THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of General Sessions
Larry B. Hyman, Circuit Court Judge

Case No. 2018-000402

The State,

Respondent,

v.

Jody Lynn Ward,

Appellant.

RECORD ON APPEAL
Volume II

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VOLUME II

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Jody Lynn Ward, Petitioner, vs. Warden of Lieber Correctional Institution, Respondent.	)	C/A No. 0:11-3277-RBH-PJG **REPORT AND RECOMMENDATION**

Petitioner Jody Lynn Ward ("Ward"), a self-represented state prisoner, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter comes before the court pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) DSC for a Report and Recommendation on the respondent's motion for summary judgment. (ECF No. 23.) Pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), Ward was advised of the summary judgment and dismissal procedures and the possible consequences if he failed to respond adequately to the respondent's motion. (ECF No. 24.) Ward filed a response in opposition to the respondent's motion. (ECF No. 39; see also Supplement, ECF Nos. 47, 50, 55 & 58.) Having carefully considered the parties' submissions and the record in this case, the court concludes that the respondent's motion for summary judgment should be granted.

BACKGROUND

Ward was indicted in July 2003 in Georgetown County for two counts of murder (03-GS-22-1030 & 03-GS-22-1031). (App. at 1067-70, ECF No. 22-9 at 70-73.) Ward was represented by Margaret Ann Kneece, Esquire, and J. Wesley Locklair, III, Esquire, and from March 15-18, 2004 was tried before a jury and found guilty as charged. (App. at 849, ECF No. 22-7 at 97.) The circuit

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court sentenced Ward to life imprisonment for each murder charge, both sentences to be served concurrently. (App. at 857, ECF No. 22-7 at 105.)

Ward timely appealed and was represented by Robert M. Dudek, Esquire, Assistant Appellate Defender, who filed an Anders[1] brief on Ward's behalf that raised the following issue:

> Whether the court erred by refusing to suppress appellant's statement where law enforcement knew appellant was attempting [to] 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?

(App. at 934, ECF No. 22-8 at 55.) Ward filed a *pro se* response to the Anders brief, which he supplemented, in which he presented numerous issues. (ECF No. 22-11; ECF No. 26-1 at 4.) On January 26, 2007, the South Carolina Court of Appeals issued an order dismissing Ward's appeal. (State v. Ward, Op. No. 07-UP-48 (S.C. Ct. App. 2007); ECF No. 26-3.) Ward filed a *pro se* petition for rehearing dated February 1, 2007. (ECF No. 26-4.) Pursuant to a letter from the Clerk of Court, the State filed a return to Ward's *pro se* petition for rehearing. (ECF No. 26-5.) The South Carolina Court of Appeals denied Ward's petition for rehearing on March 22, 2007. (ECF No. 26-6.)

Ward filed a *pro se* petition for a writ of certiorari dated April 14, 2007. (ECF No. 26-7.) In a letter dated June 29, 2007, however, Ward voluntarily withdrew his petition. (ECF No. 26-9.) The South Carolina Supreme Court granted Ward's request on July 5, 2007 and dismissed his appeal. (ECF No. 26-10.) The remittitur was issued July 6, 2007. (ECF No. 26-11.)

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[1] Anders v. California, 386 U.S. 738 (1967). Anders requires that counsel who seeks to withdraw after finding the "case to be wholly frivolous" following a "conscientious examination" must submit a brief referencing anything in the record that arguably could support an appeal; furnish a copy of that brief to the defendant; and after providing the defendant with an opportunity to respond, the reviewing court must conduct a full examination of the proceedings to determine if further review is merited. Anders, 386 U.S. at 744.

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Ward filed a *pro se* application for post-conviction relief on July 11, 2007 ("2007 PCR action") in which he raised an allegation of ineffective assistance of counsel. (Ward v. State of South Carolina, C/A No. 07-CP-22-915; App. at 944-50, ECF No. 22-8 at 65-71.) The State filed a return. (App. at 956-58, ECF No. 22-8 at 77-79.) Through counsel Bobby G. Frederick, Esquire, Ward filed a supplement to his PCR application on April 14, 2008 in which he raised the following claims:

1) Counsel for petitioner was ineffective by failing to object when the prosecutor argued lack of remorse to the jury during closing argument.

2) Counsel for petitioner was ineffective by failing to object when the prosecutors repeatedly vouched for the credibility of witnesses and placed their personal opinions before the jury.

3) Counsel for petitioner was ineffective by failing to object when the prosecutors repeatedly stated their personal opinions regarding the credibility of the petitioner and the defense theory of the case.

4) Counsel for petitioner was ineffective for failing to request jury instructions on manslaughter and involuntary manslaughter.

(ECF No. 26-12.)

On May 1, 2008, the PCR court held an evidentiary hearing at which Ward appeared and testified and continued to be represented by Bobby G. Frederick, Esquire. (App. at 960-1037, ECF No. 228 at 81 through ECF No. 22-9 at 41.) By order dated May 15, 2008, the PCR judge denied and dismissed with prejudice Ward's PCR application. (App. at 1038-53, ECF No. 22-9 at 41-56.) Through counsel, Ward filed a Rule 59(e) motion to alter or amend the PCR court's order of dismissal. (App. at 1054-59, ECF No. 22-9 at 57-65.) It appears that on August 6, 2008, the PCR court filed an order denying Ward's motion in part and clarifying its order of dismissal. (See ECF No. 26-14 at 4) (citing App. at 1060-66, ECF No. 22-9 at 63-69).

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In his PCR appeal, Ward was represented by Robert M. Pachak, Esquire, Appellate Defender for the South Carolina Commission on Indigent Defense, who filed a petition for a writ of certiorari on Ward's behalf on December 30, 2008 that presented the following issues:

1. Whether defense counsels were ineffective in failing to object to numerous errors in the solicitor's closing arguments such as to render petitioner's trial being unfair?
2. Whether defense counsels were ineffective in failing to request or put on the record requests to charge on the lesser included offenses of voluntary and involuntary manslaughter?

(ECF No. 26-13 at 3.) The State filed a return. (ECF No. 26-14.) The South Carolina Supreme Court denied Ward's petition for a writ of certiorari by letter order dated August 20, 2009. (ECF No. 26-15.) The remittitur was issued on September 8, 2009. (ECF No. 26-16.)

Ward filed a second application for post-conviction relief on July 13, 2009 ("2009 PCR application") in which he raised the following issues:

1. Was Applicant's Due Process Rights; and the right to Effective Assistance of Trial Counsel's violated and Applicant Prejudiced, when Trial Counsel's failed to Convey Plea Offers to Applicant?

2. Was Counsel's Ineffective for failing to Convey Plea Offer?

(Ward v. State of South Carolina, C/A No. 09-CP-22-1074; ECF No. 26-17 at 8) (errors in original). The State filed a return. (ECF No. 26-18.) The PCR court issued a conditional order of dismissal dated October 1, 2009, giving Ward twenty days to show cause as to why the conditional order should not become final. (See ECF No. 26-20 at 1.) Ward filed a *pro se* response to the conditional order of dismissal on November 9, 2009. (ECF No. 26-19.) A final order of dismissal was issued on January 13, 2010 which found Ward's 2009 PCR application to be successive and barred by the statute of limitations. (ECF No. 26-20.)

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Ward appealed the dismissal of his 2009 PCR application. By letter dated February 23, 2010, Ward was informed by the Clerk of Court of the South Carolina Supreme Court that, because the PCR court had determined that Ward's 2009 PCR action was successive and untimely under the statute of limitations, Ward was required pursuant to Rule 243(c)[2] of the South Carolina Appellate Court Rules to provide a written explanation as to why the PCR court's determination was improper. (ECF No. 26-21.) Ward filed a response (entitled a "petition for a writ of certiorari") on March 2, 2010 that presented the following issues:

> 1) Did the Lower Court [err] by determining in its Final Order of Dismissal that the Petitioner's post-conviction relief action was barred by the statute of limitations and impermissibly successive when the Respondents waived/abandoned/relinquished any such known legal right as a matter of law?
>
> 2) Did the Lower Court [err] by determining in its Final Order of Dismissal that the Petitioner[']s post-conviction relief action was barred by the statute of limitations and impermissibly successive, where court[']s findings and facts and conclusion of law in the Conditional Order of Dismissal wasn't barring Petitioner as to statu[t]e of limitation[s] and being impermissibly successive?

(ECF No. 26-22 at 3.) The South Carolina Supreme Court issued an order dismissing Ward's appeal on March 15, 2010. (ECF No. 26-23.) The remittitur was issued March 31, 2010. (ECF No. 26-24.)

Ward filed a third application for post-conviction relief on May 4, 2010 ("2010 PCR application") in which he raised the following issue:

> Seeking relief based on new rule of law[.] See State v. Belcher Op. No. 26729. . . . The jury instructions in my case are unconstitutional under Belcher's opinion.

(Ward v. State of South Carolina, C/A No. 10-CP-22-733; ECF No. 26-25 at 3.) The State filed a return. (ECF No. 26-26.) Ward filed a *pro se* objection to the State's return. (ECF No. 26-27.) The PCR court issued a conditional order of dismissal filed June 15, 2010, giving Ward twenty days to

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[2] This Rule was formerly numbered as South Carolina Appellate Court Rule 227(c).

show cause as to why the conditional order should not become final. (See ECF No. 26-28.) Ward filed a *pro se* response to the conditional order of dismissal on July 6, 2010. (ECF No. 26-29.) A final order of dismissal was issued on July 29, 2010. (ECF No. 26-30.)

Ward appealed the dismissal of his 2010 PCR application and filed a petition for a writ of certiorari dated July 20, 2010 that raised the following issue:

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

(ECF No. 26-31 at 3.) The State filed a return. (ECF No. 26-32.) The South Carolina Supreme Court denied Ward's petition for a writ of certiorari by letter order dated August 18, 2011. (ECF No. 26-33.) The remittitur was issued on September 7, 2011. (ECF No. 26-34.)

Ward then filed a state petition for a writ of habeas corpus with the South Carolina Supreme Court on October 31, 2011 in which he raised the following issues:

> 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?

(ECF No. 26-35 at 8-26.) The South Carolina Supreme Court denied Ward's petition by order issued November 16, 2011. (ECF No. 26-36.)

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FEDERAL HABEAS ISSUES

In Ward's federal petition for a writ of habeas corpus, he raises the following issues:

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 counsels 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.

(Pet., ECF No. 1) (errors in original). Ward has withdrawn Grounds Three and Six. (See ECF No. 39 at 1, 2, 3.) Therefore, the court will address Grounds One, Two, Four, Five, and Seven.

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DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate only if the moving party "shows that there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party may support or refute that a material fact is not disputed by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Rule 56 mandates entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

In deciding whether there is a genuine issue of material fact, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in favor of the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

The moving party has the burden of proving that summary judgment is appropriate. Once the moving party makes this showing, however, the opposing party may not rest upon mere allegations or denials, but rather must, by affidavits or other means permitted by the Rule, set forth specific facts showing that there is a genuine issue for trial. See Fed. R. Civ. P. 56(c), (e); Celotex Corp., 477 U.S. at 322. Further, while the federal court is charged with liberally construing a petition filed by a *pro se* litigant to allow the development of a potentially meritorious case, see, e.g., Cruz v. Beto, 405 U.S. 319 (1972), the requirement of liberal construction does not mean that the

court can ignore a clear failure in the pleadings to allege facts which set forth a federal claim, nor can the court assume the existence of a genuine issue of material fact where none exists. Weller v. Dep't of Soc. Servs., 901 F.2d 387 (4th Cir. 1990).

B. Habeas Corpus Standard of Review

In accordance with the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), claims adjudicated on the merits in a state court proceeding cannot be a basis for federal habeas corpus relief unless the decision was "contrary to, or involved an unreasonable application of clearly established federal law as decided by the Supreme Court of the United States," or the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(1), (2). When reviewing a state court's application of federal law, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Williams v. Taylor, 529 U.S. 362, 410 (2000); see also Harrington v. Richter, 131 S. Ct. 770, 785 (2011); Humphries v. Ozmint, 397 F.3d 206 (4th Cir. 2005); McHone v. Polk, 392 F.3d 691 (4th Cir. 2004). Moreover, state court factual determinations are presumed to be correct and the petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

"A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Harrington, 131 S. Ct. at 786 (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). Under the AEDPA, a state court's decision "must be granted a deference and latitude that are not in operation" when the case is being considered on direct review. Id. at 785. Moreover, review of a state court decision under the AEDPA standard does not require an opinion from the state court explaining its reasoning.

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See id. at 784 (finding that "[t]here is no text in [§ 2254] requiring a statement of reasons" by the state court). If no explanation accompanies the state court's decision, a federal habeas petitioner must show that there was no reasonable basis for the state court to deny relief. Id. Pursuant to § 2254(d), a federal habeas court must (1) determine what arguments or theories supported or could have supported the state court's decision; and then (2) ask whether it is possible that fairminded jurists could disagree that those arguments or theories are inconsistent with the holding of a prior decision of the United States Supreme Court. Id. at 786. "If this standard is difficult to meet, that is because it was meant to be." Id. Section 2254(d) codifies the view that habeas corpus is a " 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." Id. (quoting Jackson v. Virginia, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)).

