STATE OF NORTH CAROLINA COUNTY OF ROBESON	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION Court File Numbers: 93 CRS 15291-15293
STATE OF NORTH CAROLINA v. DANIEL ANDRE GREEN	FIRST SUPPLEMENT TO FIRST AMENDED MOTION FOR APPROPRIATE RELIEF

NOW COMES THE DEFENDANT, Daniel Green, by and through undersigned counsel, who files this FIRST SUPPLEMENT to Defendant's First Amended Motion for Appropriate Relief:

PRELIMINARY STATEMENT

Since the filing of Defendant's First Amended Motion for Appropriate Relief, counsel for Mr. Green has discovered new evidence forming the basis for additional grounds for relief. First, the former editor-in-chief of the Carolina Indian Voice, Connee Brayboy, has provided information that Mr. Green's co-defendant, Larry Demery, personally confessed to her in 1993 to shooting James Jordan. This is newly discovered evidence which supports Mr. Green's claim of actual innocence and corroborates affidavits already filed with the First Amended Motion for Appropriate Relief attesting to Mr. Demery's confession to other people. See Exhibits 98, 99, 101. Second, new evidence shows that a juror conducted an independent investigation into the murder while the trial was ongoing and in violation of a Court order. Paula Locklear, who served as jury foreperson, has admitted to conducting her own investigation into this case during trial. She also confirms the importance and material significance of Jennifer Elwell's testimony regarding the blood she claimed to discover in James Jordan's vehicle. Each

of these additional claims independently provide grounds for a new trial and are hereby incorporated by reference into Mr. Green's First Amended Motion for Appropriate Relief.

I. NEWLY DISCOVERED EVIDENCE THAT THE CO-DEFENDANT, LARRY DEMERY, HAS CONFESSED TO THIS CRIME REQUIRES A NEW TRIAL.

A. Newly Discovered Evidence Requires a New Trial.

In situations of newly discovered evidence, a new trial will follow if a criminal defendant successfully proves that (1) the evidence was discovered following trial; (2) the defendant exercised due diligence in discovering the evidence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material to issues before the court and (5) the evidence is of such a nature that a new trial would probably produce a new result. United States v. Swarek, 677 F.2d 41, 43 (8th Cir. 1982), *cert. denied*, 459 U.S. 1102 (1983); United States v. Mesa, 660 F.2d 1070, 1077 (5th Cir. 1981); United States v. Pappas, 602 F.2d 131, 133 (7th Cir.), *cert. denied*, 444 U.S. 949 (1979); United States v. Eldred, 588 F.2d 746, 753 (9th Cir. 1978); United States v. MacDonald, 640 F. Supp. 286, 331 (E.D.N.C. 1985).

In North Carolina State court, to prevail on a motion for appropriate relief based on newly discovered evidence, a defendant must establish the following: (1) that the witness or witnesses will give 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 the 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. State v. Hall, 194 N.C.App. 42, 48–49, 669 S.E.2d 30, 35 (2008); State v. Peterson, 228 N.C. App. 339, 344, 744 S.E.2d 153, 157–58 (2013).

B. Affidavit of Connee Brayboy.

By way of notarized affidavits filed in the appendix to Defendant's 2015 M.A.R., Defendant has put forth evidence that Larry Demery has confessed to multiple people over the years that he, and not Daniel Green, shot James Jordan. See Exhibits 98, 99, 101.

In the months following the filing of Defendant's M.A.R., counsel spoke with Mrs. Connee Brayboy, the former Editor-in-Chief of the CAROLINA INDIAN VOICE, a newspaper in Pembroke that operated from 1973 to 2009. Mrs. Brayboy recounted to Defendant's counsel a conversation she had with Larry Demery shortly after his arrest over the summer of 1993. Exhibit 102, Brayboy Affidavit, ¶¶ 3–5. Mrs. Brayboy said she was friendly with Mr. Demery's mother and arranged a visit with Mr. Demery in the Robeson County Jail. Id. ¶¶ 3–4. During the meeting, Mrs. Brayboy asserts that Larry Demery confessed to her that he shot and killed James Jordan. Id. ¶¶ 5–6. Mrs. Brayboy said Mr. Demery gave no indication that he intended to blame Daniel Green for the shooting. Id. ¶ 8. Mrs. Brayboy asserts that she did not publish Mr. Demery's confession on account of her concern for the reaction it would prompt from his mother, who appeared deeply traumatized by her son's arrest. Id. ¶ 8. Ms. Brayboy has provided Defendant with an affidavit attesting this information, which Defendant today files with the Court as an Appendix to this filing. See Exhibit 102.

