SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Lee S. Alford, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

v.

JEFFREY LYNN CHRONISTER,

Appellant

Appellate Case No. 2014-002630

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
ID No. 5758
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

1675-1A York Highway
York, SC 29745
(803) 628-3020

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RESPONDENT'S COUNTER-ISSUES PRESENTED

I. Where the Appellant filed a motion for new trial dated November 11, 2014 from a conviction on September 22, 1992, the lower court was correct in summarily rejecting the motion as untimely and directing him to file a post-conviction application where it was beyond one year and nothing in the motion revealed any "evidence" that was recently discovered where all claims were based upon the trial record.

II. When the Appellant asserts in a motion for new trial that he was entitled to a directed verdict of acquittal where the motion was denied in a trial in 1992, the claim is a trial issue and not properly presented or cognizable in a motion for new trial on after discovered evidence in 2014. (Supp R. 259-61, 269, 324-25, PCR App.p. 230-232, 240, 295-296).

III. When the Appellant claims in a motion for new trial based upon newly discovered evidence that an indictment was "no-billed" in 1992 and that the trial court lacked subject matter jurisdiction, the claim is not properly presented in a motion for new trial based upon after discovered evidence where the records of the Clerk of Court for York County and records from the direct appeal and state PCR proceedings reflect that the indictment for murder and unlawful possession of a firearm or knife during the commission of a violent crime reflects that it was true billed on April 6, 1992 on indictment 92-GS-46-1224 prior to the September 1992 trial and Appellant does not indicate the existence of evidence to the contrary. (Supp R. 467-68, 522-23, PCR App. 438-439, 490-491).

IV. When the motion for new trial on a claim that the arrest was made without probable cause is solely based upon an arrest warrant and trial testimony from 1992, the trial judge properly dismissed the motion as untimely.

I. INTRODUCTION

This matter comes from a pro se "motion for after newly discovered evidence . . evidentiary hearing requested" dated November 12, 2014 by Jeffrey Lynn Chronister on Indictment 92-GS-1224. R. 123-24. In the November 12, 2014 motion, Chronister asserted that he was seeking a new trial under Rule 29(b), S.C.Crim.P. and claimed that there was no statute of limitations when a party seeks to set aside a judgment due to "fraud on the court." In his grounds for a new trial, he essentially alleged the following:

I. Was a directed verdict produced by prosecutorial misconduct and representation by defense counsel? (Supp R. 2-16, Motion, p. 2-16.).

II. Was appellant's arrest made without probable cause by violating the Constitution of this State, and the 4th and 14th amendments of the U.S. Constitution? (Supp R. 16-17, Motion, p. 16-17).

II. Was the circuit court properly vested with subject matter jurisdiction to have obtained conviction? (Supp R. 17-21, Motion, p. 17-21).

On November 21, 2014, the Honorable Lee S. Alford sent Mr. Chronister a letter stating:

> This will acknowledge receipt of your motion and correspondence. This Court cannot grant relief on a motion **unless timely made.** You would need to file a Post-Conviction relief Action in order for the Court to consider your motion.

Letter, November 21, 2014 –Judge Alford to Chronister. Supp R. 27. (emphasis added).

On December 11, 2014, Chronister mailed a *pro se* notice of appeal. He asserted the decision was from the November 21, 2014 decision of Judge Alford which he received on December 1. The certificate of service upon the Attorney General was dated November 11, 2014.

On February 13, 2015, the Clerk of Court for the Court of Appeals advised the Petitioner that it was in receipt of the November 21, 2014 letter from Judge Alford which it was considering the "order on appeal."

This briefing follows. For the reasons set forth herein, to the extent the letter was an order it is correct. The conviction was final on September 22, 1992. The appeal from the conviction was dismissed on September 1, 1994. State v. Jeffrey Lynn Chronister, Memo. Op. No. 94-MO-226 (S.C.S.Ct. September 1, 1994). Supp R. 387-88, PCR App. 358-259. Pursuant to Rule 29 at that time, Appellant had a reasonable time upon discovery of new evidence to file a motion for new trial based upon after-discovered evidence. Subsequent to April 28, 2011, the Appellant had "one year after the date of discovery of the evidence by the defendant or after the date when evidence could have been ascertained by the exercise of reasonable diligence." There is no assertion in the Motion dated November 11, 2014 of any evidence that was newly discovered. Rather, he attaches documents which were attached to the Appendix to the PCR appeal from the successive application appeal in Chronister v. State, 2001-CP-46-1338, which was denied by the South Carolina Supreme Court on February 21, 2003. All references within the motion were to material in the 2001 PCR action and PCR appeal. Judge Alford correctly summarily concluded that the November 12, 2014.

