STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of General Sessions
The Honorable Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2013-002616

THE STATE, RESPONDENT,

v.

LAKEITHON M. HALL, APPELLANT.

BRIEF OF APPELLANT

TRICIA A. BLANCHETTE
PO Box 12725
Columbia, SC 29211
(803) 988-0008
ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of General Sessions
The Honorable Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2013-002616

THE STATE, RESPONDENT,

v.

LAKEITHON M. HALL, APPELLANT.

BRIEF OF APPELLANT

TRICIA A. BLANCHETTE
PO Box 12725
Columbia, SC 29211
(803) 988-0008
ATTORNEY FOR APPELLANT

INDEX

INDEX.....1

TABLE OF AUTHORITIES.....2

STATEMENT OF ISSUES ON APPEAL.....3

STATEMENT OF THE CASE.....4

STATEMENT OF THE FACTS.....7

ARGUMENT.....12

WHETHER THE LOWER COURT ERRED IN DENYING APPELLANT'S REQUEST FOR A CONTINUANCE.....12

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.....15

CONCLUSION.....20

TABLE OF AUTHORITIES

Federal Cases:

Arizona v. Fulimante, 499 U.S. 279, 111 S.Ct. 1246 (1991).....18, 19

State Cases:

Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983).....15

Johnson v. Catoe, 345 S.C. 389, 548 S.E.2d 587 (2001).....18, 19

State v. Colden, 372 S.C. 428, 641 S.E.2d 912 (Ct. App. 2007).....12

State v. DeAngelis, 256 S.C. 364, 182 S.E.2d 732 (1971).....13, 16

State v. Deese, 266 S.C. 534, 225 S.E.2d 175 (1976).....15

State v. Funderburk, 367 S.C. 236, 625 S.E.2d 248 (Ct. App. 2006).....12

State v. Irick, 344 S.C. 460, 545 S.E.2d 282 (2001).....12

State v. Johnson, 376 S.C. 8, 654 S.E.2d 835 (2007).....15

State v. Mayfield, 235 S.C. 11, 109 S.E.2d 716 (1959).....15, 18

State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009).....13, 18, 19

State v. Pierce, 263 S.C. 23, 207 S.E.2d 414 (1974).....15

State v. Preslar, 364 S.C. 466, 613 S.E.2d 381 (Ct. App. 2005).....12

State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977).....15

State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993).....15

State v. Simmons, 279 S.C. 165, 303 S.E.2d 857 (1983).....15

State v. Spann, 334 S.C. 618, 513 S.E.2d 98(1999).....15

State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001).....12

State v. Yarborough, 363 S.C. 260, 609 S.E.2d 592 (Ct. App. 2005).....12

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

During the February 2001 term of the Lancaster County Grand Jury, Appellant was indicted on two counts of Murder (Indictment No.: 2001-GS-29-71, 346), one count of Attempted Armed Robbery (Indictment No.: 2001-GS-29-72), and one count of Possession of a Firearm during a Violent Crime (Indictment No.: 2001-GS-29-73), R. pp. 1-4, 5-8, 9-12. On December 6, 2002, Appellant appeared in front of the Honorable Paul E. Short at the Lancaster County Courthouse and entered a plea of guilty as indicted. R. pp. 29-51. Appellant was represented by Ross Burton, Esquire. The State was represented by Douglas A. Barfield, Jr., Senior Assistant Solicitor. The Honorable Paul E. Short sentenced Appellant to a total term of thirty-eight (38) years. A direct appeal was not filed on Appellant's behalf. R. pp 52-66.

On October 14, 2003, Appellant filed an Application for Post Conviction Relief in Lancaster County (Docket No.: 2003-CP-39-960). R. pp. 67-71. On March 21, 2006, an evidentiary hearing was held at the Lancaster County Courthouse in front of the Honorable John C. Hayes, III. Appellant was represented by Govan T. Meyers, Esquire. The State was represented by Molly R. Crum, Assistant Attorney General. R. pp. 72-137. On March 2, 2006, the Honorable John C. Hayes, III, issued an Order denying the Application for Post Conviction Relief. R. pp. 138-42.

Appellant timely filed a Notice of Intent to Appeal in the South Carolina Supreme Court, and his appeal was perfected by Wanda H. Carter, Esquire, from the Division of Appellate Defense. R. pp. 143-49. On May 22, 2008, the South Carolina Supreme Court denied Certiorari, and the Remittitur was issued on June 9, 2008. R. p. 161-62.

