EXHIBIT D
ORDER DENYING A MOTION FOR A NEW TRIAL

RECORDED

2014 JUL 28 AM 10: 10

JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

STATE OF SOUTH CAROLINA COUNTY OF SUMTER	IN THE COURT OF GENERAL SESSIONS THIRD JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA	1997-GS-43-1092
V.	**ORDER DENYING MOTION FOR NEW TRIAL**
ROBERT LOUIS GARRETT, JR.	
Defendant	

CERTIFIED TRUE COPY
OF ORIGINAL FILED

James C Campbell

CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

Received
30 July 2014
eds

This matter is before the court on the defendant's "Motion for a New Trial Based on After-Discovered Evidence Pursuant to Rule 29 (b) SCRCrimP" dated October 9, 2012 and filed October 10, 2012. The hearing of this motion took place on two days in Sumter County, July 23, 2013 and May 29, 2014. The defendant was present and represented at the July 23, 2013 hearing by Jeremy A. Thompson, Esq., and the State was represented by Third Circuit Solicitor Ernest A. Finney, III, Esq. Also appearing at that hearing as counsel for witness Arthur Davis was Third Circuit Defender Jack D. Howle, Esq. At the hearing held on May 29, 2014, the defendant requested that Mr. Thompson be relieved and that he be allowed to represent himself. After closely questioning the defendant about this decision and after carefully explaining to him his right to counsel and the dangers of self-representation, the court relieved Mr. Thompson but appointed him as stand-by counsel. The defendant called Arthur Davis and Desmond Cunningham as witnesses at the July 23, 2013 portion of the proceedings. The defendant was the sole witness called at the May 29, 2014 hearing.

At the conclusion of the July 23, 2013 proceedings, the defendant moved for the Third Circuit Solicitor to be disqualified from this entire proceeding and that the hearing begin anew at

a later date. That motion will be discussed herein. Also, at the conclusion of the July 23 proceedings, the defendant moved for Mr. Howle to be removed as counsel for Arthur Davis. That motion will be addressed herein.

The defendant was indicted for carjacking, kidnapping, assault and battery if a high and aggravated nature (ABHAN), assault and battery with intent to kill (ABIK), armed robbery, possession of a weapon during the commission of a violent crime, and criminal conspiracy, all in connection with the abduction and assault of two Shaw Air Force Base airmen, Paul France and Joseph Chiappone (sometimes collectively referred to as "the victims"), on April 13-14, 1997. On January 18-20, 2000, the defendant and co-defendant Arthur Davis were tried by a jury and the defendant was found guilty of carjacking, kidnapping, ABHAN, and conspiracy. He moved for a new trial and presiding judge Marc H. Westbrook granted the motion. The Court of Appeals reversed Judge Westbrook, State v. Garrett, 350 S.C. 613, 567 S.E. 2d 523 (Ct. App. 2002) and remanded the case for sentencing. Judge Westbrook sentenced the defendant to an aggregate of thirty-two (32) years in prison. The convictions and sentence were affirmed by the Court of Appeals, State v. Garrett, 2004-UP-466 (Ct. App., Sept. 15, 2004).

Under Rule 29 (b), SCRCrP, a motion for a new trial must have been made "within one (1) year after the date of actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence." The court will address the timeliness issue below within the section of this order addressing the testimony of Desmond Cunningham.

