STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Sumter County
George C. James, Jr. Circuit Court Judge

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Appellate Case No. 2013-002735

STATE OF SOUTH CAROLINA,

Respondent,

v.

KEVIN CHOICE,

Appellant

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# FINAL BRIEF OF RESPONDENT

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**ATTORNEYS FOR RESPONDENT**

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Whether the trial court erred in denying the Appellant's motion for a new trial based on after-discovered evidence pursuant to Rule 29(b), SCRCrimP?

## RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Whether the hearing judge erred in denying the Rule 29 motion for new trial where Louis Jenkins recanted his earlier recantation and confirmed that his trial testimony against Kevin Choice was true. Whether the lower court correctly found that the evidence of the original affidavit and presented at the hearing as recanted and not true "would likely not change the result of the trial" and therefore the evidence did not satisfy the test for newly discovered evidence.

## RESPONDENT'S STATEMENT OF THE CASE

### Proceedings in the Court of Appeals

This matter is in the South Carolina Court of Appeals from the denial of a motion for new trial based on after-discovered evidence pursuant to Rule 29(b), SCRCrimP by the Honorable George C. James, Jr., filed December 6, 2013. ROA 407-10.

The notice of appeal was timely filed by Counsel Jeremy A. Thompson on December 20, 2013 and filed December 23, 2013. The Appellant made an Initial Brief of Appellant through counsel Thompson on November 18, 2015. This briefing follows.

## PRIOR PROCEDURAL HISTORY

The Appellant, Kevin L. Choice, #257223, is incarcerated with the South Carolina Department of Corrections at the Lee Correctional Institution pursuant to the Sumter County Clerk of Court's orders of commitment. The Sumter County Grand Jury indicted the Appellant at the September 1999 term of General Sessions for Murder, Possession of a Firearm During the Commission of a Violent Crime, and Possession of a Firearm on the Premises of an ABC Store (99-GS-43-756). The Appellant was represented by Patrick Wright, Esquire. On March 5-7, 2001, the Appellant went to trial by jury and was found guilty as charged. The Honorable Henry L. McKellar sentenced the Appellant to imprisonment for life without parole, a concurrent term of five (5) years, and a concurrent term of three (3) years.

A timely Notice of Appeal was filed on Petitioner's behalf. In the direct appeal, an Anders brief was filed by Robert M. Dudek, Esquire. In that brief, counsel Dudek raised as the sole arguable ground:

> Whether the judge erred by allowing appellant to be impeached with his prior drug convictions under Rule 609(a)(1), SCRE, since the prejudicial effect of these drugs convictions outweighed their probative value, and the probability this evidence would be misunderstood where the shooting occurred in a nightclub?

*Final Anders Brief of Appellant*, p. 3.

The South Carolina Court of Appeals dismissed Petitioner's appeal and relieved counsel Dudek. State v. Choice, Op. No. 2002-UP-603 (S.C. Ct. App. filed October 1, 2002). A petition for rehearing was made. The Court of Appeals denied the Petition on November 21, 2002.

The Appellant subsequently filed a Petition for a Writ of Certiorari on December 10, 2002 with the South Carolina Supreme Court. In this Petition, Choice raised the following question:

> I. Did the solicitor who prosecuted the crimes the Petitioner was accused of committing violate the separation of powers clause of the South Carolina Constitution Article I, Section 8 which caused the circuit court to lose jurisdiction of the subject matter where it is unconstitutional for the Solicitor to bind the Petitioner up to the circuit court and decide the probable cause of the crimes in magistrate court?

Petition for Writ of Certiorari, p. 1. The Respondents filed a waiver of formal return and letter response on January 9, 2003. In that letter, Respondents below-signed counsel stated:

> This matter is wholly frivolous and certiorari must be denied. The South Carolina Court of Appeals dismissed the appeal, upon review pursuant to *State v. Williams*, 305 S.C. 116, 406 S.E.2d 357 (1991) and *Anders v. California*, 386 U.S. 738 (1967). State v. Kevin Choice, Unpublished Op. No. 2002-UP-603 (S.C. Ct. App. Oct. 1, 2002). In the Final Anders Brief of Appellant, counsel for the Petitioner conceded that "Appellant was indicted at the September 7, 1999 term of the Sumter County Grand Jury for the offenses of murder, possession of a weapon during the commission of a violent crime, and carrying a pistol onto a[n] ABC premises." Final Anders Brief of Appellant, p. 4. The Record on Appeals includes the indictment, 99-GS-43-756, which includes the "true bill" and signature of the Grand Jury foreperson. R.p. 347-49. A presumption of regularity attaches to proceedings in the Court of General Sessions. Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986). Absent evidence to the contrary, the court must presume that the indictment is valid and that the trial court had jurisdiction. State v. James, 321 S.C. 75, 79, 472 S.E.2d 38, 40 (Ct. App. 1996). The Petitioner's bare assertions are insufficient to show the court lacked jurisdiction.
>
> This same issue was raised in the Petition for Rehearing and denied by the Court of Appeals on November 21, 2002. Respondents submit it is wholly without merit.