C. Exhaustion Requirements

A habeas corpus petitioner may obtain relief in federal court only after he has exhausted his state court remedies. 28 U.S.C. § 2254(b)(1)(A). "To satisfy the exhaustion requirement, a habeas petitioner must present his claims to the state's highest court." Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997), abrogated on other grounds by United States v. Barnette, 644 F.3d 192 (4th Cir. 2011); see also In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, 471 S.E.2d 454, 454 (S.C. 1990) (holding that "when the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies."). To exhaust his available state court remedies, a petitioner must "fairly present[] to the state court both the operative facts and the controlling legal principles associated with each claim." Longworth v. Ozmint, 377 F.3d 437, 448 (4th Cir. 2004) (internal quotation marks and citation omitted). Thus, a federal court may consider only those issues which

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have been properly presented to the state appellate courts with jurisdiction to decide them. Generally, a federal habeas court should not review the merits of claims that would be found to be procedurally defaulted (or barred) under independent and adequate state procedural rules. Lawrence v. Branker, 517 F.3d 700, 714 (4th Cir. 2008); Longworth, 377 F.3d 437; see also Coleman v. Thompson, 501 U.S. 722 (1991). For a procedurally defaulted claim to be properly considered by a federal habeas court, the petitioner must "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750.

D. Respondent's Motion for Summary Judgment

1. Ground One

Ward first alleges that the trial court erred in finding that Ward had waived his right to counsel during an interrogation by Assistant Sheriff Weaver where law enforcement allegedly knew that Ward was attempting to contact his attorney before the meeting with Weaver and knew Ward had invoked his right to counsel at the time of his arrest. Therefore, Ward argues that the trial court erred in denying his motion to suppress the statement given during that interrogation. For the reasons that follow, the court finds that the trial court's denial of Ward's motion to suppress did not unreasonably misapply clearly established federal law; nor was it based on an unreasonable determination of the facts in light of the evidence presented at the state court proceeding.

Controlling Law Regarding Suppression of Statements. The United States Supreme Court has held that under Edwards v. Arizona, 451 U.S. 477 (1981), "if a suspect requests counsel at any time during [an] interview [by law enforcement officers], he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation." Davis v. United States, 512 U.S. 452, 458 (1994). "The Edwards rule is designed to prevent police

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from badgering a defendant into waiving his previously asserted Miranda rights." Montejo v. Louisiana, 556 U.S. 778, 787 (2009) (internal quotation marks & citation omitted). In Minnick v. Mississippi, 498 U.S. 146 (1990), the United States Supreme Court held that Edwards prevents officers from reinitiating an interrogation after a suspect invokes his right to counsel unless counsel is present. The Minnick Court explained that

> [i]n Miranda v. Arizona, . . . we indicated that once an individual in custody invokes his right to counsel, interrogation must cease until an attorney is present; at that point, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. Edwards gave force to these admonitions, finding it inconsistent with Miranda and its progeny for the authorities, at their insistence, to reinterrogate an accused in custody if he has clearly asserted his right to counsel. We held that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. Further, an accused who requests an attorney, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police.

Id. at 150 (internal quotation marks & citations omitted).

Jackson v. Denno Hearing. Prior to Ward's trial, the trial court held a hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964),[3] on Ward's motion to suppress a statement that Ward provided on January 8, 2003. (See App. at 294-333, ECF No. 22-3 at 28-67.) Following sequestration of the witnesses, the trial court first heard testimony from Kenneth Owens, the Chief of Operations at the Georgetown County Detention Center, who indicated that he had spoken to Ward approximately twenty to thirty times since Ward's arrest, and each of those conversations was

[3] The Jackson Court enunciated that a criminal defendant has a "constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession." Jackson, 378 U.S. at 376-77.

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initiated by Ward. With regard to the statement at issue, Owens stated that Ward came to his office and requested to speak with "Sheriff Carter Weaver." Owens testified that he contacted Chief Michael Schwartz, the administrator of the jail, and informed him that Ward would like to speak with Weaver. Owens denied threatening or coercing Ward into giving a statement and denied promising Ward anything in return for a statement. (App. at 295-298, ECF No. 22-3 at 29-32.)

During cross-examination, Owens indicated that he could not recall certain aspects of the meeting, such as what time he met with Ward and whether Ward requested to make any phone calls. Owens testified that any time Ward requested to speak with his lawyer, Owens would let him. Owens further stated that Ward was in his office for approximately five minutes and then Ward was returned to his cell. Owens testified that he did not receive another request from Ward to speak with Weaver and that he believed Wards' conversation with Weaver occurred in Schwartz's office. (App. at 299-300, ECF No. 22-3 at 33-34.) Ward's counsel introduced an exhibit consisting of telephone records from January 8, 2003, which reflected a telephone call from Owens's extension to Ward's counsel at 2:44 p.m. Owens stated that the telephone record did not refresh his memory; however, Owens stated that if Ward requested to telephone his counsel, he let Ward. Owens indicated that Ward was not shackled while providing his statement because at some point Ward requested to use the restroom and Owens stood by the door. Owens further stated that he had to cut the shackles off Ward at one point and it was possible that that occurred on January 8, 2003. (App. at 301-04, ECF No. 22-3 at 35-38.)

Ward's counsel introduced an exhibit consisting of the business telephone logs of defense counsel's law firm. This log reflects a 2:45 p.m. telephone call on January 8, 2003 from Ward to defense counsel and the message for counsel states, "If you are not talk to Solicitor/he would talk to Sheriff and Solicitor, just let him know." (App. at 304, ECF No. 22-3 at 38.) Finally, Owens

denied that Ward ever requested the presence of his counsel during Ward's meeting with Weaver or during any of Ward's conversations with Owens and denied recalling Ward state after telephoning counsel that he did not wish to speak with Weaver. (App. at 304-05, ECF No. 22-3 at 38-39.)

Chief Michael Schwartz, the Jail Administrator for the Georgetown County Detention Center, affirmed that he received a call from Owens on January 8, 2003 regarding Ward, and as a result, Schwartz stated that he called Weaver. Schwartz testified that he informed Weaver that Ward would like to speak with him. Schwartz denied having any contact with Ward regarding his attempt to contact Weaver, denied threatening or coercing Ward or making Ward any promises, and denied withholding paperwork that would allow Ward to correspond with his brother—an inmate with the South Carolina Department of Corrections ("SCDC")—or even discussing such paperwork with Ward. Schwartz testified that to the best of his knowledge he signed the SCDC paperwork. Finally, when asked whether he saw Ward at all on January 8, 2003, Schwartz responded that he did not recall. (App. at 305-09, ECF No. 22-3 at 39-43.)

Carter Weaver, the Assistant Sheriff of the Georgetown County Sheriff's Department, testified that he took a statement from Ward beginning at approximately 3:50 p.m. on January 8, 2003 in the victims' advocate office at the detention center. Weaver indicated that Schwartz was waiting with Ward until he arrived and then Schwartz left. Weaver stated that he came to the detention center after receiving a telephone call from Schwartz informing him that Ward wanted to speak with him and offer a statement. Before going to the detention center, Weaver stated that he called the solicitor's office and gathered some equipment, such as a tape recorder, a note pad, and a pen. Weaver testified that he had briefly spoken to Ward incident to Ward's arrest and Ward had asked for an attorney, which ceased the interview. Weaver stated that Ward was not in handcuffs during the interview and that he recorded the conversation. A transcription of the conversation was

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entered into evidence. (App. at 870-928, ECF No. 22-7 at 117 through ECF No. 22-8 at 49.) Weaver denied using any physical force, threatening, or coercing Ward, and denied promising Ward anything for providing the statement. Weaver denied knowledge of anyone else performing such acts. Weaver stated that he read Ward his Miranda rights prior to obtaining the statement, and indicated that Ward did not appear to be under the influence of anything and that Ward appeared to understand the warning. Ward and Weaver signed the form containing the Miranda rights that Weaver read to Ward, which was entered into evidence. (App. at 309-315, ECF No. 22-3 at 43-49.) The form was signed and dated January 8, 2003 at 3:36 p.m. and included a notation by Ward that stated, "I called Mr. Weaver to jail." (App. at 315, ECF No. 22-3 at 49.)

Weaver denied that Ward ever asked for counsel and stated that if Ward had, Weaver would have stopped the interview. In explaining the time gap from when the form was signed until the tape recording began, Weaver testified that after the signing the Miranda form, Ward went to the restroom. Weaver also indicated that the Miranda rights were read later on the tape recording. Weaver testified that he left after Ward provided his statement. Weaver stated that he did not recall seeing shackles on Ward, affirmed that he asked Ward to write on the Miranda form that he called Weaver to the jail, and denied knowledge of Ward's placement within the detention center or any complaints by Ward concerning problems at the detention center. Weaver stated that he read the Miranda rights as written and did not ask specifically whether Ward wanted his counsel present. Weaver denied being informed by Owens that Ward had tried to contact counsel. Weaver testified that the statement took approximately an hour or an hour and a half. (App. at 316-19, ECF No. 22-3 at 50-53.)

Weaver further indicated that he last spoke with Ward on the date of Ward's arrest. Weaver stated that although he received prior telephone calls that Ward wanted to speak with him, January

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8, 2003 was the first time that Weaver was informed that Ward wanted to speak with him regarding his charges. Weaver did not followup on Ward's other requests. (App. at 319-21, ECF No. 22-3 at 53-55.) Finally, Weaver stated that Ward was in the general administration area of an office when he arrived. (App. at 323-24, ECF No. 22-3 at 57-58.)

No further testimony was offered. Defense counsel argued that Ward's statement was involuntary and that "[e]ven if Mr. Ward had initiated any conversation with Captain Owens, once he was taken back to his cell and put back into custody the initiation of that conversation then ended. When he was brought back out of his cell that was initiated by law enforcement." (App. at 324-25, ECF No. 22-3 at 58-59.) Further, defense counsel referenced the conditions of Ward's incarceration based on Owens's testimony that at one point he cut the shackles off of Ward. Defense counsel argued that there was a fourteen-minute gap between the time the Miranda form was signed and the beginning of the recorded statement and that although Weaver read Ward the basics of the Miranda form, he did not ask, "Do you want your lawyer here?" (App. at 325, ECF No. 22-3 at 59.) Defense counsel pointed out that the police were aware Ward had an attorney and appeared to argue that any initiation of contact by Ward occurred "downstairs" and when he went "upstairs" he must have asked to call his lawyer. (Id.) Defense counsel argued that Ward's initiation, to the extent that it occurred, ceased upon asking to call his lawyer unless Ward reinitiated contact and, therefore, the police initiated the contact by taking him back after he called his lawyer. Finally, defense counsel contended that Weaver exerted some influence over Ward by having Ward write on the Miranda form, "I called Carter Weaver up here." (App. at 326, ECF No. 22-3 at 60.)

At the Jackson v. Denno hearing, the State responded to defense counsel's motion by arguing that Ward requested to speak to Weaver by name and Weaver arrived within an hour of Ward's request. The State asserted that defense counsel's argument that Weaver initiated contact by

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responding in a timely manner when he was not on site at the time of the request is "an absurd semantical argument." (App. at 327, ECF No. 22-3 at 61.) The State pointed out that the Miranda form specifically informed Ward of his right to talk to a lawyer and have him present with Ward while he was being questioned. The State argued that Weaver having Ward include the statement on the form was a precautionary measure, suggesting that Ward had reinitiated contact with law enforcement. The State argued that the message from Ward included in defense counsel's business telephone log demonstrated that if defense counsel was not going to talk to the solicitor, Ward would talk to the sheriff and the solicitor and to let Ward know. Relying on the transcript of Ward's statement, the State pointed out that Ward was advised of his Miranda rights; that Ward acknowledged the series of events that occurred between the time the Miranda form was written and the time the statement was recorded; that Ward denied being threatened; and that the transcript generally revealed no indication of threats, coercion, intimidation, promises, or complaints regarding his shackles. The State asserted that defense counsel mischaracterized Owens's testimony concerning the shackles, specifically that cutting shackles off may be done when the shackles lock up. Finally, the State argued that pursuant to Edwards v. Arizona, 451 U.S. 477 (1981), Ward reinitiated contact voluntarily and of his own free will and provided a statement that should be admissible. (App. at 327-30, ECF No. 22-3 at 61-64.)

Defense counsel replied that regardless of the contents of the message from Ward to his counsel, once Ward asked to speak with his counsel, all interrogation of him should have ceased until Ward reinitiated the conversation again, which did not occur. (App. at 330, ECF No. 22-3 at 64.)

The trial court deemed Ward's statement admissible. Specifically, the trial court found by a preponderance of the evidence that Ward initiated the interview. The trial court found that the

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message to defense counsel indicated not that Ward was requesting the presence of his counsel, but that Ward was informing him that he was going to speak with the sheriff. (App. at 331-32, ECF No. 22-3 at 65-66.) The trial court observed that Ward signed a document stating that he wanted Weaver at the jail; that Ward was fully advised of his rights under the Fifth and Sixth Amendments before providing the statement, including his Miranda rights; that Ward waived his rights under the Fifth and Sixth Amendments and the constitutional safeguards that were required under Miranda; that Ward's statement was freely and voluntarily given "without duress, without coercion, without undue influence, without reward, without promise or hope of reward, without promise of leniency, without threat of injury or without impulsion or inducement of any kind and that this alleged incriminating statement or confession was the voluntary product of a free and unconstrained will of [Ward]." (App. at 332-33, ECF No. 22-3 at 66-67.)

