STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County
Honorable Benjamin H. Culbertson, Circuit Court Judge
Appellate Case No. 2012-213222

STATE OF SOUTH CAROLINA,

Respondent,

v.

JODY LYNN WARD,

Appellant

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the court erred by denying appellant's Motion for New Trial based on After Discovered Evidence S.C.Crim.R 29(b), Motion for Appointment of Counsel, and Motion for Private Investigative, and expert Funds/Expenses, Under Due Process and Equal Protection of Law, U.S. Const. Amend. xIV § 1., and Ake v. Oklahoma, 470 U.S. 68 (1985)?

2. Whether the court erred by denying appellant's Motion For Reconsideration, And Motion To Arrest of Judgment Of Order denying Motion For New Trial, In a violation of Due Process And Equal Protection of Law, U.S. Const. Amend. XIV §1, And in a violation of Ake v. Oklahoma, 470 U.S. 68 (1985) Since appellant Is a Mental Health Patient, And IT being a Conflict of Interest Within the Clerk of court's Office, and since the Lieber Mailroom held the Affidavit Of Rondie J. Ward that Clearly supported the Motion For New Trial?

3. Whether the court erred by denying Motion For New Trial, based on After Discovered Evidence S.C.R.Crim.P Rule 29(b); Motion For Appointment Of counsel; Motion For Private Investigative and expert Funds/Expenses; Motion For Reconsideration And Motion To Arrest of Judgment that resulted in an abuse of discretion amounting to an error of Law? ; as the abuse of discretion is both error of the rulings and resulting prejudice as well as denial of access of courts just because Appellant is an indigent status and pro se litigant for clerk to misabuse [her] authority, and correctional mailroom to hold affidavit?

4. Whether the court abused its discretion amounting to an error of law: By failing to grant an evidentiary hearing which amounted to a deprivation of legal rights of Appellant, by denying him full access to the courts just because he is an indigent Pro Se litigant, and mental health patient, the ruling was an error and Appellant was/did result in prejudice to denying motion for new trial based on after discovered evidence pursuant to S.C.CRim,P 29(b), motion for appointment of counsel, and motion for investigative and expert funds/expenses, under due process and equal protection of law, U.S. Const. Amend. XIV, § 1, is for all?

5. Whether Appellant's due process and equal protection was violated by court denying Appellant's motion for new trial, motion for appointment of counsel, and motion for private investigative, and expert expenses, which resulted in an abuse of discretion and Appellant was thereby prejudiced because it was clear and convincing evidence that was submitted to support an evidentiary hearing, and motion for new trial because the affidavits of Appellant, Letter Michael Abner, and sworn affidavit of Rondie J.Ward, and affidavit of Ashton Ward supported new trial motion U.S. Const., Amend, XIV § 1, is for all?

6. Whether the court abused its discretion by denying Appellant['s] motion for reconsideration, and arrest of judgment, due to conflict of interest within Clerk of Court and a denial of access of court due to indigent mental health patient who cannot afford legal counsel and affidavit of Rondie J. Ward being denied to file that says "Michael Abner did tell me that he paid them boys to kill Jody."?

COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether the circuit court abused its discretion by denying Ward's Rule 29, SCRCrim.P, motion for a new trial on after-discovered evidence, where the motion was based upon an unsworn and uncorroborated statement by another individual, Michael Andrew Abner, that did not admit either that Abner killed Ward's victims or that he hired the victims to kill Ward, contrary to Ward's reading of Abner's letter?

II. Whether the circuit court abused its discretion when it denied Ward's motions for appointment of counsel and for investigative and expert expenses as moot, in light of the circuit court's denial of his motion for a new trial?

III. Whether the circuit court abused its discretion by denying Ward's motions for arrest of judgment and for reconsideration of the Order denying the motions for new trial, appointment of counsel and for investigative and expert expenses, where the circuit court lacked jurisdiction because Ward had served and filed a notice of appeal before he filed these motions?

STATEMENT OF THE CASE

Appellant, Jody Lynn Ward, #300644 (Ward) is presently confined in the South Carolina Department of Corrections (SCDC), as the result of his two Georgetown County murder convictions and sentence. As will quickly become very clear, Ward's case has a lengthy procedural history during which *he has never previously asserted that someone other than he committed the two murders* for which he was convicted and sentenced.[1]

A. Earlier state and federal court proceedings.

1. Original State court proceedings.

The Georgetown County Grand Jury indicted Ward in July 2003 for two counts of murder. Margaret Ann Kneece, Esquire, and J. Wesley Locklair, III, Esquire, represented him on these charges. The Honorable John L. Breedan, Jr., held motions hearings and a bond hearing on these charges on December 8, 2003. The Honorable Paula H. Thomas held an additional motions hearing on February 26, 2004, and Judge Breedan held another motions hearing on February 27, 2004.

On March 15-18, 2004, Ward received a jury trial before Judge Thomas. The jury convicted him of both murders, and Judge Thomas sentenced him to concurrent sentences of life imprisonment. Ward timely perfected an appeal. On August 29, 2005, Assistant Appellate Defender Robert M. Dudek filed a Final *Anders* Brief of Appellant[2] on Ward's behalf and petitioned to be relieved as counsel. The Final *Anders* Brief set forth one issue for review:

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[1] "'A court can take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records.' *Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325 (Ct.App.1984). 'It is not error for a judge to take judicial notice of what was stated in [a] former opinion in [a] prior action of the same case.' *Id.*" *Wise v. Wise*, 394 S.C. 591, 600, 716 S.E.2d 117, 122 (Ct.App. 2011); Griffin v. Van Norman, 302 S.C. 520, 525, 397 S.E.2d 378, 381 (Ct.App. 1990). Therefore, Respondent would ask this Court to take judicial notice of the various state court proceedings and thereby obviate the necessity for a voluminous Record on Appeal.

[2] *See Anders v. California*, 386 U.S. 738 (1967).

Whether the court erred by refusing to suppress appellant's statement where law enforcement knew appellant was attempting contact his attorney prior to his meeting with Assistant Sheriff Weaver, and where Weaver was aware appellant had invoked his right to counsel upon his arrest, since appellant should not have been deemed to have waived his right to counsel under these circumstances?