*Letter, Zelenka to Shearouse, January 9, 2003.* The Supreme Court denied the Petition for Certiorari by written order on May 14, 2003. In that Order, the Court also denied Choice's intervening *pro se* motion objecting to the State's return, a *pro se* motion for summary judgement, a *pro se* petition for writ of mandamus, and a *pro* se motion for an ex parte hearing.

*Prior State Court PCR Proceedings*

On December 3, 2003, Choice filed an application for post-conviction relief. In the Application, Choice v. State of South Carolina, 2002-CP-43-1377 the Respondents made a Return. An amended application was made on August 20, 2004 raising new claims. An evidentiary hearing was convened at the Sumter County Courthouse on October 6, 2004 before the Honorable Howard King, Presiding Judge. The Appellant was represented by John James, III., Esq. The Respondents were represented by Paula S. Magargle, Assistant Attorney General. On November 18, 2004, the Honorable Howard King entered his order of dismissal. In the Order, Judge King addressed the following issues:

- Allegation that evidence was gathered contrary to the Fourth Amendment rights of Applicant.
- Allegation that Applicant was never served with the warrants regarding the weapons charges.
- Allegation that there is no rehabilitation in prison and that the conditions of confinement violate due process rights.
- Allegation that no Return was filed to the Applicant's amended application for PCR.
- Allegation that the Solicitor failed to give the Applicant notice of intent to seek a life sentence ten days prior to the trial.
- Allegation that Applicant's right to a speedy trial was violated.
- Allegation of ineffective assistance of counsel for failing to call witnesses.
- Allegation that trial counsel was ineffective for not objecting to the admission of the results of the GSR test.

- Allegation that appellate counsel was ineffective.
- Allegation that the Circuit Court lacked subject matter jurisdiction
- "Miscellaneous allegations."

Order dated November 14, 2004. The Appellant made a Rule 59 motion on November 29, 2004. The Respondents made a Return on December 3, 2004. On December 8, 2004, Judge King entered his order denying the motion.

On December 16, 2004, the Petitioner, through counsel James, made a notice of appeal. James was re-appointed counsel for Mr. Choice in the appeal from the denial of state post-conviction relief. Certiorari was initially denied by the South Carolina Court of Appeals on November 29, 2006. The Appellant sought certiorari from the denial to the South Carolina Supreme Court. A petition for writ of certiorari was filed by counsel on February 28, 2007. In the State's Return, the State set out the following issues:

1. Did the Post-Conviction Relief court properly conclude that trial counsel was not ineffective for failing to object to the admission of the results of the gunshot residue (GSR) test?

2. Did the Post-Conviction Relief court properly conclude that the issues regarding Petitioner's Motion for a Speedy Trial and Motion to Quash the indictment had already been raised and ruled upon and Petitioner was not prejudiced by these rulings? (Petitioner's Arguments II and IV.)

3. Did the Post-Conviction Relief court properly conclude that Petitioner was not prejudiced by the State's failure to serve him with the warrants regarding his weapons charges?

4. Did the Post-Conviction Relief court properly conclude that Petitioner's allegations that he is not receiving sufficient rehabilitation in prison and that the conditions of confinement are too harsh are not cognizable under the Uniform Post-Conviction Relief Act? (Petitioner's Arguments V. and VI.)

5. Did the Post-Conviction Relief court properly conclude that Petitioner was not prejudiced by the fact that the State did not file a timely Return to his application and his amended application? (Petitioner's Argument VII.)

Certiorari was denied on August 23, 2007 by the Supreme Court of South Carolina. Choice, Kevin v. State, Letter Order (S.Ct.S.C. August 23, 2007). The remittitur was issued by the Court of Appeals on August 24, 2007.

The Appellant has also unsuccessfully sought other collateral review in federal court. Choice v. Eagleton, et. al, 8:03-1999-RBH-BHH.

**HOW THE PRESENT ISSUE WAS RAISED AND DECIDED**

The Appellant made a *pro se* motion for new trial dated June 22, 2006. ROA 306-321. In the motion he attached an affidavit of Louis Charles Jenkins, Jr, dated March 24, 2006 in which he initially recanted portions of his trial testimony against appellant. R.p. 401-05.[1] On August 31, 2012, Jenkins signed another affidavit in which he stated that the statements he made in the 2006 affidavit were false and that his trial testimony was true.[2] August 31, 2012 Affidavit, R.p. 406.