MOTION TO DISQUALIFY MR. HOWLE AND 3RD CIRCUIT SOLICITOR'S OFFICE

The first portion of the hearing of the new trial motion began at approximately 2:15 p.m. on July 23, 2013 and ended at approximately 4:30 p.m. that day. The defendant was present

from the beginning. As the proceedings for that day ended, Mr. Thompson advised that the defendant wished him to move for Mr. Howle to be disqualified from representing Arthur Davis, who testified earlier in the afternoon of July 23. Mr. Howle acted as counsel for Arthur Davis at the July 23, 2013 hearing with regard to the potential for being charged with perjury if he testified inconsistently with a statement he signed (allegedly after being sworn in front of a notary public) on July 12, 2012. The defendant submitted this affidavit and the live testimony of Mr. Davis in support of the instant motion. The defendant alleges that Mr. Howle represented one Andre China after China was also charged with the offenses against the victims. The defendant argues there is a conflict of interest in Mr. Howle having represented Mr. China in this case some fourteen years before and now representing Mr. Davis at the hearing. The court concludes that the defendant cannot possibly be prejudiced by any conflict in this representation by Mr. Howle, and the court further finds that the defendant does not have standing to challenge Mr. Howle's representation of Mr. Davis. That would be an issue for either Mr. Davis or Mr. China to raise. That motion is denied.

The defendant claims that Solicitor Finney, while in private practice, visited him at the Sumter County Detention Center while he was awaiting trial on the instant charges. He claims, says Mr. Thompson, that Mr. Finney told him he would get him a ten-year deal if he hired him to represent him, and he claims that they discussed certain facts of the case. Mr. Finney advised the court that he did not recall having met the defendant and would not have told him or any client or potential client that he could get him a certain deal without being hired and without reviewing discovery and having full knowledge of the facts of the case. The court was initially inclined to disqualify Mr. Finney's office from any further involvement in this motion out of an abundance of caution; however, after careful consideration, the court concludes that the defendant has not

presented credible evidence that he ever met with Mr. Finney, or even if he did, that he is prejudiced in any way by Mr. Finney's representation of the State at this stage.

The defendant's motion to disqualify Mr. Howle and the 3rd Circuit Solicitor from any further involvement and to reconvene the hearing *de novo* is denied.

MOTION FOR NEW TRIAL

The defendant and Arthur Davis were jointly tried. The State's theory was that the defendant and his co-defendants, Andre China, Arthur Davis, and Desmond Cunningham, abducted the victims from a carwash and drove them to a field, where they stripped them, beat them, urinated on them, shot them, and left them naked in a field in Sumter County. Neither victim was able to identify the perpetrators. The defendant claims that the current testimony of Desmond Cunningham is after-discovered evidence entitling him to a new trial. To better understand this claim, it is necessary to review the trial evidence in some detail.

Victims' Trial Testimony

The victims' trial testimony was to the effect that they were in a bay at a car wash on Highway 441 near the Shaw AFB back gate installing some fog lights on victim Paul France's red Pontiac Sunfire late the night of April 13 or early the morning of April 14. Victim Joseph Chiappone observed a blue or dark colored Bronco or Blazer drive by very slowly. Ten or fifteen minutes later, the victims were accosted by a black male with a gun. That male and another male threw them onto the ground and everything was taken out of their pockets. They were put into the trunk of the Pontiac Sunfire and someone drove off with them in the trunk. Mr. France used a cigarette lighter to burn the taillight wires from inside the trunk, causing them to go out. Their vehicle stopped and someone opened the trunk and they saw a handgun pointed at

4/4

them. Someone hit Mr. France several times and dragged him out of the trunk. Chiappone was dragged out of the trunk. Both were beaten and stripped naked. Chiappone testified that at least two males were beating him and at least one other person was beating France on the other side of the car. France testified, two males were beating him and he saw Chiappone being beaten. France saw the Bronco/Blazer and the Oldsmobile (owned by Garrett). France could tell by this time that the assailants were black males. The victims were put back into the trunk of France's Sunfire and the vehicle drove off again. The Sunfire driver and the driver of one of the other vehicles started "playing crash" with one another. The Sunfire developed a flat tire and a blown radiator and the vehicle stopped. About ten minutes later they were removed from the trunk and placed face down on the ground beside one another. They heard talk among the assailants about what should be done with them. Chiappone testified that at least four people urinated on him. Then they were both shot in the buttocks as they lay face down. Chiappone saw the Bronco/Blazer leave. France testified that it seemed two vehicles left the scene. The assailants left the Sunfire behind, and the victims got into that vehicle and managed to drive it a short distance to a house where they summoned help.