Ward filed a Final Brief of Appellant (*pro se*) that the State received on October 12, 2005, in which he presented eight additional claims. He thereafter supplemented this response with two additional claims.[3] On January 26, 2007, this Court dismissed Ward's appeal and

[3] Initially, he initially presented the following issues:

Issue One: THE GRAND JURY DID NOT HAVE JURISDICTION TO ISSUE AN INDICTMENT WHEN THERE WAS INSUFFICIENT EVIDENCE PRESENTED TO MEET ALL THE ELEMENTS OF THE CRIME CHARGED IN VIOLATION OF ARTICLE I, § 3.

Issue Two: APPELLANT WAS INDICTED UPON AN ILLEGAL AND INSUFFICIENT PROCESS OF THE GRAND JURY IN VIOLATION OF S.C. CONST. Art. I, § ll, and Art. V, § 22 WHEN THE FOREMAN, SCOTT MCKENZIE WAS DIRECTLY INVOLVED AT THE CRIME SCENE AND HAVING PRIOR BIAS KNOWLEDGE OF THE EVENTS PRIOR TO SERVICE ON GRAND JURY; TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT THIS ISSUE AT TRIAL PRIOR TO THE VERDICT BY THE JURY IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE U. S. CONSTITUTION AND VIOLATION OF SC. CONST. ART. I, § 3.

Issue Three: THE INDICTMENT IN APPELLANT'S CASE WAS FLAWED WHERE MISINFORMATION STATED THAT THE DECEASED DIED DUE TO GUN SHOT WHEN AT TRIAL TESTIMONY STATED OTHERWISE IN THIS "NO BODY CASE." TRIAL COUNSEL WAS INEFFECTIVE FOR NOT SEEKING TO QUASH INDICTMENT AND/OR MAKE MOTION FOR MISTRIAL; THE GRAND JURY IN INCLUDING SAME ON INDICTMENT MISREPRESENTED THE EVIDENCE AND ESTABLISHED IN THE MINDS OF THE TRIAL JURY THAT DECEASE[D'S] DEATH WAS DUE TO GUN SHOT IN WHICH WAS NOT EVIDENCED AT TRIAL AND INDICTMENT WAS THEREFORE FLAWED. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT PURSUING THESE ISSUES; INDICTMENT WAS ISSUED IN VIOLATION OF S.C. CONST. AND THE UNITED STATES CONSTITUTION THE 5TH, SIXTH, AND FOURTEENTH AMENDMENTS AND S.C. CONST. ART. I,§ 3.

Issue Four: PETITIONER'S RIGHTS WERE VIOLATED UNDER ARTICLE I, § 3 OF THE SOUTH CAROLINA CONSTITUTION, [AND] THE FOURTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN APPELLANT WAS ARRESTED WITHOUT A (PROBABLE CAUSE) WARRANT WHILE NOT IN [THE] COMMISSION OF A CRIME, HELD FOR SEVENTY-TWO HOURS, RELEASED AND AGAIN ARRESTED THEREAFTER BY WARRANTS THAT DID NOT HAVE SUFFICIENT PROBABLE CAUSE FOR AN ARREST WHEN SUBSTANTIAL BASES FOR PROBABLE EXISTED WHEN THE MAGISTRATE WAS GIVEN NO INFORMATION REGARDING THE RELIABILITY OF THE CONFIDENTIAL INFORMER, THE [SUFFICIENCY] REQUIRED TO ISSUE WARRANT DID NOT PROVIDE ACTUAL CAUSE FOR AN ARREST.

Issue Five: THE SOLICITOR'S HIGHLY INFLAMMATORY AND PREJUDICIAL REMARKS IN OPENING AND CLOSING STATEMENTS, BOLSTERING AND VOUCHING FOR STATE WITNESSES, ACTING AS WITNESS BEFORE THE JURY, TESTIFYING AS IF

granted counsel's petition to be relieved in an unpublished Opinion. *State v. Jody Lynn Ward*, 2007-UP-048 (S.C. Ct.App, Jan. 26, 2007). Ward filed a *pro se* Petition for Rehearing, dated February 1, 2007. At the Court's direction, the State made a Return to Pro Se Petition for Rehearing on February 15, 2007. This Court denied rehearing on March 22, 2007.

A *pro se* Petition for Writ of Certiorari was received by the State on April 30, 2007, raising four allegations. On May 14, 2007, the State filed a Return to Pro Se Petition for Writ of Certiorari. However, Ward voluntarily withdrew his Petition in a June 29, 2007 letter to counsel, Mr. Dudek. Counsel forwarded this letter and, on July 5, 2007, the South Carolina Supreme

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> STATEMENTS MADE WHERE FACTUAL, AND THE FAILURE OF TRIAL COUNSEL TO OBJECT VIOLATING APPELLANT'S RIGHT TO A FAIR TRIAL, INFECTED THE JURY PRIOR TO EVIDENCE, AND DENIED APPELLANT DUE PROCESS AND EQUAL PROTECTION[] OF THE LAWS IN VIOLATION OF THE FOURTEENTH AND SIXTH AMENDMENT[S] OF U.S. CONSTITUTION AND ART. [I], § 3, ART. IV, § VI OF THE S.C. CONSTITUTION.
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> Issue Six: DID THE TRIAL COURT LACK SUBJECT MATTER JURISDICTION TO ENTER A CONVICTION OR IMPOSE SENTENCE UPON INDICTMENT 03-GS-22-1031 DUE TO THE FATAL VARIANCE BETWEEN THE PROOF AT TRIAL AND THE ALLEGATIONS WITHIN THE FACE OF THE INDICTMENT?
>
> Issue Seven: TRIAL COUNSEL WAS INEFFECTIVE COUNSEL WHEN FAILING TO MAKE CONTEMPORANEOUS OBJECTIONS IN A TIMELY MANNER IN ORDER TO PRESERVE FOR APPEAL PURPOSES VIOLATING APPELLANT'S RIGHTS OF DUE PROCESS AND EQUAL PROTECTIONS OF THE LAWS UNDER S.C. CONST. ART. I, § 3 AND ART. I, §4 AND THE 6TH AND 14TH AMENDMENTS OF THE U.S. CONSTITUTIONS.
>
> Issue Eight: THE COURT ERRED IN CHARGING THE JURY WITH HANDS OF ONE HANDS OF ALL WHERE THE APPELLANT WAS INDICTED AS A PRINCIPLE ONLY AND THE CHARGE OF HANDS OF ONE HANDS OF ALL WAS INSUFFICIENT, VAGUE, MISLEADING, CONFUSING AND ALONG WITH PRINCIPLE CHARGE DEPRIVED THE APPELLANT OF A FAIR TRIAL AND DUE PROCESS; COUNSEL WAS ALSO INEFFECTIVE IN FAILING TO OBJECT TO THIS CHARGE AND REQUEST A MORE SPECIFIC CHARGE.