On July 7, 2008, Appellant filed a pro-se Petition for Writ of Habeas Corpus. (Docket No.: 09-7543). R. pp. 163-95. On December 8, 2008, the State moved for Summary Judgment. R. pp. 196-220. After the Honorable Bruce Howe Hendricks issued his Report and Recommendation granting the State's Motion for Summary Judgment, the Honorable R. Bryan Harwell adopted the Report and Recommendation on July 31, 2009. R. pp. 221-43.

On August 14, 2009, Appellant filed a Notice of Appeal seeking a Certificate of Appealability in the Fourth Circuit Court of Appeals. On January 21, 2010, the Fourth Circuit Court of Appeals denied and dismissed Appellant's appeal. A timely Petition for Rehearing was submitted, which was denied on March 5, 2010.

On May 17, 2010, Appellant filed a pro-se Petition for Writ of Certiorari in the Supreme Court of the United States (Docket No.: 10-5259). On October 4, 2010, an Order denying Petition for Writ of Certiorari was entered.

On July 17, 2013, Appellant, through counsel, submitted a Motion Pursuant to Rule 29(b), SCRCrimP, to the Lancaster County Clerk of Court. R. pp. 244-54. By way of attachments, Appellant's Motion included the affidavits of Appellant, Calvin Peay (Peay) and Brandon Cunningham (Cunningham). 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.

On August 30, 2013, a hearing was held in front of the Honorable Brian M. Gibbons at the Lancaster County Courthouse. Appellant was present and represented by Tricia A. Blanchette, Esquire. R. pp. 255-92. The State was represented by Solicitor

Douglas A. Barfield, Jr. Appointed counsel for Peay and Cunningham were present, but Peay and Cunningham failed to appear. Tricia A. Blanchette explained that Peay and Cunningham had been properly served subpoenas, and she requested a continuance. R. pp. 259-60. The Honorable Brian M. Gibbons denied the request for a continuance. R. p. 260. During the hearing, arguments were made and documents were introduced by both parties. At the conclusion of the hearing, the Honorable Brian M. Gibbons took the matter under advisement.

Following the hearing, the Honorable Brian M. Gibbons instructed the State to submit a proposed Order. On November 12, 2013, the Order was issued and filed, from which this appeal follows. R. pp. 342-52.

STATEMENT OF THE FACTS

On November 20, 2000, Deputies Jeff Jackson and Todd Wallace, of the Lancaster County Sheriff's Department encountered a car being driven erratically on Arch Street in the City of Lancaster. R. pp. 41-42. Upon making contact with the car, the deputies discovered that Tommy Jury was driving the car and his pregnant wife (Sheila Jury) was in the passenger seat with a gunshot wound to her left shoulder / upper arm. R. p. 42, lines 5-9. E.M.S. arrived on the scene, and Mrs. Jury was transported to the emergency room at Springs Memorial Hospital, where she was pronounced deceased upon arrival. R. p. 42, lines 12-15. An emergency c-section was performed, and Sheila Catherine Jury (baby) was delivered and immediately resuscitated. R. p. 42, lines 16-20. Thereafter, she was transported to Carolinas Medical Center, where she remained on life support for several days. R. p. 42-43. Following a consult regarding the likelihood of serious and permanent mental injuries, Mr. Jury chose to discontinue life support and the baby was deceased within thirty minutes after life support was discontinued. R. p. 43, lines 8-15.

Mr. Jury informed the deputies that his wife had been shot at Pardue Street Apartments, and law enforcement, including city, county and SLED agents, converged on the apartment complex. R. p. 43, lines 16-21. Based upon identifications made by Mr. Jury, three black males were arrested at the scene (Peay, Cunningham and Alexander).

On November 21, 2000, Mr. Jury gave a statement to Pat Parsons of the Lancaster City Police Department, which provided the following details. R. pp. 44, 293. Mr. Jury and his wife were returning from Columbia where they had received an insurance settlement check for $4,500.00. They went to Palmetto Bank on Main Street and

deposited $4,200.00 and stopped at McDonalds. After leaving McDonalds, they took Highway Nine and headed back into town. Mrs. Jury asked Mr. Jury to head back to the bank to get a money order, so Mr. Jury took Pardue Street to cut back to the bank. He found the road to be a dead end, turned around and began driving back out with his window two thirds of the way down. R. p. 293. He saw three black males and one stated "Hey man, what do you want?" He responded that he did not want anything and he was lost. A young black male said "Give me your money," and he told him that he did not have any money. He saw the young black male pull a small dark colored revolver from his jacket and he stepped on the gas. As he was driving away, the young black male shot one time at the car, and he saw another light skinned black male standing near the shooter. R. p. 294.