Arthur Tyrone Davis

The defendant and Mr. Davis, aka "Bird", were jointly tried. He did not testify at trial, but gave an incriminating statement to law enforcement which also implicated the defendant in the crimes. His statement was redacted to remove any specific reference to the defendant, and to include "the other guy" or "another guy" in the place of the defendant's name. The jury found him guilty of two counts of ABHAN, one count of conspiracy, and possession of a weapon during the commission of a violent crime. He signed a statement dated July 12, 2012 in which he stated that he, the defendant, aka "Chubby", Andre China, and Desmond Cunningham, were

5

on the way to a nightclub when they saw the two victims at the car wash. He stated that China and the defendant got out of the car and robbed the victims and put them in the trunk of the victims' car. They drove down Queen Chapel Road and stopped when they realized the victims had pulled the taillights out of the rear of the vehicle. He stated that they got the victims out of the trunk and beat them up and made them take their clothes off. They put them back in the trunk and drove off again. After getting lost, they stopped and decided to let them go. Davis stated that he shot both victims in the buttocks. They drove back to Briarcliff MHP, where the defendant lived. At every point where the defendant was mentioned by name, the statement was revised to delete his name and insert "another guy" or "the other guy". The defendant's trial attorney, I. S. Leevy Johnson, repeatedly objected to the statement being admitted, his argument being that the reference to "the other guy", in conjunction with Cunningham's testimony specifically implicating the defendant, made it such that it was clear to the jury that "the other guy" was a synonym for Robert Garrett. Counsel argued that since he had no way to cross-examine Davis, the defendant was deprived of his right of confrontation. This latter point is now raised by the defendant as an additional ground for a new trial. In support of this ground, the defendant cites State v. Henson, 407 S.C. 154, 754 S.E. 2d 508 (2014). This issue will be reviewed below.

In support of his new trial motion, the defendant submitted the affidavit of Mr. Davis dated July 12, 2012 (Exhibit #3). (It is unknown whether the statement is truly an affidavit or is merely an unsworn statement, as the notary public who signed it did not testify at the hearing. The court was advised that he is deceased.). In that statement, Davis stated that on the night of the crimes, he and Chubby, the defendant, were in different vehicles, and that "I do know that Chubby did not have a gun, nor did he shoot anyone. I shot the men, not Chubby. I never saw

5/16

Chubby take any money or any valuables from these men. I never saw Chubby do anything I'd consider criminal. Chubby was not involved in planning this crime."

At the hearing on July 23, 2013, the defendant called Davis as a witness. However, Davis asserted his Fifth Amendment right not to incriminate himself with regard to portions of the July 12, 2012 statement, and further testified that the information he imparted in his pre-trial statement was the truth. In sum, he recanted his recantation. Consequently, there is no new evidence from Mr. Davis that would support the defendant's motion for a new trial.

Desmond Cunningham

Cunningham was the State's primary witness at trial. He gave a pre-trial statement to law enforcement that the defendant was directly involved in the commission of the crimes. His testimony was the sole direct evidence implicating the defendant as being involved in these crimes. He gave a signed an affidavit dated September 13, 2012 recanting his pre-trial statement and his trial testimony. He claims in a statement dated October 7, 2011 (Exhibit #5) that he mailed a recantation in January 1999 to the solicitor claiming that his pre-trial statement to law enforcement was not true and that he told lies on the defendant to get a better deal on his charges. It is apparent that the defendant's trial counsel had some knowledge of a supposed recantation at trial, as he stated to the trial judge during pre-trial motions that he was aware that Cunningham had written the solicitor a letter recanting his earlier statement (see page 55, Trial Transcript). The solicitor advised the trial judge he was not aware of any such letter.