Ward then filed a Supplement to his Final Brief of Appellant (pro se), which the State received on October 12, 2005, raising two additional claims:

> Issue A: Did the trial Court lack subject matter jurisdiction upon the indictments due to procedural flaw in the warrants in this case?
>
> Issue B: Did the trial Court lack subject matter jurisdiction due to invalid warrants and arrest?

Court granted his request to dismiss the appeal. This Court sent the Remittitur to the Georgetown County Clerk of Court on July 6, 2007.

Ward filed a *pro se* Post-Conviction Relief (PCR) Application (07-CP-22-915) on July 11, 2007. He later supplemented the claims in his Application. The Honorable Stephen H. John held an evidentiary hearing into the matter on at the Horry County Courthouse on May 1, 2008. On May 15, 2008, Judge John signed an Order of Dismissal, in which he denied relief and dismissed the Application with prejudice. The Order of Dismissal addressed Ward's claims that trial counsel was ineffective because they (1) failed to object to the Solicitor's comments regarding Ward's "lack of remorse;" (2) failed to object to the Solicitor's vouching for the State's witnesses; (3) failed to object to the Solicitor's comments on the Ward's credibility and the defense's theory; and (4) failed to request jury instructions on voluntary and involuntary manslaughter.

Ward filed a Motion to Amend or Alter the Judgment on May 20, 2008. However, Judge John filed an Order Denying Applicant's Motion To Alter Or Amend In Part And Clarifying Order Of Dismissal.

Ward timely served and filed a notice of appeal. Assistant Appellate Defender Robert M. Pachak represented him in collateral appellate proceedings. On December 30, 2008, Ward filed a Petition for Writ of Certiorari. The two Issues Presented in the Petition were stated as follows:

1. Whether defense counsel were ineffective in failing to object to numerous errors in the solicitor's closing arguments such as to render petitioner's trial unfair?

2. Whether defense counsel[] were ineffective in failing to request or put on the record requests to charge on the lesser included offenses of voluntary and involuntary manslaughter?

The State filed a Return to Petition for Writ of Certiorari on February 13, 2009. The South Carolina Supreme Court filed an Order denying certiorari on August 20, 2009, and it sent the Remittitur to the Georgetown County Clerk of Court on September 8, 2009.

Ward filed a second *pro se* Post-Conviction Relief (PCR) Application (09-CP-22-915) on July 13, 2009. In his 2009 Application, he claimed that he received ineffective assistance of counsel because counsel failed to convey a plea offer to him. He asserted that this claim was a "new rule of law" under S.C. Code Ann. § 17-27-45(B) & (C) (2009), and the decision in *Davie v. State*, 381 S.C. 601, 675 S.E.2d 416 (2009). The State thereafter filed a Return and Motion to Dismiss, in which it argued for summary dismissal because the 2009 Application was barred by the statute of limitations and because it was successive to the 2007 Application.

The Honorable Benjamin H. Culbertson, Resident Judge of the Fifteenth Judicial Circuit, ultimately filed a January 13, 2010 Final Order of Dismissal, in which he summarily dismissed the 2009 Application because *Davie v. State* did not apply to the facts of the Ward's case, the 2009 case was successive to the earlier application, and the 2009 Application was barred by the statute of limitations. Ward timely served a notice of appeal.

The Honorable Daniel E. Shearouse, Clerk of Court for the South Carolina Supreme Court, sent Ward a letter On February 23, 2010, informing Ward that he had to comply with the requirements of Rule 243(c), [formerly Rule 227(c),] SCACR. Although Ward made a response in a March 2, 2010 document styled "Petition for Writ of Certiorari," the South Carolina Supreme Court filed an Order of Dismissal on March 15, 2010, in which it dismissed the appeal. It found that Ward "failed to show that there is an arguable basis for asserting that the determination by the lower court was improper," as required by Rule 243(c). The Court sent the Remittitur to the Georgetown County Clerk of Court on April 1, 2010.

Undaunted, Ward filed a third PCR Application (2010-CP-22-00733) on May 4, 2010. He claimed that "[t]he jury instructions in my case are unconstitutional under Belcher's opinion." Again, he maintained that this was "a new rule of law" and, therefore, the statute of limitations and the successiveness bar did not bar his filing. The State made a Return on June 1, 2010, arguing that the 2010 Application should be summarily dismissed because *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) did not apply to Ward's case because the South Carolina Supreme Court indicated that *Belcher* "'will not apply to convictions challenged on post-conviction relief.' *Id.* at 613, 685 S.E.2d at 810.

Ultimately, Judge Culbertson filed a Final Order of Dismissal on July 29, 2010, and Ward signed a receipt for this Order on August 14, 2010. The Order dismissed the 2010 Application based upon Judge Culbertson's finding that *Belcher* did not apply because Ward's case was on collateral review.

Ward timely served and filed a notice of appeal, which was accompanied by a Petition for Writ of Certiorari dated July 20, 2010. His Petition for Writ of Certiorari raised the following issues:

> Did the circuit court err in holding that Petitioner was not entitled to the benefit of Francis v. Franklin, supra; and Sandstrom v. Montana, supra on collateral review to invalidate his conviction due to improper Burden-shifting instruction at his trial on malice charge?

Petition for Writ of Certiorari at p. 1.

The State filed a Return to Petition for Writ of Certiorari on August 17, 2010. On August 18, 2011, the South Carolina Supreme Court filed an Order denying certiorari. It sent the Remittitur to the Georgetown County Clerk of Court on September 7, 2011.