Ward's Habeas Claim Based on the Trial Court's Failure to Suppress. In support of his Petition on this Ground, Ward relies on alleged inconsistencies in the testimony of Schwartz and Weaver. For example, he points out that Schwartz denied having contact with Ward "with respect to him attempting to contact [] Weaver," that Schwartz did not recall whether he saw Ward at all on January 8, 2003, and that Schwartz denied seeing Ward come over to talk to Weaver (App. at 307, 309, ECF No. 22-3 at 41, 43). Ward further notes that, by contrast, Weaver indicated that Schwartz was waiting with Ward until Weaver arrived and then Schwartz left (App. at 311, ECF No. 22-3 at 45). The court finds, considering the totality of the evidence presented at the Jackson v. Denno hearing, that this alleged inconsistency is immaterial and insufficient to rebut by clear and convincing evidence the presumption that the factual determinations of the state court are correct. See 28 U.S.C. § 2254(e)(1). To the extent that Ward seeks an evidentiary hearing to submit new evidence to support this claim—such as his own testimony, his brother's testimony, and Ward's

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mental health records—the court observes that its review for habeas corpus purposes is generally limited to the evidence that was placed before the state court. See Cullen v. Pinholster, 131 S. Ct. 1388, 1398, 1400 n.7 (2011); see also 28 U.S.C. § 2254(d)(2). Ward has not established that any exception to this general rule applies here. See Cullen, 131 S. Ct. at 1400-01; see also 28 U.S.C. § 2254(e)(2); (Order, ECF No. 69). Applying the law as clearly established by the United States Supreme Court regarding the suppression of statements to the surrounding facts presented to the trial court, this court finds no unreasonable application of law nor any unreasonable factual findings. Accordingly, Ward is not entitled to federal habeas relief on this claim.

2. Ground Two

Ward next argues that defense counsel was ineffective in failing to object to numerous errors in the solicitor's opening and closing arguments.

Controlling Law Regarding Allegations of Ineffective Assistance of Counsel. A defendant has a constitutional right to the effective assistance of counsel. To demonstrate ineffective assistance of counsel, a petitioner must show, pursuant to the two-prong test enunciated in Strickland v. Washington, 466 U.S. 668 (1984), that (1) his counsel was deficient in his representation and (2) he was prejudiced as a result. Id. at 687; see also Williams v. Taylor, 529 U.S. 362, 391 (2000) (stating that "the Strickland test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims").

To satisfy the first prong of Strickland, a petitioner must show that trial counsel's errors were so serious that his performance was below the objective standard of reasonableness guaranteed by the Sixth Amendment to the United States Constitution. With regard to the second prong of Strickland, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S.

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at 694. Prejudice may be presumed when (1) a defendant is completely denied counsel at a critical stage of his trial, (2) counsel "entirely fails to subject the prosecution's case to a meaningful adversarial testing," or (3) "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." United States v. Cronic, 466 U.S. 648, 659 (1984).

The United States Supreme Court has cautioned federal habeas courts to "guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d)." Harrington, 131 S. Ct. 770, 788 (2010). The Court observed that while " '[s]urmounting Strickland's high bar is never an easy task[,]' . . . [e]stablishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult." Id. (quoting Padilla v. Kentucky, 130 S. Ct. 1473, 1485 (2010)). The Court instructed that the standards created under Strickland and § 2254(d) are both " 'highly deferential,' and when the two apply in tandem, review is 'doubly' so.". Id. (citations omitted). Thus, when a federal habeas court reviews a state court's determination regarding an ineffective assistance of counsel claim, "[t]he question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id.

Although the Supreme Court has held that a decision containing a reasoned explanation is not required from the state court, in the case at bar this court has the benefit of the PCR court's written opinion, certiorari review of which was denied by the South Carolina Supreme Court. See, e.g., Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991) (indicating that when a state appellate court affirms a lower court decision without reasoning, the court may look through the later, unreasoned, summary disposition and focus on the last reasoned decision of the state court). Having reviewed

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the PCR court's order pursuant to the § 2254 standard, the court finds for the reasons that follow that the state court did not unreasonably misapply the Strickland test in determining that no Sixth Amendment violation occurred.

PCR Proceedings Regarding Ineffective Assistance of Counsel. Ward argued before the PCR court that defense counsel was ineffective in failing to object to the following in the Assistant Solicitor's opening and closing arguments: (1) comments on Ward's lack of remorse; (2) vouching for the prosecution's witnesses; and (3) comments on the lack of credibility of Ward's statement and the defense's theory of the case. (App. at 951-54, ECF No. 22-8 at 72-75.) In Ward's supplement to his PCR application, he referenced the specific comments at issue with corresponding transcript cites. (App. at 951-54, ECF No. 22-8 at 72-75.) Ward argued that defense counsel should have objected to the State's improper references to his alleged lack of remorse in closing argument, when the Assistant Solicitor stated that Ward's demeanor on the recorded statement "is almost unbelievable. It is simply cold and calculated. . . . Protecting Jody Ward is his only interest, not, not the least bit of remorse, not the least bit of concern about the fate of the two people that he had killed." (App at 787-88, ECF No. 22-7 at 35-36.) Ward also alleged that trial counsel should have objected to the State's description of Ward's nature as "cold and calculated" and its argument that after the individuals were killed, Ward drove around looking for something to eat. (App. at 788, ECF No. 22-7 at 36.) Ward next argued that defense counsel was ineffective in failing to object to the following statements by the assistant solicitor concerning the witnesses for the prosecution: that they "are going to put their hand on the bible" and "[t]hey're going to swear to tell the truth" (App. at 385, ECF No. 22-3 at 119); his description of the factors that he believed corroborated the testimony of witness Denise Langston and statements that "[s]he admitted some stuff that wouldn't make you proud if you were her parent, but I'll submit to you that she was credible," she "told the

truth and she told the whole truth," and "you know she told the truth because her testimony was corroborated" (App. at 768-71, 771, 772, 772-74, ECF No. 22-7 at 16-19, 19, 20, 20-22); "I think that [Tracy Collins] was a very credible witness . . ." (App. at 778, ECF No. 22-7 at 26); "I submit to you that Louis Brazen was a very credible witness, that he didn't try to hide anything, that he didn't do anything but tell the truth as he knew it, and he told all the truth" (App. at 783, ECF No. 22-7 at 31); and that Melissa Elliot "told the truth" (App. at 794, ECF No. 22-7 at 42). Finally, Ward argued that defense counsel was ineffective in failing to object to the following statements concerning the Assistant Solicitor's personal opinions regarding Ward's credibility and the defense's theory of the case: "[T]here's no evidence in this case that's going to indicate that [another individual] had anything to do with it other than the statement of the Defendant, and I don't believe that" (App. at 384, ECF No. 22-3 at 118); "that's a lie and he knew it was a lie," when referencing Ward's statement (App. at 776, ECF No. 22-7 at 24); "[t]hat's just simply not believable because it's not the truth," when referencing the defense's theory of the case (App. at 778, ECF No. 22-7 at 26); "His demeanor on that tape is almost unbelievable" (App. at 787, ECF No. 22-7 at 35); "He's also caught lying a couple of times on the tapes, a couple, you heard it. You can judge for yourselves whether he was credible" (App. at 788, ECF No. 22-7 at 36); "[s]hortly thereafter, he just goes to stammering and stuttering about [a] just completely unbelievable statement," when referencing Ward's recorded statement (App. at 789, ECF No. 22-7 at 37); "Another thing he's lying about is Carter Weaver says . . ." (id.); "[n]ow, how unbelievable is it that they have this knock down, drag out argument . . ." (App. at 790, ECF No. 22-7 at 38); "One more thing he gets caught in a lie as far as he goes out there to move the bodies" (App. at 791, ECF No. 22-7 at 39); "He just plain admits that he's lying. There's no question about it" (id.); the defense's theory of self-defense "seems absurd, it's ridiculous, . . ." and later that "[i]t's simply ridiculous" (App. at 795, 797, ECF No. 22-7

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at 43, 45); "He lies . . .," stated four times (App. at 797, ECF No. 22-7 at 45); and "the man you heard on that tape giving you that ridiculous story," when referencing Ward's recorded statement (App. at 798, ECF No. 22-7 at 46).

Defense counsel, Locklair and Kneece, testified at the PCR hearing. Pertinent to these allegations, Locklair acknowledged not objecting to these statements in the Assistant Solicitor's opening and closing arguments. When asked if he saw any statements that were objectionable or harmful to Ward that he believes he should have objected to, Locklair responded,

> There were some obviously about the remorse and some that could be on borderline bolstering, but that's oftentimes a gray area. Unless it's really damaging to me is a lot of times I think it comes across to juries as being whiny when defense attorneys object to little things, so unless it's really something damning to the case, I normally don't object in opening or closing.

(App. at 990, ECF No. 22-8 at 111.) Locklair also indicated that by giving the last closing argument, he could respond to the State's comments and arguments. (App. at 992-92, ECF No. 22-8 at 113-14.) Locklair further acknowledged that he should have objected to the State's statement that Ward did not show "the least bit of remorse." (App. at 994, ECF No. 22-8 at 115.) However, Locklair stated that while many of the comments regarding witness credibility were objectionable, in his experience it is a "waste of time" because the judge gives a quick curative instruction, making him "look stupid" and because objections can offend the jury. (App. at 995, ECF No. 22-8 at 116.)

Kneece also acknowledged that the objections at issue were not made and stated that throughout the trial the attorneys for both sides looked like "Mexican jumping beans" due to the numerous objections. Kneece testified that by the time they reached closing arguments, it was clear that the jury did not want "anymore up and down;" however, Kneece pointed out that Locklair did make an objection during closing argument. (App. at 1015, ECF No. 22-9 at 18.) Specifically, Locklair objected to an allegation that Ward had been hiding evidence and obstructing the jury's duty

and asked for a curative instruction or a mistrial. As a result, the court issued a curative instruction, directing the jury to disregard the Assistant Solicitor's last statement and reminding them "that what the attorneys say in these closing arguments is not evidence. You will recall the evidence as you heard it from [the] witness stand and as you see it in the exhibits." (App. at 782, ECF No. 22-7 at 30.) Kneece indicated that not objecting to the lack of remorse statement was appropriate. She described Ward's demeanor on the recorded statement as stoic and unemotional, and testified that she believed it was a prepared statement. (App. at 1016-17, ECF No. 22-9 at 19-20.) Kneece further testified that defense counsel did

> our best not to object during [the State's] closing argument. The jury was just as tired of him as they were of us, and we felt—or of us as they were of them, that [the State] may have done some things that would irritate them in the way he was going through, and at that point he kind of postured himself to get ready, and that was a trial strategy.
>
> Again, you look at it now and seeing it in print, it—we may, just to preserve the record, may should have objected, but I think that that would have affected Mr. Ward's trial.

(App. at 1019, ECF No. 22-9 at 22.) Kneece acknowledged that on several occasions the court, defense counsel, and the State informed the jury that what is said in closing arguments is not evidence and that the jury should recall the evidence from the witness stand. (App. at 1020, ECF No. 22-9 at 23.)

In considering Ward's allegations of ineffective assistance of counsel, the PCR court[4] found Locklair's testimony to be credible, Kneece's testimony to be highly credible, and Ward's testimony

[4] In discussing the findings and conclusions of the PCR court, the court has considered the PCR court's Final Order of Dismissal (App. at 1038-53, ECF No. 22-9 at 41-56) and the clarifications in the PCR court's Order Denying Applicant's Motion to Alter or Amend in Part and Clarifying Order of Dismissal (App. at 1060-66, ECF No. 22-9 at 63-69), as the parties have represented to the court that this second Order was issued by the PCR judge.

to be not particularly pertinent to the factual issues.[5] The PCR court found that defense counsel was deficient in failing to object to the State's comments regarding Ward's lack of remorse, finding that defense counsel's "deliberate strategy of refraining from making objections, because of their perception that the jury was restless and tired of objections, should not have extended to comments regarding [Ward's] remorse for the crime of murder." (App. at 1046, ECF No. 22-9 at 49.) However, the PCR court found that Ward's

> admissions in his voluntary statement—that he helped to cover up the crimes—were put into issue when he came forward to make the statement. In addition, any inconsistencies in the statement were properly before the jury. Therefore, the solicitor's comments specifically regarding [Ward's] demeanor on the tape were not improper, as the jurors could listen to the tape and judge it for themselves.

(Id.) Notwithstanding defense counsel's failure to object to the lack of remorse comments, the PCR court found that Ward failed to satisfy the second prong of the Strickland test, as no prejudice was shown. Specifically, the court found that Ward failed to show that but for defense counsel's error, the outcome of the case would have been different. The PCR court observed that if an objection had been raised, the State would have been instructed to cease those comments and a curative instruction would have been given. Here, the State did not continue to mention Ward's lack of remorse, significantly lessening the potential prejudice, and the PCR court found that Locklair addressed the "remorse" issue in his closing argument in part by stating that the issue is not whether Ward is "likeable" or "cold-hearted." Therefore, the PCR court determined that any potential prejudice had been effectively neutralized. (App. at 1047, ECF No. 22-9 at 50.)