At trial, Cunningham testified that he pled guilty the year before to some unrelated charges for which he was facing as much as thirty-five years in prison, but that he had not been sentenced yet. He testified that on the day of the crimes, he, Davis, China, and the defendant had

been at the defendant's trailer at lot 173, Briarcliff MHP, which abuts Hwy. 441. At some point they decided to go to a club. He and Davis left in a black Chevy Blazer, the keys to which had been given to him by the defendant. The defendant and China got in the defendant's car, a blue Oldsmobile 98. They went to a gas station on Hwy. 441. They headed back in the direction of the trailer park and pulled over into a car wash parking lot, with the defendant pulling in behind them. He saw the victims' red car in one of the bays and saw the victims up under the hood. He saw China and the defendant get out of their car and walk to the victims and force them into the trunk of the red car. The defendant got into the victims' car and China got into the Oldsmobile. Cunningham followed those two cars out of the parking lot onto 441 with the defendant in the lead. China passed the defendant near Hillcrest High School on 441and they turned onto Queen Chapel Road. He and Davis noticed the taillights were out on the victims' car, so he flashed his lights to stop the defendant so he could tell him the lights were out. The defendant pulled over and he told the defendant the taillights were out. By that time, China was a distance ahead but turned around and came back. The defendant and China pulled the victims out of the trunk and started to beat them. The defendant had a handgun. The victims were forced to strip and the defendant and China continued to beat them. Davis was out of the Blazer by this time. Cunningham claims he never got out of the Blazer at any time. Cunningham called Davis back to the car and they pulled off onto Queen Chapel and were headed to the club when the defendant and China caught up with him on a side road. The defendant was still driving the victims' car and China was driving the Oldsmobile. The defendant was bumping the Blazer on the side and Cunningham was bumping him back to stay on the road. They reached 441 and at some point, the defendant rammed into the back of the Blazer. Cunningham pulled over to the side of the road, as did the defendant. The defendant said they needed to ditch the car so all three

vehicles turned into a side road and pulled into a field. The defendant got the victims out of the trunk with gun in hand. Davis got out of the Blazer, took a .22 rifle from the backseat, and said he was going to shoot the victims. Cunningham decided to leave and headed back out to 441, and the others caught up with him in the Oldsmobile about a mile down the road. He went back to the trailer at Briarcliff and got his cousin and they left for his aunt's house in Columbia.

The defendant's trial counsel vigorously cross-examined Cunningham at trial but never asked him about the recantation letter he allegedly wrote to the solicitor.

The defendant submitted the aforesaid affidavit signed by Cunningham on September 13, 2012 (Exhibit #4) in support of his motion for a new trial. Cunningham also testified at the July 23, 2013 hearing. Cunningham's current testimony is the sole evidence upon which the defendant can rationally rely in obtaining a new trial.

At the July 23, 2013 hearing, Cunningham essentially testified that he was present at the car wash, at the time the victims were stripped, and at the time they were left in the field, but that he did not know what China, Davis, and the defendant did. Specifically, he now claims he did not see the defendant and China put the victims into the trunk of the car. He also now claims he does not know who was driving the victims' car and who was driving the Oldsmobile because he really wasn't paying attention. He now says he cannot remember flashing his lights to get the defendant to stop, cannot remember telling the defendant the taillights were out, and cannot remember if the defendant checked to see if the lights were out. He now says he did not see the defendant and China get the victims out of the trunk, beat them, and strip them. He now claims he did not see the defendant and China get the victims out of the car for the last time in the field. Cunningham stated several times that he simply could not remember what happened and at some point stated that he could not remember what happened because it was so long ago.

Cunningham testified at the hearing that he gave the above-mentioned trial testimony because he was being threatened with a life prison sentence for first degree burglary and consecutive sentences for his other crimes if he did not tell the police what they wanted to hear. He testified he sent the 1999 recantation before he was threatened. He claims he essentially piggy-backed off what Davis told the police.