Despite having three PCR Applications denied, Ward filed a Petition for Writ of Habeas Corpus in the original jurisdiction of the South Carolina Supreme Court, which was received by that Court on October 31, 2011. He raised three issues in his state habeas petition:

> ISSUE I: Was trial counsel ineffective for failing to object to the Solicitor's improper closing summation which impermissibly lessened the jury's sense of impartiality that denied Petitioner his right to a fair and impartial jury and his right to a fair trial?
>
> ISSUE II: Was trial counsel ineffective for improperly telling the jury if any mistakes are made a "higher court" will take care of the error and thus counsel's improper statements tipped the scales in favor of the State, and the statements ultimately denied Petitioner his right to a fair trial?
>
> ISSUE III: Was trial counsel ineffective for failing to object to the trial court's burden shifting jury instructions, in violation of the Due Process Clause?

The South Carolina Supreme Court denied his Petition on November 16, 2011, based upon Ward's failure to meet the standard for state habeas corpus relief:

> "Because petitioner has not shown that 'there has been a violation which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice,' the petition is denied. *Simpson v. State*, 329 S.C. 43, 495 S.E.2d 429 (1998)."

2. Federal habeas corpus proceedings.

On December 1, 2011, Ward filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of South Carolina. *Ward v. Warden of Leiber Correctional Institution*, C/A No. 0:11-3277-RBH. He raised seven allegations in federal Habeas Corpus,:

> GROUND ONE: The trial court and subsequent reviewing court's erred in ruling Petitioner waived his right to counsel when Weaver interrogated Petitioner, after law enforcement knew Petitioner was attempting to contact his attorney prior to petitioner meeting with the Assistant Sheriff Weaver. Law enforcement also was aware that petitioner had invoked his right to counsel upon his arrest and therefore under the facts of the case the statement should have been suppressed.
>
> GROUND TWO: The state courts erred in failing to find defense counsel's ineffective in failing to object to numerous errors in the

solicitor's closing argument that such argument rendered petitioner's trial as being unfair and a denial of due process.

GROUND THREE: The PCR court and subsequent reviewing court's erred in failing to find counsels rendered ineffective assistance of counsel, when counsel(s) failed to convey plea offers to petitioner prior to trial.

GROUND FOUR: The State PCR court and subsequent reviewing courts erred in failing to find petitioner's jury instructions were unconstitutional under State v. Belcher.

GROUND FIVE: The State Supreme Court erred in failing to find counsel ineffective for failing to object to the solicitor's improper closing that denied petitioner his right to a fair trial.

GROUND SIX: The State Supreme Court erred in failing to find counsel rendered ineffective assistance when counsel improperly told the jury if any mistakes are made a "higher court" will take care of the error and thus counsel's improper argument tipped the scales in favor of the State and lessened the State burden of proof.

GROUND SEVEN: The State Supreme Court erred in failing to find counsel ineffective for failing to object to the unconstitutional burden shifting jury instructions given during trial. This decision was unreasonable and contrary to clearly established federal law.

Respondent filed a Return and Memorandum of Law in Support of Motion for Summary Judgment and a Motion for Summary Judgment on May 11, 2012. Ward subsequently filed a response in opposition to Respondent's motion. However, United States Magistrate Judge Paige J. Gossett filed a Report and Recommendation on February 15, 2013, recommending that Respondent's motion for summary judgment be granted.

Although Ward filed Objections to the Report and Recommendation, the Honorable R. Bryan Harwell, United States District Judge, filed an Order granting Respondent's summary judgment motion on March 20, 2013. Judgment was entered that same day. Ward filed a timely notice of appeal to the Fourth Circuit Court of Appeals. He filed an Informal Opening Brief on

May 14, 2013 and a Supplemental Informal Opening Brief on May 20, 2013. His appeal is currently pending before the Fourth Circuit Court of Appeals.

B. Motion for a new trial.

Pursuant to Rule 29, SCRCrim.P, Ward filed a Motion for a New Trial Based on After Discovered Evidence in the Court of General Sessions, on May 16, 2012. Ward argued that he was entitled to a new trial based upon a purported letter from Michael Andrew Abner to Ward's mother, in which Abner supposedly claimed to have hired the victims in this case to kill Ward. **R. pp. 5**. *See also* **R. pp. 13--17 (Exhibit A, Abner's letter)**. Ward claimed that this evidence was discovered on or about October 2011 and that it could not have been discovered before trial by exercise of due diligence, since Abner did not begin admitting that he is a serial killer until January 12, 2010. On July 16, 2012, Ward filed a Motion for Appointment of Counsel and a Motion for Investigative and Expert Expenses. **R. pp. 48-49**.

Without hearing argument or requiring a response by the State, the Honorable Benjamin H. Culbertson, Administrative Judge for the Court of General Sessions of the 15th Judicial Circuit, filed an "Order Denying Motion for New Trial, Motion for Appointment of Counsel and Motion for Expenses," on July 31, 2012. **R. pp. 108-110**. In denying the new trial motion, Judge Culbertson found that "the letter [from Abner] referenced by [Ward] in his motion and attached as an exhibit thereto makes no such admission and [Ward] has not presented anything to corroborate such an admission." Judge Culbertson further found that "[Ward] has not only failed to establish that he has new evidence that will probably change the result of his convictions if a new trial is granted, he has failed to show even the existence of newly discovered evidence. Therefore, [Ward's] motion for a new trial should be denied." **R. pp. 109-110**. Finally, Judge Culbertson found that Ward's remaining motions were moot because he had denied the new trial motion. **R. pp. 110**.

Ward served a notice of appeal on August 6, 2012. **R. pp. 51-52**. Although the circuit court no longer had jurisdiction, Ward filed a "motion for reconsideration and/or motion to reconsider order/judgment denying motion for new trial" dated August 7, 2012. **R. pp. 63-65**. Ward also provided affidavits from family members Rondie J. Ward and Carol S. Ward as to telephone conversations that they supposedly had with Abner, in which he admitted that he had hired the victims in this case to kill Ward. **R. pp. 37-38.**

Judge Culbertson denied Ward's motion for reconsideration in an Order filed on August 20, 2012. **Supp.R. p. 1**. Ward filed a motion for arrest of judgment on August 30, 2012. Judge Culbertson filed an Order summarily denying Ward's motion for arrest of judgment on September 26, 2012. **R. pp. 62**.[4]

ARGUMENT

The circuit court did not abuse its discretion by denying Ward's Rule 29, SCRCrim.P, motion for a new trial on after-discovered evidence, where the motion was based upon an unsworn and uncorroborated statement by another individual, Michael Andrew Abner, that did not admit that Abner hired the victims to kill Ward, contrary to Ward's reading of Abner's letter. Also, denial of the new trial motion rendered Ward's remaining motions moot.