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[5] To the extent that Ward objects to this finding, the court observes that Ward's testimony primarily reiterated to the court the basis for his PCR application and identified an additional issue for consideration. (See App. at 997-1010, ECF Nos. 22-8 at 118 through 22-9 at 13.)

The PCR court also found that defense counsel was deficient in failing to object to the State's improper vouching, by stating that the witnesses were "telling the truth" and improperly using the pronoun "I." The PCR court also determined that many of the comments challenged by Ward were not objectionable, "such as pointing to the evidence in the record that corroborated witness testimony." (App. at 1048, ECF No. 22-9 at 51.) However, the PCR court found that Ward failed to satisfy the second prong of the Strickland test, as no prejudice was shown. Specifically, the court found that

> in light of the fact that the solicitor, more than one time, specifically told the jury that they had to judge credibility for themselves, and considering that the judge charged the jury that they were the sole judges of credibility and that the attorneys' arguments were not evidence, [Ward] has failed to prove that he was prejudiced by the solicitor's vouching. This is especially so in light of the overwhelming evidence of his guilt.

(Id.) The PCR found that the overwhelming evidence of Ward's guilt included, but was not limited to:

> [Ward]'s confessions to Denise Cox that he planned to kill the victims—then, later, that he did in fact kill them (Ms. Cox gave this statement to police shortly after the defendant's arrest); statements from various witnesses who heard [Ward] "brag" that he got rid of the boys who took his money; evidence that [Ward] asked Kevin Cooper to purchase bullets for him in advance; evidence that the gun [Ward] had been seen with on numerous occasions was consistent with the gun that shot the victims; the pathologist testimony indicating that one of the victims was shot in the back of the head; evidence that [Ward] was the only person who moved the victims' remains; evidence of the baby-seat still strapped in the backseat of the Suzuki;[6] and evidence

[6] The PCR court explained earlier in its Order that Locklair testified that Ward's statement "did not match up with the fact that the Suzuki Sidekick in which the four of them were supposedly riding that day had a baby seat still strapped in the rear seat [when it was recovered from the bottom of Lake Dawoo]. Mr. Locklair stated that it would have been extremely difficult for four grown men to fit into the Suzuki in that condition." (App. at 1042, ECF No. 22-9 at 45) (footnote omitted).

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> that Brian Elliott was at home on the day of the incident. 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.

(App. at 1052 n.2, ECF No. 22-9 at 55.)

With regard to Ward's final allegation of ineffective assistance of counsel that defense counsel failed to object to comments on the lack of credibility of Ward's statement and the defense's theory of the case, the PCR court determined that Ward failed to demonstrate either prong of the Strickland test. Specifically, the PCR court observed that counsel may state his version of the evidence, including commenting on the weight or reliability of the evidence. Part of the evidence in this case included Ward's statement, which was introduced over the objection of the defense as discussed above. The PCR court observed that "[t]he jury could properly considered all aspects of the statement, including why it was made at that particular time in the progression of the case, how the defendant sounded on the tape as far as his demeanor, whether the story he was telling was plausible and fit with the other evidence in the case, and whether the statement was internally inconsistent." (App. at 1048-49, ECF No. 22-9 at 51-52.) The PCR court acknowledged that the solicitor "argued at length that the defendant was not credible," that Ward was "lying," that his version of events was "ridiculous," that the only evidence that anyone else was guilty was Ward's own statement "made five months after his arrest and after he had access to discovery." (App. at 1049, ECF No. 22-9 at 52.) Further, the PCR court found that

> [a]lthough the solicitor's argument regarding the defendant's statement was certainly vigorous, and although he did improperly couch a few of his comments by using the pronoun "I," this Court finds that, on the whole, his argument was proper considering the evidence in the record. Therefore, this Court cannot say that counsel was ineffective for failing to object to this line of argument, particularly where the statement was admitted over counsel's strenuous objection, and where counsel was able to specifically respond in the last closing argument. Attorney Locklair pointed out in his closing that [Ward]'s statement fit with the evidence in the car, and that if

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> Brian Elliott were not involved, he should have been called as a witness at trial but was not.

(Id.)

Ward's Habeas Claim Regarding Ineffective Assistance for Failure to Object to Solicitor's Comments in Argument. Upon thorough review of the parties' briefs and the record in this matter, the court finds that Ward cannot demonstrate that the PCR court unreasonably misapplied clearly established federal law as decided by the Supreme Court in rejecting his claims of ineffective assistance of counsel or that the PCR court made objectively unreasonable factual findings. See Williams, 529 U.S. at 410; 28 U.S.C. § 2254(d), (e)(1). As observed by the Harrington court, "[t]he pivotal question is whether the state court's application of the Strickland standard was unreasonable. This is different from asking whether defense counsel's performance fell below Strickland's standard." Harrington, 131 S. Ct. at 785. With regard to defense counsel's failure to object to the State's comments regarding Ward's lack of remorse, Ward appears to argue that he was prejudiced because Ward's statement did not indicate that he killed anyone; defense counsel failed to put up a defense; defense counsel advised Ward not to testify; Ward's statement was played for the jury; his counsel abandoned him at a critical stage; defense counsel did not address the lack of remorse argument; and the PCR court's order contains "lies." (See ECF No. 39 at 32.) The court observes initially that many of these arguments do not relate to Ward's argument that defense counsel should have objected to these comments. With regard to all of Ward's claims of ineffective assistance of counsel, upon careful review of the transcript and the PCR court's orders, the court concludes that Ward has not clearly shown that the PCR court's credibility determinations

were without support.[7] See Elmore v. Ozmint, 661 F.3d 783, 850 (4th Cir. 2011) ("We must be 'especially' deferential to the state PCR court's findings on witness credibility, and we will not overturn the court's credibility judgments unless its error is 'stark and clear.' ") (quoting Sharpe v. Bell, 593 F.3d 372, 378 (4th Cir. 2010) and Cagle v. Branker, 520 F.3d 320, 324 (4th Cir. 2008)). Additionally, for all of the reasons discussed by the PCR court, Ward has failed to establish that there is a reasonable probability that the result of the proceeding would have been different if trial counsel had objected to any these comments. Strickland, 466 U.S. at 694. To the extent that Ward is attempting to allege that prejudice should be presumed under Cronic, the court observes that this argument was not presented to the state courts. Furthermore, there is no support for this assertion in the record. Therefore, Ward has not shown that the PCR court's analysis of this issue misapplied clearly established federal law or, even if there was an error, that it was unreasonable. See Williams, 529 U.S. at 410.

3. Ground Four[8]

Ward argues that the PCR court and state appellate court erred in failing to find Ward's jury instructions unconstitutional based on the holding in State v. Belcher, 685 S.E.2d 802 (S.C. 2009). The Belcher case was decided by the state Supreme Court after the conclusion of Ward's direct appeal and his first PCR action.

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[7] As stated above, to the extent that Ward seeks an evidentiary hearing to present additional evidence to support his federal habeas claims—the court observes that its review is generally limited to the evidence that was placed before the PCR court. See Cullen, 131 S. Ct. at 1398, 1400 n.7 ; see also 28 U.S.C. § 2254(d)(2). Ward has not established that any exception to this general rule applies here. See Cullen, 131 S. Ct. at 1400-01; see also 28 U.S.C. § 2254(e)(2); (Order, ECF No. 69).

[8] As stated above, Ward withdrew Grounds Three and Six.

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The Belcher case held that "the 'use of a deadly weapon' implied malice instruction has no place in a murder . . . prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing . . . ." Id. at 809. However, the South Carolina Supreme Court specifically stated that "[b]ecause our decision represents a clear break from our modern precedent, today's ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved" and "will not apply to convictions challenged on post-conviction relief." Id. at 810 (citing Griffith v. Kentucky, 479 U.S. 314 (1987) and Harris v. State, 543 S.E.2d 716, 717-18 (Ga. 2001)).

As an initial matter, as determined by the state courts Belcher would not have been applicable to Ward's case because his direct appeal was concluded before Belcher was decided. The Belcher decision represented a change in state law, and "it is not the province of a federal habeas corpus court to re-examine state-court determinations of state-law questions." Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Contrary to Ward's argument, he has failed to demonstrate that the state court's determination that Belcher would not apply to collateral proceedings violated any constitutional right or the Supreme Court's holding in Teague v. Lane, 489 U.S. 288 (1989).[9] See Horton v. Warden, Kirkland Corr. Inst., C/A No. 9:12-2668-CMC-BM, 2013 WL 57703 (D.S.C. Jan. 4, 2013) (noting the holding in Belcher and stating that "[t]he determination of when a change in state law becomes effective is purely a state law issue") (citing Estelle, 502 U.S. at 67-68). Furthermore, to the extent that Ward attempts to argue that the charge was unconstitutional under Sandstrom v. Montana, 442

[9] In Teague, the Supreme Court held that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." Teague, 489 U.S. at 310. Under Teague, a new rule will only be applied to a case on collateral review if it falls into one of two exceptions not applicable here. See id. at 311-13; Whorton v. Bockting, 549 U.S. 406 (2007).

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U.S. 510 (1979), such a claim is procedurally defaulted as it was not raised on direct appeal and could not be raised in a PCR action, and Ward has failed to demonstrate cause and prejudice or that a fundamental miscarriage of justice will occur if these claims are not considered.[10] See Drayton v. Evatt, 430 S.E.2d 517, 520 (S.C. 1993) (stating that issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel); Coleman, 501 U.S. at 750. Finally, Ward has failed to demonstrate that the state courts' decisions were so fundamentally unfair that they resulted in a denial of due process. See 28 U.S.C. § 2254(a) (stating that a writ of habeas corpus is available for a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States").

4. Grounds Five and Seven

In Grounds Five and Seven, Ward argues that defense counsel was ineffective in failing to object to allegedly improper statements in the solicitor's closing argument (see App. at 785:19-786:6, ECF No. 22-7 at 33-34) and in failing to object to the unconstitutional burden shifting jury instructions given during trial (see App. at 829-30, ECF No. 22-7 at 77-78). Both of these claims were presented to the state appellate courts in Ward's *pro se* petition for a writ of habeas corpus in the original jurisdiction of the South Carolina Supreme Court. (ECF No. 26-35.) The state Supreme Court denied Ward's petition stating, "[b]ecause 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)." (ECF No. 26-36.) Courts in this district have held that if a state habeas action is rejected pursuant

[10] Even if this claim were properly before the court, for the reasons discussed by the respondent, Ward cannot demonstrate that the charge violated Sandstrom. (See Respt.'s Mem Supp. Summ. J. at 60-63, ECF No. 22 at 60-63.)

to Simpson, then " 'the issues have not been considered by the state supreme court and thus the state habeas is an insufficient vehicle for properly presenting issues to the state's highest court to preserve them later for federal review.' " Scott v. South Carolina, C/A No. 8:11-788-RMG, 2011 WL 5101567 (D.S.C. Oct. 26, 2011) (quoting McFarland v. Warden, Lieber Correctional Inst., C/A No. 6:07-588-TLW-WMC, 2008 WL 697152, at *6 (D.S.C. Mar. 11, 2008)). The district courts have further held that these decisions rest on adequate and independent state grounds, rendering petitioner's claims procedurally barred from federal habeas review. Id. Therefore, these claims are procedurally barred from federal habeas review.

Ward's reliance on the Supreme Court's recent decision in Martinez v. Ryan, 132 S. Ct. 1309 (2012), to establish cause for procedurally defaulting on Ground Five is unavailing. The Martinez Court recognized that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of ineffective assistance at trial." Martinez, 132 S. Ct. at 1315. However, this holding was not extended to "attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings." Id. at 1320. It appears that Ground Five was presented to and ruled on by the PCR court; however, PCR appellate counsel did not present it to the appellate court. (See App. at 1008, 1061-62, ECF No. 22-9 at 11, 64-65.)

With regard to Ground Seven, which was solely presented in Ward's *pro se* state petition for a writ of habeas corpus, Ward cannot establish cause for procedurally defaulting on this claim under Martinez based on his argument that PCR counsel was ineffective in failing to present this claim, as he cannot demonstrate that the claim has "some merit." Martinez, 132 S. Ct. at 1318-19. When a petitioner argues that he is entitled to federal habeas relief based on an improper jury instruction, the court must be mindful that "not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation." Middleton v. McNeil, 541 U.S. 433,

437 (2004). Further, " '[a] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.' " Id. (quoting Boyde v. California, 494 U.S. 370, 378 (1990)). The defendant must demonstrate "that there was a 'reasonable likelihood' that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." Waddington v. Sarausad, 555 U.S. 179, 191 (2009) (quoting Estelle v. McGuire, 502 U.S. 62, 72 (1991)). There must be more than "some 'slight possibility' that the jury misapplied the instruction" and the relevant question is " 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.' " Waddington, 555 U.S. at 191 (quoting Estelle, 502 U.S. at 72). Ward has taken portions of the jury charges discussing malice out of context in arguing that they unconstitutionally shifted the burden of proof. Moreover, reading the charges as a whole, Ward has failed to demonstrate that a reasonable likelihood that the jury applied the instruction in a way that violates the Constitution, see Waddington, 555 U.S. at 191, or that defense counsel erred in failing to object to the selected portions of the malice charge. Furthermore, as discussed above, Ward has failed to demonstrate prejudice in light of the overwhelming evidence of his guilt. Therefore, Ward has failed to demonstrate he is entitled to federal habeas relief.