II. PRIOR PROCEDURAL HISTORY

A. Indictment and Trial.

Petitioner Jeffrey Lynn Chronister, a/k/a/ Lynn J. Chronister, was indicted on April 6, 1992 for murder and unlawful possession of a firearm during a crime of crime of violence as a result of the February 14, 1992, murder of his wife, Marie Gail Chronister. Supp R. 467-68, 522-23, PCR App.p. 438-439, 490-491.[1] He was tried September 21-22, 1992 before the

[1] Respondent requests this Court to take appellate judicial notice of the records of the direct and PCR appeals made to the appellate courts of South Carolina. References in the record styled "PCR App." Are to the PCR appendix in the appeal of the successive PCR action in 2001-CP-46-1338 which was denied by the South Carolina Supreme Court on February 21, 2003 and remittitur issued March 10, 2003. The attachments to the Appellant's motion reflect particular pages from that particular Appendix.

Honorable Don S. Rushing and a jury. Petitioner was represented by Gerald Smith and Harry Dest, Esquires, of the Public Defender's office.

At trial, the State presented evidence that Petitioner's wife parked her car in the parking lot of the Catawba nuclear station just before 7:00 a.m. on the morning of February 14, 1992, and began to walk toward the front entrance of the administration building. Employees saw a white van pull into the parking lot and park. A man got out of the van with a long "rifle type" weapon, walked a short distance, and fired at least five shots in rapid succession. The man entered the van and left the parking lot, but not before employees could record the first three letters of the license plate, "DRL." Marie Gail Chronister's body was found lying on the sidewalk to the left of the entrance of the administration building. She appeared to be dead. Petitioner was stopped in a white van by Gaston County, North Carolina police officers. South Carolina officers went to the location of the traffic stop and began talking with Petitioner. Petitioner immediately asked for an attorney. In subsequent conversations initiated by Petitioner, he inquired how his wife was doing, and told police she had accused him of molesting their daughter and had left him. Petitioner was transported to the Gaston County jail where he engaged with police in idle conversation. During that conversation, Petitioner asked "I did kill her?"

Petitioner was found guilty of both crimes of September 22, 1992 and sentenced to life imprisonment for murder and five years consecutive for possession of a firearm during a violent crime. Supp R. 327, PCR App. 298.

B. Direct Appeal.

Appellant, through counsel, filed a Notice of Appeal. Tara Dawn Shurling, Esquire, of the South Carolina Office of Appellate Defense, perfected the appeal in a brief that raised three issues:

1. The lower court erred in overruling defense counsel's Motion to Suppress statements allegedly made by the Appellant while in custody where the record below fails to demonstrate that the Appellant was properly advised of his rights prior to the issuance of those statements.

2. The lower court erred in failing to issue a jury instruction concerning the proper standard for the use of statements attributed to the Appellant.

3. The lower court erred in denying the Appellant's request for a jury instruction on the lesser included offense of manslaughter where under one reasonable interpretation of the evidence as presented at trial, the jury might logically have found the Appellant not guilty of that lesser charge.

State v. Jeffrey Lynn Chronister, Final Brief of Appellant, November 4, 1993. Supp R. 332-357, PCR App.p. 303-328. The Respondent, through Assistant Attorney General Mark Rapoport made a Final Brief of Respondent on November 8, 1993. Supp R. 387-88, PCR App.p. 329-357.

On September 1, 1994, the South Carolina Supreme Court affirmed Petitioner's convictions in a memorandum opinion. State v. Jeffrey Lynn Chronister, Memo. Op. No. 94-MO-226 (S.C.S.Ct. September 1, 1994). PCR App. 358-259.