Ward's argument notwithstanding, Respondent submits that the circuit court did not abuse its discretion by denying Ward's motion for a new trial on after-discovered evidence because the motion was based upon an unsworn and uncorroborated statement by another individual, supposedly Michael Andrew Abner, that did not admit that he hired Ward's victims to kill Ward, contrary to Ward's reading of Abner's letter.[5]

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[4] Again, the Order denying his motion was based on its contents and without hearing argument or requiring a response by the State. **R. pp. 62 n. 1**.

[5] He is bringing this claim in state court, rather than in his ongoing federal habeas corpus action apparently because of the strict limitations in federal habeas corpus on hearings based upon newly-discovered evidence. 28 U.S.C. § 2254(e)(2) permits hearings only in the rarest of circumstances that Ward's showing could not possibly meet:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court **shall** not hold an evidentiary hearing on the claim **unless** the applicant shows that--
>
> (A) the claim relies on--

As discussed, Ward filed his motion for a new trial on May 16, 2012. **R. pp. 1-12**. He also filed a Motion for Appointment of Counsel and a Motion for Investigative and Expert Expenses at that time. **R. pp. 45-49**.

In addition to the motion, itself, he included the following attachments: a letter bearing a Kentucky postmark, purportedly from Michael Andrew Abner to Ward's mother (**Exhibit A, R. pp. 13-17**); a three page copy of a Kentucky Department of Corrections' "Kentucky Offender Online Lookup System"[6] and an online newspaper article discussing Abner's three murder convictions and sentence of life without parole (**Exhibit B, R. pp. 18-24**); some of Ward's medical records from the year 2000 (**Exhibit C, R. pp. 25-32**); a document marked "incident report" but without identifying information as to the agency that prepared it (**Exhibit D, R. pp. 33-35**); unsworn proffers of "testimony" of several of Ward's family member, counsel and Abner (**Exhibit E, R. pp. 36-40**); an affidavit from Ashton Jody Ward that he opened a letter addressed to his grandmother "from Michael Abner and read it." (**Exhibit F, R. pp. 41-42**); a certificate of service; and an affidavit from Ward. **R. pp. 43-44**. In his own affidavit, Ward stated that Abner had allegedly stabbed Ward "on or about December 14, 2000; that trial counsel

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> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
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> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
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> (B) **the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense**.

(Emphasis added). As the majority of the United States Supreme Court explained in *Cullen v. Pinholster*, 131 S.Ct. 1388, 140 (2011):

> Although state prisoners may sometimes submit new evidence in federal court, AEDPA's statutory scheme is designed to strongly discourage them from doing so. Provisions like [28 U.S.C.] §§ 2254(d)(1) and (e)(2) ensure that "[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings."

[6] *See* http://kool.corrections.ky.gov/KOOL/Details/83679.

had interviewed Abner before the trial "and at that time [Abner] denied having any involvement in the case." **R. pp. 43**.

Ward further averred that following Abner's January 2010 arrest in Kentucky, Abner admitted to two murders that occurred in the 1980s; that Ward was contacted by his son, Ashton J. Ward "[o]n or about October 2011[,]" and his son informed Ward that Abner had written a letter to Ward's mother, Lynn Ward. Lynn Ward, in turn, called his son. His son thereafter retrieved the letter, opened it and "forwarded a copy to me." Also, Ward averred that his uncle, Rondie J. Ward, supposedly had a telephone conversation with Abner, at some unspecified time, in which Abner admitted to paying the victims to kill Ward. **R. pp. 43**.

Ward argued that he was entitled to a new trial based upon the purported letter from Abner to Ward's mother because Abner supposedly claimed to have hired the victims in this case to kill Ward. **R. pp. 5**. *See also* **R. pp. 15-16 (Abner's letter)**. Ward claimed that this evidence was discovered on or about October 2011 and that it could not have been discovered before trial by exercise of due diligence, since Abner did not begin admitting that he is a serial killer until January 12, 2010.

In the July 31, 2012 Order denying the motion, the circuit court judge found that "the letter [from Abner] referenced by [Ward] in his motion and attached as an exhibit thereto makes no such admission and [Ward] has not presented anything to corroborate such an admission." The circuit court judge further found that "[Ward] has not only failed to establish that he has new evidence that will probably change the result of his convictions if a new trial is granted, he has failed to show even the existence of newly discovered evidence. Therefore, [Ward's] motion for a new trial should be denied." **R. pp. 109-110.** Finally, the circuit court judge found that Ward's remaining motions were moot because he had denied the new trial motion. **R. pp. 110**.

A. The circuit court did not abuse its discretion in denying the motion for new trial on after-discovered evidence.

In *State v. Spann*, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999), the Supreme Court held that:

> In order to prevail in this new trial motion, appellant must show the after-discovered evidence:
>
> (1) is such that it would probably change the result if a new trial were granted;
>
> (2) has been discovered since the trial;
>
> (3) could not in the exercise of due diligence have been discovered prior to the trial;
>
> (4) is material; and
>
> (5) is not merely cumulative or impeaching.

(Citing *State v. Prince*, 316 S.C. 57, 447 S.E.2d 177 (1993)). *See also Mercer*, 381 S.C. at 166, 672 S.E.2d at 565; *State v. Needs*, 333 S.C. 134, 157-58, 508 S.E.2d 857, 869 (1998); *Johnson v. Catoe*, 345 S.C. 389, 393 & n. 1, 548 S.E.2d 587, 589 & n. 1 (2001).

