No. ______________ TWELFTH JUDICIAL DISTRICT

****

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA

v.

LAMONT McKOY

From Cumberland County
90 CRS 11412

****

AMICUS CURIAE BRIEF OF THE INNOCENCE NETWORK

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INTRODUCTION

"Our criminal justice system is best described as a search for truth." EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL iii (National Institute of Justice 1996). Since 1989, that search for truth has led to the exoneration of over 1600 people who, subsequent to trial, have been exonerated through the use of post-conviction DNA testing and non-DNA evidence.[1]

LaMont McKoy stands in the same shoes as those over 1600 people wrongfully convicted. As meticulously set forth in Defendant's Second Motion for Appropriate Relief ("Second MAR"), Mr. McKoy has proven his innocence. However, instead of allowing the search for truth to reach its logical endpoint in Mr. McKoy's exoneration, the Superior Court prematurely aborted that search in determining that Mr. McKoy could not present evidence due to a procedural bar. State v. McKoy, Order at 3 (filed Dec. 4, 2014). As set forth below, *amici* asserts that this decision was an error, and that our criminal justice system must not use rules of procedure to stymie the search for truth. Rather, the statutes that enable the justice system to fulfill its purpose in pursuing the search for truth should be interpreted in a manner consistent with that search.

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[1] National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/about.aspx (documenting 1670 cases of wrongful conviction, from 1989 forward).

ISSUES PRESENTED

1) Did the Superior Court err in its denial of Petitioner's Second MAR?

2) Was this denial premature in light of the Court's failure to grant an evidentiary hearing?

ARGUMENT

In December 4, 2014 Order (the "Order"), the trial court concluded that the evidence asserted by Petitioner McKoy (hereafter, "Petitioner") failed to meet the definition of "new evidence" as required under State v. Cronin, 262 S.E.2d 277 (1980). Pursuant to Cronin, the prerequisites for obtaining a new trial on the grounds of newly discovered evidence are:

> (1) That the witness or witnesses will give the newly discovered evidence;
> (2) That such newly discovered evidence is probably true;
> (3) That it is competent, material and relevant;
> (4) That due diligence was used and proper means were employed to procure the testimony at trial;
> (5) That the newly discovered evidence is not merely cumulative;
> (6) That it does not tend only to contradict a former witness or to impeach or discredit him; and
> (7) That it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail.

Id. at 286. Petitioner has established all of the above.

I. THE SUPERIOR COURT ERRED IN ITS APPLICATION OF THE *CRONIN* STANDARD TO THE FACTS ALLEGED IN THE SECOND MAR

A. THERE ARE WITNESSES THAT WILL GIVE NEWLY DISCOVERED EVIDENCE, AND SUCH EVIDENCE IS PROBABLY TRUE

(a) *Statements By Members of the Court Boys Gang*

After Petitioner was convicted, the U.S. Attorney's Office formed a multi-jurisdictional task force in part to investigate criminal activity at the Grove View Terrace housing project. Second MAR ¶ 44. The Task Force focused its investigation on the Court Boys, a gang that violently controlled the drug trade at Grove View. Id. The investigation led to the trial of William Talley, an enforcer. Id. ¶ 47. During this trial, the government presented evidence showing that Talley killed Hailey. Id. ¶ 48. Court Boys members Ronald Perkins and Kelly Debnam testified for the government. Id. ¶ 49. Both men testified that they witnessed Talley fire his handgun at the back of a vehicle fleeing Grove View after a busted drug deal, and that the vehicle appeared to have been hit. Id. ¶ 50. Perkins and Debnam's descriptions of where they saw the car match where Hailey's car was found. Id. ¶ 53.

After Talley's trial, Special Agent S.E. Fox further investigated Talley's role in Hailey's murder and interviewed Ronald and Anthony Perkins. Id. ¶ 59. The Perkins brothers provided a very detailed account of the shooting in which they indicated Talley was the individual that shot at Hailey's car and killed him. Id.

Special Agent Fox also interviewed Craig Roberts, another member of the Court Boys, who provided another detailed account of the shooting. Id. ¶ 60. Additionally, Roberts specifically asserted that Petitioner had been wrongfully convicted. Id.

