2d 270, 286, n. 33 (2nd Cir. 1973), quoted in **United States v. Flynn**, 791 F.Supp. 133, 136 (M.D.N.C. 1992). The proffered evidence of Cunningham and Peay is merely newly available and not newly discovered. *Id.*

The information contained in the affidavits of Cunningham and Peay could have easily been discovered in the exercise of due diligence prior to trial. Cunningham and Peay were implicated in the crime on the day it occurred. Both admitted being present when the crime occurred and had knowledge of the crime and its perpetrators. If the Defendant did not commit the crime, Cunningham and Peay knew as much from the outset. Both gave multiple statements beginning the day the crime occurred. The statements contained glaring inconsistencies. The Defendant was on notice from the time he received the many statements of Cunningham and Peay that if the Defendant was not a participant Cunningham and Peay knew he was not a participant and that the credibility of these two witnesses could be challenged.

The affidavits of Cunningham and Peay are merely impeachment evidence. In their statements to investigators, Cunningham and Peay clearly implicate the Defendant as Sheila Jury’s

¹³ At the time this Order was issued, the Supreme Court had not issued its Opinion in Jamison v. State, ___ S.C. ___, ___ S.E.2d ___, Shearhouse Advance Sheets, Opinion No. 27454 (Filed October 22, 2014) setting forth the standard for granting a new trial based on after-discovered evidence when the defendant had previously pled guilty. [Respondent’s footnote].

shooter. In their affidavits, Cunningham and Peay recanted their prior statements that the Defendant was the shooter. The affidavits merely impeach the veracity of Cunningham's and Peay's prior statements.

The affidavits of Cunningham and Peay are not such as would probably change the result if the Defendant were granted a new trial. This court has a gatekeeping role in making a credibility assessment of the affidavits of Cunningham and Peay. **State v. Mercer**, 381 S.C. 149 (S.C. 2009). Cunningham's and Peay's statements are riddled with inconsistencies. Their stories changed in substantial ways from statement to statement. Their affidavits follow this pattern and offer yet a fifth version from each about the events leading to the shooting death of Sheila Jury. Their affidavits come over a decade after the Defendant pled guilty to these crimes and after both Cunningham and Peay were convicted for their roles in these events and have nothing to lose by again changing their stories. Cunningham now even attempts to attribute the death of Sheila Jury to Montinyo Stevens, who is deceased. The affidavits of Cunningham and Peay are also contrary to the information provided to investigators by Thomas Jury, who was face to face with the Defendant and picked him out of a photographic lineup as the shooter. Finally, both Cunningham and Peay failed to appear to testify under oath about the substance of their affidavits despite having been served with subpoenas. I conclude the affidavits of Cunningham and Peay are not credible.

Although the Defendant did not confess to investigators that he committed these crimes, he did admit doing so when he pled guilty on December 9, 2002. His plea was a guilty plea, not a nolo contendere plea or a plea pursuant to **North Carolina v. Alford**. "A guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably foreclosed. **Blackledge v Allison**,

431 U.S. 63, 97 S.Ct. 1621 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. **Crawford v. U.S.**, 519 F.2d 317 (4th Cir. 1975); **Edmonds v. Lewis**, 546 F.2d 566 (4th Cir. 1976).

The Defendant entered his guilty plea on December 6, 2002, and was sentenced on December 9, 2002. He was represented by competent counsel. He was sworn to tell the truth. Judge Short meticulously ensured that the Defendant understood his constitutional rights and that by pleading guilty he waived those rights. Judge Short reviewed each indictment with the Defendant and asked the defendant, as to each indictment, whether he committed the offenses, to which the Defendant replied affirmatively. The solicitor summarized the facts of the case including the statements of Peay implicating the Defendant. Judge Short asked the Defendant whether he agreed with the statement of the facts and he said he did, that is what happened, and that is what he did. Thomas Jury was present. Thomas Jury was also present at the sentencing hearing. The Defendant apologized to the court for what he had done. He also apologized directly to Thomas Jury and asked for Mr. Jury's forgiveness.

I conclude as a matter of law that the Defendant has failed to meet his burden in establishing that he is entitled to a new trial based on after discovered evidence.

IT IS THEREFORE ORDERED that the motion is denied.

IT IS SO ORDERED

[End of Order denying and dismissing the motion for a new trial].

This appeal followed.

ARGUMENT I.

The circuit court did not err in denying appellant's motion for a continuance.

Judge Gibbons did not err in denying the motion for a continuance because appellant was not entitled by law or procedure to present the live witnesses' testimony at the motion for a new trial hearing. State v. Sineath, 122 S.C. 354, 115 S.E. 635 (1935)(While a judge has the discretion to permit the presentation of testimony, there is no rule of substantive law or of procedure requiring that a circuit judge shall have witnesses sworn and examined at such a hearing for the purpose of discovering evidence that might prove of benefit to the moving party). There may, however, be circumstances under which, upon a proper showing, the refusal of the circuit judge to examine a recalcitrant, after-discovered witness, might amount to an abuse of discretion, *where no affidavit can be properly submitted* because of the witness' refusal to cooperate. Id. See e.g. State v. Long, 93 S.C. 502, 77 S.E. 61 (1912)(The length of time and the manner of any argument by counsel for a new trial based upon after discovered evidence is left to the discretion of the court).