After their arrest, both Peay and Cunningham gave a series of statements. In his first statement given on November 20, 2000, Peay denied hearing gun shots or having any information that would help police. R. p. 300. He explained that he was returning from Johnny's Mart and he arrived back at Pardue with Brandon Cunningham and Darrel Alexander. R. pp. 301, 303.

In his second statement that same day, which was audio/video recorded and summarized via incident report and at the motion hearing by the Solicitor, Peay stated that he was standing with Appellant, Cunningham, Heywood Watts (Watts) and Derrico Stevens (Stevens) in the 1800 block of Pardue Street Apartments when they saw two white people turn into the block, turn around and drive back towards them. R. p. 304. Appellant said he was going to rob them and yelled at the car, which came to a stop. R. p. 304. Appellant made contact with the driver, who wanted to buy drugs, and Appellant

told him to back up to the 1600 block. R. p. 304. Peay asked Appellant not to rob the victims, and he was not aware that Appellant had a gun. R. p. 304. Appellant approached the vehicle, which took off. Appellant fired one time into the vehicle. R. p. 304. Peay ran to his apartment and Appellant followed him. R. p. 304. Appellant hid the gun under the mattress of Peay's bed and left. R. p. 304.

On November 21, 2000, Peay agreed to take a polygraph. R. p. 305. Prior to the polygraph, Peay was interviewed and provided a third statement. R. p. 305. In this statement, he stated that Appellant told them that the victim wanted to buy "8 20's" of dope. R. p. 305. Appellant asked for Peay's gun, which he had found in the woods a couple days prior, and Peay gave it to him but turned around and was not paying attention. R. p. 305. He recalled hearing the car spinning out and the gun shot and running to his apartment. R. p. 305. Appellant was right behind him and returned the gun, and Peay put it under the mattress. R. p. 305.

Later that day, Peay gave a fourth statement, which was video taped and summarized via incident report. R. p. 306. In this statement, Peay gave the additional details that Hall stated "I want to try and get them, let me hold that gun." R. p. 306. Appellant took Peay's gun and walked over to the car and tried to rob them. R. p. 306. When the car attempted to leave, Appellant pointed the pistol at the car and fired one shot. R. p. 306. Peay stated that he had only had the gun for one day after finding it in the woods. R. p. 306.

On November 22, 2000, Peay provided a fifth statement, in which he indicated that Stevens gave the gun to Hall. R. p. 307. In response to why he waited to give this

information, he stated that Stevens "did not get caught up and everybody would know that I told." R. p. 307.

Turning to Cunningham's statements, he provided a three page statement on November 20, 2000 that stated that he was walking back from Johnny's Mart and headed to KFC with Peay and Alexander when he was stopped by police around 5:00 p.m. on November 20, 2000. R. p. 313. He did not hear any gunshots or know anything that would help police. R. pp. 314-15.

In his second statement given later that day, he agreed that he was in the Pardue Street Apartments on November 19, 2000 at 1:15 a.m. and he came in contact with a man that had dropped a female off in the 2300 block. R. p. 317. The man asked for marijuana, and Cunningham told him no one sold marijuana and to get out of the projects. R. pp. 317-18. He did not hear the man's response because the car was running, but he told him again to get out of the projects. R. p. 318. He struck him with his hand because "I have never seen his face before," and the man backed up and was leaving. R. p. 319. As the man was leaving, "some shots were fired," but he did not have a gun or know who fired the shots. R. pp. 319-20.

On November 22, 2000, Cunningham provided a third statement. R. pp. 323-29. He stated that Stevens was not present when the shooting took place. R. p. 323. He further stated that a white couple came into the 1900 block of Pardue Apartments and the male driver rolled down his window and asked for "8 twenties." R. p. 323. Everyone said the man "was the police." R. p. 323. Appellant shot at the man, the bullet missed him and hit the woman in the car. R. p. 323.