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1 In the March 24, 2006 affidavit, Jenkins claimed that he was in the restroom at the time of the shooting and did not see the incident. He further averred that he was married to the victim's sister and that their family members pressured and coerced him into giving false testimony. Jenkins stated in his affidavit that he was charges for trafficking in crack cocaine and possession with intent to distribute crack cocaine at the time of the trial and that William Croft, the assistant solicitor prosecuting the defendant, pressured him into giving false testimony in exchange for more lenient treatment on those charges. He declared that Mr. Croft made comments that made him fear for his safety if he went to prison on those charges. Jenkin's March 24, 2006 Affidavit, p. 2-6. R.p. 402-05. As Appellant correctly points out in his brief, the affidavit is dated March 24, 2006, but shows that his signature was notarized on March 23, 2006. Id.

2 In the handwritten August 31, 2012 affidavit, Jenkins declares that he was there with counsel Michael Jordan (who was representing Appellant Kevin Choice at the time) and Solicitor Finney. Jenkins stated in this statement recanting the earlier statement:

> I state that back in 2006 I spoke with Kevin Choice about the murder of my brother-in- law (Tony Rhodes). Mr. Kevin Choice pleaded his case to me and I felt sorry for him + and I thought that he may have had more on what took place. He drew up some papers and I signed them. I did not sign those papers in the presence of a notary public, on 23 day of March 2006, or any other time, I signed the papers in the dorm. I'm writing this confirm that I'm standing by my trial testimony. I was not in the bathroom at the time of the shooting, on Sept. 98. If I

Subsequently, Appellant proffered an affidavit of former death row inmate Ronald DeRay Skipper[3] of January 14, 2013.

On November 21, 2013, an evidentiary hearing was held before the Honorable George C. James, Jr.; Presiding Judge on the motion. The Appellant was present and represented by Jeremy Thompson. The State was represented by Solicitor Ernest A. "Chip" Finney. Testimony was received from Louis Jenkins, (R.p. 334-353, Hearing Tr. 9-28), Ronald Skipper (R.p. 354, 372, Hearing Tr. 29-47) and Kevin Choice (R.p. 372-385, Hearing Tr. 47-60). At the conclusion of the hearing, after arguments by counsel, Judge James took the matter under advisement. R.p. 398-99, Hearing Tr.p. 73-74.

On December 6, 2013, Judge James issued an order denying the motion for a new trial. In its pertinent part, Judge James concluded:

> A hearing on the defendant's new trial motion was held on November 21, 2013. Mr. Jenkins testified and stated that his trial testimony was the truth. He stated that he was incarcerated at the same facility was the defendant in 2006 and that he encountered the defendant and the defendant convinced him that he had gathered evidence to prove he was not guilty of shooting the victim. Jenkins testified that he gave the defendant the benefit of the doubt when he signed the 2006 affidavit because he thought the defendant really had information that would prove the defendant was not the shooter.
>
> It should be noted that at the 2001 trial, the defendant testified that he was present when the victim was shot but that he did not shoot the victim. The defendant testified at trial that someone handed him the gun after the shooting and that he ran out of the nightclub door with the gun.

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am ask to testify at a new hearing I would stand by my trial testimony.

Jenkins Affidavit, Aug. 31, 2012. R.p. 406.

3 Inmate Skipper has an interesting correctional history. See Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (death penalty sentence vacated and remanded for new sentencing proceeding based upon exclusion of evidence of prison adaptability), State v. Skipper, 285 S.C. 42, 47, 328 S.E.2d 58, 61 (1985) (conviction and death sentence initially upheld); Skipper v. S. Carolina Dep't of Corr., 370 S.C. 267, 272, 633 S.E.2d 910, 913 (Ct. App. 2006) (inmate, in being terminated from his prison employment, did not suffer an infringement upon his liberty interests for due process purposes).

To prevail on a motion for a new trial based upon after discovered evidence, the defendant must show (1) the evidence is such that it would probably change the result of the trial if a new trial is granted; (2) the evidence has been discovered since the trial; (3) the evidence could not have been discovered prior to trial by the exercise of diligence; (4) the evidence is material; and (5) the evidence is not merely cumulative or impeaching. State v Needs, 333 S.C. 134, 508 S.E. 2d 857 (1999).

