STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	THIRD JUDICIAL CIRCUIT
COUNTY OF CLARENDON	)	
	)	
State of South Carolina,	)	**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR NEW TRIAL PURSUANT TO SOUTH CAROLINA RULE OF CRIMINAL PROCEDURE 29(b), ANSWER TO STATE'S RESPONSE**
	)	
vs.	)	
	)	
George Stinney, Jr.,	)	
	)	
Defendant.	)	
	)	

The State submitted to the Judge and the Defense by way of electronic mail a document entitled "RESPONSE TO DEFENDANT'S MOTION FOR NEW TRIAL PURSUANT TO SCRCP 29(b)," on January 15, 2014. The Defense would answer with the following Memorandum. This Memorandum will rebut the contentions made by the State in their Response, in the same order those contentions appear in that Response.

I. RESPONSE TO STATE'S INTRODUCTION.

The State's Response opens with an introductory paragraph concerning its understanding of the basic facts before, secondly, citing inconsistency in newspaper reports and a lack of preservation as their reasoning for rejecting the original set of proposed stipulations.

The State begins with a brief summary of the investigation of the murders, the indictments and the trial, and concludes that summary in suggesting the following: "Those facts are the only ones that we are able to say with any conclusiveness that they are to any degree reliable." However, among these

"conclusive" facts, the State asserts that after Stinney was indicted for both murders, he was "tried on these charges on April 24, 1944," and that "the jury came back with a guilty verdict on both counts in ten minutes." In actuality, Stinney was tried only for the murder of Betty June Binnicker and the jury returned from deliberation with a guilty verdict on one count. Stinney was not tried for the murder of Mary Emma Thames. We know this not from newspaper articles, but, rather, from the indictment forms, which are among the few documents in the Stinney Record- which is held and maintained by the State of South Carolina.

The Response then discusses the original set of proposed stipulations, offered by the Defense in its Amended and Superseding Memorandum. Those proposed stipulations included the following: (1) two police officers testified that Stinney made confessions, that sexual assault was the motive, and a railroad spike was the weapon; (2) no written confession was admitted; (3) no bloody clothing was admitted; (4) no murder weapon was admitted; (5) Dr. Baker, whose name appeared on the medical examination, although without an accompanying signature, opined that sexual assault was possible; (6) Scott Lowder testified that the bodies were found in a watery ditch; and (7) the wheel of Binnicker's bicycle was taken off.

First, the State asserts that only "one article references that the wheel of the bicycle had been torn from its frame, that article being the one published in The State Newspaper on April 25, 1944," the day after the trial. The State further indicates that the "Defense wishes for us to stipulate to that fact, but it is not in the officer's notes, and no other newspaper article that is in our possession references it." Again, however, the fact that the wheel was torn from the frame of the bicycle

comes not only from newspaper reports, but from the trial notes of then-Solicitor McLeod, which include the following note: "Why wheel taken off?" In addition, the handwritten investigative notes of Deputy Sheriff H.S. Newman, who responded to the scene, *do* indicate that the wheel was taken off. Newman wrote that the bodies of the two girls were opposite one another, on either side of the ditch- the bicycle was next to the body of Miss Binnicker, on one side, and the wheel laid in the ditch between them. These notes, also, are included among the few surviving documents contained in the Stinney file, first maintained by the Clerk of Court and, then, the South Carolina State Archives.

The State's rejections of the remaining stipulations were based on similarly-flawed contentions. For example, the Response continues:

> Some newspaper articles indicate that the murder weapon recovered was a railroad spike. At the same time, an article published March 25th, 1944 in an unknown newspaper with the headline "Two Young Alcolu Girls Found Slain Early Today; Negro Youth Admits Crime" articulated that the murder weapon was a large blunt iron.