RECOMMENDATION

For the foregoing reasons, the court recommends that the respondent's motion for summary judgment (ECF No. 23) be granted.

Paige J. Gossett
UNITED STATES MAGISTRATE JUDGE

February 14, 2013
Columbia, South Carolina

The parties' attention is directed to the important notice on the next page.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Larry W. Propes, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

Jody Lynn Ward, Petitioner, vs. Warden of Leiber Correctional Institution, Defendant.	C/A No. 0:11-cv-03277-RBH **ORDER**

The Plaintiff, *pro se*, instituted this action pursuant to 28 U.S.C. § 2254 on December 1, 2011. He is incarcerated in the SCDC at Lieber Correctional Institution.

In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02 D.S.C., this matter was referred to United States Magistrate Judge Paige J. Gossett, for pretrial handling. The matter is before this Court on the Report and Recommendation of Magistrate Judge Gossett, which was issued on February 15, 2013. After analyzing the issues presented in this case, the Magistrate Judge recommended that this Court grant the respondent's motion for summary judgment. Magistrate Judge Gossett also filed an order on February 15, 2013 denying the petitioner's motions to supplement and expand the record. The petitioner filed objections to the Report and the Order on March 1, 2013.

In conducting its review of the Report and Recommendation, the Court applies the following standard:

> The Magistrate Judge makes only a recommendation to the court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with the court. *Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). The court is charged with making a *de novo* determination of those portions of the Report to which specific objection is made, and the court may accept, reject, or modify, in whole or in part, the

> recommendation of the Magistrate Judge, or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).
> The court is obligated to conduct a *de novo* review of every portion of the Magistrate Judge's report to which objections have been filed. *Id.* However, the court need not conduct a *de novo* review when a party makes only "general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations." *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982). In the absence of a timely filed, specific objection, the Magistrate Judge's conclusions are reviewed only for clear error. *See Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005).

This Court reviews the Magistrate's Order regarding Petitioner's nondispositive motions to determine if it is "clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a).

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law. . . or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Determinations of factual issues by state courts are presumed correct and "the applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Petitioner first generally objects to the Magistrate Judge's findings regarding Ground One, trial court's failure to suppress Petitioner's statement. The Court has reviewed the analysis of the Magistrate Judge on this ground and finds it to be correct. In addition to the arguments addressed by the Magistrate, Petitioner states in his objections that he is a mental health patient and was on medication on the day that he was taken from his cell and made the statement. However, he does not allege that he was in any way incompetent to make a statement. The Court agrees with the analysis of this ground by the Magistrate Judge.

Petitioner also contends that the Magistrate erroneously denied his motions to expand the record and for evidentiary hearing. The Court has reviewed the Magistrate's Order and finds that it is not clearly erroneous or contrary to law.

Petitioner's arguments regarding alleged ineffective assistance of counsel lack merit for the reasons stated by the Magistrate Judge.

The Court has reviewed the Petition, Report and Recommendation and Order by the Magistrate Judge, the applicable law, and the petitioner's objections. On the basis of the authorities cited by the Magistrate Judge and this Court's review of the record, the Court overrules the objections and adopts the Report of the Magistrate Judge. The respondents' [23] motion for summary judgment is granted.

A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate *both* that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85. In the instant matter, the court concludes that Petitioner has failed to make the requisite showing of "the denial of a constitutional right" and thus denies a certificate of appealability.

IT IS SO ORDERED.

s/ R. Bryan Harwell
R. Bryan Harwell
United States District Judge

March 20, 2013
Florence, South Carolina

424 424

AO 450 (SCD 04/2010) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of South Carolina

Jody Lynn Ward *Petitioner*	)	
v.	)	Civil Action No. 0:11-3277-RBH
Warden of Leiber Correctional Institutioin *Respondent*	)	

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

❒ the petitioner *(name)* _____ recover from the respondent *(name)* _____ the amount of _____ dollars ($__), which includes prejudgment interest at the rate of ____ %, plus postjudgment interest at the rate of ____ %, along with costs.

❒ the petitioner recover nothing, the action be dismissed on the merits, and the respondent *(name)* _____ recover costs from the petitioner *(name)* _____.

■ other: Summary judgment is hereby entered for the respondent, Warden of Leiber Correctional Institution. The petitioner, Jody Lynn Ward, shall take nothing of the respondent as to the petition filed pursuant to 28 U.S.C. §2254 and this action is dismissed with prejudice.

This action was *(check one)*:

❒ tried by a jury, the Honorable _____ presiding, and the jury has rendered a verdict.

❒ tried by the Honorable _____ presiding, without a jury and the above decision was reached.

■decided by the Honorable R. Bryan Harwell, United States District Judge, presiding, adopting the Report and Recommendation set forth by the Honorable Paige J. Gossett, United States Magistrate Judge, which granted the respondent's motion for summary judgment.

Date: March 20, 2013

CLERK OF COURT

s/J. Peterson

Signature of Clerk or Deputy Clerk

State v. Ward

Court of Appeals of South Carolina

January 2, 2007, Submitted; January 26, 2007, Filed

Unpublished Opinion No. 2007-UP-048

Reporter
2007 S.C. App. Unpub. LEXIS 82 *; 2007 WL 8324408

The State, Respondent, v. Jody Lynn Ward, Appellant.

Notice: THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

Prior History: [*1] Appeal From Georgetown County. Paula H. Thomas, Circuit Court Judge.

Disposition: APPEAL DISMISSED.

Counsel: Acting Chief Attorney Joseph L. Savitz, III, Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General, Salley W. Elliot, all of Columbia: and Solicitor J. Gregory Hembree, of Conway, for Respondent.

Judges: ANDERSON, HUFF, and BEATTY, JJ., concur.

Opinion

PER CURIAM: Jody Lynn Ward appeals his conviction of two counts of murder, each with a sentence of life imprisonment. Ward argues the trial court erred in failing to suppress his statement to police where the police knew Ward was attempting to contact his attorney prior to his statement, and were aware Ward had invoked his right to counsel upon his arrest. Ward also filed a separate pro se brief raising numerous arguments. After a thorough review of the record, counsel's brief, and Ward's pro se brief pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967) and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), we dismiss [1] Ward's appeal and grant counsel's motion to be relieved.

APPEAL [*2] **DISMISSED.**

ANDERSON, HUFF, and BEATTY, JJ., concur.

End of Document

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of General Sessions

Benjamin H.Culbertson,Circuit Court Judge

Case No.2003-GS-22-1030&1031

The State,.....Respondent.

V.

Jody Lynn Ward,#300644,.....Appellant.

NOTICE OF APPEAL

Jody Lynn Ward appeals his conviction and sentence in this case, from the denial of motion for new trial based on after discovered evidence,denial of motion for arrest of judgment;and the denial of motion to reconsideration of order denying motion for new trial.All the listed Orders was denied by the Honorable Benjamin H. Culbertson.[This appeal is taken from the following Orders of the Honorable Benjamin H. Culbertson,dated July31,2012;September 25,2012;and finally September 25,2012.which denied appellants motions for a new trial or related in nature.Appellant received written notice of entry of these Orders on August3,2012;September28,2012 and finally October 3 ,2012.] It appears that motion to reconsideration was also made in the denial of arrest of judgment.

Date: October 4 ,2012

/S/ Jody Lynn Ward, #300644
Jody Lynn Ward,#300644
Lieber Corr.Inst.E-B-29
P.O. BOX 205
Ridgeville,S.C. 29472

Other Counsel of Record:
Scott Hixson
Assistant Solicitor
P.O. BOX 1688
Georgetown,S.C.29442
Attorney for Respondent

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of General Sessions

Benjamin H. Culbertson,Circuit Court Judge

Appellate Case No. 2012-213222

CASE NO. 2003-GS-22-1030&1031

The State Of South Carolina,.....Respondents.

V.

Jody Lynn Ward,#300644,.....Appellant.

[FINAL] BRIEF OF APPELLANT

Jody Lynn Ward,#300644
Lieber Corr.Inst.E-B-29
P.O. BOX 205
Ridgeville,S.C. 29472
Appellant Pro Se

Other Counsel Of Record:
Attorney General Of South Carolina
Mr.Allan Wilson,Attorney General
P.O. BOX 11549
Columbia, S.C. 29211-1549

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TABLE OF AUTHORITIES

CASES :

STATEMENT OF ISSUE 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 MotionTo 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 there authority ,and corrections mailroom to hold affidavit?

STATEMENT OF ISSUES ON APPEAL

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 APPELLANTS DUE PROCESS AND EQUAL PROTECTION WAS VIOLATED BY COURT DENYING APPELLANTS 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 PREJUDICE 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 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,"?

STATEMENT OF THE CASE

Appellant (Jody Lynn Ward) was indicted in July 2003 in Georgetown County for the alleged murders of Wilford Brown and Elton Rutledge,Jr.

Appellant proceeded to trial by a jury and Judge on March 15-18, 2004. The Jury ultimately convicted Appellant as indicted and the Honorable Paula H. Thomas sentenced Appellant to two-2 concurrent life sentences.A timely notice of appeal was filed and the appeal was reviewed pursuant to Anders V. California in which the Court of Appeals affirmed the sentences and convictions January26,2007 (2007-UP-048).A timely rehearing was filed and rehearing was denied March 22,2007.Subsequently thereafter Appellant filed a Petition For Writ Of Certiorari.The Petition for certiorari was withdrawn by Appellant June 29,2007 and the remittitur was thereafter handed down to the circuit court.Appellant filed his first application for post conviction relief ("PCR") July 11,2007 An evidentiary hearing was convened May 1,2008.By way of Written Order the Honorable Judge Steven John denied the application.

On May 27,2008,Appellant submitted a timely Rule 59 (e),SCRCP, Motion to alter/amend judgment.August 6,2008,Judge John denied the rule 59 (e) motion.A timely notice of appeal was filed and appellant filed for writ of certiorari August 20,2009,and the remittitur was handed down September 8,2009.

Appellant filed his second pcr application July 13,2009 based on "New Rule" of Law,while his first pcr was currently being reviewed on certiorari.Respondent made a Return and Motion to dismiss.A conditional Order Of Dismissal was issued and appellant

made his timely opposition to the dispositive pleading.January 13, 2010 a Final Order was issued granting the respondents motion to dismiss. A timely notice of appeal was filed in the lower court that was ultimately denied and dismissed.The remittitur was handed down about April 1,2010.

Appellant filed a third pcr application May 4,2010 based on a New Rule of law.The respondent filed a return and motion to dismiss June 1,2010.Appellant lodged a timely opposition to the respondent's dispositive pleading June 14,2010.A conditional order was issued and Appellant lodged a timely opposition to the conditional order.A final order was issued granting the respondent's motion on July 20,2010.A timely notice of appeal was filed, accompanied with a pro-se petition August 18,2010.Appellant filed a reply brief,certiorari was ultimately denied August 18,2011.

Appellant filed a notice of petition for original jurisdiction petition for writ of habeas corpus in South Carolina Supreme court on October 31,2011.It was ultimately denied on November 16, 2011;to fully exhaust all state remedies.Appellant files a motion for a new trial based on after-discovered evidence on May,7,2012 On July 23,2012 Rondie J. Ward,Appellants uncle went to the Georgetown County Clerk Of Court To file an affidavit that clearly supported the motion for new trial and paid .50¢ and Clerk Ms. Jennifer M. Lawrence Notarized the affidavit but failed to file it.My uncle Rondie J. ward went and mailed me a copy of the affidavit and the Lieber correctional Institution mailroom held the affidavit due to the contents had to be reviewed and Appellant filed an EMERGENCY STEP 1 GRIEVANCE to get the affidavit,

and while Appellant was waited to get the affidavit approved to be released the Court issued an Order Denying Motion For New Trial,motion for appointment of counsel,and motion for expenses on July 31,2012.Appellant filed a timely notice of appeal dated August 6,2012.And on August 7,2012 the appellant filed a motion for reconsideration and/or motion to reconsider order/judgment denying motion for new trial;motion for appointment of counsel an motion for investigative & expert expenses,and while this motion was pending On August 30,2012 Appellant filed Motion to Arrest of judgment/order denying motion for new trial,motion for appointment of counsel and motion for expenses for expert witness after the discovery of Ms. Jennifer M. Lawrence Georgetown County Clerk of court employee had signed a petition to have Appellants Third Bond hearing denied dated back to September 22,2002.On September 25,2012 the Honorable Benjamin H. Culbertson issued an Order Denying motion to arrest judgment.On September 28,2012 Appellant wrote to the Georgetown County Clerk's office for the disposition of the motion for reconsideration that was still pending and the Clerk mailed to me On October 3,2012 order denying arrest of judgment.On October 4,2012 Appellant files his timely Notice of Appeal with attached orders.This appeal Follows:

ARGUMENT

The Appellant presented After-Discovered Evidence that clearly supported a Motion for New Trial based on After-Discovered Evidence,Appellant submitted a Sworn Affidavit,Sworn Affidavit of Rondie J. Ward,Sworn Affidavit of Ashton J. Ward,and a letter written to his mother from serial killer Michael Abner,Appellant was convicted by jury for two (2) alleged murders that the newly Evidence clearly refute,and since Appellants first jury never heard this Evidence he should have atleast been granted an Evidentiary Hearing for oral arguments because he meets the five (5) criteria for after-discovered Evidence that was set by the South Carolina Supreme Court,Therefore the Judge abused his discretion that amounted to resulting prejudice to Appellant the moving party.