Here, appellant had submitted the affidavit of Peay and the notarized statement of Cunningham. Judge Gibbons treated Cunningham's notarized statement as an affidavit. (See Order denying motion for a new trial, Tr. 8/30/13). Judge Gibbons had before him what Peay and Cunningham's purported testimony would be at the hearing on the motion for new trial if they had appeared. Judge Gibbons denied the State's objection to proceeding with the hearing only on *the affidavits*. The two (2) witnesses had failed to appear at the hearing after being subpoenaed to appear. It was not an abuse of discretion for Judge Gibbons to proceed with the hearing **on the affidavits submitted** by appellant. Sineath. See also Rule 29(b), SCRCrimP; State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009)(which appellant argued below as authority for proceeding on the

affidavits alone); State v. DeAngelis, 256 S.C. 364, 371, 182 S.E.2d 732, 735 (1971)(same). Judge Gibbons duly considered the affidavits in ruling on the motion for a new trial, including considering Cunningham’s notarized statement as an affidavit. (See Order denying motion for a new trial). As a result, this appellate ground has no merit and must be dismissed. Sineath.

ARGUMENT II.

Judge Gibbons did not abuse his discretion in denying the motion for a new trial on after-discovered evidence.

Standard of Review

(General Appellate Standard)

In criminal cases, an appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Wood, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). Thus, the appellate court is bound by the trial court’s factual findings unless they are clearly erroneous. Id.; State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 504 (Ct. App. 2004). On appeal, the appellate court is limited to determining whether the trial court abused its discretion. State v. Walker, 366 S.C. 643, 653, 623 S.E.2d 122, 127 (Ct. App. 2005).

(Motion for a New Trial based on after discovered evidence)

“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. State v. Irvin, 270 S.C. 539, 545, 243 S.E.2d 195, 197–98 (1978); State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011). As the South Carolina Supreme Court held in State v. Rhodes, 44 S.C. 325, 327, 21 S.E. 807 (1895):

We, however avail ourselves of this opportunity to say that the universally recognized doctrine is that applications of this kind should be scrutinized with great caution, in order to avoid delays, and prevent any obstructions to

the administration of justice. As was said by the late Chief Justice Simpson in the case of State v. David, 14 S.C. at page 432, “There can be no doubt that motions of this sort should be received with the utmost caution, because, as it is said by a learned judge, there are but few cases tried in which something new may not be hunted up, and also because it tends to perjury; and as was said in the case of State v. Harding, 2 Bay, 268, it would have a mischievous tendency after all the evidence on the part of the state had been fully disclosed, to allow one with his life in danger, an opportunity, by the assistance of confederates, to procure unprincipled witnesses to contradict the evidence on the part of the state, and thereby defeat the ends of justice”

Rhodes, 44 S.C. at 327, 21 S.E. 807.

“A motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge.” State v. Irvin, 270 S.C. at 545, 243 S.E.2d at 197; State v. Harris, 391 S.C. at 544, 706 S.E.2d at 529. The credibility of newly-discovered evidence is for the trial court to determine. State v. Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977); Harris, 391 S.C. at 545, 706 S.E.2d at 529. 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.; Harris, 391 S.C. at 545, 706 S.E.2d at 529. “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); Harris, 391 S.C. at 545, 706 S.E.2d at 529. “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.; Harris, 391 S.C. at 545, 706 S.E.2d at 529.

The South Carolina Supreme Court has repeatedly held recanted testimony is ordinarily unreliable and should be subjected to the closest of scrutiny when offered as a ground for a new trial. Porter, 269 S.C. at 621, 239 S.E.2d at 643 (*quoting* State v. Mayfield, 235 S.C. 11, 34-35,

109 S.E.2d 716, 729 (1959); Harris, 391 S.C. at 545, 706 S.E.2d at 529 (finding 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, 249 S.C. 139, 153 S.E.2d 183 (1967)(recantation of testimony by jailhouse trustee, who testified at trial he heard defendant confess to committing crime, not sufficient basis for granting new trial); State v. Mayfield, (recantation by jail house informer who had served time in same penitentiary with defendant was properly discounted by trial judge as not credible); State v. Whitener, 228 S.C. 244, 89 S.E.2d 701 (1955); State v. Rhodes, 44 S.C. 325, 21 S.E. 807 (1895). To hold that evidence of recanted testimony would be sufficient to require the granting of a new trial would open the door to fraud and perjury, as well as to invite interminable delays in the disposition of causes. Parker; Mayfield.¹⁴

Traditionally, in South Carolina, to obtain a new trial on after discovered evidence, a defendant must show the five (5) factors set forth in Spann, *supra*. McCoy v. State, 401 S.C. 363, 368 n. 1, 737 S.E.2d 623, 625 n. 1 (2013)(quoting Clark v. State, 315 S.C. 385, 387-88, 434 S.E.2d 266, 267 (1993)).¹⁵ However, this test proved unworkable where the defendant pled guilty. “Indeed, the traditional, newly discovered evidence factors are ‘difficult, if not impossible to apply