Actually, if considering all of the newspaper reports, the murder weapon was described with impressive variety to include the following: (a) a heavy piece of blunt iron; (b) a railroad spike; (c) a railroad trestle spike, about a foot long; (d) one of those [spikes] used to tie together railroad trestle beams, possibly 18 inches long and [weighing] approximately a pound and a half or two pounds; (e) a piece of iron, about 15 inches long; and, finally, (f) an iron rod. Thus, the Defense would agree that a large amount of inconsistency existed in regard to the descriptions of the murder weapon. However, it is difficult to understand how this might be detrimental to the Defense's case, rather than the State's. Furthermore, again, several of those

descriptions were actually extracted from surviving documents in the Stinney Record, maintained by the Clerk of Court, then the South Carolina State Archives. Specifically, from the handwritten notes of H.S. Newman, as well as the Indictments. Furthermore, the handwritten trial notes of then-Solicitor McLeod contain the word "spike," suggesting that the murder weapon as it relates to the State's theory at trial was said to have been a spike, although nothing, including the contents of the State's file, indicates whether or not a murder weapon was entered into evidence.

Actually, only a couple of the proposed stipulations were drafted in consideration of newspaper articles. Disregarding the newspaper articles entirely, it is true that it would be difficult to determine that Scott Lowder testified at trial, or that sexual assault as the State's theorized motive. However, both of these facts are repeatedly conveyed through the articles gathered in our investigation. Furthermore, in a letter signed by Olin Johnston and typed on his letterhead, sent in response to petitions for clemency following Stinney's conviction and before his execution, then-Governor Johnston states that the investigating officer told him that Stinney killed the younger girl in order to rape the older girl, then returned twenty minutes later to do so once more- but, he says, her body was too cold. Thus, for several reasons, the Defense believed it safe to assume that sexual assault was the motive in regard to the State's theory at trial.

The only other fact coming, partially, from a newspaper is the assertion that George W. Burke signed as a witness, served as the foreman of the jury on the Coroner's Inquest, and served on the Grand Jury that indicted Stinney. His name as a witness and his position on the Coroner's Inquest were determined through review

of the documents maintained by the State in the Stinney Record. The fact that he was on the Grand Jury was determined through reviewing the newspaper's publication of the grand jurors at the beginning of that term.

However, the Defense and the State have now come to an agreed-upon set of stipulations, and the Defense will argue that the after-discovered evidence, forensic and otherwise, will overcome the State's case, without even having to consider the fact that the State has no evidence, and dismissing the notion that the State's lack of evidence is the Defense's sole advantage.

II. RESPONSE TO STATE'S POSITION IN REGARD TO DEFENDANT'S MOTION FOR NEW TRIAL.

In order to succeed on a 29(b) motion, the movant must also show that the evidence: (1) is such as will probably change the result is a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial by the exercise of due diligence; (4) is material to the issue; and (5) is not merely cumulative or impeaching. *State v. Spann*, 334 S.C. 618, 619-620, 513 S.E.2d 98, 99 (1999).

Further, "A motion for a new trial is based on after-discovered evidence must be made within one (1) year after the date of actual discovery of the evidence or after the date when the evidence could have been ascertained by the exercise of reasonable diligence." Rule 29(b) SCRCrimP. "A motion for a new trial based on after-discovered evidence must be made within a reasonable period of time after the discovery of the evidence." *State v. Harris*, 391 S.C. 539, 706 S.E.2d 526, 529 (S.C. Ct. App. 2011).

The State contends that the statements from three witnesses- Charles Stinney, Amie Ruffner and Francis Batson- do not qualify as after-discovered evidence because they were available at the time of the trial. To support this contention, the State cites a case factually dissimilar to the case at bar:

> This case is not the first time that a court in South Carolina has been faced with the issue of whether a statement by a witness who did not testify at trial is then after-discovered evidence simply because the Defense did not call the witness, or know about the witness. In the case of State v. Needs, 333 S.C. 134 (1998), our Supreme Court addressed this exact issue. In that case, a man was murdered in his bed in Cherokee County. No murder weapon was recovered, no eyewitness existed, and no physical evidence was recovered to link the Defendant to that crime. Law Enforcement did speak with a young boy who was riding by the house at the time of the murder, who provided that he heard arguing, and what he thought was gunshots coming from within. Later, the Defendant's girlfriend came forward and inculpated the Defendant in the crime. The Defense hired private investigators, and when the asked a neighbor if her or anyone in her family knew anything about the murder, she signed an affidavit saying they did not. In closing arguments, the Defense argued that the State failed to thoroughly investigate leads in the crime. The Defendant was convicted. Two years after the case was tried, the Defendant's wife secretly taped a conversation between herself and the neighbor with her kids, where the young boys asserted that they did see a man running from the victim's home on the night of the murder after hearing a gunshot. Based on this, the Defense requested a new trial pursuant to Rule 29(b) on after-discovered evidence, specifically seeking to introduce the testimony of two young boys. The Court denied defendants motion, finding that the testimony would have not changed the outcome of the trial, but also noting that the defense, in due diligence, should have insisted on speaking with the boys prior to trial, instead of just their mother. See Needs at 156-158.