C. Post-Conviction Relief Proceedings.

FIRST PCR PROCEEDING – 1995-CP-46-1109)

On August 28, 1995, Petitioner filed an Application for Post-Conviction Relief (95-CP-46-1109) alleging that his confinement was unlawful because he received ineffective assistance of counsel. On September 16, 1996, Petitioner filed an Amended Application alleging that his confinement was unlawful on the following grounds:

1. Ineffective assistance of counsel;

2. Applicant was denied Due-Process of law in violation of the Sixth and Fourteenth Amendments.

In attachments to the Application, Petitioner made specific allegations, which, construed broadly, include the following:

1. Counsel failed to investigate Petitioner's competency;

2. Counsel failed to put up an insanity defense;

3. Counsel failed to investigate mitigating circumstances;

4. Counsel allowed a mandatory presumption of malice charge to be charged to the jury without objection;

5. Counsel failed to advise Petitioner of important laws, cases, and defenses;

6. Counsel failed to make an objection during trial (citing p. 91, line 5 of the trial transcript);

7. Counsel failed to request a specific jury instruction (citing page 163, line 15 of the trial transcript);

8. Counsel failed to adequately investigate the case or call witnesses;

9. Counsel failed to raise issues on appeal concerning the mishandling of evidence by police (citing page 9, line 15 of the trial transcript);

10. Counsel committed procedural errors (citing page 114, lines 7-13, page 158, lines 20-23, page 214, lines 8-25 and page 215, lines 1-3);

11. The trial court failed to hold an additional hearing on applicant's criminal responsibility and competence to stand trial.

A hearing on Petitioner's allegations was held September 18, 1996 before the Honorable John C. Hayes, III. Petitioner was the only witness. Supp R. 422-58, PCR App.p. 393-429. By Order dated October 21, 1996, Judge Hayes dismissed the application. Supp R. 459-466, PCR App. 430-437.

D. Appeal from Denial of First Post-Conviction Relief Action

On November 11, 1996, Petitioner, through counsel, served a Notice of Appeal from the order dismissing his post-conviction relief action On October 13, 1997, M. Anne Pearce, Esquire, of the South Carolina Office of Appellate Defense, filed a Johnson Petition for Writ of Certiorari that presented the following issue:

1. Whether the lower court erred in granting the state's motion for directed verdict on the ground that petitioner had failed to carry his burden of proof?

Petitioner also filed a document entitled "Amended Johnson Petition for Writ of Certiorari" raising the following issues:

1. Whether the lower court erred in granting the state's motion for directed verdict on the ground that petitioner had failed to carry his burden of proof?

2. Whether the lower court's decision to grant the state's motion for directed verdict violated the Petitioner's right to confront witnesses and of Due Process?

By Order dated May 28, 1998, the South Carolina Supreme Court granted counsel's motion to withdraw and denied the petition for certiorari. The remittitur was returned to the lower court on June 15, 1998.

1998 Federal Habeas Petition.

In the pro se Petition for Writ of Habeas Corpus dated October 17, 1998, Petitioner alleges the following:

Conviction obtained in violation of Petitioner's U.S.C.A. 5 right against compulsory self-incrimination. Petitioner was subjected to interrogation by police without being properly warned of his rights against self-incrimination.

Conviction was obtained in violation of U.S.C.A. 5 right to have counsel present during interrogation. Petitioner twice stated that he wanted his counsel present, that he did not want to talk to police without counsel being present. Despite this request Petitioner was subjected to the psychological ploys and interrogation tactics of Officer John Dean Shillinglaw.

Conviction obtained in violation of Petitioner's rights to due process of law under U.S.C.A. 5 and 14. The trial court erred and violated Petitioner's rights when it allowed into evidence an illegally obtained statement.

Conviction obtained in violation of Petitioner's U.S.C.A. 6 right to the effective assistance of counsel. Trial counsel was ineffective and prejudiced Petitioner by failing to adequately investigate and present a defense based on Petitioner's sanity at the time of the crime. (Petitioner's lack of criminal responsibility).

Conviction obtained in violation of Petitioner's U.S.C.A. 6 right to the effective assistance of counsel. Trial counsel was ineffective and prejudiced Petitioner by failing to request a change of

venue on the grounds of pretrial publicity where voir dire showed jury to be both knowledgeable about the case and biased against Petitioner. Petitioner could not obtain a fair trial by impartial jury in York County and counsel should have moved for a change of venue or to have the jury picked in another county.

The Federal habeas corpus petition was dismissed on January 28, 2000.

