THE STATE OF South CAROLINA
IN THE SUPREME COURT

APPEAL FROM BARNWELL COUNTY
COURT OF COMMON PLEAS
1997-CP-06-0011

ORDER OF DIMISSAL DATED JANUARY 21ST 2015, SIGNED BY THE HONORABLE DOYET A. EARLY III CHIEF JUSTICE FOR ADMINISTRATIVE PUPOSES, SECOND JUDICIAL CIRCUIT.

ELMORE BRAXTON ,,, PETITIONER

STATE OF South CAROLINA ,,, RESPONDENT

PETITION FOR A WAIT OF CERTIORARI

ALAN WILSON
OFFICE OF ATTORNEY GENERAL
P.O. BOX 11549
COLUMBIA, S.C. 29211

2-19-2015
DATE

Elmore Braxton
ELMORE BRAXTON #219263
LIEBER CORR. INST.
P.O. BOX 205
RIDGEVILLE, S.C. 29472
PRO-SE

PROOF OF SERVICE

I ELMORE BRAXTON THE UNDERSIGNED AFFIRM THAT A TRUE AND COMPLETE COPY OF RESPONSE TO DIMISS ORDER 1997-CP-06-0011 HAS BEEN SERVED THIS DAY OF FEBUARY 2015 BY DEPOSITING THE SAME IN US MAIL FIRST CLASS POSTAGE PREPAID ADDRESSED AS FOLLOWS:

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	OF THE SECOND JUDICIAL CIRCUIT
COUNTY OF BARNWELL)	1997-CP-06-0011
)	
Elmore Braxton,)	
S.C.D.C. No. 219263,)	
)	
Applicant,)	
)	**ORDER OF DISMISSAL**
v.)	
)	
State of South Carolina,)	
)	
Respondent.)	
)	

This post-conviction relief matter comes before the Court by Applicant's document titled "Motion for After-Newly Discovered Evidence" filed on May 14, 2013, under Applicant's prior PCR action 1997-CP-06-0011 and is construed as a Rule 60(b) motion pursuant to SCRCP. Respondent made its Return and Motion to Dismiss, construing the Motion as one under Rule 60(b) SCRCP and requesting the Motion be denied and dismissed.

I. PROCEDURAL HISTORY

Applicant is currently incarcerated at the South Carolina Department of Corrections pursuant to orders of commitment from the Clerk of Court of Barnwell County. Applicant was indicted by a Barnwell County grand jury during a February 1995 term of general sessions for Murder (95-GS-06-031). Walter Bedingfield, Esquire, represented Applicant on the charge. A jury trial was held February 7-8, 1995, before the Honorable James Johnson, at the conclusion of which the jury found Applicant guilty of murder. The judge sentenced him to life in prison.

Applicant timely appealed. Robert M. Dudek, Assistant Appellate Defender of the South Carolina Office of Appellate Defense, represented Applicant on appeal. Appellate counsel filed a

Final Brief of Appellant in the Supreme Court of South Carolina on January 10, 1996, and raised the following single issue:

> Whether the judge erred by striking the jury panel where appellant's reasons for challenging certain female members of the venire were rational and legitimate on their face, and the state failed to show they constituted gender-based discrimination?

The State filed its Final Brief of Respondent on December 20, 1995. The South Carolina Supreme Court affirmed the conviction in State v. Braxton, Memorandum Opinion No. 96-MO-189 (S.C.Sup.Ct. filed August 19, 1996). The Remittitur was sent September 4, 1996.