In my view, there is a, substantial questions as to whether there is now any "evidence" that has been discovered since the defendant's trial. It is true that the sole eyewitness recanted his testimony in his 2006 affidavit. However, he has now recanted his recantation two times, once in his 2012 affidavit and again in his testimony at the hearing. Neither side presented any case law on the issue of whether a recantation that itself has been recanted rises to the level of after discovered evidence. Even if the 2006 recantation is "after discovered evidence", this court concludes that the motion must be denied. While the information imparted in the 2006 affidavit is material and has been discovered since the trial, and while it is arguable the evidence could not have been discovered prior to trial by the exercise of due diligence, the motion must still be denied. The evidence imparted in the 2006 affidavit would likely not change the result of the trial, primarily because Mr. Jenkins' 2006 recantation has been drastically tainted by his own 2012 affidavit and by his hearing testimony, i.e., there have been two recantations of his recantation.

The court also heard testimony from self-professed "jail-house lawyer" Ronald D. Skipper, who was the author of Mr. Jenkins' 2006 affidavit. His testimony was, in my view, inconsequential, as Mr. Jenkins did not deny that he made the statements in his 2006 affidavit. Instead, Mr. Jenkins now says those 2006 statements were simply not true.

For the foregoing reasons, the defendant's motion for new trial is denied.

R. 408-09, Order, p. 2-3.

## ARGUMENT

**I. The hearing judge did not err in denying the Rule 29 motion for new trial where Louis Jenkins recanted his earlier recantation and confirmed that his trial testimony against Kevin Choice was true. The Court found that the evidence of the original affidavit and presented at the hearing as recanted and not true "would likely not change the result of the trial." Therefore, the evidence did not satisfy the test for newly discovered evidence.**

During the 2001 trial, Louis Jenkins testified as a state witness against Kevin Choice and declared that Choice was the shooter in the September 3, 1998 incident that killed Tony Rhodes, Jenkins brother-in-law, at the Diamond Club in Sumter, S.C. He testified that when he was at the bar the victim and Appellant initially appeared to have a small argument and were passing words. As the argument grew louder, the lights came on in the bar suggesting a concern about the argument and then it turned off, although words were still being passed. R. 33-34, 25-26, Tr.p. 68-69, Trial Tr.p. 60-61. In pertinent part, Jenkins's testimony against Choice was clear and specific:

Q. Once he turned the lights back off and moved to this area, what happened?

A. Like I said, Kevin and Tony was a change in words still at that time Kevin said of, you think I'm a punk mother's fucker?

A. Kevin said do you think I'm a punk mother fucker and had it happened fast, you know, oh, you think I made punk mother's fucker and he just aim it beside him and he shot. . . .

Q. . . . How far were you from Kevin and Tony when the weapon was fired?

A. I was on the side, on the side of them. They was like practically in front of each other and I was like on the side and Harry Spann was on sort of the backside of Kevin in the area in the back.

Q. Approximately how many feet would you say you were away from Kevin?

A. I say three, four feet. I was close.

Q. And you are absolutely sure about what you saw?

A. Yes, positive.

Q. Okay, Is there any point that someone else fired the weapon?

A. No.

Q. Okay. And tell me again where did he retrieve this weapon from?

A. From of his front of his waist.

Q. From his waistband?

A. From the front.

R. 35-37, Trial Tr.p. 70, l. 11- p. 72, l. 8. Jenkins then identified the Appellant in court as the person who shot the victim. R. 37, Tr.p. 72, ll. 9-13. He then continued to describe the incident:

Q. . . . . And after you saw Kevin choice shoot Tony Rhodes, what did you do?

A. At the time it happened so fast, I turned, turned around and it was like a corner and he was, when he shot, he was saying something but I couldn't make it out what he was saying. He pulled out the turn [?] because I thought I was going to be shot, too, because it happened so fast. When it first came, I – – I thought it was going to be another, so I turned my back and it was like a weight machine or something and I tripped over. . . .

R. 37, Trial Tr.p. 72, ll. 14-23. Jenkins stated only one shot was fired. R. 38, Trial Tr.p. 73, ll. 5-6. The witness confirmed that he did not give a written statement at the time though he stated he wrote a statement but never turned it in saying the same thing he testified about. R. 39, Trial Tr.p.74, ll. 15-22.

On cross-examination, Jenkins stated he never told the police that night what happened because he "was thinking I could get murdered too." R. 41-42, Trial Tr.p. 76-77. He stated that he made this statement for the first time a week before the trial when he talked to the solicitor. R. 42, Trial Tr.p. 77, ll. 17-18. He confirmed that he witnessed and saw Kevin Choice pull a gun out and shoot your brother-in- law and murder him." R. 42, Trial Tr.p. 77, ll. 20-24. Jenkins stated to the police earlier that he was present when the victim was shot, but did not give any details until recently because he feared for his life. R. 46, Trial Tr.p. 81, ll. 15-25.