This Court discussed motions file pursuant to Rule 29, SCRCrim.P, in *State v. Harris*, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct.App. 2011):

> "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.
>
> The credibility of newly-discovered evidence is for the trial court to determine. *State v. Porter*, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977). Only the trial court and not the appellate court has the power to weigh the evidence; the trial court's judgment will not be disturbed except for error of law or abuse of discretion. *Id.* "In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment." *State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009). "On review, we may not make our own findings of fact. The deferential standard of review constrains us to affirm the trial court if reasonably supported by the evidence." *Id.*

Respondent submits that Ward cannot show an abuse of discretion. *Id.* First, there is no corroborating proof that the letter was written by Abner. There is merely an envelope, bearing a Kentucky postmark and with Abner's name and address on it. The letter, itself, is merely signed "Michael." Although the letter states that the author would do anything in his power to help Ward and to "right a wrong," Respondent submits that it would make little sense that Abner is truly the author because Ward admits that Abner had previously stabbed him.[7]

Further, Ward's construction of the letter makes even less sense in light of the three murders for which Abner was convicted in Kentucky. He did not hire anyone to kill those three victims. He personally killed them. At the very least, the fact Abner is serving a sentence of life without in Kentucky and has nothing to lose by admitting culpability in this case, so that Ward can escape justice as his appeals are about to run out, undermines the credibility of the letter and Ward's construction of it. *Accord Mercer*, 381 S.C. at 167-70, 672 S.E.2d at 565-67 (capital murder defendant was not entitled to new trial based on after-discovered evidence based on prison informant's testimony that defendant's accomplice admitted being the triggerman; accomplice's participation in, and first-hand knowledge of, the crime, was known to defendant and the State from the beginning, the prison informant had extensive criminal history, the prison informant had given varying versions as to the timing and the substance of accomplice's alleged confession, and the alleged confession conflicted with known facts regarding the crime).

Moreover, and as the circuit court correctly found, the letter allegedly from Michael Abner does not admit to hiring the victims to kill Ward. To the contrary, in the unsworn, October 16, 2011, letter, "Michael" states that he is trying to do "everything in my power to help Jody" for the benefit of Ward's son Ashton and "the girls." The author then complains because his mail is being delayed because it is being read by "INTERNAL AFFAIRS." He further states that "[i]t

[7] Additionally, Ward admits that counsel had spoken to Abner before trial and he denied involvement. Also, the Appendix to Ward's first Petition for Writ of Certiorari reflects counsel had listed Abner as a potential defense witness. **Supp.R. p. 2.**

seems like **the FBI thinks I have killed in more states than this** so they go through all going out mail and all coming in mail I get." **R. pp. 15**. (Emphasis added).

On the following page, "Michael" states that prison officials "shook me down my cell," as soon as he got an affidavit from Ashton Ward. He further indicates that he told the truth when questioned by authorities and that he "was trying to make a wrong right." Then, he asked her to send another affidavit, which he would have his caseworker notarize. **R. pp. 16**. Ward did not submit any affidavit from Abner.

Thus, the circuit court correctly found that Ward did not establish that he has new evidence that will probably change the result of his convictions if a new trial is granted, or even that he has "newly discovered evidence" because Abner's letter is vague as to what he will allegedly say and does not even expressly mention this case or the two victims, whatsoever. Ward submitted absolutely nothing with the new trial motion to corroborate his favorable construction of the letter, apart from his own, self-serving affidavit.

Also, Respondent would note that the circuit court judge had presided over two of Ward's previous PCR cases: 09-CP-22-915 and 2010-CP-22-00733 (in which he asserted that he was entitled to a new trial under *Belcher*). Thus, the circuit court judge was familiar with the record, which included overwhelming evidence of Ward's guilt. In the original Order of Dismissal, the PCR judge summarized that evidence:

> The evidence of overwhelming guilt of murder includes, but is not limited to, the following: [Ward's] confessions to Denise Cox that he planned to kill the victims **[Supp.R. p. 3-6]** - then, later, that he did in fact kill them **[Supp.R. p. 7-9; 16-18]** (Ms. Cox gave this statement to police shortly after [Ward's] arrest) **[Supp.R. p. 20-22]**; statements from various witnesses who heard [Ward] "brag" that he got rid of the boys who took his money **[Supp.R. p. 27-28; 48-49]**; evidence that [Ward] asked Kevin Cooper to purchase bullets for him in advance **[Supp.R. p. 27]**; evidence that the gun [Ward] had been seen with on numerous occasions was consistent with the gun that shot the victims **[Supp.R. p. 9-12; 13-15; 33-35]**; the pathologist testimony indicating that one of the victims was shot in the back of the head **[Supp.R. p.72-79]**; evidence that [Ward] was the only person who moved the victims' remains **[Supp.R. p. 36-57]**; evidence of the baby-seat still strapped

> in the backseat of the Suzuki [**Supp.R. p. 29-30; 31-32; State's Exhibit 24-25 (photographs)**]; and evidence that Brian Elliott was at home on the day of the incident. [**Supp.R. p. 78-84**]. Internal inconsistencies in [Ward's] own statement, in addition to its conflicts with the other evidence in the case, also tended to point towards his guilt.

Supp.R. p. 89 n. 2 ("**Supp.R.**" citations added).

Additionally, Louis Blazen testified that Ward had him drive to a location where Ward buried something in a burlap bag. When they later passed this same location, Blazen saw buzzards and Ward mentioned that "the boys" were in that area. Police subsequently went to this location and found portions of the remains of two people and a burlap bag, using cadaver dogs. Also, there was evidence presented that Ward had threatened Cox subsequent to his confessions to her. **Supp.R. p. 17-19; 23; 24; 25-26;; 36-57; 58-68; 69-72**.

The unsworn, uncorroborated letter from Abner - assuming both that he wrote it and that it can properly be considered as "evidence"[8] - does not impact this other evidence showing Ward's guilt, at all. Thus, it cannot be "such that it would probably change the result if a new trial were granted" under *Spann*. Also, although Ward received a self-defense instruction at trial (*see* **Supp.R. p. 85-88**), he did not testify and he cannot show how this letter, standing alone, bolstered his claim of self-defense.

In connection with his "motion for reconsideration and/or motion to reconsider order/judgment denying motion for new trial" dated August 7, 2012 (**R. pp. 63**), Ward provided affidavits from family members Rondie J. Ward and Carol S. Ward as to telephone conversations that they allegedly had with Abner, wherein Abner admitted that he had hired the victims in this case to kill Ward. **R. pp. 63-64**. However, the circuit court lacked jurisdiction to consider the additional filings because it is undisputed by Ward that he served and filed a notice of appeal on August 6, 2012, which was the day before he mailed the motion with these affidavits.