Later that day, Cunningham provided a fourth statement. R. p. 324. In this statement, he indicated that he was standing with Watts, Peay, Appellant and Stevens when a white couple drove by them. R. p. 324. The car turned around and backed into a parking space across from them. R. p. 324. He went over to the car, and the man told him he wanted "8-20's." R. p. 324. He was walking back to the guys and passed Appellant and told him what the man wanted. R. p. 324. Appellant leaned into the driver's side, and Cunningham heard a gunshot. R. p. 324. They all ran, and he heard the car tires spin out. R. p. 325.

After his arrest, Appellant did not give a statement to law enforcement.

At the motion hearing, the Solicitor acknowledged that six people, including Peay and Cunningham, were charged as principles. R. p. 281, lines 18-20. As a result of his plea agreement with the State, Cunningham "pled guilty to misprision of felony and some unrelated charges, and received a five year sentence suspended to two years, followed by two years probation." R. p. 281, lines 22-24. Peay was also extended a plea agreement by the State, and he "pled guilty to accessory before attempted armed robbery, and he also pled guilty to possession of a pistol under 21 for his possession of the pistol and provision of the pistol to Lakeithon Hall which became the murder weapon, he got an eight year sentence on the accessory before the armed robbery." R p. 283, lines 3-8.

ARGUMENT

I. The lower court erred in denying Appellant's request for a continuance.

Appellant submits that the lower court erred in denying his request for a continuance due to the absence of two necessary witnesses. On appeal, the lower court's ruling on a motion to continue will not be disturbed absent an abuse of discretion. State v. Yarborough, 363 S.C. 260, 609 S.E.2d 592 (Ct. App. 2005). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Colden, 372 S.C. 428, 435, 641 S.E.2d 912, 917 (Ct. App. 2007), State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001), State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249-50 (Ct. App. 2006). The lower court's ruling will not be disturbed if there is any evidence to support the ruling. Colden, 372 S.C. 428, 435-36, 641 S.E.2d 912, 917 (Ct. App. 2007), State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 829 (2001). For the lower court's ruling to be reversed, Appellant also must show that he was prejudiced as a result of the trial court's error since an error without prejudice does not warrant reversal. State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005).

At the beginning of the motion hearing, Appellant's counsel explained that affidavits of Calvin Peay and Brandon Cunningham were attached to the Motion Pursuant to Rule 29(b), SCRCrimP, and Peay and Cunningham had been subpoenaed to be present at the hearing. R. p. 259. Counsel further explained that appointed counsel were present in the courtroom to advise Peay and Cunningham prior to taking the stand. R. p. 259. As a result of their absence, counsel requested "a continuance for additional time to secure their presence." R. p. 259, lines 12-15.

In response, the State objected to the continuance. R. p. 259, lines 17-23. The State argued that the motion should fail for "inability to prosecute." R. p. 259, lines 17-23. Thereafter, the court ruled as follows:

> Well, I'm going to deny the continuance to extent that their live testimony is necessary here today, we will go ahead and hear it. I have what their sworn testimony purports to be, obviously the fact that they are not here, I don't know what to draw from that, but I will consider all of that when I look over everything.

R. p. 260, lines 12-17.

Following the court's ruling, the State further argued that the hearing should not proceed based upon the affidavits since the lower court could not make a proper credibility assessment, yet the State agreed with the court that he could draw a negative inference from the witnesses' failure to appear.[1] R. pp. 260-63. After the State's argument and brief response from Appellant's counsel, the court questioned:

> Well, if I make a credibility assessment that puts in the issue of whether or not a continuance is necessary because the witnesses are not here which brings up the whole adverse inference thing as to whether or not I can consider that in support of a motion or not.

R. p. 262, lines 17-21.

Not abandoning her request for a continuance, Appellant's counsel explained that pursuant to Rule 29(b), which did not preclude the consideration of affidavits alone, along with State v. DeAngelis, 256 S.C. 364, 371, 182 S.E.2d 732, 735 (1971) and State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009), it was proper for the motion to proceed based upon the affidavits submitted to the court. R. pp. 263-64. After reviewing Rule 29(b), SCRCrimP, in conjunction with Rule 59, SCRCP, and the case law provided, the lower court found that he would consider the witnesses' absence "under the ambient of

[1] The Solicitor conceded that he was "arguing kind of out of both sides of my mouth." R. p. 262, lines 23-4.

deciding their credibility," but he would allow the motion to proceed since he denied the request for a continuance. R. p. 264, lines 22 – 11, line 17.

Appellant submits that the lower court abused his discretion in denying his request for a continuance. Appellant further submits that the prejudice suffered is apparent from the court's comments at the hearing as well as his findings in the Order.

