

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DORCHESTER COUNTY
COURT OF GENERAL SESSIONS
Edgar W. Dickson, CIRCUIT COURT JUDGE

RECEIVED
FEB 05 2018
SC Court of Appeals

Case No: 2007-GS-18-0261

The State of South Carolina..... Respondent,
v.
Phillip M. Turner, SCDC# 288680..... Appellant,

Designation of Matter To Be Included
In The Record On Appeal

Appellant proposes the following be included in the record on Appeal:

- 1: Order of denial, Dec. 28, 2016; Motion for Newly Discovered Evidence.
- 2: Exhibit #A - Appellant's indictment; Exhibit #B - Letter to Dorchester County Clerks Office requesting Grand Jury Reports and the response; Exhibit #C Term of Court and Family Courts for the months of March and April 2007.

I certify that this designation contains no matter which is irrelevant to this Appeal...

Feb. 05, 2018

Phillip Turner
Phillip M. Turner, SCDC# 288680
Allendale Correctional Institution
Bamberg A 62
Post Office Box 1151
Fairfax, South Carolina 29827-7127

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ORDER DENYING RULE 29(B) MOTION. (SCRCrIMP) (1-7)

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STATE OF SOUTH CAROLINA IN THE COURT OF GENERAL SESSIONS
COUNTY OF DORCHESTER FOR THE FIRST JUDICIAL CIRCUIT

2016 DEC 30 PM 12:38

State of South Carolina,

vs.

Phillip Marion Turner,

Defendant.

Cheryl Graham

CLERK OF COURT
DORCHESTER COUNTY

**ORDER DENYING DEFENDANT'S
RULE 29(B) MOTION**

CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

2016 DEC 30 PM 12:29

FILED - RECORDED

This matter is before the court on Defendant Phillip Marion Turner's ("Defendant") motion for a new trial based on after-discovered evidence pursuant to Rule 29(b) of the South Carolina Rules of Criminal Procedure. After due deliberation, review of the motion and supporting documents, and hearing arguments on behalf each party, for the reasons stated below, this court denies Defendant's motion.

FACTS

Defendant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Dorchester County. Defendant was true bill indicted during the April 2007 term of the Dorchester County Grand Jury for assault and battery with intent to kill (Indictment No. 2007-GS-18-0261). Defendant proceeded to a trial by jury and was represented by Attorney Melissa Gay. On May 21, 2009, the jury convicted Defendant as indicted. The Honorable Diane S. Goodstein sentenced Defendant to twenty (20) years. A Notice of Appeal was filed with the South Carolina Court of Appeals and an appeal was perfected on Defendant's behalf by Attorney Katherine H. Hudgins. The Court of Appeals denied the appeal on May 2, 2012 and the remittitur was issued on May 21, 2012.

Defendant filed his first application for post-conviction relief on June 23, 2012, in which he alleged that his trial counsel rendered ineffective assistance of counsel in failing to properly

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advise Defendant "in how to proceed through the guilty plea at two separate stages during the trial." An evidentiary hearing was convened on May 20, 2015 before the Honorable Maite Murphy, in which Defendant was represented by Attorney Davis J. Clayton Mitchell. At the hearing, Defendant testified on his own behalf. Also testifying was trial counsel Melissa Gay. Defendant's application for post-conviction relief was denied and dismissed with prejudice by Order dated September 24, 2015.

On November 13, 2015, Defendant filed a motion for a new trial based on after-discovered evidence pursuant to Rule 29(b) of the South Carolina Rules of Criminal Procedure. In his motion, Defendant asserts the following grounds for relief:

Ground A: Did the Solicitor commit[] . . . a "procedural error" by unlawfully impaneling its Grand Jury the Statute of S.C. Code Ann. § 14-5-620(2)[?]

...

Ground B: Did the Trial Court lack subject matter jurisdiction to tried the Defendant on a No-Bill Indictment?

...

Ground C: The foreperson of the grand jury committed fraud upon the Court by signing the indictment before full panel was assembled of the Grand Jury.

...

Ground D: The Solicitor committed a Brady violation by failing to produce exculpatory evidence that [was] in the hand[s] of the . . . investigating agencies.

Defendant's motion was heard by this court on December 6, 2016, and the matter was taken under advisement.

DISCUSSION

A. Defendant's allegation that the Solicitor committed a Brady violation is successive and untimely, and, therefore, it is denied and dismissed.