14 See also Williams v. Coyle, 260 F.3d 684, 707-08 (6th Cir. 2001); United States v. Chambers, 944 F.2d 1253, 1264 (6th Cir. 1991)(legally, recantation affidavits are always viewed with extreme suspicion); United States v. Carbone, 880 F.2d 1500 (1st Cir. 1989)(same); May v. Collins, 955 F.2d 299 (5th Cir. 1992)(similar); United States v. Gallego, 191 F.2d 156 (2nd Cir.1999)(same), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004); United States v. MacDonald, 640 F.Supp. 286 (E.D.N.C. 1985)(same). See also e.g. United States v. Flynn, 791 F.Supp. 133 (M.D.N.C. 1992)(newly available testimony of recently convicted and sentenced co-defendants is inherently suspect; co-defendants have nothing to lose by exonerating their friend and co-defendant); United States v. Castano, 756 F.Supp. 820, 824 (S.D.N.Y. 1991)(same).

15 See State v. Spann, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999)(Citing State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993)). See also Mercer, 381 S.C. at 166, 672 S.E.2d at 565; State v. Needs, 333 S.C. 134, 157-58, 508 S.E.2d 857, 869 (1998); Johnson v. Catoe, 345 S.C. 389, 393 & n. 1, 548 S.E.2d 587, 589 & n. 1 (2001).

when the moving party pleaded guilty instead of standing trial.” Jamison v. State, ___ S.C. ___, ___ S.E.2d ___, Shearhouse Advance Sheets, Opinion No. 27454 (Filed October 22, 2014), (quoting In re Reise, 192 P.3d 949, 954 (Wash. Ct. App. 2008)). As the Court noted in Jamison, in the case of a guilty plea:

[I]t was not an independent trial of fact that determined the defendant’s guilt based upon sworn trial testimony—it was the defendant who acknowledged his own guilt. Because of that simple fact, the trial court handling the post-conviction proceeding is necessarily in a different position. That court does not have the full record of the prior trial, but it does have the defendant’s own statements of guilt. [The traditional, five-factor newly discovered evidence test] presumes that the [PCR] judge is in a position to weigh the new testimony against that provided at the prior trial and assess whether an acquittal verdict would enter based upon new evidence. In the circumstance in which there never was a trial on the charges, the [PCR] court is hampered in that assessment.

Jamison, *supra* (quoting People v. Schneider, 25 P.3d 755, 761 (Colo. 2001)). As a result, in Jamison, our Supreme Court held where a criminal defendant seeks relief on the basis of after discovered evidence from a guilty plea, relief is appropriate only where the defendant 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 of that particular case, the “interest of justice” requires the defendant’s guilty plea to be vacated. Id. “In other words, a defendant may successfully disavow his guilty plea only where the interest of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interest in maintaining the finality of guilty-plea convictions.” Id. The Court pointed out:

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...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).

Jamison, *supra*.

The Lack of Merit of appellant's argument

Basically, what appellant asks is for this Court to vacate his **guilty pleas** to two (2) counts of murder, attempted armed robbery, and possession of a weapon during a violent crime, based on one (1) affidavit and one (1) notarized statement of (2) co-defendant's recanting their earlier statements to police incriminating appellant some thirteen (13) years ago. As previously shown, the South Carolina Supreme Court has repeatedly held recanted testimony is unreliable and should be subjected to close scrutiny when offered as a ground for a new trial. Porter; Parker, (recantation by jailhouse trustee, who testified at trial he heard defendant confess to committing crime, not sufficient basis for granting new trial); Mayfield, (recantation by jail house informer who had served time in same penitentiary with defendant was properly discounted by trial judge as not credible); Whitener; Rhodes. To hold that evidence of recanted testimony would be sufficient to require the granting of a new trial would open the door to fraud and perjury, as well as to invite interminable delays in the disposition of causes. Parker; Mayfield. Federal authority is in agreement. Coyle, 260 F.3d at 707-08; Chambers, 944 F.2d at 1264 (legally, recantation affidavits are always viewed with extreme suspicion); Carbone, 880 F.2d 1500 (same); May, 955 F.2d 299 (similar); Gallego, 191 F.2d 156 (same), *abrogated on other grounds by Crawford v. Washington*; United States v. Waters, 194 F.3d 926 (8th Cir. 1999); United States v. Pearson, 203 F.3d 1243 (10th Cir. 2000); United States v. Santiago, 837 F.2d 1545 (11th Cir. 1988); United States v. Kearney, 682 F.2d 214 (D.C. Cir. 1982); MacDonald, 640 F.Supp. 286. *See also e.g. United States*

v. Flynn, 791 F.Supp. 133 (M.D.N.C. 1992)(newly available testimony of recently convicted and sentenced co-defendants is inherently suspect; co-defendants have nothing to lose by exonerating their friend and co-defendant); United States v. Castano, 756 F.Supp. 820, 824 (S.D.N.Y. 1991)(same).