In May 2010, James Rodney Smith, a man who was arrested with Talley, was interviewed by Petitioner's post-conviction counsel. Id. ¶¶ 86, 88. Smith described witnessing the shooting of a blue Honda (the same make and color as Hailey's car) on the night Hailey was murdered. Id. at 88. He stated further that the blue Honda was shot in Grove View after a passenger in the vehicle snatched drugs from a Grove View dealer. Id. Smith later saw the blue Honda down an embankment in the same area described by Debnam and the Perkins brothers—the area where Hailey was found dead in his blue Honda. Id.

In 2007, after being released from federal prison, Bernard McIntyre, another member of the Court Boys, provided additional details about the Grove View shooting. Id. ¶ 92. In a sworn affidavit, McIntyre stated:

> I was in Groveview (sic) Terrace with other members of the Court Boys. Among others present were Craig Roberts, William Talley and Prescott McIntire…I was familiar with Myron Hailey because he regularly purchased crack cocaine from our group. I was familiar with Hailey's light blue Honda Accord…Then William Talley offered to make a drug sale to him, but Mr. Hailey snatched the drugs and drove off without paying. I saw William Talley pull out a gun and shoot Mr. Hailey's car. He fired several times. In the following days I learned a

> man had been shot and killed in a light blue Honda Accord the night I saw William Talley shoot at the blue Honda Accord. I believe that to be the same shooting.

Id. ¶ 93. At least six Court Boys witnessed or had knowledge that Talley shot at Hailey's car. Id. ¶ 228. Five eyewitnesses have each provided a richly detailed and consistent account of what they saw, and their accounts are also consistent with the known facts. Id. This new evidence reveals that the crime could not have occurred – and did not occur – as Bobby Lee Williams, Jr., the State's only witness directly implicating Petitioner, claimed it did. Unsurprisingly, given the inconsistencies in his testimony, there is newly discovered evidence that Williams recanted his trial testimony and admitted that he received money from the Fayetteville Police Department for testifying against Petitioner. Second MAR ¶¶ 8 & 35.

(b) *Presence of the Fayetteville Police Department at the Purported Scene of the Crime*

New evidence obtained subsequent to Petitioner's first MAR also proves that the State's theory that Petitioner committed the murder at the time and place alleged was impossible. As explained in full detail in the Second MAR, the only witness to establish a time and place for Mr. Hailey's murder was Bobby Lee Williams. Second MAR at ¶¶ 175-79. Mr. Williams set forth the following: Petitioner and Hailey went behind a house on Bryan Street to conduct a drug transaction; Petitioner shot at Hailey's car near the corner of Bryan and Branson

Streets; and Petitioner fired again at the corner of Arsenal Avenue and Davis Street. Id. at ¶ 176. Later during trial, when re-called by the State as a rebuttal witness, Williams testified as to a timeframe – he claimed that the incident occurred after streetlights and a transformer were repaired. Id. ¶¶ 178-80. Because of the disabled transformer, officers from the Fayetteville Police Department were at the corner of Bryan and Branson Streets all night and into the early morning hours. Id. The officers present did not hear any shots fired during the entire time they were on the scene. Id.

Petitioner has established the first two Cronin prerequisites with regards to both the involvement of William Talley and the absence of any shooting in the time and location set forth by the State.

B. THE NEWLY DISCOVERED EVIDENCE IS COMPETENT, RELEVANT, AND MATERIAL

New evidence regarding Talley's involvement in the murder and the absence of any shooting at the alleged scene of the crime satisfies the second Cronin prerequisite.

The Court of Appeals recently considered this Cronin prong in State v. Peterson, 744 S.E.2d 153, 156 (N.C. Ct. App. 2013). In Peterson, an SBI agent testified as an expert in bloodstain analysis. Id. The agent testified that the victim was struck at least four times with a blowpoke before falling down the stairs. Id.

The agent further testified that the defendant attempted to clean up the scene before the police arrived and that the defendant was in close proximity when his wife was injured. Id.

After deliberating for almost four days, the jury returned a guilty verdict. Id. As evidenced by their verdict, the jury relied heavily on the reliability and credibility of the SBI agent. Id. Similar to Petitioner, the defendant in Peterson filed an MAR arguing that the SBI agent provided false and misleading testimony. Id. The trial court concluded that the defendant was entitled to a new trial. Id.

On appeal, this Court affirmed and held that the newly discovered evidence concerning the agent's misrepresentations at trial was competent, material, and relevant. Id. at 158. This Court stated: "this evidence is relevant and material in that it is logically related to issues at defendant's trial – specifically, Agent Deaver's testimony and, relatedly, his credibility. Thus, the evidence...which undermined that credibility, had a direct bearing to issues at trial." Id. at 158.