SECOND PCR ACTION – 2001-CP-1338

In the Petitioner's second PCR action, he filed an application on June 19, 2001. Supp R. 489-494, PCR App. 457-462. In the application, Appellant essentially raised the following claims:

1. ineffective assistance of trial counsel. (7 separate specifications) (Supp R. 490-92, PCR App. 458-460)
2. ineffective assistance of PCR counsel. (Supp R. 491-92, PCR App. 459-460).
3. Conviction obtained in violation of applicant's USCA 5 right against compulsory self-incrimination.
4. Conviction obtained in violation of applicant's USCA 5 right to have counsel present during interrogation.
5. Conviction obtained in violation of applicant's USCA 5 right to due process of law.

Supp R. 491-92, PCR App.p. 459-460. The Respondent made a return and motion to dismiss dated January 9, 2002. Supp R. 495-99, PCR App.p. 465-467. A conditional order of dismissal in rule to show cause why the applicant's application should not be dismissed was issued by the Hon. Lee S. Alford, circuit court judge, on January 14, 2002. Supp R. 501-06, PCR App. 469-474. The Applicant, through counsel David L. Little made a reply to the conditional order. Supp

R. 507-13, PCR App.p. 475-481. On April 19, 2002, Judge Alford entered the final order of dismissal of April 18, 2002. Supp R. 514-16, PCR App.p. 482-484.

SECOND PCR APPEAL.

Chronister made in appeal the denial of the application for post-conviction relief to the South Carolina Supreme Court. In the appeal the petitioner was represented by Daniel T. Stacey of the South Carolina office of appellate defense. On November 21, 2002, counsel made a Johnson petition for writ of certiorari asserting as the sole arguable issue: "whether the court erred in dismissing the instant application as successive?" The Appellant made a *pro se r*esponse asserting:

1. Defective indictment.
2. Ineffective assistance of trial counsel.
3. Ineffective assistance of appellate counsel.
4. Ineffective assistance of PCR hearing counsel.
5. Ineffective assistance of 2nd PCR counsel.
6. Violations of U.S.C.A. amendments 14th, 6th, 5th.
7. Violations of South Carolina Constitution.

Brief in Support of Pro Se Response to Petition for Writ of Certiorari. On January 2, 2003 the petitioner made an amended pro se response asserting "*newly discovered issues*". On February 21, 2003, the Supreme Court of South Carolina denied the petition for writ of certiorari and granted counsel's request to be relieved. Chronister v. State, Order (S.C.S.Ct. February 21, 2003). The remittitur was issued on March 10, 2003.

STATE HABEAS CORPUS – 2005-CP-46-2212

The Applicant subsequently filed a Petition for Writ of Habeas Corpus on September 26, 2005 (2005-CP-46-2212). By Order dated August 29, 2005, Judge Hayes denied and dismissed the Applicant's petition.

THIRD PCR ACTION – 2006-CP-46-348

The petitioner next filed an application for post-conviction relief filed February 9, 2006. In this application, Chronister alleged:

1. Subject matter jurisdiction
2. Violations of the U.S. and the S.C. Constitution.
3. Professional Misconduct by Defense counsel.
4. Ineffective assistance of trial counsel.

On July 6, 2006, Judge Alford entered a conditional order of dismissal to dismiss the application as successive and untimely. The appellant filed a motion for relief of judgment, a motion in opposition, and a motion to appeal in the South Carolina Supreme Court. By order dated August 9, 2006, the Supreme Court of South Carolina dismissed the appeal because a conditional order of dismissal is not an appealable order. On November 22, 2006, Judge Alford entered a final order of dismissal.

The petitioner filed a notice of appeal in the South Carolina Supreme Court. On January 22, 2007, the South Carolina Supreme Court entered an order of dismissal of the appeal concluding "in the explanation required by Rule 227 (C), SCACR, petitioner has failed to show that there is an arguable basis for asserting that the determination by the lower court was improper." The remittitur was issued in the matter on February 7, 2007.

ARGUMENT

I. The Judge of the Court of General Sessions Properly Denied the Motion for New Trial As Untimely Under South Carolina 29 where the motion itself reveals no newly discovered evidence and it was made more than one year after the 1992 trial.

On November 21, 2014, the Honorable Lee S. Alford sent Mr. Chronister a letter stating :

> This will acknowledge receipt of your motion and correspondence. This Court cannot grant relief on a motion **unless timely made.** You would need to file a Post-Conviction relief Action in order for the Court to consider your motion.