1997-CP-06-011

On January 13, 1997, Applicant filed an application for post-conviction relief, alleging he was being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
   a. Applicant claims that counsel at trial by jury was ineffective for failing to object to trial judge proceeding directly from the guilt phase of applicant's trial to the sentencing phase without waiting at least twenty-four hours period [sic] required by S.C. Code Ann. § 16-3-20(8) (C.Supp. 1991-1995);
   b. Applicant claims his trial counsel was ineffective for failure to interpose an objection when the trial judge gave the jury instructions invited [sic] the jury to prematurely deliberate the case and were reversible error;
   c. Applicant claims he was denied effective assistance of counsel because his attorney failed to object to prejudicial comments made by the trial judge;
   d. Applicant claims trial counsel were [sic] ineffective in failure to object to testimonies that was inadmissible hearsay and violated his confrontation rights;
   e. Applicant claims that he received ineffective assistance of counsel for failure to object to [sic] in allowing certain portions of the solicitor's closing argument;
   f. Applicant contends the type of ineffective assistance of counsel claim involves counsel's failure to render legal assistance, reasonable;
   g. Applicant claims that trial counsel was ineffective for failing to object to an erroneous malice charge;
   h. Applicant claims that trial counsel was ineffective for not objection to the trial judge's jury charge on the element of intent;

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2. Indictment and Information:
    a. Applicant claims that the trial court lacked subject-matter jurisdiction because the indictment were true billed with the court of general sessions in session;
    b. Applicant claims that where demand for preliminary hearing, following arrest on one warrant issued by magistrate charging offense of murder, was made ten days before convening of next term of court of general sessions but such hearing was not held and indictment was submitted to grand jury and true bill return, the court was without jurisdiction to convict him and, the jurisdiction of the grand jury being coextensive with the criminal jurisdiction of the court, the indictment was a nullity and conviction is required to be vacated.
3. Ineffective Assistance of Appellate Counsel:
    a. Applicant claims that his appellate attorney was ineffective for failing to argue on appeal that the trial judge's charge on reasonable doubt was erroneous;
    b. Applicant claims that his appellate counsel was ineffective for failing to argue on appeal that when the solicitor argued to jury during the guilt phase of the trial that appellant had shown no remorse for his actions, thereby denying him of due process of law;
    c. Applicant claims that his appellate attorney was ineffective for failing to argue on appeal that when the trial judge gave on the ground of an erroneous additional instruction to jury.

The State made its Return on March 13, 1997. Charles J. Johnson, Esquire, represented Applicant in the action. An evidentiary hearing was convened on May 28, 1998, before the Honorable Donald W. Beatty. The State failed to timely provide Judge Beatty a proposed order, and, on March 31, 1999, Judge Beatty issued an order for a new evidentiary hearing. However, on June 1, 1999, Judge Beatty inadvertently signed an Order of Dismissal. This Order of Dismissal was later voided by Judge Beatty in an Order of Clarification on September 27, 2001, with the surviving order being the Order for a New Trial signed March 31, 1999. On January 10, 2000, Applicant submitted an Amendment to his application, in anticipation of the re-hearing ordered by Judge Beatty.

2001-CP-06-091

Applicant subsequently filed a Petition for a Writ of Habeas Corpus on April 26, 2001, alleging that he was entitled to release, and entitled to have the indictment dismissed, for the State's failure to schedule and hold a new evidentiary hearing in accord with Judge Beatty's March 31, 1999 Order. An evidentiary hearing into the matter was convened on October 1, 2001, at the Aiken County Courthouse. The Applicant was present and represented by Hugh Claytor, Esquire. The Petition was dismissed by written Order of Judge Williams on December 7, 2001. The Order was appealed to the South Carolina Court of Appeals by Eleanor Duffy Cleary, Esquire. The appeal was withdrawn before the Court of Appeals, contingent on the pending re-hearing on the Applicant's 1997 PCR. This petition was dismissed by written order of the Court of Appeals on March 28, 2002, and the Remittitur followed.

2002-CP-06-109 (originally 1997-CP-06-011)

The new evidentiary hearing ordered by Judge Beatty was held on July 11, 2002, before the Honorable Rodney A. Peeples. In his application, Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel;
2. Indictment and Information; and
3. Ineffective assistance of appellate counsel.