INTRODUCTION

The Appellant herein would show the court Record on appeal pages 1 -50 Motion for New Trial based on After - Discovered Evidence,with attached Fortior Exhibits A - F ,and Motion for Expenditure of Funds for investigative and expert services,and Motion for Appointment of counsel/indigent funds pursuant to §17-3-10.Appellant filed the motions after a convicted Serial killer wrote a letter to Appellants mother,and after his uncle Rondie J. Ward informed him that Michael Abner did call him on the phone at his residence and did in fact tell him that he being Abner did in fact pay Appellants alleged victims that a jury convicted Of 2-alleged murders.see record on appealpg.70-71,and pg.97-103.The Appellant's uncle went to the clerk of court in Georgetown a total of (5) five times in an effort to file his Sworn Affidavit in my behalf since Im an indigent pro se inmate and also mental Health patient Due to a Conflict of interest the Clerk Ms. Jennifer M. Lawrence,and also Mr. Keith Moore they refused to file the affidavit.see:record on appeal pages 63-120 of all the Rigmarole that Appellant has experienced the mailroom staff at Lieber Corr. Inst. also witheld Appellants Affidavit see:record on Appeal: see pages: 74-76 Sworn Affidavit of

Appellant.It is clear that Appellant's Constitutional Right's to Access of the Court's has been violated in a number of ways and the Judge abused his discretion in denying Motion for New Trial, Motion for Appointment of Counsel,Motion for expenditure of funds for Private Investigative & Expert Funds/witnesses,and Arrest of Judgment Motion,And finally the Court/Clerk's office sent Appellant a copy of order Denying Motion for a reconsideration on October 11,2012 see: Record on Appeal pages 126-150.Its Clear by the record See:R.on Appeal pages 1-150 as a Whole before it will be fully clear how Appellant has been denied Equal Protection and Due Process under the United States Constitution Amend.XIV § 1 . The Constitution was made for all persons regardless of whether I'm a Mental Health ,Indigent inmate with no Funds to hire an Attorney or a Private Investigator.Thats why the Constitution was made to protect all persons Equal.The Record really speaks for itself.I should be Granted an Evidentiary Hearing in the Court of General Sessions for oral Arguments after I have been Granted competent Legal Counsel to be Appointed to represent me for the Hearing,thats how I have been Prejudiced to the extent that Abuse of Discretion, amounting to an error of law.As the Courts rulings was prejudicial and a Denial of Appellants Access of the Courts and a Denial of Due Process and Equal Protection of Law that should be afforded to all.And after Private Investigator been appointed.

DISCUSSION

A motion made on the ground of after discovered evidence is addressed to the sound discretion of the trial court,and a denial of the motion will not be overturned on appeal unless an abuse of discretion amounting to an error of Law is sworn.See: Bettis V. Busbee,283 S.C. 502,323 S.E. 2d 536 (Ct. App. 1984).

AFTER DISCOVERED EVIDENCE:In order to be entitled to a new trial on the ground of after discovered evidence,the movant is required to demonstrate that the evidence:

1.) is such that it will probably change the result if a new trial is granted;

2.) was discovered after trial;

3.) could not have been discovered before trial by exercise of due diligence;

4.) is material to the issue;and

5.) is not impeaching or merely cumulative.

Now Appellant has covered all 5 prongs because Michael Abner never started admitted to crimes that he committed until after he was arrested for the Murder of Jack Roerink 79,in the state of Kentucky See:Record on appeal pg.22-24.

Appellant submits that the letter he wrote to his mother and the admitting that he paid Appellants 2 alleged victims to kill Appellant See:Sworn Affidavit of Rondie J. Ward record on appeal pg.70-71;and97-103 It is clear that an Evidentiary hearing should have been granted as a matter of law.

Abate v. Abate, 377 S.C. 548 (App. 2008),660 S.E.2d 515

APEAL AND ERROR 946

The term "abuse of discretion" does not reflect negatively on the trial court:rather,it merely indicates the appellate court believes an error of law occured in the circumstances at hand.

Burroughs V. Worsham,574 S.E. 2d 215,352 S.C. 382
Dearybury V. Dearybury,569 S.E. 2d 367,351 S.C. 278
Clark V. Cantrell,529 S.E. 2d 528,339 S.C. 369
Fontaine V. Peitz,354 S.E. 2d 565,291 S.C. 536
Stewart V. Floyd,265 S.E. 2d 254,274 S.C. 437
Eubank v. Eubank,555 S.E. 2d 413,347 S.C. 367
Hill V. Dotts,547 S.E. 2d 894,345 S.C. 304
State V. Commander,396 S.C. 254,721 S.E. 2d 413 (2011)
State v. Jennings, 394 S.C. 473,477-78,716 S.E. 2d 91,93(2011) (citation omitted)

CONCLUSION

WHEREFORE,based on the foregoing this Court should Grant Appellants Motion For New Trial based on after Discovered evidenc Motion For Appointment of counsel,Motion For expenses,and/or Remand the case back to General Sessions Court for Evidentiary Hearing for Oral Arguments.Or Grant a New Trial this this matter.

Respectfully Submitted,

/S/ Jody Lynn Ward, #300644

Jody Lynn Ward,#300644
Appellant Pro-Se

Petitioner 439 Copy 1

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	IN THE COURT OF GENERAL SESSIONS FOR THE FIFTEENTH JUDICIAL CIRCUIT
JODY LYNN WARD, Petitioner, vs. STATE OF SOUTH CAROLINA Respondent.	INDICTMENT CASE No: 03-GS-22-1030 & 1031 MOTION FOR NEW TRIAL BASED ON AFTER DISCOVERED EVIDENCE Pursuant to: SCRCrimp Rule 29(b)

FILED
GEORGETOWN COUNTY, S.C.
2012 MAY 16 PM 2:42
ALMA Y. WHITE
CLERK OF COURT

The above named Petitioner, moves before this Court for a Motion for a New Trial Based on After-Discovered Evidence pursuant to South Carolina Rules Criminal Procedure Rule 29(b).

JURISDICTION

AFTER DISCOVERED EVIDENCE: In order to be entitled to a new trial on the ground of after discovered evidence, the movant is required to demonstrate that the evidence:

(1). is such that it will probably change the result if a new trial is granted;

(2). was discovered after trial;

(3). could not have been discovered before trial by exercise of due diligence;

(4). is material to the issue; and

(5). is not impeaching or merely cumulative.

See also: SCRCrimP Rule 29(b) - POST TRIAL MOTIONS:

(b) New Trials Based on After - Discovered Evidence.

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PROCEDURAL HISTORY OF THE CASE

Petitioner (Jody Lynn Ward) was indicted in July 2003 in Georgetown County for the alleged murders of Wilford Brown and Elton Rutledge, Jr.

Petitioner proceeded to trial by a jury and Judge on March 15-18, 2004. The jury ultimately convicted Petitioner as indicted and the Honorable Paula H. Thomas sentenced Petitioner to two-2 concurrent life sentences. A timely notice of appeal was filed and the appeal was reviewed pursuant to Anders vs. California in which the Court of Appeals affirmed the sentences and convictions January 26, 2007 (2007-UP-048). A timely rehearing was filed and rehearing was denied March 22, 2007. Subsequently thereafter Petitioner filed petition for Writ of Certiorari. The petition for certiorari was withdrawn by Petitioner June 29, 2007 and the remittitur was thereafter handed down the the circuit court. Petitioner filed his first application for Post Conviction Relief ("PCR") July 11, 2007. An evidentiary hearing was convened May 1, 2008. By way of written Order the Honorable Judge John denied the application.

On May 27, 2008, Petitioner submitted a timely Rule 59(e), SCRCP, motion to alter/amend judgement. August 6, 2008, Judge John denied the Rule 59(e) motion. A timely notice of appeal was filed and Petitioner for Writ of Certiorari August 20, 2009 and the remittitur was handed down September 8, 2009.

Petitioner filed his second PCR application July 13, 2009 based on "new rule" of law, while his first PCR was currently

being revieved on certiorari. Respondent made a Return and Motion to dismiss. A Conditional Order of Dismissal was issued and Petitioner made his timely opposition to the dispositive pleading. January 13, 2010 a final order was issued granting the Respondents motion to dismiss.

A timely notice of appeal was filed in this Court that was ultimately denied and dismissed. The remittitur was handed down about April 1, 2010.

Petitioner filed a third PCR application May 4, 2010 based on a "new rule" of law. The Respondent filed a Return and Motion to dismiss June 1, 2010. Petitioner lodged a timely opposition to the Respondent's dispositive pleading June 14, 2010. A Conditional order was issued and Petitioner lodged a timely opposition to the Conditional Order. A final Order was issued granting the Respondent's motion on July 20, 2010. A timely notice of appeal was filed, accompanied with a pro-se petition August 18, 2010. Petitioner filed a Reply brief. certiorari was ultimately denied August 18, 2011.

Petitioner filed a Notice of Petition for Original Jurisdiction; Petition for Original Jurisdiction; Petition for Writ of habeas Corpus in South Carolina Supreme Court on October 31, 2011.

It was ultimately denied on November 16, 2011; to fully exhaust all State remedies. Petitioner herein files his motion for New trial Based On After-Discovered Evidence herein.

FACTS AND ISSUE

Petitioner herein is informed and believes in good faith that Michael Andrew Abner payed "Murder For Hire" to his alleged victims that Petitioner was convicted for murdering by trial jury.

Petitioner directs the Court herein to what's been marked as Fortior Exhibit A - Letter written to Lynn Ward Petitioner's mother from Michael Andrew Abner. By reading the letter it is in fact evidence of After-Discovered Evidence that Petitioners trial jury never heard and it will probably change the results if a new trial is granted; was discovered on or about October 2011 therefore this is after Petitioner's 2004 trial, which could not have been discovered before trial by exercise of due diligence, see: Fortior Exhibit B- Michael Andrew Abner is a serial killer and never started admitting to any crimes he committed until whenever his killed his last victim on or about January 12, 2010 where he admitted to killing (2) two other victims more than (20) twenty years ago, in the State of Kentucky. see: Fortior Exhibit C- where Petitioner was treated at Georgetown Memorial Hospital for five (5) stab wounds (3) three stab wounds under left armpit on side; (1) stab wound to left elbow; (1) one stab wound between left index and middle finger that was treated with stitches and was inflicted by Michael Andrew Abner, see: Fortior Exhibit D- incident report.

Fortior Exhibit E- is proffer testimony of witnesses that will

testify at the hearing of this case herein. (2) witnesses being Rondie J. Ward and carol S. Ward who Michael Abner called on the telephone and admitted to paying Petitioner (2) alleged victims "Murder for Hire". Therefore is material to the issue herein and is not impeaching or merely cumulative.

Petitioner submits that he is entitled to a hearing as a matter of law.

See: Fortier Exhibit F- Affidavit Ashton J. Ward

The After-Discovered Evidence must reflect upon the defendant's innocence. Generally, A motion for a New Trial should be considered when New Evidence is Discovered; or when New Evidence is discovered after the completion of State PCR, see: Simpson v. Moore, 627 S.E.2d 701, 708 (S.C. 2006). In this case at hand Petitioner has exhausted a trial by Jury in 2004; and all State remedies; PCR was held May 1st, 2008. This New After-Discovered Evidence was not discovered until well after 2008.

The Petitioner bares the burden of proof and must satisfy each element for the Court to grant the motion, see: Hayden v. State, 299 S.E.2d 854, 855 (S.C. 1983). The motion must be filed before the trial court with jurisdiction over the conviction, see: S.C.R. Crim.P. 29.

The provisions of Rule 29(b) place no time limitations on a motion for a New trial based on After-Discovered Evidence. See: State v. Spann, 513 S.E.2d 98, 100 (S.C.1998), (Granting motion

for New Trial where New Evidence was discovered eighteen years after the original trial)but does require that it be filed within a reasonable time after discovery of the Evidence. See: Town of Hilton Head Is. -vs- Godwin, 634 .S.E.2d 59, 61-61 (S.C.Ct.of App.2006).

Petitioner submits that his motion herein is timely. The motion must be supported by affidavits and, if available other relevant evidence. The moving party must also submit a personal affidavit supporting the motion; that he could not have discovered it by the exercise of due diligence. See: State v. DeAngelis, 182 S.E.2d 732, 735 (S.C.1971), see also hereto attached Petitioners Affidavit. The trial Judge has broad discretion to either grant or deny the motion, and his decision will not be reversed on appeal unless the defendant can show that it meets the onerous "abuse of discretion" standard, see: State v. Euen, 250 S.E.2d 116, 118 (S.C.1978); State v. Pierce, 207 S.E.2d 414,417 (S.C.1974).

Therefore Petitioner respectfully ask this Court for counsel to be appointed due to his indigence and respectfully ask for a hearing in the Matter to resolve the issue here at hand.