The Appellant is not entitled to a new trial based upon a March 2006 statement of state witness Louis Jenkins that was subsequently recanted to Appellant's counsel and the Solicitor in

a statement made on August 31, 2012 and consistently in a hearing before Judge James. The unreliability of March 2006 statement in which he declares that his trial testimony was false was evident during the new trial hearing where Jenkins under oath repudiated the March 2006 statement confirming he gave original testimony at the 2001 trial which was accurate, that that the 2001 testimony was he was given to the best of his ability to what he saw and what he knew and he told what he saw. R. 342, 343, 346, Hearing Tr. p. 17, 18, 21. Jenkins specifically denied the portion of the March 2006 statement that declared he was in the bathroom when the shooting occurred and denied that the 2001 testimony had been induced by any threats from the prosecutor in the case. R. 350, 351, 352, Hearing Tr. 25, ll. 1-7; p. 26, ll. 2, 11-16, p. 27. Jenkins confirmed he saw Choice pull the gun from his waistband. R. 351-52, Hearing Tr. p. 26-27.

The questionable circumstances in the giving of the March 2006 statement support its unreliability. Jenkins testified that he was housed at the Lee Correctional Institution when he was confronted by Kevin Choice who pleaded his case to him and based upon what other people were saying Jenkins wanted to give Choice the benefit of doubt. He denied telling Choice that he was in the bathroom at the time of the shooting. R. 350, Tr.p. 25, ll. 1-7. Judge James did not abuse his discretion in resolving that the March 2006 statement was too unreliable to warrant a new trial based upon its repudiation by Jenkins.

> In my view, there is a, substantial questions as to whether there is now any "evidence" that has been discovered since the defendant's trial. It is true that the sole eyewitness recanted his testimony in his 2006 affidavit. However, he has now recanted his recantation two times, once in his 2012 affidavit and again in his testimony at the hearing. Neither side presented any case law on the issue of whether a recantation that itself has been recanted rises to the level of after discovered evidence. Even if the 2006 recantation is "after discovered evidence", this court concludes that the motion must be denied. While the information imparted in the 2006 affidavit is material and has been discovered since the trial, and while it is arguable the evidence could not have been discovered prior to trial by the exercise of due diligence, the motion must still be denied. The evidence imparted in the 2006 affidavit would likely not change the result of the trial,

> primarily because Mr. Jenkins' 2006 recantation has been drastically tainted by his own 2012 affidavit and by his hearing testimony, i.e., there have been two recantations of his recantation.

R. 408-09, Order, p. 2-3.

In his brief before this Court, Appellant suggests that the basis for reversal of Judge James assessment of the evidence was in error. He contends that Judge James used an improper standard of assessment under prong one: "whether or not Jenkins' (initial) recantation would probably change the result of a new trial" and is an error of law that must be reversed. He contends that Judge James did not analyze the evidence at trial in light of the affidavit. Initial Brief of Appellant, p. 10-11. He questions whether the lower court reviewed the evidence as a whole, with the recantation in mind to determine whether it was reasonably likely that the Appellant would have been convicted, citing State v. Mercer, 381 S.C. 149, 170, 672 S.E.2d 556, 567 (2009) ("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."). He relies upon a Wisconsin case, State v. McCallum, 208 Wis.2d 463, 474, 561 N.W.2d 707, 711 (1997) that "the correct legal standard when applying the 'reasonable probability that jury of a different outcome' criteria is whether there is a reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to the defender's guilt."

In making his assessment, Appellant contends that because Jenkins was the only individual to testify that he witnesses Appellant shoot Rose, his testimony would now be undermined even if he stood by his original testimony at a retrial because the jury would have heard that he had signed an affidavit stating both that he was not near Rose when Rose was shot and that he had been pressured to testify at the original trial. He points out that there were salient

factors of guilt which included that Appellant ended up in possession of the weapon that shot Rose, although Appellant claimed at trial that he was handed the hand after the shooting. Further, Appellant points out that at trial Sharon Bailey testified that Appellant was not near Rose when the shot was fired.

Respondent respectfully submits that reversal of the hearing court's denial of the motion.

**STANDARD OF REVIEW**

"Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial." State v. Mayfield, 235 S.C. 11, 34, 109 S.E.2d 716, 729 (1959), citing State v. Whitener, 228 S.C. 244, 261, 89 S.E.2d 701, 709 (1955). "A trial [court] has the discretion to grant or deny a motion for a new trial, and [its] decision will not be reversed absent a clear abuse of discretion. State v. Johnson, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007).

To obtain relief at a new trial hearing, Appellant 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 have been discovered prior to trial in the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. State v. Mercer, 381 S.C. 149, 170, 672 S.E.2d 556, 567 (2009); Johnson v. Catoe, 345 S.C. 389, 548 S.E.2d 587 (2001); State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999). As the Court stated in State v. Mercer, 381 S.C. 149, 167, 672 S.E.2d 556, 565 (2009), on appellate 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."