In this case, appellant obtained these affidavits of recantation eleven (11) years after his admission of guilt to these charges. At the time these affidavits were obtained, the two (2) co-defendants [affiants] who are attempting to recant their earlier statements to police had already completed their prison and/or probation sentences and been released. As the trial court found, the recantations are not credible. Similarly, our Supreme Court has held that proffered testimony of a person who will not incur any significant penalty by confessing to a crime, has not been deemed to be credible. *See e.g.*, State v. Fowler, 264 S.C. 149, 213 S.E.2d 447 (1975)(where person already serving 32 years for armed robbery, and was facing other indictments, proffered testimony confessing to armed robbery that co-defendant was convicted of was not deemed credible); Accord Mercer, 381 S.C. at 167-70, 672 S.E.2d at 565-67 (capital murder defendant was not entitled to new trial based on after-discovered evidence based on prison informant's testimony that defendant's accomplice admitted being the triggerman; accomplice's participation in, and first-hand knowledge of, the crime, was known to defendant and the State from the beginning, the prison informant had extensive criminal history and had given varying versions as to the timing and the substance of accomplice's alleged confession, and the alleged confession conflicted with known facts regarding the crime). Judge Gibbons did not abuse his discretion. State v. Rector, 166 S.C. 312, 164 S.E. 872 (1932)(affidavits in motion for a new trial based upon after discovered evidence, which conflicted with testimony presented, would have been of little value, because

there would have remained a sharp issue of fact to be determined by the jury.... It cannot be said, therefore, that the affidavits must necessarily lead any reasonable mind to the inference that the newly discovered evidence would probably change the result); State v. Griffin, 100 S.C. 331, 84 S.E. 876 (1915)(affidavits of two inmates of the City Guard House were held to be too unreliable to warrant the upsetting of the verdict of a jury on a motion for a new trial on the ground of after discovered evidence); State v. Corn, 224 S.C. 74, 77 S.E.2d 354 (1953)(where after discovered evidence consisted of alleged affidavit of deceased father of defendant, who claimed it was he who killed the deceased and not the defendant, the court observed the normal reaction of a parent is to shield the child where possible and it is not unreasonable to suspect this as being the motive behind the alleged confession, where defendant's father and his wife both knew the father was dying and beyond the reach of the law); State v. Morrison, 246 S.C. 575, 145 S.E.2d 15 (1965)(no error in denying motion for a new trial based on after-discovered evidence where judge concluded the affidavits were not credible with one of the affiants being a habitual criminal who was confined to the State Penitentiary along with appellant when he made his affidavit, and the other, also a confirmed criminal, as a brother-in-law of the defendant and was, at the time of making his affidavit confined in the county jail); State v. Mayfield, 235 S.C. 11, 109 S.E.2d 716 (1959)(where witness against defendant, who had been a jailhouse trustee when crime was committed and his testimony was presented, had been paroled and then convicted again after the trial, was a habitual criminal, and was serving a long sentence in the prison where the defendant was also being housed when he made his affidavit recanting his earlier testimony, such evidence was properly discounted by the circuit judge).

Additionally, both of these co-defendants had credibility issues even before their attempted

recantations. Both gave multiple statements to police, **of which appellant was aware prior to his pleas of guilty**, in which they first denied any knowledge of the murders or who committed them, and then directly implicated appellant. Appellant was aware of the credibility problems of these two (2) witnesses before his entry of his guilty plea and admission he committed the murders. *See Commonwealth v. Hayward*, 437 Pa. 215, 263 A.2d 330 (1970)(affidavits of witnesses whose identities were known at trial are not after-discovered evidence); *Commonwealth v. Johnson*, 228 Pa. Superior Ct. 364, 323 A.2d 295 (1974).

Further, the recantations cannot overcome the identification of appellant as the murderer by the husband of the victims, who identified appellant as the shooter from a photographic line-up shortly after the incident. And, the recantations cannot overcome the identification of appellant as the murderer by Haywood Watts who has not recanted his statement *and* gave no previous inconsistent statements to police.

Further, Cunningham's claim that the Solicitor coerced him into his willingness to testify has no credibility. First, Cunningham did not provide an affidavit but only a notarized statement. Therefore, he has not given a statement under oath *and* avoided testifying at the motion hearing by failing to appear. His "notarized" *statement* is suspect on its face, since he did not subject himself to the penalty of perjury, and there is no explanation in the record why he failed or refused to give a sworn affidavit. Further, Cunningham incriminated appellant **in statements to police** before the Solicitor was even involved in the case. *See Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006)(finding state could not have coached child witness where witness gave incriminating statement on issue of armed robbery to police before Solicitor's office was involved). Further, Cunningham has given numerous prior statements to police regarding his knowledge of the case;

and, as a result, his claims in his statement lack any credibility. Finally, Cunningham waited approximately eleven (11) years to make the claims he is now making in his *statement*. There is absolutely no merit to this argument because Cunningham lacks any credibility. Judge Gibbons finding that Cunningham lacked credibility is fully supported by the record.

While the fact that a defendant has pled guilty is not a per se bar to making a motion for a new trial on after discovered evidence, *see State v. Williams*, 108 S.C. 295, 93 S.E. 1006 (1917), a guilty plea is still a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmates' right to contest the validity of such a plea is usually, but not invariably, foreclosed. *Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct 1621 (1977); *Dalton v. State*, 376 S.C. 130, 654 S.E.2d 870 (Ct. App. 2007). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. *Crawford v. United States*, 519 F.2d 347 (4th Cir. 1975); *Edmonds v. Lewis*, 546 F.2d 566, (4th Cir. 1976); *Dalton v. State*, 376 S.C. 130, 654 S.E.2d 870 (Ct. App. 2007).