The State suggests that the "facts and law from Needs is very similar to the case before us today."

The facts from *Needs* are *not* similar to the facts of the case before us today, and a proper application of the law should not produce the same result. First of all, as the State indicates in the passage above, the Defendant's girlfriend, in that case,

"inculpated" the Defendant in the crime, meaning there was a witness testifying in regard to something the State didn't already know upon reviewing the crime scene. Secondly, the recorded conversation offered by the Defense as after-discovered evidence contained only an assertion from a couple of young boys that they saw a man running from the victim's home on the night of the murder. It seems relatively obvious that this testimony would not have changed the outcome of a new trial, and *that* is why the Court denied the defendant's motion in that case. The State argues that the Court "also [noted] that the defense, in due diligence, should have insisted on speaking with the boys prior to trial, instead of just their mother." Without even having to consider the fact that the case at bar contains an entirely different set of circumstances, the State, here, is arguing dicta.

First, the statements of Charles and Amie provide their brother with an alibi, testimony far more material than that of a couple of kids who "did see a man running from the victims home." Their statements and testimony, if deemed credible by the Judge, will probably change the outcome at a new trial. This rebuttal, however, will address the dicta argued by the State as precedential and binding caselaw, applied in their Response to the statements from Stinney's surviving siblings by and through the following passage:

> In the current case, what reason the Defendant chose not to call the witnesses is candidly unknown, but whether it was a strategic decision or a failure to properly investigate and call the witnesses needed for trial are immaterial to this hearing. Either one would not give rise to a new trial under 29(b), but would more appropriately be decided in a post-conviction relief venue at best.

The Defense Attorney chose not to call these witnesses for one reason: Calling on them was not an option. They were gone, forced to leave Alcolu the night following their brother's arrest. The Amended Memorandum included the following passage:

> The Alderman Lumber Company evicted the entire family on the night of the arrest within a matter of hours. Bishop Charles Stinney explained in his sworn affidavit that it would have been impossible for him to share this information at the time of his brother's trial: "... the police came to our home. They took George....My father was fired from his job and my entire family had to move that night and go live with my grandmother in Pinewood. I remember my mother and father being very afraid for the safety of our family." Stinney Aff. ¶7.

The Defense Attorney could not reasonably have been expected to go on a one-man bounty hunt across the State for these alibi witnesses who had been run out of town. In *Needs*, the two young boys remained in the same neighborhood for the entirety of the relevant time period. In this case, the Stinneys were gone, a black family exiled from a community turned-furious in 1944 Jim Crowe Era South Carolina.

The same goes for the sworn statement from Francis Batson. As the Defense's Amended Memorandum indicated, "Batson pulled the girls from the ditch, but was never questioned or asked to testify. He was sent home prior to the police responding to the scene." Batson was fifteen years old at the time, was sent home immediately upon discovery of the bodies, and before the investigating officers arrived at the scene. This is corroborated by the notes of Deputy Sheriff H.S. Newman, in the Stinney Record, when he describes only the positioning of the bodies after they had already been moved. In *Needs*, the investigator had already interviewed the children's mother, and he knew of the children's presence. He consciously decided not to interview them before the trial and that was his own

doing, although it should be noted that the after-discovered evidence was rejected for an entirely different reason in that case. Here, there is nothing to indicate that the Defense attorney ever knew of Batson's presence among the search party, nor is there anything suggesting that the Defense attorney even knew who Batson was.