S.C. Code Ann. § 17-27-90 provides that:

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All grounds for relief available to an application under this chapter must be raised in his original, supplemental or amended Application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding Applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended Application.

Successive applications are disfavored and the burden is on the applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Aice v. State, 305 S.C. 448 (1991); see also Foxworth v. State, 275 S.C. 615 (1981).

This court finds that Defendant's allegation that the Solicitor committed a Brady violation could have been raised in the proceedings based on Defendant's prior application for post-conviction relief and, thus, the current application is successive. Defendant has failed to establish sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief.

Therefore, Defendant's allegation of a Brady violation is denied and dismissed.

B. Defendant's remaining allegations in his Rule 29 motion are untimely, and, therefore, must be denied and dismissed.

Rule 29(b) of the South Carolina Rules of Criminal Procedure states, in pertinent part, the following:

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. . . 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.

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

3/7 ~~8~~

has been discovered since the trial; (3) the evidence could not have been discovered prior to trial by the exercise of due diligence; (4) the evidence is material; and (5) the evidence is not merely cumulative or impeaching. E.g., State v. Needs, 333 S.C. 134, 157-58 (1998).

In his motion, Defendant makes no mention that any of the purported evidence has been discovered since the trial and that such evidence could not have been discovered prior to trial by the exercise of due diligence. In effect, Defendant's Rule 29 motion is merely another attempt at an application for post-conviction relief, which had been denied and dismissed with prejudice by the Honorable Maite Murphy by Order dated September 24, 2015. Failure of Defendant to meet this burden of showing that the evidence had been discovered since trial and that the evidence could not have been discovered prior to trial through the exercise of due diligence renders his allegations to be without merit.

Therefore, Defendant's remaining allegations are denied and dismissed.

C. Regardless, of the above, S.C. Code Ann. § 14-5-620(2), Defendant's indictment, and the Dorchester County Grand Jury Reports are all public record, and, therefore, are not "after-discovered evidence" within the meaning of Rule 29(b).

The theory of after-discovered evidence does not extend to evidence available or attainable from public record before the time of trial. State v. Allen, 276 S.C. 412 (1981); see also State v. Jones, 172 S.C. 129 (1933); 24 C.J.S. Criminal Law § 1454, p.179. The evidence upon which Defendant relies in Grounds A through C are all available or attainable from public record, and have been so since before the time of trial. Therefore, based on the above, Defendant's Rule 29 motion must be denied and dismissed.

4/7/15

D. Regardless of the above, S.C. Code Ann. § 14-5-620, under which Defendant asserts that he is entitled to relief in Grounds A and C of his motion, provides for the minimum terms of court scheduled for each county, and does not limit the ability of the Chief Justice of the Supreme Court to schedule terms of court as is necessary.

The judicial power is vested under Article V of the South Carolina Constitution, in the unified judicial system. Article V, Section 1, provides for the following: "The judicial power shall be vested in a unified judicial system, which shall include a Supreme Court, a Circuit Court, and such other courts of uniform jurisdiction as may be provided for by general law." With regard to setting terms of court, this power remains with the Chief Justice of the Supreme Court, who is the administrative head of the unified judicial system. See S.C. Const. Art. V, § 4 ("The Chief Justice shall set the terms of any court and shall have the power to assign any judge to sit in any court within the unified judicial system."). The provision further states, in pertinent part:

[E]ach county shall be entitled to four weeks of court each year and such terms therefor shall be provided by the General Assembly. Provided, further, that the Chief Justice shall set a term of at least one week in any court of original jurisdiction in any county within sixty days after receipt by him of a resolution of the county bar requesting it. The Supreme Court shall make rules governing the administration of all the courts of the State.

Id.

In his motion, Defendant relies on S.C. Code Ann. § 14-5-620(2), which states the following:

The court of general sessions for Dorchester County shall be held at St. George on the third Monday in February, the second Monday in April, the fourth Monday in June and the second Monday in November for one week each.

Defendant contends that, because he was indicted in the month of April and convicted in the month of May, Defendant's indictment and subsequent conviction are null and void. However, the above statute merely provides for a minimum amount of terms of court that are to be scheduled in each

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county, which is the responsibility of the General Assembly. The statute does not limit the ability of the Chief Justice of the Supreme Court to schedule additional terms of court pursuant to its constitutional power delineated in Article V, § 4.