Appellant's "[s]olemn declarations in open court carry a strong presumption of veracity." *Blackledge*, 431 U.S. at 74; *United States v. Eades*, ___ Fed. Appx. ___, 2014 W.L. 4792062 (4th Cir. 2014)(not reported in federal reporter); *Fields v. Attorney Gen.*, 956 F.2d 1290, 1299 (4th Cir. 1992)("Absent clear and convincing evidence to the contrary, a defendant is bound by the representations he makes under oath during a plea colloquy"); *Beck v. Angelone*, 261 F.3d 377, 395-96 (4th Cir. 2001)(similar). A guilty plea is a "'grave and solemn act,' which is 'accepted only with care and discernment.'" *United States v. Hyde*, 520 U.S. 670, 677, 117 S.Ct. 1630 (1997). *See also United States v. Lambey*, 974 F.2d 1389, 1394 (4th Cir. 1992)(If an appropriately

conducted plea colloquy and proceeding is to serve a meaningful function, on which the criminal justice system can rely, “..it must be recognized to raise a strong presumption that the plea is final and binding.”). Indeed, “the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas.” United States v. Timmreck, 441 U.S. 780, 784, 99 S.Ct. 2085, 2087 (1979).

Appellant has not shown anything which would overcome the “strong presumption of veracity” carried by his statements at the guilty plea and sentencing hearing. See United States v. Morrow, 914 F.2d 608 (4th Cir. 1990). “A plea of guilty is an admission or a confession of guilt, and as conclusive as a verdict of a jury; it admits all material fact averments of the accusation, leaving no issue for the jury, except in those instances where the extent of the punishment is to be imposed or found by the jury.” Jamison; State v. Fuller, 254 S.C. 260, 174 S.E. 774 (1970)(citing 21 Am Jur. (2d) Criminal Law, section 495; 22 C.J.S. Criminal Law s 424(1); State v. Caldwell, 269 N.C. 521, 153 S.E.2d 34 (1967) [*and the cases cited therein*]), *reversed on other grounds* Furman v. Georgia. See also North Carolina v. Alford, 400 U.S. 25, 37 (1970)(guilty pleas constitute an express admission of guilt upon which a sentence may be imposed).

“The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision.” Jamison, (*quoting* Brady v. United States, 397 U.S. 742, 757 (1970)). “A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State’s case or the likely penalties attached to alternative courses of action.” Id. Indeed, “[w]hat is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, but whether, years

later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and putting the State to its proof.” Jamison, (quoting McMann v. Richardson, 397 U.S. 759, 773 (1970))(noting the compelling interests in maintaining the finality of guilty-plea convictions validly obtained). “Furthermore, there must be some consequence attached to the decision to plead guilty.” Id., (quoting People v. Schneider, 25 P.3d 755, 761 (Colo. 2001)) (“A defendant who voluntarily and knowingly enters a plea accepting responsibility for the charges is properly held to a higher burden in demonstrating to the court that newly discovered evidence should allow him to withdraw that plea.”).

Additionally, appellant argued below the recantations should be considered in conjunction with the testimony of three (3) witnesses he presented at PCR. There is no merit to this argument for several reasons. First, this issue is not preserved for appellate review because appellant did not argue this in his brief on appeal. (See BOA, pp. 1-21). State v. Bray, 342 S.C. 23, 535 S.E.2d 636 (2000)(it is error for appellate court to consider issue not raised to it).

Second, the PCR Court addressed the issue of the alleged failure of counsel to investigate the case or interview witnesses prior to Petitioner’s guilty plea and found the claim had no merit. This issue has previously been decided and is the law of the case. Our federal court also addressed this issue and found it to be without any merit under its standard of review. That decision is also the law of the case.

Third, the PCR Court’s decision and that of the federal habeas court are fully supported by the record at the PCR hearing. The testimony at the PCR hearing established counsel was diligent in the preparation and presentation of appellant’s case and defense. Counsel credibly testified at the PCR hearing he reviewed the discovery, including two (2) of the witness’ statements who

testified at the PCR hearing, autopsy reports, and gunshot residue tests. (App. p. 66). He also spoke to the victim's husband who was an eyewitness to the crimes in Lancaster County. (App. p. 6). Counsel also spoke to appellant's co-defendant, Calvin Peay, who implicated appellant in the murders and told police appellant gave him the gun after the murders, where the murder weapon was placed, and how it was hidden. (App. p. 11, 68).¹⁶ Peay is one (1) of the co-defendant's now attempting to recant his incriminating statements. He was not attempting to recant his statements eleven (11) years ago when appellant pled guilty. Counsel attempted to speak with other co-defendants of appellant; however, he was rebuffed by their attorneys.

Counsel also credibly testified that, had Petitioner decided not to plead guilty, he would have done further investigation. (App. p. 57, ln. 15). As the Court noted in Strickland v. Washington, 466 U.S. 668 (1985), the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based ...on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. Id. at 691.