This portion of the State's Response also attacks the credibility of Dr. Stephens. The Response states that it "should be noted that a westlaw search of his name makes it clear that it is almost always a defense counsel who retains him." This means absolutely nothing. More important, however, is the fact that the Solicitor was available for the deposition and actively participated in cross-examination. The Solicitor had the opportunity to qualify Dr. Stephens and he made no objection. We would object to this improper reference to Dr. Stephens, as it was not raised in the deposition, nor was he questioned about it. Additionally, it's certainly worth noting that Dr. Stephens work on this case was entirely *pro bono.*

The State, then, argues that the testimony of Dr. Stephens was not offered in a timely manner:

> The Defense has gone to great lengths to argue that this hearing has been brought at the earliest point in time at which it could have been, that the evidence they are arguing is after-discovered evidence had no other means of coming to light prior to approximately 2010, and that this motion falls in compliance with the requirements of Rule 29(b) of the South Carolina Rules of Criminal Procedure. That simply just is not the case. By Dr. Stephens and the Defense Counsel's own report and motions, forensic science was not a well-regarded science in the 1940's, and it was not until the 1950's that it truly became a widely-used practice. Assuming for arguments sake that we take the Defense's assertion at its word and assume that the medical doctors in 1944 that examined the bodies of these young girls were not well versed enough to establish an appropriate cause of death, it calls deeply into question why it then took approximately

> sixteen years to find a forensic pathologist who could make that determination.

Here, the State misinterprets the law and misapplies it to the evidence on two separate levels. One prong of the 29(b) standard is that evidence be of the nature that it could not reasonably have been discovered before the trial through exercise of due diligence. Furthermore, the evidence must have been discovered since the trial, and the motion must be filed within a reasonable period of time upon discovering that evidence. These are three separate prongs, and the "due diligence" standard applies only to one of them. More plainly stated, the due diligence standard applies before the trial, but not after the trial. The State has just agreed that the expert opinion of a Forensic Pathologist with today's understanding of the field and a modernized skillset could not have been discovered before the trial through exercise of due diligence. The fact that some of this science has been available for a period of time and the expert testimony may have been discoverable for the last several years is entirely irrelevant- the bottom line is that *wasn't* discovered. This is all that matters in regard to that particular prong. Thus, employing the State's own analysis of the Defense's evidence with a more accurate application of the relevant law, the State has just agreed that the expert opinion of Dr. Peter Stephens meets that requirement of the 29(b) test.

Furthermore, Dr. Stephens testimony is based upon the statement of Francis Batson, as well as the statement of Wilford "Johnny" Hunter, neither of whom could have been discovered prior to trial through the exercise of due diligence. The expert testimony reviews, also, the medical report completed by Dr. Bozard. While the newspaper reports indicate that Dr. Baker testified at trial, despite not having

signed the medical report above his name, the State has expressed a desire to exclude any extraneous material from consideration, leaving the State with nothing to establish that the report was shared with the Defense or considered at trial. This- coupled with the fact that the Defense only discovered the medical report in the last few months and filed well within the time allotted- would establish that Dr. Stephens's opinion, undiscoverable before the trial by its very nature, is based upon yet another piece of evidence that likely satisfies this prong of the 29(b) test.

The State concludes with the following:

> All of this brings us to the final and overarching problem with the Defense motion for new trial. To read their memorandum, one would think that the blame for a lack of a court record, for surviving witnesses, and for the ability for the State to re-try Stinney falls squarely on the shoulders of the State, and that the state and the victims should concede loss. What that argument ignores is the plain fact that the reason that the State has none of this evidence, these transcripts, and these witnesses is because of the age of this case. And that goes right to the heart of why it is so incumbent upon the defense to raise issues of after-discovered evidence as soon as is reasonable possible, and why new trials are looked at harshly. Our Courts operate on the notion that both sides will have a fair opportunity to present their evidence. For one side, then, to wait until all evidence is gone, whether this wait was intentional or not, and to then use that spoliation of evidence as a sword and shield goes against the spirit of 29(b). It is therefore for all of these reasons stated above that the State respectfully requests that this court deny the defendant's motion for a new trial pursuant to rule 29(b).

First of all, our Memorandum did not contend that the "blame" for a lack of a court record, as well as the inability of the State to re-try Stinney, "falls squarely on the shoulders of the State." The Defense did not "blame" anybody. The Defense did rightfully contend, however, and continues to maintain, that the *burden* of producing evidence to rebut that evidence offered by the Defense for a new trial, according to the law, is carried by the State. To read their memorandum, one would think that

the State suggests this burden is carried by Mr. Stinney. It is not. That said, the Defense, understanding that the case at bar is nearly seventy years old, proposed a set of stipulations for *the Defense* to overcome, even though the Defense does not carry that burden. This hardly suggests that the Defense believes the State should "concede loss," or that the Defense is attempting to take advantage of the "spoliation of evidence," as the State wrongfully suggests in the above passage. In reality, the Defense conducted such extensive research for the sole purpose of overcoming that notion.