DISCUSSION

AFTER DISCOVERED EVIDENCE: In order to be entitled to a new trial on the ground of after discovered evidence, the movant is required to demonstrate that the evidence:

(1). is such that it will probably change the result if a new trial is granted.

(2). was discovered after trial.

(3). could not have been discovered before trial by exercise of due diligence.

(4). is material to the issue; and

(5). is not impeaching or merely cumulative.

see: State v. Allen, 276 S.C. 412, 279 S.E.2d 365 (1981);
State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979);
State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993);
State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct.App.1995);
State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998);
State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998);
State v. Hill, 360 S.C. 13, 598 S.E.2d 732 (Ct.App.2004).

A motion made on the ground of after-discovered evidence is addressed to the sound discretion of the trial court, and a denial of the motion will not be overturned on appeal unless an abuse of discretion amounting to an error of law is shown. Bettis v. Bushee, 283 S.C. 502, 323 S.E2d 536 (Ct.App.1984).

It is the better practice for a trial judge to specify the grounds upon which he denies a motion for new trial based on after discovered evidence. State v. Pierce, 263 S.C. 23, 207 S.E.2d 414 (1974).

Although "due diligence" for the purposes of this motion has not been fully defined in South Carolina, in one recent case the Court applied some limitation to the concept. In State v. Spann, Spann was convicted of the 1981 Sexual assault, robbery, and murder of Melvin Neill, as well as the burglary of her home, and received a death sentence. See: State v. Spann, 279 S.C. 399, 308 S.E.2d 518 (1983). Between July and November 1981, within a twelve mile radius in York County, Mrs. Neill and two other women were killed in a similar fashion. After Spann was convicted, another person, Johnny Hullett, was convicted of one of the other killings.

Spann filed a new trial motion based on after-discovered evidence. At the new trial hearing, Spann presented the testimony of three expert witnesses: a forensic pathologist (Dr.Spitz); a forensic psychiatrist (Dr. Taney); and an expert in crime scene analysis and criminal personality profiling (Mr.Ressler).

Dr. Spitz testified that all three women were strangled in a unique way, a method he had never before observed in forty three years of practice. He testified to other factual similarities between the crimes, and opined that one perpetrator was responsible for all three murders. Dr. Taney testified the three murders were committed by a single individual, a sexual sadistic murderer. He testified to the psychiatric characteristics of

these types of killers, and opind based upon his examination of the appellant that it was "impossible" that Spann had committed these offenses. Dr. Taney also testified that sexual sadistic killers are almost always psychiatrically disturbed white males. Spann was a black man with no history of psychiatric problems; Hullett was a white male with a long psychiatric history. Finally, Mr. Ressler profiled the killer of these three women as a white male in his mid-twenties to mid-thirties with a history of mental illness, who was either single or had a dysfunctional marriage, a person with bizarre fantasies, a history of childhood abuse, and knowledge of the area. Spann did not fit this profile.

The circuit Court Judge found the expert testimony "thought provoking" and "intriguing" and specifically found that Mr.Resssler's testimony "raise[d] a reasonable inference as to [Spann's] innocence." The Judge rejected the testimony of all three experts as grounds for the granting of a new trial, however, finding the evidence and science upon which their opinions were based were all in existence at the time of Spann's trial, and thus could have been discovered by his attorney's with the exercise of due diligence. The Supreme Court disagreed with the trial judge. The Court stated, "for the attorney's to have pursued these types of experts, they would first have needed to recognized the similarities between the crimes, similarities not apparent at the time even to the experts (i.e. law enforcement investigators and the pathologist) involved in all three cases. We hold that the due diligence standard imposed upon trial

attorney's can not be said to be this high". The Supreme Court held "the circuit court judge committed an error of law, under the unusual facts of this case, in holding that the newly discovered expert's evidence could have been discovered by the exercise of due diligence". The Court reversed the trial Court's ruling and remanded for further proceedings.

NOTE: A motion to reopen a case for additional testimony will be denied where counsel does not proffer the testimony and does not show that it would make a difference in out come of the case. Wright v. Strickland, 306 S.C. 187, 410 S.E.2d 596 (Ct.App.1991).

Petitioner submits that under the unusual facts of his case that he is entitled to a new trial. He submits that he meets all five criteria to be entitled to a new trial on the grounds of after discovered evidence.

Petitioner herein submits Fortior Exhibits which will demonstrate that the new evidence meets the requested criteria that was explained in his facts and issues of this motion. Petitioner further submits that the hereto attached proffer of the testimony of the witnesses that he wishes to call at the new trial hearing of this motion herein.

CONCLUSION

WHEREFORE, based on the foregoing Motion for a New Trial should issue in the instant matter or in the alternative this Court should fashion any available equitable relief warranted.

Respectfully Submitted,

Jody Lynn Ward, #300644

Jody Lynn Ward, 300644
Lieber Correctional Inst.
P.O. Box 205
Ridgeville, S.C. 29472

STATE OF SOUTH CAROLINA)	THE COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN)	CASE NUMBERS: 2003-GS-22-1030
	2003-GS-22-1031
State of South Carolina)	
)	
vs.)	
)	ORDER DENYING
Jody Lynn Ward,)	MOTION FOR NEW TRIAL,
)	MOTION FOR APPOINTMENT OF COUNSEL
Defendant.)	AND MOTION FOR EXPENSES
)	

Before the court are the defendant's Motion for New Trial based upon after discovered evidence, Motion for Appointment of Counsel and Motion for Investigative and Expert Expenses.[1]

Defendant argues that he is entitled to a new trial based upon a purported letter from another person claiming to have hired the victims in this case to kill the defendant. However, the letter referenced by the defendant in his motion and attached as an exhibit thereto makes no such admission and the defendant has not presented anything to corroborate such an admission.

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. *State v. Needs* (S.C. 1998) 333 S.C. 134, 508 S.E.2d 857, rehearing denied. In the case at hand, the defendant 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, the defendant's motion for a new trial should be denied.

[1] These motions are based upon the contents of the defendant's motions without oral arguments.

Since the defendant's motion for a new trial is denied, his motions for appointment of counsel and funds for investigative and expert services are moot.

NOW, THEREFORE, based upon the above, it is hereby

ORDERED, that the defendant's Motion for a New Trial is DENIED; it is further

ORDERED, that the defendant's Motion for Appointment of Counsel is MOOT; it is further

ORDERED, that the defendant's Motion for Funds for Investigative and Expert Services is MOOT.

AND IT IS SO ORDERED.

Benjamin H. Culbertson
Administrative Judge
Court of General Sessions, 15th Judicial Circuit

July 31, 2012
Georgetown, SC

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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of General Sessions

2012-213222

The State of South Carolina,.....Respondent,

v.

Jody Lynn Ward. #300644,.....Appellant.

NOTICE OF APPEARANCE

YOU WILL PLEASE TAKE NOTICE that the undersigned hereby gives notice of its appearance as attorney for the Appellant for the limited purpose of the Motion to Suspend Appeal and For Leave to File Motion For a New Trial Based on After Discovered Evidence.

LAW OFFICE OF NATASHA M. HANNA, P.C.

Natasha M. Hanna, Esq.
Attorney for the Appellant
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9-17, 2014
Myrtle Beach, SC

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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of General Sessions

2012-213222

The State of South Carolina,.....Respondent,

v.

Jody Lynn Ward. #300644,.....Appellant.

NOTICE OF MOTION AND MOTION TO SUSPEND APPEAL AND FOR LEAVE TO FILE MOTION FOR A NEW TRIAL BASED ON AFTER DISCOVERED EVIDENCE

Pursuant to Rule 240 of the South Carolina Appellate Court Rules and Rule 29(b) of the South Carolina Rules of Criminal Procedure, the undersigned attorney, counsel for Appellant, Jody Lynn Ward, files this motion to stay or suspend the appeal currently pending in the South Carolina Court of Appeals and for leave to file a new Motion For a New Trial Based on After-Discovered Evidence. Since filing the pending appeal, new evidence regarding juror bias and concealment was discovered. Any motion based on this after-discovered evidence must be filed within one (1) year of discovery. S.C. R. Crim. P. 29(b). The Appellant received information regarding one of the juror's concealment in October of 2013. Appellant has attached a copy of the Proposed new Motion as "Exhibit A".

Therefore, Appellant respectfully requests that this Court stay the current appeal and

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request leave from this Court to file the new Motion for a New Trial Based on After Discovered Evidence.

LAW OFFICE OF NATASHA M. HANNA, P.C.

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Attorney for the Appellant
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Fax: 843-839-8011

9-19, 2014
Myrtle Beach, SC

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Exhibit A

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STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	))))	IN THE COURT OF GENERAL SESSIONS FOR THE FIFTEENTH JUDICIAL CIRCUIT
THE STATE OF SOUTH CAROLINA, VS. **JODY LYNN WARD,** Defendant	)))))))))	NOTICE OF MOTION AND MOTION FOR A NEW TRIAL BASED ON AFTER DISCOVERED EVIDENCE

COMES NOW THE DEFENDANT, by and through the undersigned counsel, moving this Court for an Order granting the Defendant a new trial in the above-caption matter. The Defendant moves for a new trial pursuant to South Carolina Rule of Criminal Procedure 29(b). The grounds for this motion are that Defendant has discovered the following evidence related to juror bias that was not discovered and could not have been discovered through the exercise of due diligence at the time of trial:

1) Juror Number 19, Marissa Cooper, was, at the time of trial, related by marriage to one of the state's witnesses, Kevin Cooper and failed to disclose this relationship to the Court during voir dire.

2) Juror Number 39, an alternate, Bernadette Gardner, knew the Defendant prior ro trial as she went to school with his brother and failed to disclose this relationship to the Court during voir dire.

3) Juror Number 48, Judy Harper, was related by marriage to Tony Harper, a witness listed by the Defense, and failed to disclose this relationship to the Court during voir dire.

4) The foreman of the grand jury that indicted the Defendant, Scott McKenzie, had knowledge of the incident before the grand jury proceedings. Mr. McKenzie was the tow truck driver that pulled the vehicle that was alleged to be the scene of the shooting out of Dawhoo Lake.

A defendant has the right to a trial by a competent and impartial jury. Smith v. State, 375 S.C. 507, 518, 654 S.E.2d 523, 529 (2007). In order to fully safeguard this protection, a jury must render a verdict free of outside influences of any kind. Id. When a juror conceals information inquired into during voir dire, a new trial is required when the juror intentionally concealed the information and that information would have supported a challenge for cause or would have been a material fact in the use of the party's peremptory challenges. Id.

When a juror fails to disclose a relationship without justification, it may be inferred that the juror is not impartial. Id. Determining whether a juror' s failure to respond to voir dire is intentional is a fact intensive determination to be made on a case-by-case basis. Id. Intentional concealment occurs when the question on voir dire is reasonable comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. Id. In cases where a juror's partiality is questioned after trial, it is appropriate to conduct a hearing in which the defendant has the opportunity to prove actual juror bias. State v. Bryant, 354 S.C. 390 (2003).

In this case, three jurors intentionally failed to disclose a relationship to the Defendant or witness. Marissa Cooper failed to disclose a relationship the a State witness. The Solicitor, during voir dire, listed Kevin Cooper as a potential witness. Juror Number Nineteen (19), Marissa Cooper, was asked along with the other jurors, whether she was related by blood or marriage to any of the potential witnesses. Transcript p. 254. At no point did she respond to this question. Kevin Cooper testified for the State against the Defendant. Transcript p. 452. Marissa Cooper was in fact, at the time, related by marriage to Kevin Cooper. The juror, Marissa Cooper, was married to James D. Cooper. James D. Cooper's grandfather was Walter Cooper. The witness, Kevin Cooper's, grandfather was Walter Cooper's brother. Therefore, Marissa Cooper and Kevin Cooper were second cousins by marriage. Marissa Cooper intentionally concealed this relationship. The question on voir dire was reasonably comprehensible but Ms. Cooper failed to respond and disclose her relationship to the witness. This

relationship would have supported a challenge for cause. Marissa Cooper was called and served as a juror at the trial of Jody Ward. Transcript p. 262.

Juror Number thirty nine (39), Bernadette Gardner, went to school with the Defendant's brother. Ms. Gardner had prior knowledge of the Defendant and his family as a result of this connection to the Defendant's brother. The Court asked on voir dire whether any juror was friends or business acquaintances with Mr. Ward. Transcript p. 224. There was no response from any member of the jury. Transcript p. 224. The question was reasonably comprehensive and the answer would have supported a challenge for cause. Therefore, Ms. Gardner intentionally concealed this relationship from the Court. Ms. Gardner was called and served as an alternate juror in the trial of Mr. Ward. Transcript p. 265-66.

Juror Number forty eight (48), Judy Harper, was related by marriage to a witness listed by the Defense, Tony Harper. She failed to disclose this relationship. She, along with the other jurors, were asked in voir dire whether they were related by blood or marriage to any of the potential witnesses. Transcript 255. Tony Harper was listed and read as a potential witness for the defense. Transcript 255. There was no response from the jury. Transcript p. 255. Ms. Harper was called and served as a juror in the trial against Mr. Ward. Transcript p. 258.

Further, an indictment returned by an unbiased grand jury is not be enough to call a trial on the merits of the case. See, Costello v. United States, 350 U.S. 359, 76 S.Ct. 406 (1956). Without a valid indictment, the trial court does not have subject matter jurisdiction to hold a trial against a defendant. S.C. Const. art. I, sec. 11.