As stated above, the Chief Justice has the power to set the terms of any court and shall have the power to assign any judge to sit in any court within the unified judicial system. See also S.C. Const. Art. V, § 4 (The Chief Justice also has the power to "appoint an administrator of the courts and such assistants as he deems necessary to aid in the administration of the courts of the State."). Although S.C. Code Ann. § 14-5-620(2) does not provide for Dorchester County general sessions terms of court at the time Defendant was indicted and ultimately convicted, the South Carolina Court Administration specifically scheduled general sessions terms of court during those weeks and it acted within their constitutional authority in doing so.

Accordingly, Defendant's argument that he was indicted and convicted out of term is without merit.

E. Regardless of the above, Defendant's indictment was true-billed, so his arguments in Ground B are without merit.

In his motion, Defendant states that the "Grand Jury render[ed] a No-Bill indictment." However, it is clear from Defendant's indictment and the Dorchester Grand Jury Reports from April 2007 that Defendant's indictment was reported as true billed. As stated above, 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 due diligence; (4) the evidence is material; and (5) the evidence is not merely cumulative or impeaching. Needs, 333 S.C. at 157-58. In light of the Dorchester County Grand

6/7 ~~SS~~

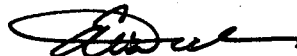
Jury Reports and the face of Defendant's indictment, this court finds that Defendant fails to meet his burden of showing the five (5) factors above.

Therefore, Defendant's argument that the grand jury returned a no-bill indictment is without merit.

CONCLUSION

Accordingly, for the reasons stated above, IT IS ORDERED that Defendant's motion for a new trial pursuant to Rule 29(b) of the South Carolina Rules of Criminal Procedure be, and hereby is, DENIED.

AND IT IS SO ORDERED.



Edgar W. Dickson
Presiding Judge, First Judicial Circuit

December 28, 2016
Orangeburg, South Carolina

7/7

WITNESSES

Dixson, Ray

DCSO

Agency Case # 06-011929

ARREST WARRANT NUMBER -

K177919

Arrested: Dec 15, 2006

ACTION OF GRAND JURY

4-12-07

Foreperson of Grand Jury

Date: March 08, 2007

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2007GS18-0261#

EXHIBIT A

The State of South Carolina

County of

DORCHESTER

COURT OF GENERAL SESSIONS

March 12, 2007 TERM

THE STATE

vs.

Phillip Marlon Turner

Indictment for

**ASSAULT AND BATTERY WITH INTENT
TO KILL**

SC Code: 16-3-620

CDR Code: 0014

Class: FEL-C

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

FILED - RECORDED
2007 APR 17 AM 9:50
CHERYL COYNE
CLERK OF COURT
DORCHESTER COUNTY

DORCHESTER COUNTY CLERK OF COURT
Cheryl Graham, Clerk of Court
200 East Jim Bilton Blvd.
St. George, SC 29477

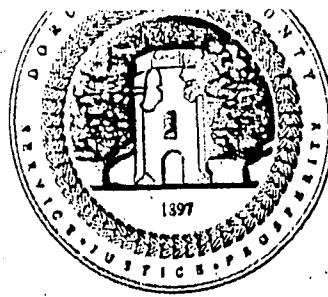


Exhibit # B

To: Phillip Turner
From: Dorchester County Clerk of Court
Date: 1/12/2018
RE:

Please find the enclosed copy or copies of requested indicated information concerning your case.

- The Grand Jury met on March 8, 2007 and April 12, 2007.
- () Sentencing Sheet(s) Grand Jury proceedings are held in private. No minutes are taken or recorded when the Grand Jury is deliberating. The only documentation that results from these proceedings is an indictment of True bill or No Bill. Your indictments show the Grand Jury met on April 12, 2007. They normally do not meet during a week when General Session Court is in session.
 - () Warrant(s)
 - () Ticket(s)
 - () Indictment(s)
 - () Contact the Magistrates Court or Arresting Agency Concerning your Request
 - () Jail Time Served in Dorchester County - Contact: Dorchester County Sheriff Department, 100 Sears Street, St. George, SC 29477. Any other location where jail time was served Contact: The South Carolina Department of Corrections where you were located.
 - () Transcript(s): Contact the Court Reporter by mail.
 - () PCR Form
 - () Hold/Detainer contact caseworker, attorney or arresting agency. Contact the Family Court where your Divorce Case was heard or where you plan to have it heard.
 - () Contact Probation, Parole & Pardon Office
 - () Information not available in the Clerk of Court's Office
 - () Other:

Phillip M. Turner #288680
ACJ - FZA03
PO Box 1151
Air Fax, SC, 29827

Exhibit # B

Dec. 28, 2017

FILED-RECORDED
2018 JAN -8 PM 4:30
CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

Dorchester County Clerk
Cheryl Graham
5200 East Jim Bilton Blvd.
St. George, SC, 29477

RE: Phillip M. Turner vs. State of South Carolina
Case Nos 2007-GS-18-0261

Dear Ms. Graham,

I would respectfully request a copy of The
Dorchester County Grand Jury Signature and Report
for the year of 2007, More specific the days
and the Months of March and April (of 2007).

