

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Barnwell County
The Honorable Doyet A. Early, III, Circuit Court Judge

S.C. Supreme Court

Appellate Case No: 2014-001970

THE STATE,

Respondent,

vs.

TUNZY SANDERS

Appellant.

**RETURN TO MOTION TO SUSPEND APPEAL AND GRANT LEAVE TO FILE
A RULE 29(b) MOTION FOR NEW TRIAL IN COMMON PLEAS**

1. Counsel for Petitioner request that this Court remand for a new evidentiary hearing Pursuant to Rule 29(b) SCRCrimP based on the "newly discovered evidence" that Trial Counsel Brenda Sanders has been found mentally incompetent. Respondent notes that Counsel for Petitioner is seeking a new PCR hearing in Common Pleas based on a General Sessions rule. Despite Counsel's assertion, Rule 29(b) is wholly inapplicable to the instant case.
2. Petitioner was indicted at the July 20, 1998 term of the Barnwell County Grand Jury for Murder (98-GS-06-180). Petitioner was subsequently indicted at the January 11, 1999 term of the Barnwell County Grand Jury for Attempted Armed or Alleged Robbery (99-GS-06-078) and Criminal Conspiracy (99-GS-06-079). Petitioner was represented by

Daniel Williams, Esquire. On January 11, 1999, Petitioner proceeded to trial and found guilty as indicted. He was sentenced by the Honorable Gary E. Clary to confinement for a period of life for Murder, twenty years for Attempted Armed Robbery, and five years for Criminal Conspiracy. All sentences were to be served concurrently.

3. A timely notice of appeal was filed and an appeal was perfected on Petitioner's behalf. The South Carolina Supreme Court reversed and remanded the conviction due to Honorable Brenda Sanders (Petitioner's sister and a licensed Michigan Attorney) not being allowed to represent Applicant during his trial. *State v. Sanders*, Op. No. 25613 (filed July 3, 2000).
4. The case proceeded to re-trial on February 5-8, 2001. Petitioner was represented by Brenda K. Sanders, Esquire and Daniel Williams, Esquire. Petitioner was found guilty of the charges. The Honorable James R. Barber, III, sentenced Petitioner to confinement for a period of thirty-five years for Murder, twenty-five years for Armed Robbery, and five years for Criminal Conspiracy.
5. A notice of appeal was filed and an appeal perfected. The South Carolina Court of Appeals affirmed. *State v. Sanders*, 356 S.C. 214, 588 S.E.2d 142 (Ct. App. 2003). The Court of Appeals denied Petitioner's Petition for Rehearing on February 19, 2004. Petitioner filed a Petition for Writ of Certiorari in the South Carolina Supreme Court. The Petition was denied by order dated May 18, 2005. The remittitur was sent on May 19, 2005.
6. Petitioner filed an application for post-conviction relief (PCR) on May 11, 2006 (C.A. No. 2006-CP-06-0106). The State made its Return on June 13, 2007. An evidentiary hearing was convened before the Honorable J. Michael Baxley on August 8, 2007, at

which Petitioner was present and represented by Jane Matthews Moody, Esquire. In an order dated September 18, 2007, and filed October 4, 2007, Judge Baxley denied and dismissed the application with prejudice.

7. Subsequently, Petitioner filed a second application for post-conviction relief (C.A. No. 2009-CP-06-0146) on June 16, 2009. The Respondent made its Return on or about September 18, 2009, requesting all allegations except for Petitioner's Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) claim be summarily dismissed. An evidentiary hearing into the matter was convened on January 29, 2010, at the Aiken County Courthouse. Petitioner was represented by Christopher Moore, Esquire. Mary S. Williams, Esquire, of the South Carolina Attorney General's Office represented the Respondent. Counsels for both parties consented to the dismissal of his Application for post-conviction relief and the grant of an appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) with regard to C.A. No. 2006-CP-06-0106. By Order filed March 30, 2010, the Honorable William Jeffrey Young granted Petitioner's appeal pursuant to Austin v. State and denied his remaining allegations.
8. Subsequently, the court reporter informed Petitioner that a portion of the hearing on Petitioner's first post-conviction relief application (C.A. No. 2006-CP-06-00106) was missing from her tapes. Petitioner requested the matter be remanded to the circuit court for a de novo hearing on Petitioner's first post-conviction relief application. The South Carolina Supreme Court granted the petition and remanded the matter to the Honorable J. Michael Baxley for the purpose of reconstructing the record of the hearing. A hearing was held on August 8, 2007 before Judge Baxley. However, Judge Baxley informed the court that he could not fully reconstruct the missing portion of the transcript. Petitioner