Applicable Law and Discussion

To prevail on a motion for a new trial based on after-discovered evidence, a defendant must show (1) the evidence is such as will probably change the result if a new trial is granted; (2) the evidence has been discovered since the trial; (3) the evidence could not have been discovered prior to trial by the exercise of reasonable diligence; (4) the evidence is material to the issue of guilt or innocence; and (5) the evidence is not merely cumulative or impeaching. State v. Needs, 333 S.C. 134, 508 S.E. 2d 857 (1998); State v. Spann, 334 S.C. 618, 513 S.E. 2d 98 (1999) (numerous other citations omitted).

The court first notes that trial counsel was apparently aware that Cunningham had allegedly recanted the content of his statement to law enforcement. Counsel chose not to explore that issue during his cross-examination of Cunningham during trial. As noted above, Cunningham signed a statement on October 7, 2011 (Exhibit #5), in which he stated that the statement he gave to law enforcement was not true and that he lied to law enforcement to get a better deal on his pending charges. This revelation is no different from what trial counsel contended at trial. On page 55 of the trial transcript, defendant's trial counsel stated to the trial judge during pre-trial proceedings, "I am advised by my client that one of their witnesses, two of their potential witnesses, specifically China and Cunningham, communicated with the solicitor's office, and wrote them a letter recanting their original statements." Counsel went on to relate to

the court that he had spoken with assistant solicitor Dudley Saleeby and that Mr. Saleeby had advised him that he had gone through his entire file and had not found any such statements. Mr. Saleeby confirmed this to the trial court. It is therefore apparent that the evidence that Cunningham recanted not only **could have** been discovered prior to trial, but also that the evidence **was** discovered prior to trial. It is of no moment that trial counsel chose not to explore the alleged recantation when cross-examining Cunningham; the fact remains that he could have addressed it with Cunningham at that time. This recantation therefore cannot be considered evidence that could not have been discovered prior to trial by the exercise of reasonable diligence. Consequently, the defendant has failed to establish the above-numbered factors (2) and (3) of the five factors the defendant must establish to prevail on a motion for a new trial. In addition, and for the same reason, the motion is not timely under Rule 29 (b), as a Rule 29 (b) motion must be made "within one (1) year after the date of actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence."

The court will further examine Cunningham's recantation testimony under applicable case law. Recantation of testimony is ordinarily unreliable and should be subjected to the closest scrutiny when offered as a ground for a new trial. State v. Whitener, 228 S.C. 244, 89 S.E. 2d 701 (1955); State v. Mayfield, 235 S.C. 11, 109 S.E. 2d 716 (1959; State v. Porter, 269 S.C. 618, 239 S.E. 2d 641 (1977); State v. Harris, 391 S.C. 539, 706 S.E. 2d 526 (Ct. App. 2011). It is apparent that the reason for this requirement of scrutiny is that freely allowing recantation testimony to pave the way for a new trial would "open the door to fraud and perjury, as well as ... invite interminable delays in the disposition of causes." Mayfield, 235 S.C. at 35, citing State

v. Workman, 38 S.C. 550, 16 S.E. 770 (1892). Of course, if the defendant is able to satisfy the five requisite showings, the defendant is entitled to a new trial.

The cases hold that this court is the gatekeeper insofar as making a credibility assessment of the evidence offered in support of a new trial motion is concerned. State v. Mercer, 381 S.C. 149, 672 S.E. 2d 556 (2009) (analyzing the five factors in the context of after-discovered third-party guilt evidence), citing Porter, *supra*, 269 S.C. at 621; see also State v. Deese, 266 S.C. 534, 225 S.E. 2d 175 (1976), State v. Pierce, 263 S.C. 23, 207 S.E. 2d 414 (1974), Mayfield, *supra*, and Harris, *supra*, 391 S.C. at 545 ("This issue comes down to a matter of the credibility of the witnesses, which we leave to the trial court's discretion.").