In the case at bar, a critical State's witness, Bobby Lee Williams, Jr., testified that he saw Petitioner shoot at Hailey's car as Hailey drove away from Petitioner. Second MAR ¶ 158. Williams alleged that the shooting occurred in Haymount Hill, about one mile southwest of where Hailey's car was discovered. Id. Williams's multiple accounts of the alleged incidents were inconsistent with both the known facts of the case and the evidence discovered post-trial. Second

MAR ¶¶ 165 & 175. Testimony from a police officer on the scene would undoubtedly undermine Williams' credibility and has a direct bearing to the issues at Petitioner's trial. See State v. Armstrong, 744 S.E.2d 153,158 (N.C. Ct. App. 2013) (holding that a new trial was appropriate when newly discovered evidence as to an SBI agent's qualifications were called into question).

In addition, the newly discovered evidence that William Talley, not Petitioner, shot and killed Myron Hailey is relevant as it dramatically undermines Williams' purported eyewitness testimony. See *supra*, Sec. I(A)(a). All of the testimony from the Court Boys members also directly undermines Williams' testimony, and is undoubtedly germane.

The new evidence accomplishes two purposes: (1) it identifies another individual who shot Hailey and (2) it renders Williams' testimony as to the setting of Hailey's death implausible. As Williams was the State's only witness linking Petitioner to Hailey's murder, it is axiomatic that the jury relied heavily on Williams's testimony in rendering their verdict. Thus, this new evidence is material.

C. DUE DILIGENCE WAS USED AND PROPER MEANS WERE EMPLOYED TO PROCURE THE TESTIMONY AT TRIAL

Petitioner has satisfied the Cronin prerequisite that due diligence and proper means were employed to procure the testimony at trial. As the information related

to Talley's murder of Hailey was not uncovered until the Task Force investigation and federal prosecutions of gang members, trial counsel was not aware that these witnesses existed or that they had exculpatory information. Trial counsel had none of this information to suggest that Hailey was killed in another location, and thus could not have discovered this new information. In addition, the State's suppression of evidence in its constructive or actual suppression rendered Petitioner's trial counsel unable to obtain the information, let alone have sufficient predicate knowledge to understand the gravity of the undisclosed evidence. See Second MAR at ¶¶ 184-98 (discussing Brady violations).

Prior to Petitioner's trial, the State had in its actual and constructive possession evidence that law enforcement was present at Haymount Hill on the night of the murder. Second MAR ¶ 9. One of the officers present confirmed that no shooting in Haymount Hill the night Hailey was shot. Second MAR ¶ 180. The State failed to disclose this evidence, and Petitioner's counsel was not aware of it at trial. Thus, defense counsel's efforts to impeach Williams and disprove his version of the events was severely hindered by the State's failure to disclose exculpatory evidence. Second MAR ¶ 42.

Additionally, the State failed to correct false and misleading testimony. The State knew that law enforcement was present at the location where it argued Hailey was murdered. Second MAR ¶ 202. Yet, despite this knowledge, Williams was

allowed to testify without correction that Hailey was murdered in Haymount Hill. Id. Indeed, Williams's false story *was* the State's case, yet the State had evidence that clearly demonstrated that Hailey could not have been murdered as the State posited. Id.

Because this newly discovered evidence proving Petitioner's innocence was not known to him at the time of trial and could not have been procured by due diligence, Petitioner has established the fourth Cronin prerequisite.

D. THE NEWLY DISCOVERED EVIDENCE IS NOT MERELY CUMULATIVE

Evidence that William Talley murdered Myron Hailey at Grove View and that no shooting took place at Haymount Hill during the time set forth by the State is not merely cumulative. Peterson, discussed *supra*, is again instructive. In Peterson, this Court held that the evidence concerning the SBI agent's misrepresentations was not cumulative because the defendant was unable to demonstrate the misrepresentations at trial. 744 S.E.2d at 159. This Court stated: "it is illogical to argue that this evidence is cumulative when defendant was unsuccessful in eliciting it at trial because of the witness's own false testimony." Id.

In this case, the Task Force that uncovered the evidence of Talley's involvement in Hailey's death was not formed until long after Petitioner's trial.