Appellant's statement that had he known the testimony of the three (3) women he offered at PCR, Takeisha Cunningham, Tara Evans, and Crystal Duncan, he would not have pled guilty is simply not credible. Ms. Cunningham's existence was no secret to appellant prior to his guilty plea. While appellant denied it at PCR, counsel testified he reviewed the discovery in the case with appellant. Ms. Cunningham had given a written statement to police stating there were six (6)

¹⁶Peay initially told police appellant and he ran to his bedroom after the shooting and appellant asked him to hold the gun, and appellant placed it under Peay's mattress. Peay later admitted to police that appellant handed him the gun in his bedroom, and he actually placed it under the mattress. (See police investigation reports).

individuals around the victim's car prior to the shooting and none of the six (6) were appellant. (See statement of Takeisha Cunningham).¹⁷ As a result, appellant was aware of her alleged exculpatory statement. Tara Evans also gave a statement to police. Again, counsel testified he reviewed Ms. Cunningham's and Ms. Evans' statements prior to the plea, and he reviewed the evidence in the case with appellant. In her statement, Ms. Evans states she was outside the third female witness' (Crystal Duncan's) apartment and she was *talking to Crystal Duncan*. She was sitting in a car. She was not looking at the victim's car when the shooting occurred and only turned around after the shooting occurred and after she asked Crystal Duncan what that noise was, and Crystal said the noise was a gunshot. Evans told police she saw six (6) to eight (8) boys running. They looked like teenagers. She stated *she knew some of them, but not by name*, and could identify approximately four (4) or more of them if she saw them again. She said they ran toward the first set of apartments [where Peay lived and appellant disposed of the gun]. If Ms. Evans' testimony at PCR is to be believed, she had known appellant for several years and was a friend, so appellant would have known based on her earlier statement to police that she did not identify him, because she states the boys she recognized she did not know by name. Counsel credibly testified under oath he reviewed the discovery and the evidence in the case with appellant. (App. p. 83, ll. 11-13). Appellant was well aware of this witness and the existence of Ms. Duncan as a witness through Ms. Evans' statement. Appellant chose to plead guilty anyway. State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998)(motion for a new trial was properly denied where the

¹⁷Ms. Cunningham's non-identification of appellant is suspect. Initially she told police she saw six (6) boys around the victim's car. She told police she could only identify four (4) of the six (6). At the police station, she said she believed the other two (2) were Rico Stevens and Haywood Watts. The police officer involved in this subsequent identification noted on his report that Ms. Cunningham saw these two (2) individuals, Stevens and Watts, while she was there at the station to be interviewed.

existence of possible witnesses and their testimony was known to the defense prior to trial, and such testimony was merely cumulative); State v. Deese, 266 S.C. 534, 225 S.E.2d 175 (1976)(where defendant knew of evidence that would have identified another person as the participant in the crime, but waited until after the trial to present the witness, who claimed to be the perpetrator of the crime, motion for new trial was properly denied.); State v. Fowler, 264 S.C. 149, 213 S.E.2d 447 (1975)(where other persons informed defendant another person had committed the armed robbery, prior to defendant's arrest, defendant could not claim such information was after discovered evidence that could not have been obtained by due diligence); State v. Nicholson, 228 S.C. 300, 89 S.E.2d 876 (1955)(similar); State v. Clark, 130 S.C. 149, 125 S.E. 297 (1924)(same); State v. Bigham, 123 S.C. 411, 117 S.E. 57 (1923); State v. Griffin, 100 S.C. 331, 84 S.E. 876 (1915)(similar).

Furthermore, as plea counsel testified at the PCR hearing, these witnesses' testimony was suspect. Counsel testified at the PCR hearing he was not even sure he would have called these witnesses had appellant gone to trial. (App. pp. 55, ln. 20). Each had criminal records with which they were impeached at the PCR hearing. Two (2) of the witnesses had prior convictions for forgery. Each admitted they were friends with appellant or with his family and had been for some time. Furthermore, they were some distance removed from the actual shooting itself and were not as close as the other four (4) witnesses who identified appellant as the shooter. Appellant's three (3) witnesses offered at PCR were twenty (20) to forty (40) feet away from the incident. (App. p. 31, ln. 3; 37, ln. 19). Additionally, at least two (2) of these witnesses testified they were not even looking at the victim's car at the time of the shooting and only looked up after hearing the shot and ducking or asking a question of the other witness. Counsel testified it is "hard to imagine that the

jury would weigh their testimony more heavily than they would weigh Tommy Jury's." [the surviving husband]. (App. p. 63, ln. 23). Mr. Jury was seated in the driver's seat of the car when appellant shot into the car killing his wife and their unborn baby. (App. p. 9, ln. 16). He positively identified appellant in a photographic line-up, stating "that's him, I'll never forget that face." (App. p. 63, ln. 16). Further, Haywood Watts identified appellant as the shooter and has never recanted the one (1) and only statement he gave to police. (See Statement of Haywood Watts).

Appellant's assertion he would not have pled guilty if he had known of these three (3) female witnesses' testimony lacked credibility. Appellant lacked any credibility at the PCR hearing. Under oath, appellant claimed he lied while he was under oath during his guilty plea. (App. p. 80, ln. 3). When he pled guilty, appellant admitted he was the murderer of Ms. Jury and her unborn child. He also admitted he attempted to rob them. He admitted the underlying facts as to the commission of the murder of the two (2) victims. (App. p. 95). Appellant apologized to the victim's family for his criminal acts, including the murder of Mrs. Jury and her unborn child, and asked Mr. Jury for his forgiveness. (See Tr. Dec. 9, p. 9).