Turning to the Order, the lower court found that the evidence contained in the affidavits of Peay and Cunningham was newly available, not newly discovered. Due to the lower court's denial of the continuance, this assessment was made without hearing from Peay and Cunningham as to whether they would have provided the information contained in their affidavits at the time Appellant was facing a trial. Appellant submits that it is clear that this finding was prejudicially impacted by the court's failure to grant a continuance.

As to the court's credibility assessment, he made it clear at the hearing that he would draw a negative inference from the absence of Peay and Cunningham. His comments were substantiated by his finding in the Order, which reads: "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." R. p. 348. From the lower court's comments and findings, it is readily apparent that the absence of Peay and Cunningham, which resulted from the court's failure to grant a continuance, was highly prejudicial and greatly impacted the lower court's denial of Appellant's motion. Therefore, Appellant urges this Court to find that the lower court erred in denying Appellant's request for a continuance.

II. 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.

By way of the underlying motion, Appellant alleged after discovered evidence that warrants a new trial. To prevail on this claim a defendant "must show that the after-discovered evidence: 1) is such that it would probably change the result if a new trial were granted; 2) has been discovered since the trial; 3) could not in the exercise of due diligence been discovered prior to trial; 4) is material; and 5) is not merely cumulative or impeaching." State v. Spann, 334 S.C. 618, 619, 513 S.E.2d 98, 99 (1999) (citing State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993); See Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983).

The decision whether to grant a new trial rests within the sound discretion of the trial court, and the appellate court will not disturb the trial court's decision absent an abuse of discretion. State v. Johnson, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007); State v. Simmons, 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983). In State v. Mercer, 381 S.C. 149, 166-67, 672 S.E.2d 556, 565 (2009), the South Carolina Supreme Court has held:

> In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment. State v. Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977) (noting that the determination of whether new evidence is credible for purposes of a new trial motion rests with the trial court); State v. Deese, 266 S.C. 534, 538, 225 S.E.2d 175, 176 (1976) (noting that the trial court is tasked with assessing the new evidence in a motion for a new trial); State v. Pierce, 263 S.C. 23, 33, 207 S.E.2d 414, 419 (1974) (quoting State v. Mayfield, 235 S.C. 11, 34-35, 109 S.E.2d 716, 729 (1959)) ("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."). 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.

Despite the deferential standard of review, Appellant submits that the lower court erred in performing his gate keeping function when he failed to assess the credibility of the affidavits provided by Appellant and applied the incorrect standard to the affidavits of Peay and Cunningham. Thus, the lower court committed a reversible error of law.

By way of his written Order, it appears that the lower court did not directly assess the credibility of the affidavit of Appellant, which stated that the evidence at issue was not known to Appellant at the time of his plea and that he exercised all due diligence in discovering the evidence within the last year. The Order does find that the evidence was timely submitted to the court or discovered within the last year, yet the Order also finds that the evidence is "merely newly available and not newly discovered." R. p. 347.

In State v. DeAngelis, 256 S.C. 364, 371, 182 S.E.2d 732, 735 (1971), the South Carolina Supreme Court upheld the denial of a motion for a new trial. The Court reasoned:

> As is heretofore stated, the appellant did not file his own affidavit setting forth the after-discovered evidence and the facts to which the witnesses will testify. It 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, the affidavit of the accused must show 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. 24 C.J.S. Criminal Law § 1484c, page 286. Chilton v. Commonwealth, 170 Ky. 491, 186 S.W. 191. Nothaf v. State, 91 Tex. Cr. R. 378, 239 S.W. 215, 23 A.L.R. 1374.

Here, Appellant provided the court with two affidavits, was present at the motion hearing and counsel offered to provide his testimony to the Court. R. pp. 269-70, 289-90. As argued above, the court had decided to proceed based solely upon the affidavits of his

co-defendants but indicated that he would draw an adverse inference from the absence of Peay and Cunningham. As Appellant was present and his testimony was twice offered to the Court, it can be assumed that the court did not draw an adverse inference from solely considering his affidavits on the issues of his discovery and exercise of due diligence in bringing forth the affidavits of Peay and Cunningham and information contained therein. Additionally, it is apparent from the Order that the court did not perform his gate keeping function of assessing the credibility of Appellant's affidavits, yet the lower court's findings were in opposition to the sworn statements contained in Appellant's affidavits.