Letter, November 21, 2014–Judge Alford to Chronister. Supp R. 27. (emphasis added). This letter order rejection of the appellant's November 12, 2014 "motion for after newly discovered evidence... Evidentiary hearing requested" was a proper determination under South Carolina Rule of Criminal Procedure Rule 29. The appellant was challenging his September 22, 1992 conviction and sentence on indictment number 92-GS-1224. In the motion before the court the appellant failed to assert or show the existence of any newly discovered evidence to support the motion. Rather, the appellant argued substantive claims which could have been raised at trial, on direct appeal, or in the state post-conviction relief proceedings that had preceded the November 12, 2014 motion. Similarly, in his arguments before this court, the appellant wholly fails to address any entitlement under Rule 29 for this belated assertion or how Judge Alford's summary rejection of the motion as untimely was incorrect as a matter of law or fact. To the contrary, the Appellant, in his arguments of each issue ignores the condition precedent of the untimeliness finding and merely relies upon records that he has had in his possession since the 2005 second PCR action and refers to those items and the trial transcript. Judge Alford did not err in his summary action.

RULE 29 REQUIRES TIMELY FILING WHICH WAS NOT DONE.

South Carolina Rule of Criminal Procedure, Rule 29 sets forth the following time standards for filing since 2011:

> (a) Generally. **Except for motions for new trials based on after-discovered evidence, post-trial motions shall be made within ten (10) days after the imposition of the sentence.** In cases involving appeals from convictions in magistrate's or municipal court, post-trial motions shall be made within ten (10) days after receipt of written notice of entry of the order or judgment disposing of the appeal. The time for appeal for all parties shall be stayed by a timely post-trial motion and shall run from the receipt of written notice of entry of the order granting or denying such motion. The time within which to make the motion shall not be affected by the ending of a term of court or departure of the judge from the circuit, and the circuit judge shall retain jurisdiction of the action for the purpose of hearing and disposing of the motion if not heard and disposed of during the term. Except by consent of the parties, argument on the motion shall be heard in the circuit where the trial or hearing was held. The motion may, in the discretion of the court, be determined on briefs filed by the parties without oral argument.
>
> (b) New Trials Based on After-Discovered Evidence. **A motion for a new trial based on after-discovered evidence 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.** A motion for a new trial based on after-discovered evidence may not be made while the case is on appeal unless the appellate court, upon motion, has suspended the appeal and granted leave to make the motion. Leave of the appellate court is not required if no appeal has been taken or if the appeal has been finally decided in the appellate court.[2]

Rule 29, South Carolina Rules of Criminal Procedure.

The November 14, 2014 motion is void of any timeliness presentation or suggestion as to how he has complied. To the contrary, throughout his motion and the argument in the appeal,

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[2] Prior to 2011, Rule 29(b) allowed "A motion for a new trial based on after-discovered evidence must be made **within a reasonable period of time after the discovery of the evidence**...." Rule 29(b), SCRCrimP. "A motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge." State v. Irvin, 270 S.C. 539, 545, 243 S.E.2d 195, 197 (1978). "The granting of a new trial because of after-discovered evidence is not favored," and this court will affirm the trial court's denial of such a motion unless the trial court abused its discretion. Id. at 545, 243 S.E.2d at 197–98.

he relies upon the appellate records before this court in their entirety to assert arguments that could have been raised either at trial or in the initial PCR action. This was evident to Judge Alford and must be evident in the appeal. Rather than address the basis for the rejection by Judge Alford, the Appellant proceeds forward as if he was granted a direct appeal de novo. This action cannot be sustained.

In his pleadings before this Court and the lower court, Appellant asserts that following:

> In his grounds for a new trial, he essentially alleged the following:
>
> I. Was a directed verdict produced by prosecutorial misconduct and representation by defense counsel? (Supp R. 2-16, Motion, p. 2-16.).
>
> II. Was appellant's arrest made without probable cause by violating the Constitution of this State, and the 4th and 14th amendments of the U.S. Constitution? (Supp R. 16-17, Motion, p. 16-17).
>
> III. Was the circuit court properly vested with subject matter jurisdiction to have obtained conviction? (Supp R. 17-21, Motion, p. 17-21.