With this in mind, it is important to note that in making that determination the trial court first has an important gatekeeping function to determine the credibility of the supposed new

evidence. For example, in Johnson v. Catoe, this court affirmed the trial court's finding that the recanting witness in that case was not credible, and that as such it was not probable that her new testimony would change the result of the trial. 345 S.C. 389, 548 S.E.2d 587. The Johnson Court, which, unlike in this case, was acting in its original jurisdiction, stated:

> [T]o decide whether [the witness's] statement would probably change the result of petitioner's trial, we are required to determine [the witness's] credibility.

345 S.C. at 400 n.6, 548 S.E.2d at 593. As quoted in the case of State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977):

> 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 . . . resides the power to weigh such evidence . . . .

*See also* State v. Wright, 269 S.C. 414, 237 S.E.2d 764 (1977) (affirming a trial court's denial of a motion for a new trial based on a witness's recantation, where the judge found that the new testimony was not "believable" based on the many versions offered); State v. Parker, 249 S.C. 139, 153 S.E.2d 183 (1967) (affirming a trial court's rejection of a motion for a new trial based on the affidavit of a state inmate that his testimony was untrue, and noting: "It is a fixed rule that the credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for the determination by the circuit judge to whom it is offered."); State v. Mayfield, 235 S.C. 11, 109 S.E.2d 716 (1959) (affirming trial court's testimony that repudiation was not believable, and noting "to hold such affidavits sufficient to require the granting of a new trial would be to open the door to fraud and perjury, as well as to invite interminable delays in the disposition of causes"); State v. Needs, 333 S.C. 134, 158, 508 S.E.2d 857, 869 (1999) (same); State v. Deese, 266 S.C. 534, 225 S.E.2d 175, 176 (1976) ("When testimony is in direct conflict and depends largely on the credibility of the new evidence, the trial judge is charged with the duty of assessing the evidence"). See also United States v. Roberts, 262 F.3d 286 (4th Cir. 2001)

(affirming trial court that concluded, after viewing witness's demeanor, that it was not reasonably well satisfied the trial testimony was false); United States v. Nixon, 881 F.2d 1305 (5th Cir. 1989).

Of course, part and parcel of that judge's duty to assess the credibility of the newly discovered evidence is this Court's deference to that determination on appeal, as the judge had the opportunity to observe the evidence and testimony firsthand:

> 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 (citation omitted).

State v. Morrison, 246 S.C. 575, 145 S.E.2d 15 (1965) (refusal to grant new trial on ground of after-discovered affidavit by inmate who confessed and who thought he had nothing to lose not abuse of discretion). State v. Harris, 391 S.C. 539, 544–45, 706 S.E.2d 526, 529 (Ct.App.2011) (finding the record supported the trial court's assessment that the circumstances surrounding the witness's recantation of his trial testimony and his testimony during the hearing caused it to find the recantation testimony unreliable and noting the issue came "down to a matter of the credibility of the witnesses, which [should be left] to the trial court's discretion").

The decision in Harris is persuasive as to why the appeal in this case must be denied. In Harris, the hearing judge found that a witness who recanted his trial testimony was unreliable. Leaving the credibility of the witness to the trial court, the Court found the circumstances of the witness's recantation, as well as the witness's testimony at trial made the recantation unreliable. Here, the unreliability of the March 2006 statement of Jenkins is clearly shown by the fact that Jenkins repudiated the statement he gave in the presence of an attorney for Mr. Choice and the solicitor. Jenkins further confirmed his trial testimony at the hearing before Judge James. This Deborah repudiation of the initial recantation demanded a conclusion that it was reliable by the

hearing judge. The record plainly supports that the hearing judge's assessment that the March 2006 statement was unreliable and therefore would probably not have changed the outcome of the original verdict.

During the motion hearing, Louis Jenkins was initially advised of the potential for perjury based upon the affidavits he had given and his prior trial testimony. R. 334-336, Hearing Tr. p. 9-11. Jenkins confirmed he signed the March 2006 declaration and the August 2012 statements. R. 337-39, Hearing Tr.p. 12-14.

Jenkins testified that when he signed the 2006 affidavit he thought Choice may have had more on what took place. He testified choice "dropped some papers and I signed them." R. 339, Hearing Tr. p. 14, ll. 13-19. When he wrote that Choice "pleaded his case to him and he felt sorry for him" (in the March 2006 statement), he thought Choice may have had more on what took place. R. 339-344, Hearing Tr. p. 14-19.

Jenkins confirmed the March 2006 statement was not typed up in front of him in 2006. He stated that he did not recall having the 2006 statement signed by a notary but it was possible. R. 341-42, Hearing Tr. p. 16-17. Jenkins testified that he was standing by his original 2001 trial testimony which he stated was accurate "to the best of my ability." R. 342, Tr. p. 17, ll. 13-19. He stated he gave the testimony "to the best of his ability to what I saw."