Other witnesses have previously indicated that Mr. Demery confessed to killing Mr. Jordan. Jason Matthew Sams stated that Demery "told me he killed James Jordan and that he testified against Daniel in fear of receiving the death penalty. He told me that

Daniel had nothing to do with the murder except for helping to get rid of the body." See Exhibit 101. William Cruise stated that Larry Demery "boasted about killing Michael Jordan's father." Exhibit 99. He said that "he had a good lawyer put a loophol[e] in his plea and that is how he was getting back in court."[1] Exhibit 99. Marcus Devaughn Carrington also spoke with Demery when they were both housed in the Foothills Correctional Institute when Demery "brag[g]ed about killing James Jordan like it was only a game." Exhibit 98. He said "he me[a]nt to kill James Jordan and never talked about Mr. Green taking part in the murder of Mr. Jordan." Exhibit 98.

This constitutes newly discovered evidence for the following reasons:

1. The witnesses will give newly discovered evidence.

The statements of these witnesses are newly discovered as they were discovered after trial by the Defendant and his counsel.

2. The newly discovered evidence is probably true.

These statements are probably true because they are statements against Mr. Demery's criminal interest. They were made at different times to different people who have no connection to one another and do not know one another. The witnesses have no bias against Mr. Demery or in favor of Mr. Green. In particular, the statement to Mrs. Brayboy was made prior to Mr. Demery's plea and Mr. Green's conviction, to a newspaper editor.

3. The evidence is competent, material and relevant.

This evidence suggests an alternative explanation for Mr. Jordan's murder and directly points to Mr. Green's innocence.

---

[1] This statement from Demery corroborates Mr. Green's claim that there was a benefit offered to Demery that was not disclosed to the Defense. See First Amended M.A.R. Claim II

4. **Due diligence was used and proper means were employed to procure the testimony at the trial.**

Trial counsel would have had no way to procure these statements prior to trial. The witnesses did not come forward or tell anyone about these statements prior to trial.

5. **The newly discovered evidence is not merely cumulative.**

There was no evidence at trial that Mr. Demery confessed to shooting Mr. Jordan. This would have constituted new evidence at trial supporting Mr. Green's innocence.

6. **It does not tend only to contradict a former witness or to impeach or discredit him.**

Although this evidence does impeach Mr. Demery, it more importantly offers substantive evidence of an alternative theory of the crime which supports Mr. Green's innocence. If offered at trial, it would have been admissible for more than impeachment purposes. This evidence could have been offered for the truth of the matter asserted that Mr. Demery, and not Mr. Green, shot Mr. Jordan. N.C. R. EVID. 804(b)(3) (Statement against Interest). Therefore this evidence does not only contradict and discredit Mr. Demery; it also offers substantive evidence of Mr. Green's innocence.

Demery's testimony was the only evidence suggesting Mr. Green committed this killing. Evidence which impeaches his testimony goes to a crucial aspect of the State's case and is not mere impeachment evidence. In State v. Peterson, the Court of Appeals has held that impeachment evidence which undermines a central aspect of the State's case does more than merely impeach and constitutes newly discovered evidence. See Peterson 228 N.C. App. at 346, 744 S.E.2d at 159 ("While, generally, impeachment evidence, by itself, may be insufficient to warrant granting a defendant a new trial based

on newly discovered evidence, this evidence constitutes much more than impeachment evidence. Due to the importance of Agent Deaver's testimony, the evidence concerning his qualifications would have completely undermined the credibility of the State's entire theory of the case.").

Similarly here, the information that the State's only witness directly implicating Mr. Green has confessed to the crime himself goes well beyond mere impeachment evidence and strikes at the core of the State's theory.

7. It is of such a nature as to show that on another trial a different result will probably be reached and that the right outcome will prevail.

Given that Mr. Demery offered the only testimonial evidence directly connecting Mr. Green to the robbery and murder of Mr. Jordan, the evidence that he confessed to killing Mr. Jordan himself would have led the jury to a different result. No other evidence was introduced at trial implicating defendant in the crime. Demery's confessions to other people suggest he was the sole perpetrator of the crime. If the jury also understood that Demery acted alone in the killing of Mr. Jordan, it is likely it would have acquitted Mr. Green of the felony murder. At an evidentiary hearing, Defendant intends to demonstrate to this Court that Mr. Demery has confessed his responsibility for shooting Mr. Jordan to numerous persons over the years, starting with Mrs. Brayboy shortly after his arrest. Because newly discovered suggests that Mr. Demery committed the killing alone, a new trial is required.

