STATE OF LOUISIANA	*	**NO. 2005-KA-0973**
VERSUS	*	**COURT OF APPEAL**
RYAN LEWIS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

* * * * * * *

MCKAY, J., DISSENTS WITH REASONS

I respectfully dissent from the majority opinion in this matter.

In the instant matter the State argues that Form 44 was not "newly discovered" or that the production of Form 444 would have changed the verdict had it been submitted at trial.

It is important to distinguish between new evidence and evidence that simply had not been collected prior to trial. The form was available prior to trial and in the possession of a defense witness. Obviously, the defense investigator realized the importance of the form when he instructed Ms. Mackie to hold on to it. However, the defense did not request a copy of the form at that time, even though the witness told the investigator that the form would be turned into the office at the end of the school year. In fact, the defense did not attempt to subpoena the attendance records until May 2004,

almost two years after they were submitted to the school. Form 44 was not newly discovered evidence as defendant was clearly aware of its existence long before trial and it was discoverable before trial. Following trial, the form was located approximately one month after the first post-trial subpoena was issued. Defense counsel had sufficient time prior to trial to procure the form. The defendant has failed to show that the form was any more available or capable of being located after trial, than it was before trial.

Furthermore, assuming the form was unavailable for purposes of La. C.Cr.P. art. 851, it does not constitute evidence, which if introduced at trial, would probably have changed the verdict. In evaluating whether newly discovered evidence warrants a new trial, the test to be employed is not simply whether another jury might bring in a different verdict, but whether the new evidence is so material that is probably would produce a verdict different from that rendered at trial. State v. Metoyer, 97-2266 (La. App. 4 Cir. 12/7/98), 720 So.2d 148.

In State v. East, 99-1379, (La. App. 5 Cir. 7/25/00), 768 So.2d 173, the court opined that cumulative evidence as to an issue fairly disclosed and decided at the trial is usually not of the nature that would probably produce an acquittal for the purpose of determining whether defendant is entitled to a new trial based upon newly discovered evidence.

At trial, Ms. Mackie testified that she recalled Lewis being in class at the time of the shooting. She further testified that she referred to Form 44 to corroborate her statement. Thus, the jury was informed that Form 44 indicated Lewis was in class. Form 44 is cumulative evidence. The defendant has failed to show that the evidence was so material that its introduction ought to have produced a different result.

Accordingly, I would reverse the trial court's judgment granting the defendant's motion for new trial.