Jenkins confirmed that he testified that he saw Choice pull out a gun and shoot Mr. Rhodes, but he also said Mr. Spann was behind him. Jenkins said that there was "talk" that someone could have reached over him, but Jenkins said the testimony at trial was what he knew. R. 343, Tr.p. 18, ll. 10-18.

Jenkins was referred to the original record on appeal, pages 70 and 72. (Jenkins testified no one else fired a weapon). Jenkins testified that his reference at the hearing that Spann could

have fired the weapon was the "talk of people" and that he didn't do it, but Jenkins said he didn't say that. Jenkins said if something else did happen, he was opening the door for him in signing the statement. R. 345-46, Tr. 20-21. However, he stated it was still being said that Choice didn't do it, "but as of what I saw, I can only speak to what I saw." R. 346, Tr. 21, ll. 1-6. In response to whether he was certain that Choice shot Rhodes, Jenkins stated "I told what I saw." R. 346, Tr. 21, ll. 7-17. Jenkins stated he believed that something more took place, but this is what other people were saying and that he wanted to give that the benefit of a doubt. R. 347, Tr. 22. Jenkins did not recall whether the fact that he had charges pending came up with the solicitor and 2001. Jenkins recalled signing the 2006 statement. He thought that Choice had given him the affidavit and acknowledged that they were housed together at the Lee Correctional Institution at some time.

Jenkins specifically denied ever telling Choice that he was in the bathroom, because he was right there when everything took place so "I wasn't in the bathroom." R. 350, Tr. 25, ll. 1-7.

During the hearing court's inquiry about the first affidavit's reference to the prosecutor suborning perjury, Jenkins declared "the prosecutor didn't tell me to lie." R. 351, Tr.p. 26, ll. 1-2, 11-13. Jenkins also denied that the prosecutor told him that if he did not get on the stand and give perjurous testimony and that he would be an old man when he got out of jail. R. 351, Tr. 26, ll. 14-16. In response to whether he ever told the solicitor he did not witness the incident, Jenkins responded "no" and said that he was standing there the whole time. R. 351, Tr. 26, ll. 18-21. He confirmed he saw Choice pull the gun from his waistband "to the best of his ability." R. 351-52, Tr. 26-27. He denied being threatened by the prosecutor as stated in the March 2006 declaration. R. 352, Tr. 27.

The Appellant called Ronald Skipper who was incarcerated at Lee correctional institution sense 2001 for murder. Skipper lived with Choice on the north side of the Sumter unit. He described coming into contact with Jenkins after choice told him "that's the guy who testified against me." R. 356, Tr. 31, ll. 1-7. Skipper claimed Choice told him that Jenkins wanted to help them. Skipper said he spoke with Jenkins because Choice wanted to file something with the court concerning the testimony Jenkins gave. R. 356, Tr. 31. Skipper claimed after spending 3 weeks with Jenkins about an hour every day Skipper typed up the March 2006 affidavit. R. 356-57, Tr. 31-32. Skipper confirmed that he did not personally witness Jenkins sign the 2006 affidavit. R. 359, Tr. 34. He claimed Choice was not present when he had the discussions with Jenkins because Skipper asked Choice "to stay away because I didn't want them to feel like he was threatened or being coerced into doing something he didn't want to do." R. 360, Tr. 35, ll. 6-8. Skipper confirmed that he help Choice prepare his motion to get to court. R. 363, Tr.p. 38.

The Appellant testified that he came into contact with Jenkins around March 2006 at Lee Correctional Institution. R. 372-73, Tr. 47-48. He claimed that Jenkins approached him and had a discussion with them about the case, asserting that the testimony he gave was in a true and accurate account. R. 373, Tr. 48. At that point, choice said he wanted to come back to court and try to fight it and arrange for Jenkins to talk to Skipper about the case. R. 374, Tr. 49. Choice claimed to have no involvement in the preparation of the March 2006 affidavit. On cross examination, Choice confirmed that during the trial Jenkins testified that he had pulled out a handgun and shot Tony and that at trial Choice testified that he did not have a beef with the victim and claimed that the handgun that had been identified as the murder weapon had been passed to him. R. 378, Tr.p. 53. [4]

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4 During the trial, Choice testified when asked who gave him the gun that "I couldn't say

The State asserts that the problem with the Appellant's position is that an entitlement to a new trial only exist if the Court would conclude that Jenkins lied at the trial. However, what Jenkins is now stating under oath does not support the fact. Jenkins was thoroughly cross-examined during the trial about the fact that he had not previously given a statement and only given the statement to the Solicitor's office the week before. However in sworn testimony before the hearing judge, Jenkins confirmed that his testimony at trial was the truth and was consistent with what he believed he saw at the time of the incident that Kevin Choice shot the victim and was only shooter that day.