renewed his petition to remand for a de novo hearing on his first post-conviction relief application. By Order dated March 23, 2012, the South Carolina Supreme Court vacated the order dated September 18, 2007, denying and dismissing Petitioner's first post-conviction relief application and the order dated March 23, 2010, finding Petitioner was entitled to a belated review of the September 18, 2007 order. The South Carolina Supreme Court granted the Petitioner's petition to remand and remanded the matter to Judge Baxley for a de novo hearing on Petitioner's first post-conviction relief application.

9. An evidentiary hearing into the matter was convened on August 20, 2013, at the Bamberg County Courthouse. Applicant was present at the hearing and was represented Tara D. Shurling, Esquire. Respondent was represented by Senior Assistant Attorney General David Spencer and Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office. By order filed August 19, 2014, the Honorable Doyet A. Early, III, denied and dismissed Petitioner's application for post-conviction relief with prejudice.
10. Petitioner filed and served notice of appeal and the appeal is currently pending before this Court. Petitioner now moves this Court to suspend the appeal and remand the matter to the court of general sessions so that he can pursue a Rule 29(b), SCRCrimP, motion for new trial based upon newly discovered evidence.
11. Counsel's request to remand the matter to the Barnwell County Common Pleas court for a full hearing on the effect this newly discovered evidence would have had on Brenda Sander's testimony at the PCR hearing should be dismissed. Notably, Counsel relies on Rule 29(b) SCRimP to allege a remand for a civil matter. Respondent notes Rule 29(b), a general session rule, has no bearing or applicability in this civil case.

12. Respondent notes, Petitioner has now had two full trials - of which he was convicted of murder twice, two direct appeals, and three full evidentiary hearings in PCR. Respondent submits that not only has Petitioner received his full "bite at the apple," but he has in fact consumed the entire apple and requested a second bushel.
13. Respondent further submits that none of the attached information concerns the charges, trial, murder conviction, or events of the subsequent PCR hearing in the instant matter. The initial actions in the disciplinary proceedings and much of the allegations upon which the disciplinary actions are based occurred after Brenda Sanders testified at her brother's PCR hearing in August 2013. All events appear to have occurred after Brenda Sanders represented her brother at his February 2001 murder trial. The materials have no relevance to the instant action.
14. Respondent submits these materials do not amount to after discovered evidence and, at most, would have been merely impeaching at a PCR hearing. See Johnston v. Belk-McKnight Co. of Newberry, 188 S.C. 149, 158, 198 S.E. 395, 399 (1938) ("[I]mpeaching must mean that which is outside the evidence already given, and impeaches that evidence; it may be by attacking the character, the motives, the integrity, or veracity of those who gave the testimony.") Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983) (among five requirements for after-discovered is a showing the evidence is not merely cumulative or impeaching).

15. Respondent submits that this motion to remand to Barnwell County Common Pleas court for a full PCR evidentiary hearing pursuant to Rule 29(b) SCRimP is wholly inappropriate and Petitioner's motion must be denied.¹

Respectfully submitted,

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By: 

August 4, 2015

¹ In the event that this Court denies Petitioner's motion and continues with the appeal, Respondent submits that the majority of information relied upon in Petitioner's motion was never before the PCR Court and should not apart of the record. See Rule 210(h), SCACR, facts not appearing in the record on appeal are not proper for this Court's consideration; Rule 210(c), SCACR: "The record shall not, however, include matter which was not presented to the lower court or tribunal." (Emphasis added).

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TUNZY SANDERS,

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THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Motion to Suspend Appeal and Grant Leave to File a Rule 29(b) Motion for New Trial in Common Pleas**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

John H. Strom, Esquire
South Carolina Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211

This 4th day of August, 2015



CAROLINE COLLINS
LEGAL ASSISTANT