The State then makes two assertions, together, in complete contradiction of one another- "new trials are looked at harshly," but "our courts operate on the notion that both sides will have a fair opportunity to present their evidence." Remedies such as the new trial offered by our State's Rule 29(b) are put in place in order to provide for a just result when one of our citizens *did not* have the opportunity to present their evidence, and to look upon them harshly for seeking help pursuant to a law of our State enacted for precisely that reason is unjust.

Finally, to suggest that the Defense "waited until all of the evidence was gone" and hoped to use this as an advantage in bringing a motion for new trial, especially considering the willingness of the Defense to reconstruct the facts of the case, is just as offensive as it is ridiculous.

III. DEFENDANT'S RESPONSE TO STATE'S CONCLUSION.

The State's Response includes a brief conclusion, which contains the following passage:

> But what we must avoid doing is ignoring the law to try and correct something the defense asserts was done wrong in a courtroom seventy years ago. That will only cause people to question the validity of the Courts, and create a precedent for ignoring the law in the future. The defense has outlined other avenues of relief in their brief, and those may provide a better and more legal route for the relief they seek. Whether it will or will not provide that relief will have to be determined by that Court, and are not at issue here today.

Again, the Defense would disagree with the contention of the State. The State suggests that the Defense is "ignoring the law" in order to try and correct something done wrong in a courtroom seventy years ago. The duration of time, here, is immaterial. The statute is one *designed* for the purpose of correction and the evidence offered by the Defense pursuant to Rule 29(b) satisfies the terms of the rule.

The State suggests that the Defense take another route. With a pardon, the State could "forgive" the fourteen year-old, ninety-five pound boy it wrongfully convicted and executed. After all, the second page of the Response suggests that inconsistency in descriptions of the murder weapon, as well as the poorly-preserved nature of Stinney's case, are both the Defendant's problem. On page three, the State suggests that it would be "unfair to the original trial court" to use unreliable sources in reconstructing the facts, even though that burden does not rest with the Defense, and despite the fact that the stipulations are constructed entirely from documents contained in the *State's* file. On the fifth page, commenting on the Stinneys' having been forced to leave town by law enforcement on the night of George's arrest, the State, again, blames the Defense, labeling the witness's denied opportunity to testify at trial as either a "strategic decision or a failure to properly investigate". On the eighth page, the State claims that Stinney should be denied a new trial because the

State has not maintained a better file, and suggests that the Stinneys intentionally waited until the evidence was gone and used this as a "sword and shield that goes against the spirit of Rule 29(b)." These issues, however, are no fault of the Stinneys, and there is alternative route to justice.

We wholly disagree with the contentions of the State and believe the evidence offered by and through this Motion complies legally with the standard set forth in Rule 29(b). The Defense would ask that this Court grant a new trial pursuant to our State's law. Co-counsel of the Defense, Professor Miller Shealy, recently filed a Memorandum discussing the Court's authority to consider this matter as a Petition for Writ of *Coram Nobis.* If the Defendant is to be denied a new trial pursuant to Rule 29(b), George Stinney, Jr., or his legal representatives, are entitled to the extraordinary Writ of *Coram Nobis.* He and they have no other remedy. There were many errors of fact and law in his trial and related proceedings. The judgment of conviction against George Stinney, Jr. must be vacated.

The procedurally-flawed conviction of George Stinney, Jr. for a murder he did not commit and the execution of a fourteen year-old boy have left an ugly knot in the thread of our State's timeline. Seventy years later and with aging witnesses finally courageous enough to come forward in order to be heard by the Court of Law that denied them that opportunity years ago- and backed by forensic evidence supporting the young boy's innocence- the Court is afforded not only the opportunity to repair the shattered name of a child that our State executed, but to untie and make right this inexcusable miscarriage of justice before it becomes permanently a glaring blemish in South Carolina's history.

Respectfully Submitted,

COFFEY, CHANDLER & McKENZIE, P.A.

January 2nd, 2014

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