STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Georgetown County
The Honorable Benjamin H. Culbertson, Circuit Court Judge
Appellate Case No. 2012-213222

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

JODY LYNN WARD,

APPELLANT.

RETURN TO MOTION TO SUSPEND APPEAL AND FOR LEAVE TO FILE MOTION FOR A NEW TRIAL BASED ON AFTER-DISCOVERED EVIDENCE

Respondent hereby makes its Return to Motion To Suspend Appeal And For Leave To File Motion For A New Trial Based On After-Discovered Evidence filed by Appellant, Jody Lynn Ward, #300644 (Ward). Respondent submits that the Court should deny Ward's motion for the following reasons:

Ward is presently confined in the South Carolina Department of Corrections (SCDC), as the result of his two Georgetown County murder convictions and sentence. As discussed at length in the Final Brief of Respondent, Ward's case has a very lengthy procedural history. Following a March 15-18, 2004 jury trial before Judge Thomas, his jury convicted him of both murders and Judge Thomas imposed concurrent sentences of life imprisonment. Ward thereafter exhausted his state court remedies by taking a direct appeal and pursuing multiple Applications for Post-Conviction Relief. In the third and last action filed by him, South Carolina Supreme

Court filed an Order denying certiorari. It sent the Remittitur to the Georgetown County Clerk of Court on September 7, 2011.

Ward then filed a Petition for Writ of Habeas Corpus in the original jurisdiction of the South Carolina Supreme Court, which was received by that Court on October 31, 2011. The Court denied his Petition on November 16, 2011, based upon Ward's failure to meet the standard for state habeas corpus relief in *Simpson v. State*, 329 S.C. 43, 495 S.E.2d 429 (1998).

On December 1, 2011, Ward filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of South Carolina. *Ward v. Warden of Lieber Correctional Institution*, C/A No. 0:11-3277-RBH. He raised seven allegations in federal Habeas Corpus. Respondent filed a Return and Memorandum of Law in Support of Motion for Summary Judgment and a Motion for Summary Judgment on May 11, 2012. Ward subsequently filed a response in opposition to Respondent's motion. However, United States Magistrate Judge Paige J. Gossett filed a Report and Recommendation on February 15, 2013, recommending that Respondent's motion for summary judgment be granted.

Although Ward filed Objections to the Report and Recommendation, the Honorable R. Bryan Harwell, United States District Judge, filed an Order granting Respondent's summary judgment motion on March 20, 2013. Judgment was entered that same day. Ward filed a timely notice of appeal to the Fourth Circuit Court of Appeals. He filed an Informal Opening Brief on May 14, 2013 and a Supplemental Informal Opening Brief on May 20, 2013. On August 14, 2013, the Fourth Circuit Court of Appeals dismissed his appeal in a per curiam opinion.

Pursuant to Rule 29, SCRCrim.P, Ward filed a Motion for a New Trial Based on After Discovered Evidence in the Court of General Sessions, on May 16, 2012. His appeal from the denial of that motion is currently before this Court. The parties have previously filed their final

briefs, in accordance with Rule 211, SCACR. On September 2, 2014, the Court notified the parties that "this case will be submitted to the Court on the record and briefs during the September 2014 term without oral argument."

However, on September 22, 2014, the undersigned received a copy of the above-styled motion, which was submitted by Natasha M. Hanna, Esquire. In *State v. Spann*, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999), the Supreme Court held that:

In order to prevail in this new trial motion, appellant must show the after-discovered evidence:

> (1) is such that it would probably change the result if a new trial were granted;
>
> (2) has been discovered since the trial;
>
> (3) could not in the exercise of due diligence have been discovered prior to the trial;
>
> (4) is material; and
>
> (5) is not merely cumulative or impeaching.

(Citing *State v. Prince*, 316 S.C. 57, 447 S.E.2d 177 (1993)). *See also Mercer*, 381 S.C. at 166, 672 S.E.2d at 565; *State v. Needs*, 333 S.C. 134, 157-58, 508 S.E.2d 857, 869 (1998); *Johnson v. Catoe*, 345 S.C. 389, 393 & n. 1, 548 S.E.2d 587, 589 & n. 1 (2001).

According to Ward's motion,

> 1) Juror Number 19 ... was, at the time of trial, related by marriage to one of the state's witnesses, Kevin Cooper and failed to disclose this relationship to the Court during voir dire.
>
> 2) Juror Number 39, an alternate, ... knew the Defendant prior to trial as she went to school with his brother and failed to disclose this relationship to the Court during voir dire.
>
> 3) Juror Number 48... was related by marriage to Tony Harper, a witness listed by the Defense, and failed to disclose this relationship to the Court during voir dire.

> 4) The foreman of the grand jury that indicted the Defendant ... had knowledge of the incident before the grand jury proceedings. [He] was the tow truck driver that pulled the vehicle that was alleged to be the scene of the shooting out of Dawhoo Lake.