Each of these claims is not grounded on newly discovered evidence, but instead rests upon a review of the trial record.

Since each of the grounds is a trial record based claim, they would fall within Rule 29(a), not Rule 29 (b). This portion of the Rule as it currently stands would require the motion to be made within 10 days after the conviction on September 22, 1992. This was similarly to the Rule that existed in 1992. This derived from the common law rule on motions and in 1991 provided for the 10 days to file the post-trial motions. In the criminal court, the only post-verdict fact-based remedy available is a motion for a new trial under Rule 29. State v. Taylor, 348 S.C. 152, 158, 558 S.E.2d 917, 919 (Ct.App.2001)(citing State v. Miller, 287 S.C. 280, 285, 337 S.E.2d 883, 886 (1985)(Ness, J., concurring in part and dissenting in part citation omitted)). "The granting or refusal of a motion for a new trial is within the discretion of the trial judge and will

not be disturbed absent a clear abuse of discretion." State v. Simmons, 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983)(citation omitted).

A. DIRECTED VERDICT ISSUE IS TIME-BARRED.

Clearly, the directed verdict argument in the new trial motion would be applicable to Rule 29(a). It is completely record based. Supp R. 2-16, Motion, p. 2-16. He essentially contends that the testimony at trial by one of the officers and attempts to show inconsistencies in their testimony. The record reflects that a motion for directed verdict was made during the trial through defense counsel. Supp R. 259-61, 269, 324-25, PCR App.p. 230-232, 240, 295-296. Although he may now be suggesting a different argument should have been made concerning the directed verdict, it is not based upon newly discovered evidence. The lower court correctly rejected this assertion as being untimely where it was merely a new argument based upon old evidence within the record.

The directed verdict issue is not appropriate under Rule 29(b) as "after discovered evidence. In order to warrant the granting of a new trial on the ground of after-discovered evidence, **the movant must show the evidence** (1) is such as will probably change the result if a new trial is granted; **(2) has been discovered since the trial; (3) could not have been discovered before the trial by the exercise of due diligence;** (4) is material to the issue; and (5) is not merely cumulative or impeaching. State v. Spann, 334 S.C. 618, 619–20, 513 S.E.2d 98, 99 (1999). Plainly the directed verdict issue cannot meet Rule 29 because it is solely based upon evidence at the trial. Therefore it cannot be deemed timely under Rule 29(b) because it is well beyond the 10 day rule and is not "newly discovered evidence."

Further, to the extent he claims his counsel erred in his emphasis or the prosecutor arguably erred in their emphasis, a Rule 29(b) is not the appropriate statutory or rule remedy.

Those would be in a state post-conviction relief setting under S.C. Code Ann. Section 17-27-10, et seq. as a claim of ineffective assistance of counsel. His assertion otherwise is improper. Judge Alford properly stated that the motion should be filed as a Post-conviction relief action, not a Rule 29(b) motion. [3]

B. ARREST WITHOUT PROBABLE CAUSE ISSUE IS TIME –BARRED.

Similarly, in his second ground, he contends that his arrest was made without probable cause. Supp R. 16-17, Motion, p. 16-17. He contended below that the trial evidence concerning his interview and the photographic line-up shows that the arrest was based on a lack of probable cause. Like the first claim, the lower court appropriately found this was untimely presented under Rule 29. Again, this was entirely based upon the trial record. He claims there was no witness presented at trial or lawful physical evidence to support that Officer Whitstine had interviewed any of the witnesses on that morning and therefore lacked knowledge to have signed the arrest warrant. Supp R. 16-17, Motion, p. 16-17. However, this is based upon his interpretation of the evidence presented at trial –not on the discovery of newly discovered evidence within the last year since November 2011.

The Appellant misreads Rule 29 as allowing a belated new argument based upon a trial record. Further, the Appellant had possession of the record he is using in this action and made arguments about the alleged defects in the trial in his response to the Johnson petition in the appeal from the second PCR application (as well as the first) by January 3, 2003. Chronister v. State, 2001-CP-1338, Chronister v. State, Order (S.C.S.Ct. February 21, 2003). Attached to his motion which he relies upon are the Appendix from that appeal, particularly pages 442, 443, 490,

[3] In his motion, he claims to alternately be making a Rule 60(b) motion. This is a civil motion for the Court of Common Pleas, not a motion for a General Sessions court. The Appellant did not contend that the Rule 60(b) motion would be viable to any particular prior action. To the extent he claims this avoids any statute of limitation he is incorrect as related to the arguments he presents.