Charlie Johnson, Esquire, represented Applicant and amended the application at the hearing to limit his grounds for relief to ineffective assistance of trial counsel for:

1. Failure to get a psychological evaluation to ascertain the Applicant's state of mind at the time of the crime;
2. Misinforming the Applicant that he could not get more than 30 years if he went forward with the trial;
3. Failure to object to hearsay evidence— a reference to "bad acts";
4. Failure to request proper jury instructions on the malice element; and
5. Failure to investigate the scene.

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Applicant's counsel also withdrew the allegation that counsel was ineffective for failing to object to improper jury instructions which invited the jury to engage in premature deliberations. Counsel also argued at the conclusion of the hearing that given the inordinate delay in the PCR action that Applicant was entitled to a new trial, noting the lack of the first PCR hearing transcript and the fact that trial counsel had since passed away. Judge Peeples denied relief and issued a formal written order on September 9, 2002.

Applicant filed a notice of appeal and Aileen P. Clare, Assistant Appellate Defender of the South Carolina Office of Appellate Defense, represented Applicant on appeal. Appellate counsel filed a Johnson Petition for Writ of Certiorari with the Supreme Court of South Carolina on September 22, 2003, and presented the following issue:

> Was trial counsel ineffective for failing to object to irrelevant, prejudicial evidence of alleged prior bad acts?

Applicant filed a pro se response on or about October 16, 2003, and raised the following additional issues:

1. [Applicant is entitled to a new trial based on the March 31, 1999, order of Judge Beatty, clarification should be sought before further proceedings held.]
2. Was trial counsel ineffective for failing to object on grounds that short interval between indictment and trial gave him (counsel) insufficient opportunity to assist in preparation of defense of Petitioner's case?
3. Was Trial Counsel constructively ineffective for eliciting highly prejudicial comments on cross examination of Det. Tom Gantt regarding prior incidents of domestic violence between the Victim and Petitioner?
4. Denial of 6th and 14th Amendment "Due Process" rights based on incomplete PCR records on which to base Adequate Appellate Review.

By Order dated April 22, 2004, the Supreme Court of South Carolina denied the petition for certiorari review. The Remittitur was sent May 11, 2004.

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Applicant subsequently filed a Petition for Writ of Habeas Corpus to the United States District Court under 28 U.S.C. § 2254. Applicant alleged the following grounds for relief:

1. Ineffective Assistance of Counsel;
   Supporting Facts: Counsel provided ineffective assistance in failing to (a) object to prejudicial evidence, (b) request mental evaluation, (c) provide effective advice concerning sentence.
2. Ineffective Assistance of Counsel;
   Supporting Facts: Counsel was ineffective due to the short interval between appointment and trial, and indictment and trial.
3. Denial of Due Process, trial court struck entire jury panel;
   Supporting Facts: During trial the trial court struck the entire jury panel over defense objection, denying petitioner's right to fair trial;
4. Denial of Due Process/Lack of Jurisdiction;
   Supporting Facts: During Petitioner's appeal process the PCR court granted petitioner a new trial, that order was rescinded, due to respondent's delay petitioner's trial counsel passed, the state should have been barred by Laches from conducting a new hearing due the [sic] extreme prejudice to petitioner.

Respondent filed a motion for summary judgment on November 10, 2004. After being served Respondent's motion and a Roseboro order, Applicant filed his response on January 27, 2005. On March 28, 2005, the Honorable Robert S. Carr issued a Report and Recommendation, recommending that Applicant's petition be dismissed in its entirety. After being noticed to do so, Applicant filed no objections to the Report and Recommendation. By Order dated April 28, 2005, the Honorable Cameron McGowan Currie adopted the Report and Recommendation, granted Respondent's motion for summary judgment, and dismissed Applicant's petition.

Applicant sought to appeal the dismissal to the Fourth Circuit Court of Appeals. On October 18, 2005, the Fourth Circuit Court of Appeals denied a certificate of appealability and dismissed Applicant's appeal.