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[8] *See Com. v. Hayward*, 437 Pa. 215, 263 A.2d 330 (1970) (affidavits of witnesses whose identities were known at trial are not after-discovered evidence); *Com. v. Johnson*, 228 Pa. Superior Ct. 364, 323 A.2d 295 (1974).

Pursuant to Rule 205, SCACR, the service of a notice of appeal gives the appellate court exclusive jurisdiction over the appeal." Although Rule 205 further provides that the circuit court may proceed "with matters not affected by the appeal," there was nothing for the circuit court to act upon at the time Ward served and filed the notice of appeal. Thus, the circuit court lacked jurisdiction over the belated filings.[9] *See Bunkum v. Manor Properties*, 321 S.C. 95, 98-99, 467 S.E.2d 758, 760 (Ct.App. 1996) ("The appellate court retained jurisdiction of the case until the remittitur was issued and the proceedings were returned to the circuit court. .... At that point, the circuit court re-acquired subject matter jurisdiction to enforce the judgment and take any action consistent with the appellate court's ruling"); *Hampton Bldg. Supply, Inc. v. Wilson*, 285 S.C. 135, 138, 328 S.E.2d 635, 636 (1985) ("We hold the trial judge was without jurisdiction to modify his March 2, 1982 order after FHA's appeal on March 9 to the Supreme Court, or to issue any order subsequent to the April 30, 1982 dismissal of FHA's appeal to the Supreme Court"). *Accord Raby Const., L.L.P. v. Orr*, 358 S.C. 10, 13, 594 S.E.2d 478, 480 (2004) (restaurant

[9] Respondent would further note that his motion for arrest of judgment was not an appropriate motion for further reconsideration of the Order denying relief. This Court has explained that:

> A 'motion for arrest of judgment' is a postverdict motion made to prevent the entry of a judgment where the charging document is insufficient or the court lacked jurisdiction to try the matter." *State v. Taylor*, 348 S.C. 152, 160, 558 S.E.2d 917, 920-21 (Ct.App.2001) (cert. granted May 30, 2002, [*aff'd as mod.*, 355 S.C. 392, 585 S.E.2d 303 (2003) (finding state had not preserved this argument on appeal)]). A defendant may make a motion for arrest of judgment alleging an insufficiency of the indictment. *Id.*; *see also State v. Brown*, 201 S.C. 417, 23 S.E.2d 381 (1942) (holding motion for arrest of judgment should have been granted where trial court did not have jurisdiction to impose the sentence); *State v. Jeter*, 47 S.C. 2, 24 S.E. 889 (1896) (concluding it was error for trial court to deny motion for arrest of judgment where indictment was insufficient). However, the defendant may not move for a verdict in arrest of judgment based on the insufficiency of the evidence to support the charges in the indictment. Taylor, 348 S.C. at 160, 558 S.E.2d at 921; *see also State v. Miller*, 287 S.C. 280, 286, 337 S.E.2d 883, 886-87 (1985) (Ness, J., concurring in part and dissenting in part) (stating a defendant "may **not** move for verdict in arrest of judgment based on the sufficiency of the evidence to sustain the allegations in the indictment.") (emphasis in original) (citation omitted). "[W]hen ruling on a motion in arrest of judgment, the trial court is limited to rectifying trial errors, and cannot make a redetermination of the credibility and weight of the evidence." 21 Am.Jur.2d *Criminal Law* § 785 (1998); *see also Taylor*, 348 S.C. at 160, 558 S.E.2d at 921.

State v. Follin, 352 S.C. 235, 259-60, 573 S.E.2d 812, 824-25 (Ct.App. 2002), *reh. den.*, Dec 19, 2002, *cert. den.*, May 30, 2003. Ward's motion for a new trial does not involve either a challenge to sufficiency of the indictment or to the circuit court's jurisdiction. It, therefore, was not a proper mechanism for the circuit court to further consider his motion for a new trial.

owner's filing of notice of appeal from the denial of his motion for relief from judgment, in construction company's action to foreclose a mechanics' lien, did not deprive trial court of jurisdiction to award additional attorney fees to construction company pursuant to an earlier foreclosure order; appeal stayed only the matters addressed in the order appealed from, and owner did not appeal the foreclosure order); *Jackson v. Speed*, 326 S.C. 289, 311, 486 S.E.2d 750, 761 (1997) ("Although service of notice of an intent to appeal divests the lower court of jurisdiction over the order appealed, the lower court retains jurisdiction over matters not affected by the appeal").

On appeal, Ward contends that the Georgetown County Clerk of Court refused to file the affidavit of his uncle, Rondie J. Ward, although Rondie Ward supposedly attempted to get the Clerk to accept it for filing. This argument was not timely presented to and passed upon by the circuit court because Rondie Ward's affidavit was not submitted until after service and filing of the notice of appeal and the circuit court no longer had jurisdiction over the case. See *Bunkum*, 321 S.C. at 98-99, 467 S.E.2d at 760; *Hampton Bldg. Supply, Inc.*, 285 S.C. at 138, 328 S.E.2d at 636; *cf. State v. Simmons*, 384 S.C. 145, 171-72, 682 S.E.2d 19, 32-33 (Ct.App. 2009) (the Court found unpreserved Simmons' appellate argument that the trial court erred in denying his motion for a mistrial in response to testimony of a witness referencing the robber as "the defendant," where Simmons failed to make a timely objection in response to the witness's statement); *Doe v. S.B.M.*, 327 S.C. 352, 356, 488 S.E.2d 878, 880 (Ct.App.1997) ("[t]he duty is on the litigant to make a timely objection in order to preserve the right to review ... [and] ... [a] contemporaneous objection is required to properly preserve an error for appellate review"); *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court"); *State v. Neeley*, 271 S.C. 33, 244 S.E.2d 522 (1978) (appellant's failure to object to the court's failure to admonish the jury that they were not to

deliberate until all of the evidence had been introduced precluded consideration of the issue on appeal).