491, 452. Supp R. 22-25, Motion, p. 22-25. Supp R. 472, 473, 483, 522, 523, See PCR App.p. 442, 443,452. 490, 491. Again, this allegation about a lack of probable cause to arrest in untimely under both Rule 29(a) and Rule 29(b). Judge Alford did not err in this rejection.

C. SUBJECT MATTER JURISDICTION ISSUE IS TIME-BARRED.

His final claim in his motion and before this Court is that the 1992 trial court lacked subject matter jurisdiction because the indictment was defective and did not show "true bill." This is the same argument presented in his Brief at pages 17-25. However, the indictment reflects "TBill" and the signature of the grand jury foreperson on 4/6/92. Motion, p. 23b. See Supp R. 468-69, 522-23, PCR App.p. 439-440, 490-91. The trial record reflected that he was charged in a bill of indictment. Supp R. 48, PCR App.p. 19. Further, the Petitioner raised an issue concerning whether the indictment was defective in prior proceedings in the state court in the second and third PCR actions through 2006.[4] This is not "after-discovered evidence. " The petitioner has claimed the indictment was defective since 2003.[5] He cannot meet the requirements of timeliness of Rule 29. Judge Alford was correct in his assessment that it was not timely. Further, he was correct in asserting that the claim should be presented in a post-conviction relief application. See Section 17-27-20(A) (2)("that the court was without jurisdiction to impose sentence").

Further, he claims that trial counsel was ineffective in the manner he failed to investigate the indictment issue. Brief of Appellant, p. 21. This is not an available claim under Rule 29, but is more appropriate in a state PCR setting. Again, Judge Alford was not in error ins asserting in

[4] In his pro se response to the Johnson Petition in January 2003 in the appeal from the dismissal in Chronister v. State 2001-CP-1338, the Petitioner raised a claim of a "defective indictment." The petitioner next filed an application for post-conviction relief filed February 9, 2006. In this third application, Chronister alleged: "Subject matter jurisdiction."

[5] Further, his claim that the trial court lacked subject matter jurisdiction would fail under State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), wherein our supreme court held "if an indictment is challenged as insufficient or defective, the defendant must raise that issue before the jury is sworn and not afterwards."

his letter order that the claim needed to be raised in such an action. It is not based on after-discovered evidence and therefore not proper for a Rule 29 motion. This claim was properly addressed on procedural grounds by Judge Alford.

CONCLUSION

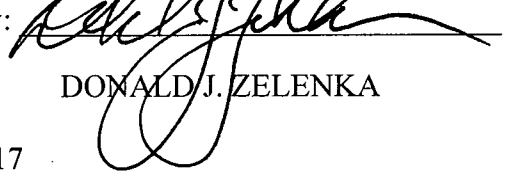
Respondent respectfully submits that Judge Alford properly rejected the motion for new trial on timeliness grounds, rather than addressing the merits. The Appellant has completely failed to assert that there is any newly discovered evidence to support his motion. Rather, Appellant seeks to raise new or different arguments. This is not proper under Rule 29. The appeal should be dismissed. Should the motion be deemed timely, a remand may be appropriate for the lower court to address whether he satisfies the newly discovered evidence requirements of Rule 29 and whether he is entitled to relief based upon the particular allegations which Judge Alford did not address on the merits. However, it is clear that those claims as alleged in the motion are not proper under Rule 29 rather that state PCR proceedings (which would likely be barred as successive and untimely).

Respectfully submitted,
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
ID No. 5758
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENTS

By: 

January 19, 2016

DONALD J. ZELENKA

SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

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SC Court of Appeals

Appeal from York County

Lee S. Alford, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

v.

JEFFREY LYNN CHRONISTER,

Appellant

Appellate Case No. 2014-002630

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014 Order of the South Carolina Supreme Court entitled " Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

January 19, 2016

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that a true copy of the Final Brief of Respondent in the above referenced case has been served upon the Appellant by depositing one copy of same in the United States Mail, postage prepaid, to:

Jeffrey Lynn Chronister, #189827
Kirkland Correctional Institution
4344 Broad River Road
Columbia, SC 29210

This 19th day of January, 2016.

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General