Current Rule 60(b) Motion

On May 14, 2013, Applicant filed this current "Motion for After-Newly Discovered Evidence." In his Motion, Applicant alleges the following issues for relief:

1. "Did the solicitor committed fraud upon the Court by unlawfully impameled [sic] its grand jury outside the jurisdiction of the Court of General Sessions?"
2. "Did the PCR Court have juriction to conduct a Second PCR Hearing?"
3. "Was the Defendant's Fourteenth Amenment Rights of the United States Constitution and Rights of Due Process violated by Clerk of Court failure to signed the Commitment Order to authenticate as to genuineness of the signature on the Order?"

Before this Court are the Barnwell County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, Applicant's prior PCR and appellate records, and Applicant's current 60(b) Motion, and Respondent's Return and Motion to Dismiss.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Applicant's Motion Must Be Dismissed as Untimely

This Court finds that Applicant's motion must be dismissed as untimely. Rule 60(b), SCRCP, states that a motion under 60(b)(2) based on newly discovered evidence shall be made "not more than one year after the judgment, order, or proceeding was entered or taken." Applicant's initial PCR Action 1997-CP-06-011 was reheard pursuant to Judge Beatty's March 31, 1999 Order in action 2002-CP-06-0109. After an evidentiary hearing, the court issued an Order of Dismissal on September 10, 2002. Thus, Applicant had one year, until September 10, 2003, to file this Motion. Applicant failed to timely file this Motion and it is therefore untimely.

B. Applicant's Motion Fails To Qualify As Newly Discovered Evidence

Assuming, *arguendo*, that Applicant's Motion is timely, the Court must summarily dismiss the allegations as they do not entitle Applicant to relief under newly-discovered

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evidence. A party making a motion for a new trial or for relief from judgment based on newly-discovered evidence must show that the evidence:

1. Will probably change the result if a new trial is granted;
2. Has been discovered since the trial;
3. Could not by the exercise of due diligence have been discovered before the trial;
4. Is material to the issue; and
5. Is not merely cumulative or impeaching.

Lanier v. Lanier, 364 S.C. 211, 612 S.E.2d 456 (S.C. App. 2005). As outlined below, this Court finds that Applicant's contentions of "newly discovered evidence" are improper as they would not change the result if a new trial is granted.

1. Ground One – Grand Jury Impanelment

The allegation that the solicitor committed fraud upon the court by impaneling the grand jury outside the jurisdiction of the court of General Sessions is not newly discovered evidence and must be dismissed. This is untimely as newly discovered evidence because Applicant could have discovered any issues involving grand jury impanelment by exercising due diligence after being indicted and before his trial.

Additionally, this Court finds that this evidence is not material and would not change the result if a new trial was granted. A grand jury may meet at any time ordered by a circuit judge. See S.C. Code Ann. §§ 14-5-910 to -940 (allowing for terms of court not provided for by law). Thus, a grand jury is not unlawfully impaneled simply because it does not meet during a term of court as provided for in sections 14-5-620 to -820. See State v. Jeffcoat, 26 S.C. 114, 1 S.E. 440, 441 (1887) ("[M]erely changing the time for holding the court did not make the grand jury illegal."). Furthermore, a presumption of regularity attaches to proceedings in the Court of General Sessions. Pringle v. State, 287 S.C. 409, 411, 339 S.E.2d 127, 128 (1986). Absent evidence to the contrary, the court must presume that a properly returned indictment is valid.

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State v. James, 321 S.C. 75, 472 S.E.2d 38, 40 (Ct. App. 1996) (citing Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995)). Applicant's indictment is valid on its face because it states all the necessary elements of the crime, the date of the offense, and the name of the accused. Id. at 75, 472 S.E.2d at 40. Likewise, the indictment is stamped "True Billed" and signed by the Grand Jury foreperson. See Pringle, 287 S.C. at 410, 339 S.E.2d at 128.