As previously noted, a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, and a criminal inmate's right to contest the validity of such a plea, is usually, but not invariably, foreclosed. Blackledge v. Allison. Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of those statements. Crawford; Edmonds. Appellant has failed to present a valid reason why this Court should allow him to depart from the truth of his statements made during his guilty plea:

The Court: Mr. Hall, are you pleading guilty of your own free will and accord?

Mr. Hall: Yes, Sir.

The Court: And are you guilty?

Mr. Hall: Yes, sir.

The Court: Did you commit the two offenses of murder, as stated in the indictment?

Mr. Hall: Yes, sir.

The Court: Did you do that?

Mr. Hall: Yes, sir.

(See Tr. of Guilty Plea p. 11, 16-25). After the Solicitor recited the facts regarding how appellant murdered Mrs. Jury and her baby, appellant made the following statements:

The Court: All right, Sir.

All right, Mr. Hall, Did you hear the Solicitor recite into the record the facts as the (sic) alleges that they occurred in this case?

Mr. Hall: Yes, Sir.

The Court: Do you agree or disagree?

Mr. Hall: Yes, Sir.

The Court: You agree?

Mr. Hall: Yes, Sir.

The Court: Is that what happened?

Mr. Hall: Yes, Sir.

The Court: Is that what you did?

Mr. Hall: Yes, Sir.

(Guilty Plea Tr. pp. 21, ln. 21 - 22, ln. 8).

Counsel testified at PCR that the State had a strong case against appellant. This testimony is supported by the record. The State had Mr. Jury's testimony and identification of appellant as the shooter. Mr. Jury was just a few feet from appellant when the shooting occurred. The shooting occurred during daylight. Appellant had approached the Jury's car two (2) times before actually firing the fatal shot, so Mr. Jury got a clear look at appellant. At that time, the State also had the testimony of co-defendant Peay implicating appellant as the shooter in this double murder. (App.

p. 62, ln. 16). Peay not only implicated appellant but implicated himself in the crimes by admitting in one (1) statement he handed the gun to appellant immediately prior to appellant murdering Mrs. Jury and her unborn child. Peay was also in close proximity to appellant when the crime was committed. Peay also implicated himself in the cover-up of the crime and his statement implicating himself and appellant led directly to police recovering the murder weapon. At that time, the State had two (2) other witnesses, one (1) who initially denied any knowledge of the murder, but both eventually told police appellant was the trigger-man. Both were friends of appellant and present when the murders occurred. (See police investigation reports regarding Brandon Cunningham and Haywood Watts).¹⁸ Further, the gun used by appellant to commit the murders was forensically matched to the bullet taken from the victim's body. The PCR Court correctly found counsel was not ineffective in failing to investigate female witnesses Cunningham, Evans, and Duncan. The evidence against appellant was strong and convincing with or without these witnesses. See Savino v. Murray, 92 F.3d 593, 599 (4th Cir. 1996)(if there exists no reasonable probability that a possible defense would have succeeded at trial, the alleged error in failing to disclose or *pursue it* cannot be prejudicial).

Appellant was nineteen (19) years old at the time of his guilty plea. Appellant was faced with strong and convincing evidence of his guilt. Appellant was facing a sentence of life without the possibility of parole on each murder charge, and as counsel testified at PCR, given the facts in

¹⁸As previously stated, Watts came forward to police with his attorney Lionel Lofton and gave a detailed statement to that appellant murdered Ms. Jury and her unborn child. Watts told police he was just a few feet away and saw appellant near the driver's side door of the victim's car. He saw appellant raise his arm and then Watts heard a gunshot. Watts said the victim's car then sped away. Watts said he could not see the gun because he believed another co-defendant's body was blocking his view. Watts said appellant and others near the car then fled. Watts gave only one (1) statement and has never recanted that statement. (See attached statement of Haywood Watts).

this case, there was a significant likelihood, if found guilty by a jury, appellant could have been sentenced to life in prison. The State made a plea offer to allow appellant to plead guilty to the Lancaster County charges and in exchange the State would recommend concurrent sentences and appellant not be sentenced to life without parole. Additionally, the trial judge gave counsel an indication in a pre-plea conference he would sentence appellant somewhere in the range of thirty-eight (38) years, not forty (40) to fifty (50) years, and this was communicated to appellant. Finally, appellant was facing additional serious charges in Chester County, which included burglary first degree, armed robbery, and kidnapping for which he could receive a life sentence or substantial prison time. These charges were eventually dismissed as part of his pleas to the Lancaster County charges. Because of these factors, the PCR Court correctly determined appellant's pleas were knowingly, voluntarily and intelligently entered.