II. AN UNAUTHORIZED JURY VIEW OF THE SCENE VIOLATES THE SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES AND RIGHT TO A FAIR TRIAL. THE STATE MUST SHOW THIS ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT. HERE, A JURY FOREPERSON VISITED THE LOCATION WHERE THE BODY WAS DISCOVERED AND SHE DECIDED, BASED UPON HER VISIT TO THE SCENE,

THAT MR. JORDAN DID NOT DIE IN NORTH CAROLINA. THIS WAS NOT HARMLESS ERROR.

A. An unauthorized jury view of the scene violates the Sixth Amendment and requires harmless error review.

An unsupervised and unauthorized visit to a crime scene violates a defendant's Sixth Amendment rights to confront and cross-examine witnesses against him and to be judged by an impartial jury. Sherman v. Smith, 89 F.3d 1134, 1137 (4th Cir. 1996). An unsupervised juror site visit does not constitute structural error; rather, it is subject to harmless error analysis. Id.

B. Here, the Jury Foreperson visited the location where the body was discovered and decided on the basis of that visit that Mr. Jordan died outside of North Carolina.

Paula Locklear served as jury foreperson in this case. See T p. 7548. In an affidavit filed with this supplement, she admits to conduct which violated Defendant's right to a fair trial, including: (1) her personal investigation into the murder—including a visit to the location where the body was discovered—while she was serving on the jury, and the significant impact that visit had on her interpretation of the evidence; (2) her prior relationship with the State's chief witness, Larry Demery, and his family, which Defendant's counsel did not ask her about in voir dire or during the trial; (3) her prior knowledge of the Defendant and her negative impression of him as a child; (4) the unauthorized consumption of media coverage by at least three members of the jury, in direct contravention of the trial judge's orders; and (5) the significance of Agent Jennifer Elwell's testimony about the blood evidence to the jury's finding of guilt. See Exhibit 103, Paula Locklear Affidavit (2016).

In her affidavit, Ms. Locklear states that prior to the trial, she knew the State's chief witness, Larry Demery—from her church and from the school where she worked as a substitute teacher. Id. ¶¶ 6–7, 10. Ms. Locklear said she also knew Mr. Demery's family and his mother, in particular, who she regarded as a "good Christian woman." Id. ¶¶ 6–7. Ms. Locklear stated that during the trial, Ms. Demery addressed the church congregation and asked them to pray for her son. Id. ¶ 8. Although Ms. Locklear did not know Defendant personally, she stated she knew him by reputation as someone her fellow teachers regarded as a troublemaker. Id. ¶ 10. Given her history with the Demery family, and her prior negative impressions of Defendant, Ms. Locklear's presence on the jury was inappropriate and prejudiced Defendant's right to a fair trial. See, e.g., State v. White, 349 N.C. 535, 551, 508 S.E.2d 253, 264 (1998) ("[C]oncerns about a prospective juror's knowing the defendant or witnesses were a sufficient basis to support an excusal for cause[.]" (citing State v. Locklear, 331 N.C. 239, 247–48, 415 S.E.2d 726, 731–32 (1992))).

Perhaps most troublingly, by visiting the location in South Carolina where Mr. Jordan's body was discovered (Id. ¶5), Ms. Locklear violated repeated instructions from the trial judge not to conduct any independent investigation. The trial judge repeatedly instructed the jury: "[D]on't conduct any independent inquiry or research of any kind." See, e.g., T p. 1562. This violation of the Court's clear instruction was of such a nature that, had the trial judge been aware of it, the Court could have exercised its discretion to charge her with criminal contempt. See N.C. GEN. STAT. § 5A-11(a)(3) (defining criminal contempt as "[w]illful disobedience of . . . . a court's lawful . . . order, directive, or instruction").

In her affidavit, Ms. Locklear states that she knew the woman whose brother discovered Mr. Jordan's body, that she discussed the discovery of the body with her, and that she thereafter traveled to the creek at Gum Swamp. Exhibit 103, ¶ 5. Upon visiting the creek and observing the precise location of the branch where the body was recovered, she came to believe that Mr. Jordan had in fact been alive when his body was placed in the creek, and that he later crawled onto the branch where he expired. Id.

In determining the circumstances for "reversal for unauthorized juror site visits," reviewing courts "look to the nature and extent of the juror's activity and assess how that activity fit into the context of the evidence presented at trial." Sherman, 89 F.3d at 1139–40. The court looks to "whether the juror learned information that was merely cumulative of other evidence or whether he unearthed new information not previously presented to the jury." Id.