Second MAR ¶ 208. After that time, witnesses began to come forward and provide statements that it was Talley who shot and killed Hailey. Second MAR ¶¶ 49 & 50. After Talley's trial, more witnesses came forward and provided accounts implicating Talley as Hailey's murderer. In addition, evidence as to the FPD's presence at Haymount Hill was also not discoverable because it was not disclosed by the State. Second MAR at ¶¶ 184-98

The new evidence is not merely cumulative it dramatically adds to the facts of the case, and was not known by Petitioner at the time of his conviction in part due to the State's failure to disclose exculpatory evidence.

E. THE NEWLY DISCOVERED EVIDENCE DOES NOT ONLY TEND TO CONTRADICT A FORMER WITNESS OR TO IMPEACH OR DISCREDIT HIM

Petitioner's newly discovered evidence constitutes far more than impeachment evidence.

In Peterson, this Court held that "[w]hile generally, impeachment evidence, by itself, may be insufficient to warrant granting a defendant a new trial based on newly discovered evidence, this evidence [of the agent's misrepresentations] constitutes much more than impeachment evidence." 744 S.E.2d at 157. This Court further stated that because the SBI agent's testimony was "crucial and necessary to the jury's verdict of murder, evidence of his misrepresentations goes well beyond simply impeaching a single witness." Id.

In the present case, Williams testified that he witnessed Petitioner murder Myron Hailey in Haymount Hill. Second MAR ¶ 158. However, as previously stated, Williams's account of the alleged incidents were inconsistent with known facts and evidence discovered by the Task Force and post-conviction counsel. Second MAR ¶¶ 165 & 175. Williams has also recanted his trial testimony and admitted that he received financial compensation in exchange for his testimony. Second MAR ¶¶ 8 & 35.

The State presented no physical evidence that connected Petitioner to the murder. Second MAR ¶ 155. Williams was the only witness at trial to claim direct knowledge about the events alleged in the Haymount Hill on the night of Hailey's death. Second MAR ¶ 174. Indeed, his testimony constituted the *only* evidence directly linking Petitioner to Hailey's murder. Id. Without Williams's testimony, there would have been no evidence upon which to convict Petitioner or even to indict him. Id. Thus, Williams's testimony was crucial and necessary to the jury's verdict of murder and evidence of his misrepresentations – both from the statements of the Court Boys and the on-scene FPD officer – go well beyond simply impeaching a single witness. Instead, the new evidence unravels the theory of the State's case in its entirety.

F. THE NEWLY DISCOVERED EVIDENCE IS OF SUCH A NATURE AS TO SHOW THAT PETITIONER WOULD PREVAIL UPON ANOTHER TRIAL

Petitioner has shown that the newly discovered evidence regarding the murder of Myron Hailey is of such a nature that on another trial a different result will probably be reached and that he would likely prevail. In Peterson, this Court concluded that the evidence concerning the SBI agent's misrepresentations would cause a jury to reach a different result in another trial. 744 S.E.2d at 159. This Court stated: "while we recognize that Agent Deaver was not the only witness to testify for the State, we find that the importance of his testimony was such that, had it been undermined, the jury would probably not have unanimously agreed on a guilty verdict based on this evidence." Id.

As previously stated, the State failed to disclose key evidence that would have shown that Petitioner did not kill Myron Hailey. The State also failed to correct the related false testimony given by Bobby Lee Williams, Jr. Had this evidence been disclosed and testimony corrected, there can be no doubt that a different result would have been reached in this case. Further, evidence implicating William Talley as Hailey's murderer was not discovered until years after Petitioner's trial. Had this evidence been available and known at the time of Petitioner's trial, it would have dramatically undermined Williams' testimony,

which the jury relied heavily on in rendering their guilty verdict, and Petitioner would likely have been found not guilty of Myron Hailey's murder.

II. THE DENIAL OF THE SECOND MAR WITHOUT AN EVIDENTIATY HEARING CONSTITUTES REVERSIBLE ERROR

Section 15A-1420(c)(1) of the North Carolina General Statutes mandates that trial courts determine whether an evidentiary hearing is required to resolve factual questions. N.C.G.S. § 15A-1420(c)(1). When the trial court "cannot rule upon the motion without the hearing of evidence, it must conduct a hearing for the taking of evidence, and must make findings of fact. N.C.G.S. § 15A-1420(c)(4). When subsection C of Section 15A-1420 is read in full, an evidentiary hearing is *required* unless the motion presents assertions of fact which will entitle the defendant to no relief even if resolved in his favor or the motion presents only questions of law. State v. McHone, 499 S.E.2d 761, 763 (1998).