Furthermore, it appears that the lower court failed to consider the generous offers detailed by the Solicitor at the motion hearing that were extended and accepted by Peay and Cunningham for their statements and cooperation against Appellant. Simply put, what was known at the time of Appellant's plea was that Peay and Cunningham were cooperating with the State, not that Peay and Cunningham were willing to provide the information contained in their affidavits at issue, which essentially exonerated Appellant. As was stated in Appellant's affidavit, if this information would have been known to him at the time of his plea, he would have proceeded to trial.[2]

By way of the written Order, the lower court held: "I conclude as a **matter of law** that the Appellant has failed to meet his burden in establishing that he is entitled to a new trial based on after discovered evidence." R. p. 349. Appellant submits that the lower court's finding as "matter of law" falls squarely within this court's standard of review and should be reversed due to the lower court's failure to make the threshold credibility findings regarding Appellant's affidavits and failure to address the acknowledgement by

[2] As already argued, the lower court did not find that Appellant's affidavits lacked credibility and the lower court chose not to take testimony from Appellant despite him being present in the courtroom.

the Solicitor that Peay and Cunningham were extended generous offers and cooperating with the State at the time of Appellant's plea.

As discussed above, the South Carolina Supreme Court has held:

> 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. Mayfield, 235 S.C. 11, 34-35, 109 S.E.2d 716, 729 (1959). In applying this standard of review, in State v. Mercer, the South Carolina Supreme Court explained:

> 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.

381 S.C. at 170, 672 S.E.2d at 567. Even though the lower court cited to Mercer in determining that the affidavits of Peay and Cunningham were not credible and would not change the result of a new trial, the lower court failed to complete the analysis as set forth in Mercer. The lower court failed to address whether the affidavits could create a reasonable doubt if a new trial were granted.

Appellant submits that the information contained in the affidavits amount to a confession by the perpetrators of the crime at issue and an exoneration of Appellant; therefore, such evidence is not merely impeaching and would affect the outcome of a trial by creating a reasonable doubt in the mind of the jurors. Regarding confessions, the Supreme Court of the United States has held:

> A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. The admissions of a defendant come from the

> actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.

Arizona v. Fulminante, 499 U.S. 279, 296, 111 S.Ct. 1246, 1257 (1991) (Internal citations and punctuation omitted). See Johnson v. Catoe, 345 S.C. 389, 401, 548 S.E.2d 587, 593 (2001) (Pleicones, J., dissenting).

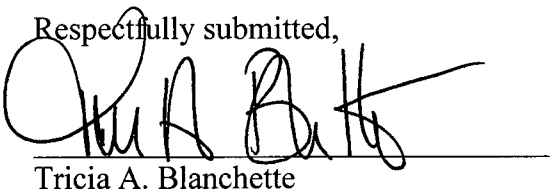
Here, the lower court inconsistently found that the affidavits of Peay and Cunningham were not credible and would not affect the outcome of a trial, yet determined that the affidavits, which must have been assumed credible to make such a finding, were merely impeaching. As was stated by the Solicitor, Peay and Cunningham were cooperating with the State and given generous plea agreements as a result. In finding that the affidavits were merely impeaching the court fails to address the clear statement by Peay that he lied "because he was afraid to go to prison" and statement by Cunningham that he lied to get Solicitor Barfield's deal. R. pp. 248-49. Appellant concedes that the multiple inconsistent statements given by Peay and Cunningham, which are addressed above, amount to impeachment evidence but not the present affidavits that exonerate Appellant and give an explanation for their prior statements. As a result, it is clear that the lower court committed an error of law and abused his discretion in failing to make a complete credibility finding pursuant to Mercer and in finding that the affidavits that he later found to be "not credible" were merely impeaching.

Therefore, Appellant would request that this Court reverse the Order of the lower court and hold that 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.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the above-mentioned findings of the lower court and remand the case for a new trial.

Respectfully submitted,



Tricia A. Blanchette
Bar No. 74904
Post Office Box 12725
Columbia, South Carolina 29211
(803) 988-0008
Attorney for Appellant

March 4, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of General Sessions
Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2013-002616
Trial Court Case No. 2001-GS-29-0071, 0072, 0073, 0346

THE STATE,

RESPONDENT,

v.

LAKEITHON M. HALL,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

Tricia A. Blanchette
Bar No. 74904
PO Box 12725
Columbia, SC 29211
(803) 988-0008

March 4, 2015