This court had the opportunity to evaluate Cunningham's credibility and concludes that his recantation testimony is not credible. Cunningham testified that when he was questioned by law enforcement about the instant crimes, Investigator Mike Hicks threatened him with a life sentence in his unrelated burglary case if he did not give the State favorable testimony against the defendant. He thereafter gave a statement with which his trial testimony was consistent. He claims he mailed a recantation to the solicitor from the Sumter County jail some time in 1999, obviously before the defendant's trial. The defendant's trial counsel stated to the court before the trial began that the defendant had been made aware of the alleged recantation. If Cunningham had mailed the recantation to the solicitor shortly before trial in spite of Hicks' alleged threat, it makes no sense why Cunningham would not have simply testified consistently with the mailed recantation. There is no evidence that Cunningham was not free to give such testimony, especially since he had already supposedly put the recantation in writing to the solicitor. There has been no explanation from the defendant or from Cunningham of why Cunningham did not simply testify at trial that he had fabricated his statement to law

conveniently left out Supra Cut pressure

12

enforcement. There was no more of a life sentence "threat" facing him at the defendant's trial than there was when he allegedly-mailed the recantation to the solicitor.

In addition, the curt simply did not find Cunningham to be credible in the presentation of his testimony during the new trial motion hearing. The court concludes the recantation itself was fabricated.

Even if the "new" testimony were put to a jury, the court concludes that it is not probable that the result would change. The trial judge charged the jury on the "hand of one is the hand of all", and Cunningham's current testimony is set forth above. He now claims that he does not know what, if anything, the defendant did at the car wash, on the highway, on the side of the road, or in the field. However, he does not vary from his trial testimony that the defendant was originally driving a Oldsmobile, that the defendant's original passenger was Andre China, that the defendant pulled into the carwash parking lot, that he (Cunningham) was driving a Blazer supplied to him by the defendant, that his passenger was Arthur Davis, that he also pulled into the car wash parking lot, that "somebody" got out of the defendant's car, that the victims were kidnapped and placed by into the trunk of the victims' vehicle by Davis, China, or the defendant, and that Davis got back into the Blazer with him before they exited the car wash parking lot. He claims he does not know whether China or the defendant drove the victim's car away from the car wash; however, whoever was driving victim France's car, Cunningham claims the Oldsmobile followed the victims' vehicle out of the parking lot, with Cunningham behind the Oldsmobile. Cunningham still maintains that all three vehicles drove down Highway 441 and at some point the victim's vehicle stopped on the side of the road. At some point, the three vehicles took off down the road again and at some point they all turned off into a field. Cunningham still

13

maintains that when the victims were shot, he was inside his vehicle, and that when they all left, the victims' vehicle was left behind with the victims.

First, as noted above, the court does not find Cunningham's new testimony credible. He claimed at different times during the motion hearing that he could not remember certain things or that he was not in a position to see who did what to the victims at any given time. The court finds this fading memory to be quite "convenient" and that simply having a faulty memory over ten years after a trial does not even amount to a true recantation, much less a credible one. Also, the fact remains that Cunningham has not varied from his testimony that the defendant was present at all stages of the crimes and that, at the least, the defendant either drove the victims' car away from the car wash or followed closely behind in the Oldsmobile. The trial judge charged the jury on the principle of "the hand of one is the hand of all". In his September 13, 2012 statement, Cunningham stated that the defendant "did not participate much in these crimes. We were kids at the time trying to have a little fun and didn't intend to harm anyone." (Emphasis added). This makes it clear that Cunningham still admits the defendant participated in the crimes, *albeit* not much. In my view, Cunningham's new testimony, with regard to the first of the five relevant factors the defendant must establish, is not such as would probably change the result if a new trial is granted.