Respondent would note that these allegations are of dubious credibility, since he would have the Court believe that three jurors violated instructions of the trial judge when she questioned them on *voir dire*. Contrary to Ward's unsubstantiated allegations, jurors are presumed to follow jury instructions. *Old Chief v. United States*, 519 U.S. 172, 196 (1997) ("Any incremental harm resulting from proving the name or basic nature of the prior felony can be properly mitigated by limiting jury instructions"); *United States v. Olano*, 507 U.S. 725, 740-41 (1993) ("'[We] presum[e] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them'") (citing *Francis v. Franklin*, 471 U.S. 307, 324, n. 9 (1985)); *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)). *Accord United States v. Senn*, 129 F.3d 886, 894 (7th Cir.1997) (noting, in context of holding that Government's comments did not violate *Griffin*, that "[t]he judge instructed the jury during the prosecutor's closing argument that the defense had no burden of proof, and the judge gave the usual jury instructions at the end of the trial regarding the defendants' refusal to testify").

Also, his assertion relating to the foreman of the Grand Jury that indicted him runs afoul of the presumption that a properly returned indictment is valid. A " 'presumption of regularity attaches to a grand jury's proceedings,' ... and [a defendant bears] the burden of rebutting the presumption." *United States v. Brothers Const. Co. of Ohio*, 219 F.3d 300, 314 (4th Cir. 2000). "[I]f the record does not reveal any irregularity in the proceedings affecting the indictment, this

court must presume the trial court had subject matter jurisdiction." *State v. James*, 321 S.C. 75, 79, 472 S.E.2d 38, 40 (Ct. App. 1996).

Here, Ward's indictment shows that it is regular on its face. " 'Speculation about 'potential' abuse of grand jury proceedings cannot substitute for evidence of actual abuse as grounds for quashing an otherwise lawful indictment.' " *Id.* Ward's motion does not set forth the basis for believing the truth of his allegations. Thus, he has not given the Curt any reason to grant the motion. Rather, he has merely raised bald assertions of impropriety.

Worse, Ward fails to state when or how he supposedly discovered the information that gave rise to these allegations by him. In other words, he has made no demonstration that he could not have raised these assertions at some earlier point in the ten years that he has been litigating his convictions and sentence. He likewise does not indicate why he believes that any juror deliberately failed to reveal the relationship alleged by him or that, in fact, any of the jurors deliberately did not reveal the alleged relationship. Further, he does not allege that how the grand jury foreman should have been disqualified because he towed a vehicle involved in the case, assuming *arguendo* that this is true.

Indeed, Ward's motion must be denied because he did not submit an affidavit, *by him*, averring the after-discovered evidence and the facts to which the witnesses will testify, as well as the fact he did not know of the existence of such evidence at the time of the trial and that he used due diligence to discover such evidence, or that he could not have discovered it by the exercise of due diligence. Over forty years ago, the Supreme Court found that such an affidavit is necessary when a criminal defendant seeks a new trial based upon after-discovered evidence

> As is heretofore stated, the appellant did not file his own affidavit setting forth the after-discovered evidence and the facts to which the witnesses will testify. It is essential to the consideration of a motion for a new trial based on after-discovered evidence that such motion shall be supported by an affidavit of the accused

himself. Unless a valid and sufficient reason for the omission to file such an affidavit is shown, the affidavit of the accused must show that he did not know of the existence of such evidence at the time of the trial and that he used due diligence to discover such evidence, or that he could not have discovered it by the exercise of due diligence. An affidavit of the appellant's counsel showing these matters is not sufficient. 24 C.J.S. *Criminal Law* s 1484c, page 286. *Chilton v. Commonwealth*, 170 Ky. 491, 186 S.W. 191. *Nothaf v. State*, 91 Tex.Cr.R. 378, 239 S.W. 215, 23 A.L.R. 1374.

Viewing the record in this case in the light of the affidavit made in support of the motion and in the light of the foregoing principles of law, we find no abuse of discretion, amounting to an error of law, on the part of the trial judge in refusing the motion of the appellant for a new trial based on after-discovered evidence.

State v. DeAngelis, 256 S.C. 364, 371-72, 182 S.E.2d 732, 735 (1971).

Therefore, Respondent respectfully asks that the Court to deny his motion and end over a decade of litigation.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

September 29, 2014.

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THE STATE OF SOUTH CAROLINA,

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PROOF OF SERVICE

I, William Edgar Salter, III, do hereby certify that on this date, I served the within *Return to Motion to Suspend Appeal and for Leave to File Motion for a New Trial Based on After-Discovered Evidence* in the foregoing action on counsel for the Appellant by depositing two (2) copies of the same in the United States mail, first-class postage prepaid, and addressed as follows:

Natasha M. Hanna, Esq.
The Law Office of Natasha M. Hanna, P.C.
4717 Jenn Drive, Ste. #102
Myrtle Beach, South Carolina 29577

This 29th day of September, 2014.

By: _____
WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

ATTORNEYS FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

September 29, 2014

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: *The State v. Jody Lynn Ward*
Appeal from Georgetown County
Appellate Case No. 2012-213222

Dear Ms. Kitchings:

Enclosed for filing please find the original and six (6) copies of Respondent's Return to Motion to Suspend Appeal and for Leave to File Motion for a New Trial based on after-discovered evidence, together with Proof of Service in the above-referenced case. If you should have any questions, please contact me.

Thank you for your assistance in this matter.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd
Enclosures
cc: Natasha M. Hanna, Esq. (w/two copies of encls.)
The Honorable Jimmy A. Richardson, III, Solicitor, 15th Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Services (w/copy of encls.)