The hearing judge's assessment of the lack of reliability that a jury would have found on the March 2006 statement based upon its repudiation by the same witness should not be deemed an error of law. Judge James had the entire trial record before him, the affidavits of Jenkins, and the actual hearing testimony of Jenkins to determine the credibility and the impact it may have had on the jury. Recognizing that Jenkins was the sole witness who specifically identified appellant as the shooter, Judge James reasonably determined that appellant had failed in his burden of proof because of the inherent fact that this had been "drastically tainted by his own

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because all the power went off inside the place and it was dark." R. 245, Trial Tr. p. 280, ll. 17-21. Security Officer George McQuilla testified at trial that once he heard the shot he immediately turned towards the door and saw a gentleman putting what I saw was a weapon down the back of his back and pulled his shirt over it. McQuilla said he kept his eyes on him to make sure he knew what was going on and then he went up to him and grabbed a weapon from him. McQuilla identified the person with the gun as Kevin Choice. R. 63-66, Tr.p. 98-101. The gun was warm when he recovered it. R. 66, Tr. 101. McQuilla said he could not identify who put the gun in the pants because he was only looking through the crack of the door at the time. R. 72, Tr.p. 107. However, he only saw Choice with the gun in the waistband. R. 72-73, Tr.p. 107-108. The Appellant contended that the testimony suggested that it was possible that someone had given Appellant the gun, although it could have been Choice putting the gun in his waistband as well. R. 392, Hearing Tr.p. 67. As to the gunshot residue on the back of his right hand, he claimed this could have come from the fact that he was given the gun (inconsistent with McQuilla's testimony) or from picking up a gun that had just been fired (inconsistent with McQuilla or Choice trial testimony).

2012 affidavit and by his hearing testimony." As the court held, Jenkins now says those 2006 statements were simply not true. As reflected in the trial transcript there is salient factors which directed the jury verdict against appellant in addition to the testimony of Louis Jenkins. Marion Howard testified that immediately after the shooting he saw the defendant running towards the door with a gun in his hand. R. 58-59, Trial Tr. 93-94. The appellant was immediately detained as he was leaving the bar with the murder weapon in his waistband. R. 64-65, Trial Tr. 99-100. The Appellant had gunshot residue on the back of his right hand. R. 131, Tr.p. 166, ll. 1-21. The shot was determined to have come from not more than one foot from Rhodes based upon the gunshot reside pattern on the shirt. R. 149, Tr.p. 184, ll. 11-16. Further, the fact of Jenkins late statement was known by the 2001 jury and impeachment was sought.

In addition, Jenkins had expressed at trial the reason for his late statement before trial was that he was in fear. Oddly, Jenkins was placed in the same prison setting with the person he had testified committed the murder and upon confronting him agreed to give a statement, now repudiated. Plainly, the unreliability of the March 2006 statement casts against the full record supports Judge James rejection of it as a basis for a new trial.

Respondent submits that the Appellant failed to prove the first prong of the test for after discovered evidence that the March 2006 declaration "is such that it would probably change the result if a new trial were granted." This setting is similar to the setting in State v. Parker, 249 S.C 139, 153 S.E.2d 183 (1967). In Parker, like here, the witness who initially declared his trial testimony was untrue subsequently signed an affidavit recanting his recantation. There, like here, the character of the affidavits and of the affiant furnished a reasonable basis for the refusal of the new trial. The Respondent cannot say that the order of Judge James refusing the motion for a new trial was based upon an error of law or constituted an abuse of discretion. The appeal should

be dismissed. Judge James tested the evidence under the standard that "recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial." Under this scrutiny, the request was properly denied.

## CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that the judgment and denial of a motion for new trial of the lower court should be affirmed.

Respectfully submitted,

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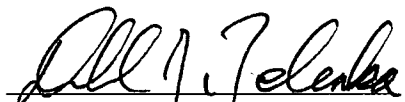
BY: 
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July 7, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Sumter County
George C. James, Jr. Circuit Court Judge

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Appellate Case No. 2013-002735



STATE OF SOUTH CAROLINA,

Respondent,

v.

KEVIN CHOICE,

Appellant

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**CERTIFICATE OF COMPLIANCE**

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The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014 Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

July 7, 2016

## CERTIFICATE OF SERVICE

**I, Donald J. Zelenka**, hereby certify that a true copy of the Final Brief of Respondent in the above referenced case has been served upon counsel for Appellant by depositing two copies of same in the U.S. Mail, postage-prepaid and addressed as follows:



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This 7th day of July, 2016.

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