Thank you for your assistance with this re-
quest Ma'am.

Respectfully Submitted,

Phillip Turner

Exhibit # C

March 2007 Go To Date

**Terms of Circuit and Family Court
March 2007**

week of week of

Circuit Number	3/5/2007	3/12/2007	3/19/2007	3/26/2007
1	Common Pleas Dorchester Goodstein, Diane KEIL 5, 6, 7 NO CR NEEDED 8 KEIL 9 General Sessions Orangeburg Williams, James WALKER	General Sessions Dorchester Goodstein, Diane KEIL General Sessions Orangeburg Williams, James WALKER	General Sessions Dorchester Young, Roger KEIL Common Pleas Orangeburg Williams, James WALKER	Common Pleas Non- Jury 26 Goodstein, Diane KEIL 26
	Family Court Dorchester McMahan, Judy L. AMICK Family Court Calhoun / Dorchester McLin, Nancy C. MURDAUGH 5, 6, 7, 8 CUMMINGS 9 Family Court Orangeburg McFaddin, George M. SNELLING	Family Court Dorchester McLin, Nancy C. MURDAUGH Family Court Dorchester Wylie, William J. HOLSTON 12 BAKIS-RAY 13, 14 WRIGHT 15 SINGLETARY 16 Family Court Orangeburg Jones, Anne Gue COLLINS	Family Court Orangeburg Jenkins, Robert N. MURDAUGH 19 NO CR NEEDED 20 MURDAUGH 21, 22 VARNADOE 21, 22 NO CR NEEDED 23 Family Court Dorchester Wylie, William J. GARVIN Family Court Orangeburg Jones, Anne Gue COLLINS	Family Court Dorchester McLin, Nancy C. MURDAUGH Family Court Orangeburg Wylie, William J. GARVIN

April 2007 *Exhibit C*

**Terms of Circuit and Family Court
April 2007**

week of week of

Circuit Number	4/2/2007	4/9/2007	4/16/2007	4/23/2007	4/30/2007
1	General Sessions Orangeburg Nicholson, J. WALKER Common Pleas Non-Jury 3, 4, 5, 6 Goodstein, Diane KEIL 3, 4, 5, 6	General Sessions Orangeburg Goodstein, Diane KEIL Common Pleas Dorchester Young, Roger SHEPPARD 9, 10, 11, 12 NO CR NEEDED 13	General Sessions Calhoun Goodstein, Diane KEIL General Sessions/State Grand Jury Dorchester Nettles, Michael WALKER	Common Pleas Non-Jury/PCR Cothran, R. RICHARDSON General Sessions Dorchester Mullen, Carmen KEIL 23, 24, 25 WALKER 26, 27	General Sessions Orangeburg Goodstein, Diane KEIL Common Pleas Dorchester Williams, James WALKER
	Family Court Dorchester McLin, Nancy C. MURDAUGH	Family Court Orangeburg Myers, Marion D. WALKER Family Court Dorchester Wylie, William J. GARVIN Family Court Calhoun / Dorchester Jones, Anne Gue COLLINS	Family Court Orangeburg McMahan, Judy L. GARVIN Family Court Dorchester McLin, Nancy C. MURDAUGH Family Court Orangeburg Jones, Anne Gue COLLINS	Family Court 23, 24 Dorchester McLin, Nancy C. MURDAUGH 23, 24 Family Court 23 Orangeburg Jones, Anne Gue COLLINS 23 Family Court 25 Dorchester Wylie, William J. GARVIN 25	Family Court Dorchester Jenkins, Robert N. MURDAUGH 30 NO CR NEEDED 1, 2 MURDAUGH 3, 4 Family Court Dorchester Wylie, William J. GARVIN Family Court Orangeburg McFaddin, George M. VARNADOE

-13-

PROOF OF SERVICE OF NOTICE OF APPEAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
FEB 05 2018
SC Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Edgar W. Dickson, Circuit Court Judge

