

**STATE OF LOUISIANA**  
**COURT OF APPEAL, FIRST CIRCUIT**

STATE OF LOUISIANA

NO. 2017 KW 0715

VERSUS

JOHN GILMORE

**OCT 02 2017**

---

In Re: State of Louisiana, applying for supervisory writs,  
20th Judicial District Court, Parish of West  
Feliciana, No. 14-WFLN-436.

---

**BEFORE: HIGGINBOTHAM, HOLDRIDGE AND PENZATO, JJ.**

**WRIT DENIED.**

**GH**  
**TMH**

**Penzato, J.**, dissents and would grant the writ application. I find the district court abused its discretion in granting the defendant's motion for new trial based upon newly discovered evidence, as the defendant failed to make a showing of new evidence that was discovered after trial, the failure to discover the evidence at the time of trial was not caused by lack of diligence, the evidence was material to the issues at trial, and the evidence was of such a nature it probably would have produced a different verdict. See State v. Tucker, 2013-1631 (La. 9/1/15), 181 So.3d 590, 626, cert. denied, \_\_\_ U.S. \_\_\_, 136 S.Ct. 1801, 195 L.Ed.2d 774 (2016). See also La. Code Crim. P. arts. 851(B)(3) & 854. The burden is on the defendant to show that the new evidence was not discoverable prior to or during trial and that if the evidence had been introduced at trial, the new evidence probably would have caused the trier of fact to reach a different verdict. Our law is well settled that the proposed newly discovered evidence must not only be newly discovered, but also not discoverable by reasonable diligence before the verdict for it to justify the granting of a new trial. **State v. McKinnies**, 2013-1412 (La. 10/15/14), 171 So.3d 861, 870. In evaluating whether newly discovered evidence warrants a new trial, the test is not simply whether another jury might bring in a different verdict, but whether the new evidence is so material it ought to produce a different verdict. Newly discovered evidence affecting only a witness's credibility is merely cumulative or impeaching and ordinarily will not support a motion for new trial. **State v. Wilson**, 2015-1794 (La. App. 1st Cir. 4/26/17), 220 So.3d 35, 53.

Alleging that the defense was not aware of the specific time of the incidents until after the victim's trial testimony, after trial, the defense produced affidavits from the defendant's brothers and sister-in-law that set forth that the home where the alleged incidents occurred had burned down during the time the victim testified that count two occurred. However, during trial all three defense witnesses, including the defendant, testified regarding the house at issue burning down. The defendant's indictment set forth a time range for each

**STATE OF LOUISIANA**  
**COURT OF APPEAL, FIRST CIRCUIT**

NO. 2017 KW 0715  
PAGE 2 OF 2

charged count. The trial testimony regarding the house burning down indicated that it had burned down during the time range set forth for count one. Thus, it appears that the alleged new evidence was merely cumulative and should have been discovered prior to trial.

COURT OF APPEAL, FIRST CIRCUIT

A handwritten signature in cursive script, appearing to read "Renee K. Reed". The signature is written in black ink and is positioned above a horizontal line.

DEPUTY CLERK OF COURT  
FOR THE COURT