Appellate courts in North Carolina have further developed the statutory provisions governing when an evidentiary hearing on a motion for appropriate relief should be granted. *Amici* concedes that this Court has properly ruled that denials of evidentiary hearings can be proper under certain circumstances. *See, e.g.,* State v. Essick, 314 S.E.2d 268, 272 (N.C. Ct. App. 1984) (no error where an evidentiary hearing did not take place because facts asserted by the State in response to petitioner's motion directly contradicted those advanced by petitioner, rendering an evidentiary hearing unnecessary); State v. Aiken, 326 S.E.2d 919, 927

(N.C. Ct. App. 1985) (no evidentiary hearing necessary where only "bare allegations" were made); State v. Harris, 449 S.E.2d 371, 376-77 (1994) (mere "general allegation" insufficient to merit an evidentiary hearing).

However, the facts of Petitioner's case align far more closely with cases where this Court has deemed that an evidentiary hearing is proper. In State v. Dickens, a defendant asserted that his plea bargain was improper because his plea was entered on the (incorrect) advice of his attorney that he would be allowed to make restitution instead of serving time. 261 S.E.2d 183, 187 (1980). As the precise advice of the attorney was not clear, the Court held that "the trial court should have held a hearing, received evidence under oath…together with any other relevant evidence, and then make findings of fact" as to the alleged defectiveness of the plea. Id. In addition, in State v. McHone, the defendant contended that improper *ex parte* contact occurred regarding an order denying his motion for appropriate relief. 499 S.E.2d 761, 763 (1998). Again, as factual questions emerged that required resolution, the court held that denial of the petition without an evidentiary hearing was improper. Id. at 764. In State v. Morganherring, the North Carolina Supreme Court went so far as to identify six specific issues where insufficient evidence was available for the trial court to have rendered a decision without an evidentiary hearing. 517 S.E.2d 622, 629-30 (1999).

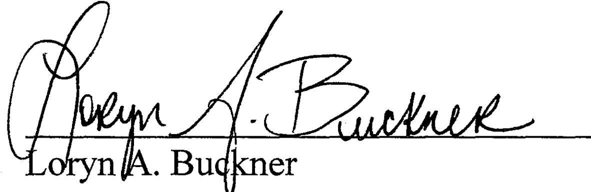
As discussed *supra*, the Petitioner has raised two issues of critical importance, the facts of which merit – at an absolutely bare minimum – consideration at an evidentiary hearing. The statements of six witnesses to the shooting, as well as the statement of a FPD officer – all newly discovered and properly before the court – are issues of fact that raise glaring concerns about the validity of Petitioner's conviction. Simply put, he is entitled to his "day in court."

CONCLUSION

In order for our justice system to function in its search for truth, courts must not use rules of procedure to ignore and obfuscate the obvious. Lamont McKoy has brought before the trial court evidence that is both new and exceedingly relevant. This evidence deserves consideration on its merits; a refusal to do so would be not only an errant interpretation of the applicable procedural rules, but also a grave injustice apparent to lawyers and laypeople alike.

For the foregoing reasons, this Court should reverse the decision of the Court below and remand this case for further proceedings in accordance with State v. Cronin, 262 S.E.2d 277 (1980).

Respectfully submitted this the 8th day of October 2015.



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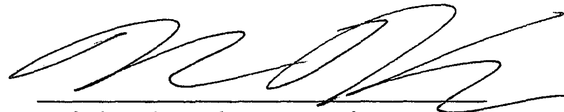
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, the undersigned hereby certifies that the foregoing brief was prepared using a proportionally spaced Times New Roman typestyle, with size 14 characters. According to the word-count statistics generated by the word-processing software utilized to prepare this brief, the contents of this brief do not exceed 3,750 words (excluding covers, index, table of authorities, certificate of compliance, and certificate of service).



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of this **Amicus Curiae Brief of the Innocence Network** was served upon all other parties to this action on the date shown below, by placing a copy in an envelope with adequate postage thereon and depositing the same in an official depository of the United States Postal Service under the exclusive care and custody of the United States Postal Service, said envelope being properly addressed to:

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