Case No. 2007-GS-18-0261

The State of South Carolina Respondent,
V.
Phillip M. Turner, SDC# 288680 Appellant,

PROOF OF SERVICE

I certify that I have served a copy of the original Designation of Matter, -
to be included in the record of Appeal on the above referenced case on the
South Carolina Court of Appeals and the Respondent on the date of Feb.
05, 2018. by depositing a copy of the same in the United States Mail,
postage prepaid, to the addresses listed below:

Other Counsel of Record:

South Carolina Court of Appeals
Ms. Jennifer Abbott-Kitchens - Clerk of Court
Post Office Box 11629
Columbia, South Carolina 29211

Alan Wilson, Attorney General
South Carolina Attorney General's Office
1000 Assembly Street
Post Office Box 11549
Columbia, South Carolina 29211-1549

Phillip Turner
Phillip M. Turner, SDC# 288680
Allendale Correctional Institution
Bamberg A62
Post Office Box 1151
Fairfax, South Carolina 29827-1127

DATE Feb. 05, 2018

Phillip M. Turner, SDC# 288680
Allendale Correctional Institution
Bamberg A62
1057 Revolutionary Trail
Post Office Box 1151
Fairfax, South Carolina 29827-1127

South Carolina Attorney General
Mr. Alan Wilson
1000 Assembly Street
Post Office Box 11549
Columbia, South Carolina 29211-1549

Re: Phillip Turner v. State of South Carolina
Case No: 2007-GS-18-0261
Appellate Case No: 2017-000061

RECEIVED

FEB 05 2018

SC Court of Appeals

Mr. Wilson,

Please find enclosed for filing in your Honorable Court a copy of the original initial brief of Appellant and designation of matter with a subsequent Proof of Service on the applications.

Appellant filed with the South Carolina Court of Appeals a motion for extension of time in pursuant to SCR Crim P, Rule 240(b) on Jan 05, 2018 notifying the Attorney General's Office and other parties of this action, so as to have time to investigate and/or search for lost documents pertaining to the above captioned case. The alternative for filing a motion for an extension of time is to prepare a duplicate copy for the court of appeals....

The Appellant is incarcerated at Allendale Correctional Institution. South Carolina Department of Corrections and is afforded a restricted amount of time to "Access to the Courts" of up to two (2) days a week per SDC Policy GA 01.03 Access to the Courts in the Law Library.

to prepare legal documents and legal materials to be in compliance with the South Carolina Appellate Court Rules (SCACR) and request.

Appellant would like to take the time to thank you and your office in advance for any and all assistance that you may provide the Appellant with helping to process this matter. In kindest regards, respond in kind.

Respectfully Submitted,
Phillip Turner
Phillip Turner
Appellant

cc: file
Ms. Jennifer Abbott-Kitchens
Clerk of Court: S.C. Court of
Appeals

Phillip M. Turner, SCDC# 288680
Allendale Correctional Institution
Bamberg A62
1057 Revolutionary Trail
Post Office Box 1151
Fairfax, South Carolina 29827-7127

January 29, 2018


RECEIVED
FEB 05 2018
SC Court of Appeals

Ms. Jennifer Abbott-Kitchens
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Post Office Box 1629
Columbia, South Carolina 29211-1629

Re: Phillip Turner v. State of South Carolina
Appellate Case No: 2017-000061
Case No: 2007-GS-18-0261

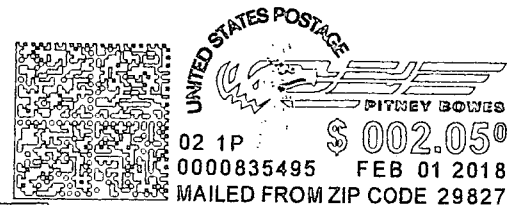
Ms. Jennifer Abbott-Kitchens,

Enclosed for filing with the above referenced captioned case, please find "Appellant's Initial Brief" and "Designation of Matter". The Respondent has been served copies as affirmed by the enclosed Proof of Service. Thank you for your assistance in this Matter.

Respectfully Submitted,

Phillip M. Turner

cc: file
Mr. Alan Wilson

Phillip Turner # 288680
ACI - F4A52
PO Box 1151
Fairfax, SC, 29827



RECEIVED
FEB 05 2018
SC Court of Appeals

MAIL ROOM
ACI
JAN 27 2018
RECEIVED

Ms. Jennifer Abbott-Kitchens
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Post Box 11629
Columbia, SC, 29211-1629

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