Thus, because Applicant's indictment appears to have been lawfully obtained, his alleged "newly discovered evidence" would not change the outcome if a new trial was granted. Accordingly, this allegation must be dismissed.

2. Ground Two – PCR Court Jurisdiction

Applicant's allegation that the PCR Court did not have jurisdiction to conduct a second PCR hearing is not newly discovered evidence and must be dismissed.

The Court finds that Applicant's contention is not material evidence and would not change the result if a new trial was granted. Applicant contends that this new evidence shows he should have been granted a new criminal trial because of the "Order for a New Trial" signed by Judge Beatty on March 31, 1999. However, the written words and context of this document clearly show that Applicant's belief is in error. As Respondent points out in its Return and Motion to Dismiss, the March 31, 1999 Order clearly refers to a new PCR trial/hearing as evidenced by its contents:

> A hearing in this matter was held May 28, 1998 in Aiken County. Notwithstanding repeated requests to the Assistant Attorney General for an Order in this matter, none was received until approximately 10 months later. During that interim, the Court's memory of the proceeding has faded and the Court has no recollection of the Hearing.
>
> A transcript of the hearing is not available to the Court at this time. Therefore, to avoid further delay in resolving this matter, the Court believes that the interest of justice would be better served by rehearing this case.

> Therefore IT IS ORDERED that a new trial is granted and that this matter be scheduled for hearing immediately.

Order for New Trial, 97-CP-06-011.

The Court finds it is apparent that although captioned "Order for New Trial," the "new trial" being granted is the PCR hearing. The Order is captioned with 97-CP-06-011, the Case Number for Applicant's initial PCR action. Judge Beatty refers to the PCR hearing held on May 28, 1998, in Aiken County rather than Applicant's trial which took place February 7-8, 1995. Also, the reasons given for granting the new trial make it apparent that Judge Beatty is referring to the PCR action because he states that ten months passed after the PCR hearing, a transcript is not available from the hearing, and the Court's recollection of the hearing has faded.

This Court also finds relevant a letter from Judge Beatty to Judge Peeples dated August 31, 2000, incorporated in Respondent's Return and Motion to Dismiss and stating in part:

> Therefore, **on March 31, 1999 I issued an order granting the Applicant a new hearing (PCR)**...Subsequent to my conversation with the Assistant Attorney General I received a call from someone in the clerk of court's office inquiring if my order granted a new trial or a new PCR hearing, I informed her that **I meant a new PCR hearing**.

(emphasis added).

Thus, Applicant's alleged evidence that the PCR court did not have jurisdiction to hear a subsequent PCR hearing because Judge Beatty ordered a new criminal trial is erroneous and would not change the result if a new trial was granted. Accordingly, this allegation must be dismissed.

3. Ground Three – Lack of Clerk's Signature

The allegation that Applicant's rights were violated by the Clerk of Court failing to sign the commitment order is not newly discovered evidence and must be dismissed. This alleged evidence is not material to Applicant's trial. Additionally, this Court finds that evidence that the

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Clerk of Court failed to sign the sentencing sheet will not change the result if a new trial was granted. Thus, this allegation must be dismissed.

CONCLUSION

For the foregoing reasons, Applicant's Motion For After-Newly Discovered Evidence, construed by this Court as a 60(b) Motion, is untimely and does not contain actual newly-discovered evidence. Therefore, this Court hereby denies Applicant's Motion in its entirety and grants Respondent's Motion to Dismiss.

This Court notifies that if Applicant desires to secure appellate review of this Order and the Order of Dismissal, a notice of appeal must be filed and served within thirty (30) days of the service of this Rule 60(b) Order. Applicant is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

AND IT IS SO ORDERED this 21 day of January 2015.

DOYET A. EARLY, III
Chief Judge for Administrative Purposes
Second Judicial Circuit

Aiken, South Carolina

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