Further, a "'presumption of regularity' supports official acts of public officers. In the absence of clear evidence to the contrary, the doctrine presumes that public officers have properly discharged their official duties." *Bernklau v. Principi*, 291 F.3d 795, 801 (Fed.Cir. 2002) (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)). *see also United States v. Chem. Found.*, 272 U.S. 1, 14–15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties"); *Jefferson v. Hart*, 84 F.3d 1314, 1315 (10th Cir. 1996) ("The clerk of court entered a minute order dated January 6, 1995 "upon direction by the court" denying that motion as moot. II R. doc. 32. This order, although signed by the clerk, was authorized by the court and is entitled to a presumption of regularity"); *Chuen Piu Kwong v. Holder*, 671 F.3d 872, 879-80 (9th Cir. 2011) ("When prepared by the court clerk, at or near the time of judgment, as part of his or her official duty, [an abstract] is cloaked with a presumption of regularity and reliability...."). The "presumption of regularity" has long been recognized in South Carolina. *E.g.*, *State v. Bultron*, 318 S.C. 323, 329, 457 S.E.2d 616, 619 (Ct.App. 1995) (citing *Pringle v. State*, 287 S.C. 409, 339 S.E.2d 127 (1986)); *State v. Mason*, 126 S.C. 426, ___, 120 S.E. 367, 368 (1923); *State v. Waring*, 109 S.C. 52, __, 95 S.E. 143, 144 (1918) (proceedings of court of sessions, which is a court of general jurisdiction, are presumably regular; and it will be presumed that clerk of court of sessions, when reading a manslaughter verdict, properly asked jury if it was their verdict); Petrelle v. Weirton Steel Corp.. 953 F.2d 148, 153 (4th Cir. 1991); *Riggins v. Norris*, 238 F.3d 954 (8th Cir. 2001) (although there was no evidence presented during the state PCR evidentiary hearing to contradict petitioner's testimony that trial counsel failed to convey to him a favorable plea bargain offer, the state trial court was

entitled to disbelieve petitioner's self-serving testimony, and those self-serving statements were insufficient to overcome the presumption of regularity accorded state convictions or to warrant conclusion that the state findings were based on an unreasonable determination of the evidence, so as to warrant federal habeas relief).

In the present case, Ward cannot overcome the presumption of regularity by his self-serving claims. In this regard, Respondent would point out that Rondie Ward's affidavit does not make any averment that the Clerk refused to permit Ward to file the affidavit. *Id.*[10] Additionally, Ward's remaining challenge to the Clerk of Court's alleged inaction (a supposed conflict of interest) and his challenges to the circuit court's rulings on his remaining motions are not properly before the Court because Ward did not submit them before he deprived the circuit court of jurisdiction by serving and filing his notice of appeal. *See* Rule 205, SCACR; *Bunkum*, 321 S.C. at 98-99, 467 S.E.2d at 760; *Hampton Bldg. Supply, Inc.*, 285 S.C. at 138, 328 S.E.2d at 636.

B. Ward's Motion for Appointment of Counsel and Motion for Expenses were moot after denial of his new trial motion.

As discussed, the circuit court found that Ward's Motion for Appointment of Counsel and Motion for Expenses were both moot in light of the court's denial of the motion for a new trial. Respondent submits that this was not an abuse of discretion because there was nothing before the circuit court for counsel to be appointed or expenses paid. Moreover, Ward's Rule 29, SCRCrim.P, motion was not heard and decided at a critical stage in the proceedings him. In rejecting a similar claim, the Supreme Court explained in *State v. Clinkscale*, 318 S.C. 513, 515, 458 S.E.2d 548, 549 (1995), that:

> A defendant's Sixth Amendment right to assistance of counsel attaches at all critical stages of a criminal prosecution. *Michigan v. Jackson*, 475 U.S. 625, 106

[10] Indeed, Ward's claim is disingenuous, since his affidavit in support of his May 16, 2012 new trial motion clearly reflects that he was aware of the supposed conversation between Abner and his uncle at that time (**R. pp. 43**) and he could have gotten an affidavit from his uncle well before he ever filed the new trial motion.

> S.Ct. 1404, 89 L.Ed.2d 631 (1986). However, this constitutional right extends only to the first right of appeal. *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987).
>
> We hold that Clinkscales was not entitled to counsel. Clearly, the New Trial Motion on the ground of after-discovered evidence was not heard and determined at a critical stage. Moreover, the record does not contain evidence which would support a New Trial for after-discovered evidence.

See also State v. Corn, 224 S.C. 74, __, 77 S.E.2d 354, 356-57 (1953); *United States v. Tajeddini*, 945 F.2d 458, 470 (1st Cir. 1991) (there is no constitutional right to counsel for post-appeal motions for new trial because they are collateral attacks), *abrogated on other grds.*, *Roe v. Flores–Ortega*, 528 U.S. 470 (2000); *United States v. Williamson*, 706 F.3d 405, 415-18 (4th Cir. 2013) (concluding that there is no Sixth Amendment right to counsel to pursue a Rule 33 motion based on newly discovered evidence filed more than fourteen days after the district court enters the judgment of conviction because "such a motion [is] truly collateral to the judgment of conviction and the appeal"); *United States v. Lee*, 513 F.2d 423, 424 (D.C. Cir. 1975); *United States v. Birrell*, 482 F.2d 890, 892 (2nd Cir.1973).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court must be affirmed.

Respectfully submitted,

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September 23, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County
Honorable Benjamin H. Culbertson, Circuit Court Judge
Appellate Case No. 2012-213222

STATE OF SOUTH CAROLINA,

Respondent,

v.

JODY LYNN WARD,

Appellant

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211 (b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled "Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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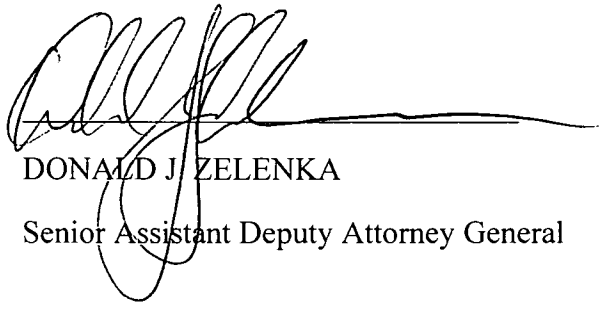
CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the ***Final Brief of Respondent*** in the foregoing action by depositing copies in the United States mail to Jody Lynn Ward, #300644, Lieber Correctional Institution, P. O. Box 205, Ridgeville, SC 29472 this 23rd day of September, 2013.



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