Here, Ms. Locklear states in her affidavit that her unauthorized visit provided her with a different understanding of the evidence—that it led her to believe that Mr. Jordan died in South Carolina as opposed to North Carolina. Exhibit 103, ¶ 5. This theory is inconsistent with the State's evidence at trial. Indeed, if the State of North Carolina had subscribed to Ms. Locklear's interpretation of the evidence, the State of North Carolina may have lacked jurisdiction. Because it prompted her to embrace a theory of the case not presented at trial, Paula Locklear's unauthorized visit "unearthed new information not previously presented to the jury"—information that was not "merely cumulative of other evidence" that had been presented. Sherman, 89 F.3d at 1139–40.

Ms. Locklear's visit to South Carolina was so prejudicial that it warrants a new trial. Her visit led her to conclude a theory of the crime that was significantly different

than the theory presented at trial. In many jurisdictions, "the unauthorized view [of a scene] by [a] juror . . . automatically require[s] a new trial." Com. v. Price, 463 Pa. 200, 203, 344 A.2d 493, 494 (1975) (collecting cases). The Supreme Court has clearly commanded that "verdict[s] must be based *upon the evidence developed at the trial.* This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." Turner v. Louisiana, 370 U.S. 466, 472 (1965) (emphasis added) (internal citations and quotations omitted). Here, Ms. Locklear served as the jury's foreperson and she admits to both considering and being persuaded by evidence she developed on her own, outside of the trial. Her independent, unauthorized, unsupervised view of the scene and the conclusions she drew from her investigation deprived Mr. Green of his rights to confront her about the evidence she collected, to an impartial juror, and, ultimately, to a fair trial with a "verdict ... based upon evidence developed *at the trial.*" Id. (emphasis added).

Ms. Locklear's affidavit also corroborates juror James Cassidy's statement, addressed at length in Defendant's M.A.R., that he watched news coverage of the case in violation of the trial court's repeated instruction not to "allow yourselves to be exposed to any media accounts which may exist in this matter." See, e.g., T p. 1562; Defendant's M.A.R., App'x, Exhibit 27, ¶ 177 (recounting statement of juror James Cassidy). Ms. Locklear states that, in addition to Mr. Cassidy, at least two other jurors discussed media coverage of the case. Exhibit 103, ¶ 11. Given the celebrity of the victim, the case was covered more heavily by state and national media than perhaps any North Carolina case at the time. See, e.g., News Articles, First Amended Motion for Appropriate Relief, Exhibits 25, 32, 35, 49, 50, 51, 55, 76, 84, 85, 96. Much of that coverage was

inflammatory and inaccurate. A quarter of the jury is known to have violated the court's clear instruction not to consume media coverage of the case. It thus cannot be said with any confidence that their "verdict [was] . . . based upon the evidence developed at the trial." Turner, 370 U.S. at 472.

CONCLUSION

These additional claims are hereby incorporated by reference to Defendant's First Amended MAR. In addition, the attached Exhibits, #102–07, are also incorporated by reference. For the above stated reasons, as well as those presented in Defendant's M.A.R., this Court should award Defendant a new trial. In the alternative, this Court should order an evidentiary hearing so that Defendant may present evidence of his innocence and deficiencies in his trial that rendered it unfair.

Respectfully submitted this date 30th March 2016

C. Scott Holmes
3130 Hope Valley Rd.
Durham, North Carolina 27707
Office: (919) 401-5913
Email: scott.holmes@meecelawfirm.com
N.C. Bar No. 25569

Ian A. Mance
Staff Attorney, Criminal Justice
Southern Coalition for Social Justice
1415 W. NC Hwy. 54, Ste. #101
Durham, North Carolina 27707
Office: (919) 323-3380, ext. 156
Email: ianmance@southerncoalition.org
N.C. Bar No. 46589

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that copies of the foregoing Reply to State's Answer in the above entitled action were served by Email and United States Mail, placing it in a depository for that purpose, postage prepaid and addressed as follows:

To:

Mr. Jonathan Babb and
Ms. Danielle Marquis Elder
Special Deputy Attorneys General
Capital Litigation Section
NC Department of Justice
PO Box 629
Raleigh, North Carolina 27602
Email: jbabb@ncdoj.gov
Email: dmarqis@ncdoj.gov
Fax: (919) 716-0001
Telephone: (919)716-6500

This date 30th March 2016

C. Scott Holmes
N.C. State Bar # 25569
3130 Hope Valley Road
Durham, North Carolina 27707
Telephone: (919) 401-5913
Facsimile: (919) 419-1018

Ian A. Mance
Staff Attorney, Criminal Justice
Southern Coalition for Social Justice
1415 W. NC Hwy. 54, Ste. #101
Durham, North Carolina 27707
Office: (919) 323-3380, ext. 156
Email: ianmance@southerncoalition.org
N.C. Bar No. 46589