As the record reflects, appellant's pleas to two counts of murder, attempted armed robbery and possession of a weapon during a violent crime were knowingly and voluntarily entered according to the mandates of Boykin v. Alabama, 395 U.S. 238 (1969) and later cases developing that doctrine. See Vickery v. State, 258 S.C. 33, 186 S.E.2d 827 (1972). The transcript of the guilty plea clearly shows appellant understood the charges to which he was pleading and the possible sentences he could receive. There is no doubt appellant was aware of the consequences of his plea. The plea judge recited on the record the maximum sentences appellant could receive for the various charges. Appellant acknowledged he wanted to plead guilty, and *he was in fact guilty of the crimes*. At his later sentencing, appellant asked the victim's husband, Mr. Jury, to forgive him for what he had done, murdering Mr. Jury's wife and unborn child. Appellant received a substantial benefit for himself, by these pleas, and he has not shown anything that would overcome

the “strong-presumption of veracity” carried by his statements at the guilty plea hearing of a voluntary decision to plead guilty. *See United States v. Morrow*, 914 F.2d 608 (4th Cir. 1990).

Appellant was informed that by pleading guilty he would waive and give up his right to remain silent, to make the State prove him guilty, the right to confront witnesses, and put up his own defense. Appellant was also carefully examined on the record about waiving and giving up his right to a trial by jury. Appellant understood all that the judge had told him and asked him during the plea. Appellant never asked the judge to explain anything, even though he was instructed by the plea judge to do so if he had any questions. Appellant admitted on the record his plea was his decision, and he made it of his own free will. Appellant stated he was satisfied with his attorney’s representation. There simply is no merit to this claim, and appellant is not entitled to any relief. *Id.*; *Unites States v. Marquez*, 909 F.2d 738, 742 (2nd Cir. 1990)(a defendant’s plea is not rendered involuntary because he enters it to save himself many years in prison).

Appellant’s present claim that he would not have pled guilty if he had known of Cunningham’s and Peay’s recantations or that there recantations would have changed the result if a new trial were granted is without merit. First, there recantations are not credible given they gave statements at the time of the crime directly implicating appellant, and appellant himself subsequently admitted under oath to Judge Huff that he committed the crimes. Further, there recantations did not take place until eleven (11) years after appellant’s guilty plea to the crimes and after Cunningham and Peay had been released from prison. Finally, the two (2) co-defendant’s who are attempting to recant their prior statements incriminating appellant failed to appear for the motion hearing and face cross-examination on their purported recantations after being subpoenaed to do so. *See Mercer* (finding trial court’s credibility determination was reasonably supported by

the evidence and therefore the motion for a new trial was properly denied). Furthermore, their recantations cannot overcome the positive identification of appellant as the murderer by the surviving victim, who was in close proximity to appellant when he fired the fatal shot, and the identification of appellant as the perpetrators of these murders by Haywood Watts, who has never recanted his original and only statement to police. The decision of Judge Gibbons is reasonably supported by the evidence and must be affirmed. Id. Appellant has failed to show that this is the rare case where the interests of justice will require that a knowing and voluntary guilty plea be vacated. Jamison.

CONCLUSION

For the above stated reasons, Judge Gibbons did not err in denying the motion for a new trial. As a result, this appeal should be denied and dismissed.

Respectfully submitted,

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By: _____

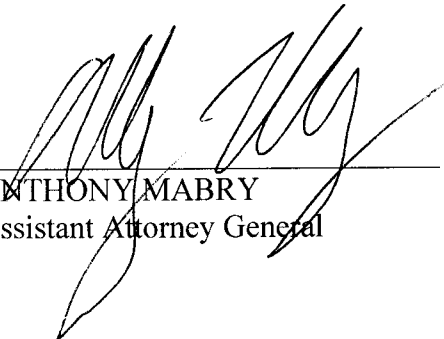

Anthony Mabry

ATTORNEYS FOR RESPONDENT
P.O. Box 11549
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November 10, 2014

CERTIFICATE OF SERVICE

I, **Anthony Mabry**, hereby certify that I have served the *Initial Brief of Respondent and Designation of Matter* in the foregoing action by depositing copies in the United States Mail to Tricia A. Blanchette, Esquire, P. O. Box 12725, Columbia, SC 29211 this 10th day of November, 2014.



ANTHONY MABRY
Assistant Attorney General

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NOV 10 2014

SC Court of Appeals



ALAN WILSON
ATTORNEY GENERAL

November 10, 2014

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

Re: The State v. Lakeithon Hall
Appellate Case No. 2013-002616

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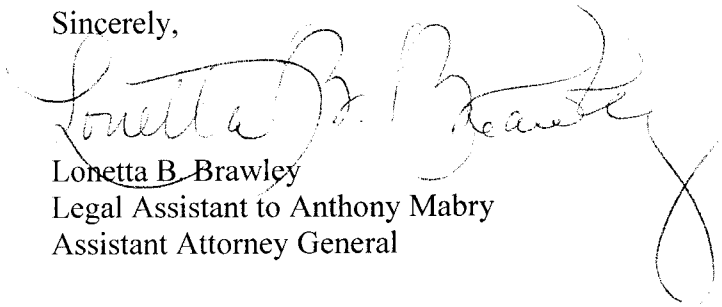
NOV 10 2014

SC Court of Appeals

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 opposing counsel with same.

Sincerely,


Lonetta B. Brawley
Legal Assistant to Anthony Mabry
Assistant Attorney General

/lbb
Enclosure

cc: Tricia A. Blanchette
Douglas A. Barfield, Jr., Solicitor
Trisha Allen, Victims Assistance