Defendant's Claim under State v. Henson

At trial, both the defendant and Arthur Davis repeatedly moved to sever their trials on the ground that their defenses were inconsistent. As noted above, Davis gave a statement to law enforcement that implicated himself, China, Cunningham, and the defendant. The statement was redacted to remove any reference to the defendant's name, and words to the effect of "another guy" or "the other guy" were inserted in the place of his name. Cunningham testified as noted

14

above and implicated himself, Davis, China, and the defendant by name. The defendant argued at trial that it would be obvious to any juror that the reference to "another guy" or "the other guy" in Davis' statement would point to no one other than the defendant as being that person. The defendant cites State v. Henson, 407 S.C. 154, 754 S.E. 2d 508 (2014) for the proposition that his Sixth Amendment right to confront witnesses was violated by the admission of Davis' statement.[1]

It is possible that if the instant defendant were to be tried today, he would be entitled to be tried separately from Davis, as the use of the identifiers "another guy" or "the other guy" might impermissibly "facially incriminate through inference" the defendant. See Henson, 407 S.C. at 164. This is true even though Cunningham also testified that the defendant was involved in the crimes. In Henson, the non-testifying co-defendant's statement was read to the jury and referred to Henson as "him", "the guy", and "he". Two other parties to the crime testified and directly detailed Henson's, the co-defendant's, and their own participation in the crime. The only practical difference between the posture of Henson and the posture of the instant case is that in Henson, there were two participants testifying against Henson, and in the instant case, only one (Cunningham) testifying against the defendant. France and Chiappone were not able to identify the defendant, and the only direct evidence identifying the defendant as an active participant other than Davis' statement was Cunningham's testimony. Cunningham, as the two witnesses in Henson, faced charges for his participation, and had an incentive to downplay his involvement and to shift blame to others. To paraphrase Henson, unless Davis' confession could be redacted in such a way as not to implicate the defendant, there is an argument that the only

[1] The defendant raised the issue of the admissibility of the redacted statement to the Court of Appeals, and the Court held the statement was properly admitted. 350 S.C. at 620-621.

alternative would be not to admit Davis' confession or to grant the motion to sever their trials. Henson, 407 S.C. at 167.

The question becomes whether Henson affords the defendant the right to a new trial at this stage. It does not. The Court of Appeals addressed the issue and held the statement was properly introduced. Also, the court is aware of no authority for the proposition that Henson may form the basis for a state court granting a new trial either under Rule 29 (b) or otherwise, in a case that was tried fourteen years before Henson was decided.[2] The court therefore denies the defendant's motion for a new trial pursuant to Henson. The court will not address whether the defendant may be entitled to relief in another forum.

Defendant's Additional Grounds for New Trial

At the May 29, 2014 hearing, the defendant testified. He submitted the following additional grounds for a new trial:

1. This court's Conditional Order dismissing his application for post-conviction relief (See 2012-CP-43-2007) contained a "blatant lie". This ground is dismissed as not properly considered in a new trial motion.

2. The Honorable Marc H. Westbrook, if still alive, would grant the new trial motion. This ground is dismissed, as it is irrelevant what another circuit judge might rule.

3. Retroactivity of State v. Henson. Discussed above.

[2] The court recognizes that Henson is not new law, but the Henson Court's ruling, along with State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009), does somewhat crystallize the approach to be taken in considering severance motions in these-type instances.

16

4. The defendant has been denied due process because his conviction was secured through known false testimony. This ground is dismissed, as there is no evidence that the conviction was secured with known false testimony.

5. The defendant also read into the record a 7 ½ page statement. Nothing contained in the statement represents any sufficient ground for granting a new trial.

Conclusion

For the foregoing reasons, the defendant's motion to disqualify Solicitor Finney is denied and his motion for a new trial is denied.

AND IT IS SO ORDERED.

July 17, 2014

George C. James, Jr.
Circuit Judge