In this case, the Grand Jury Foreman had prior knowledge of and participation in the investigation of the incident for which Mr. Ward was indicted. Scott McKenzie worked for Winston Wrecker Service in 2002. Affidavit of Scott McKenzie. Winston Wrecker Services was called by the Georgetown County Sheriff's office in 2002 to assist in pulling a vehicle out of a lake. Affidavit of Scott McKenzie. After pulling the vehicle from the lake, Mr. McKenzie was informed that the car belong to

Jody Ward. This vehicle was testified to at the trial as containing various pieces of physical evidence related to the alleged crime. See transcript, 568-600. Mr. McKenzie also knew Mr. Ward from growing up in the same community. Affidavit of Scott McKenzie. In 2003, Mr. McKenzie served on the Grand Jury in Georgetown County. Affidavit of Scott McKenzie. Both investigating officers, Ernest Hampton and Gary Todd, knew of Mr. McKenzie's involvement in the investigation. Affidavit of Ernest A. Hampton; Affidavit of Gary Todd. Ernest Hampton testified in front of the Grand Jury. Affidavit of Ernest Hampton. Scott McKenzie, the Grand Jury foreman, signed and marked as true-billed the indictment on July 8, 2003.

Mr. McKenzie was not an unbiased grand juror. Not only did he have prior knowledge of the Defendant, he had prior knowledge of the investigation that led to the arrest of the Defendant. He pulled the vehicle out of the lake, A vehicle he was later informed belong to Jody Ward and alleged to be the scene of the shootings. Mr. McKenzie was a biased grand juror and as such the indictment against Mr. Ward was not a valid indictment.

Therefore, Mr. Ward respectfully requests that this Court convene a hearing regarding the concealment of information by members of the jury and grand jury and grant Mr. Ward a new trial.

Respectfully Submitted,

Natasha M. Hanna, Esq., Attorney for the Defendant
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Fax: [843] 839-8011

Myrtle Beach, South Carolina

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of General Sessions

2012-213222

The State of South Carolina,.....Respondent,

v.

Jody Lynn Ward. #300644,.....Appellant.

AFFIDAVIT OF SERVICE

Mallary W. Hitchcock certifies that she is an employee of the Law Office of Natasha M. Hanna, P.C., attorneys for the Appellant, and that she deposited in the United States Mail, with adequate postage affixed thereto, a copy of the **Notice of Appearance** and **Notice of Motion and Motion to Suspend Appeal and For Leave to File Motion for a New Trial Based on After Discovered Evidence** in the above-captioned matter, addressed to the following on this 19th day of September, 2014.

Addressee:

Office of the South Carolina Attorney General
Salley W. Elliot, Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

Mallary W. Hitchcock

SWORN to before me this 19th day
of September, 2014

Notary Public for South Carolina
My Commission Expires: 2/6/17

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The South Carolina Court of Appeals

The State, Respondent,

v.

Jody Lynn Ward, Appellant.

Appellate Case No. 2012-213222

ORDER

Appellant's Motion to Suspend Appeal and For Leave to File Motion for a New Trial Based on After Discovered Evidence is denied. We note that pursuant to Rule 205, SCACR, "Nothing in these Rules shall prohibit the lower court . . . from proceeding with matters not affected by the appeal."

J.

J.

J.

Columbia, South Carolina

cc:
Jody Ward, 300644
W. Edgar Salter, III, Esquire
Alan McCrory Wilson, Esquire

FILED
Oct. 8, 2014

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John W. McIntosh, Esquire
Donald J. Zelenka, Esquire
Jimmy A. Richardson, II, Esquire
Natasha M. Hanna, Esquire

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jody Lynn Ward, Appellant.

Appellate Case No. 2012-213222

Appeal From Georgetown County
Benjamin H. Culbertson, Circuit Court Judge

Unpublished Opinion No. 2014-UP-402
Submitted September 1, 2014 – Filed November 12, 2014

AFFIRMED

Jody Lynn Ward, pro se.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General W. Edgar Salter, III, all of Columbia; and Solicitor Jimmy A. Richardson, II, of Conway, for Respondent.

PER CURIAM: Jody Lynn Ward appeals the trial court's orders denying his motion for a new trial based on after-discovered evidence, arguing (1) the trial

court should have granted an evidentiary hearing, (2) the trial court abused its discretion in denying the motion because he met the necessary requirements to prove after-discovered evidence, and (3) he was denied due process. Ward also appeals the denial of his motions for appointment of counsel, investigative expenses, and arrest of judgment. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in not conducting a hearing: Rule 29(a), SCRCrimP (providing a post-trial motion "may, in the discretion of the court, be determined on briefs filed by the parties without oral argument").

2. As to whether the trial court abused its discretion in denying the motion for a new trial based on after-discovered evidence: *State v. Harris*, 391 S.C. 539, 544-45, 706 S.E.2d 526, 529 (Ct. App. 2011) ("A motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial [court]."); *id.* at 545, 706 S.E2d at 529 ("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.").

3. As to whether the trial court erred in denying his motion for a new trial based on a violation of due process because he was prevented from filing an affidavit: *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) (stating issues must be raised to and ruled on by the trial court to be preserved for appellate review); *State v. Hamilton*, 333 S.C. 642, 648, 511 S.E.2d 94, 97 (Ct. App. 1999) ("[I]t is improper to argue new matter in a motion for reconsideration.").

4. As to whether the trial court erred in denying his motion for appointment of counsel and investigative expenses: *State v. Clinkscales*, 318 S.C. 513, 515, 458 S.E.2d 548, 549 (1995) (holding the appellant was not entitled to appointment of counsel to argue for new trial based on after-discovered evidence when this motion was not at a critical stage and the record did not contain after-discovered evidence that would support a new trial).

5. As to whether the trial court erred in denying his motion for arrest of judgment: *State v. Follin*, 352 S.C. 235, 259, 573 S.E.2d 812, 824 (Ct. App. 2002) ("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.").

AFFIRMED.[1]

WILLIAMS, GEATHERS, and McDONALD, JJ., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

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STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)
)

IN THE COURT OF GENERAL SESSIONS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

THE STATE OF SOUTH CAROLINA,)
Plaintiff,)
)
VS.)
)
JODY LYNN WARD,)
Defendant.)
)
)

NOTICE OF MOTION AND MOTION FOR A NEW TRIAL BASED ON AFTER DISCOVERED EVIDENCE

COMES NOW THE DEFENDANT, by and through the undersigned counsel, moving this Court for an Order granting the Defendant a new trial in the above-caption matter. The Defendant moves for a new trial pursuant to South Carolina Rule of Criminal Procedure 29(b). The grounds for this motion are that Defendant has discovered the following evidence related to juror bias that was not discovered and could not have been discovered through the exercise of due diligence at the time of trial:

1) Juror Number 19, Marissa Cooper, was, at the time of trial, related by marriage to one of the state's witnesses, Kevin Cooper, and failed to disclose this relationship to the Court during voir dire.

2) Juror Number 39, an alternate, Bernadette Gardner, knew the Defendant prior to trial as she went to school with his brother and failed to disclose this relationship to the Court during voir dire.

3) The foreman of the grand jury that indicted the Defendant, Scott McKenzie, had knowledge of the incident before the grand jury proceedings. Mr. McKenzie was the tow truck driver that pulled the vehicle, that was alleged to be at the scene of the shooting, out of Dawhoo Lake.

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disclose this relationship. The question on voir dire was reasonably comprehensible but Ms. Cooper failed to respond and disclose her relationship to the witness. This relationship would have supported a challenge for cause. Marissa Cooper was called and served as a juror at the trial of Jody Ward. Transcript p. 262.

Juror Number thirty nine (39), Bernadette Gardner, went to school with the Defendant's brother. Ms. Gardner had prior knowledge of the Defendant and his family as a result of this connection to the Defendant's brother. The Court asked on voir dire whether any juror was friends or business acquaintances with Mr. Ward. Transcript p. 224. There was no response from any member of the jury. Transcript p. 224. The question was reasonably comprehensive and the answer would have supported a challenge for cause. Therefore, Ms. Gardner concealed this relationship from the Court. Ms. Gardner was called and served as an alternate juror in the trial of Mr. Ward. Transcript p. 265-66.

B. DEFENDANT SHOULD BE GRANTED A NEW TRIAL AS THE GRAND JUROR FOREMAN HAD PRIOR KNOWLEDGE AND PARTICIPATED IN THE INVESTIGATION.

Further, an indictment returned by an unbiased grand jury is not enough to call a trial on the merits of the case. See, Costello v. United States, 350 U.S. 359, 76 S.Ct. 406 (1956). Without a valid indictment, the trial court does not have subject matter jurisdiction to hold a trial against a defendant. S.C. Const. art. I, sec. 11.

In this case, the Grand Jury Foreman, Scott McKenzie, had prior knowledge of and participation in the investigation of the incident for which Mr. Ward was indicted. McKenzie worked for Winston Wrecker Service in 2002. Affidavit of Scott McKenzie. Winston Wrecker Services was called by the Georgetown County Sheriff's office in 2002 to assist in pulling a vehicle out of a lake that was alleged to be at the scene of the shooting for which Ward was indicted. Affidavit of Scott McKenzie. After pulling the vehicle from the lake, McKenzie was informed that the car belonged to Jody Ward. Affidavit

of Scott McKenzie. SLED investigators testified at the trial that the vehicle contained various pieces of physical evidence related to the alleged crime. See transcript, 568-600.

McKenzie also knew Mr. Ward from growing up in the same community. Affidavit of Scott McKenzie. Later in 2003, McKenzie served on the Grand Jury in Georgetown County. Affidavit of Scott McKenzie. Both investigating officers, Ernest Hampton and Gary Todd, knew of McKenzie's involvement in the investigation but did not disclose that he pulled the vehicle from the lake. Affidavit of Ernest A. Hampton; Affidavit of Gary Todd. Ernest Hampton testified in front of the Grand Jury. Affidavit of Ernest Hampton. Scott McKenzie, the Grand Jury foreman, signed and marked as true-billed the indictment on July 8, 2003.

McKenzie was not an unbiased grand juror. Not only did he have prior knowledge of the Defendant and the crime, but was a part of the investion that led to the arrest of the Defendant. He pulled the vehicle out of the lake. A vehicle he was later informed belong to Jody Ward and alleged to be at the scene of the shootings. McKenzie was a biased grand juror and ,as such, the indictment against Mr. Ward was not a valid indictment.

Therefore, Mr. Ward respectfully requests that this Court convene a hearing regarding the non-disclosure of information by members of the jury and grand jury and grant Mr. Ward a new trial.

Respectfully Submitted,

Natasha M. Hanna, Esq., Attorney for the Defendant
Law Office of Natasha M. Hanna, P.C.
4717 Jenn Drive, Ste. 102
Myrtle Beach, SC 29577
Phone: [843] 839-8002
Fax: [843] 839-8011

Myrtle Beach, South Carolina

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STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)
)

IN THE COURT OF GENERAL SESSIONS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

THE STATE OF SOUTH CAROLINA,)
Plaintiff,)
)
VS.)
)
JODY LYNN WARD,)
Defendant.)
)
)

CERTIFICATE OF SERVICE

PERSONALLY APPEARED before me, the undersigned Mallary W. Hitchcock who duly states that she is an employee in the Law Office of Natasha M. Hanna, P.C. and that she deposited in the United States Mail, with adequate postage affixed thereto, a copy of the **Notice of Motion and Motion for a New Trial Based on After Discovered Evidence** in the above-captioned matter. addressed to the following on this 28th day of October, 2014.

Addressee:

Georgetown County Solicitor's Office
PO Box 1688
Georgetown, SC 29442

FILED
GEORGETOWN COUNTY, S.C.
2014 OCT 30 PM 2:16
ALMA Y. WHITE
CLERK OF COURT

Mallary W. Hitchcock

SWORN to before me this 28th day
of October, 2014

Notary Public for South Carolina
My Commission Expires: 2/6/17

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STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN
IN THE COURT OF GENERAL SESSIONS

ORDER IN A CRIMINAL CASE
WARRANT(S):
INDICTMENT(S): 2003-GS-22-1030
2003-GS-22-1031

State of South Carolina

Jody Lynn Ward, #300644
DEFENDANT(S)

This form order submitted by:	Benjamin H. Culbertson Administrative Judge, General Sessions	Attorney for : ☐ State ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE

☐ **DECISION BY THE COURT AFTER HEARING.** This action came to a hearing before the court. The issues have been heard and a decision rendered. ☐ See below for additional information.

☐ **DECISION BY THE COURT AFTER STATUS CONFERENCE.** This case came for a status conference before the court. The status of this case and pending issues in this case were discussed and a decision rendered. ☐ See below for additional information.

☑ MOTION: **Defendant's Motion for New Trial**

☐ GRANTED ☑ DENIED ☐ CONTINUED ☐ WITHDRAWN

☐ WITHDRAWN BY MOVING PARTY: _____
Signature of Moving Party

☑ OTHER: **This motion is decided on the defendant's brief and affidavits in support of the motion without oral arguments.**

IT IS ORDERED AND ADJUDGED: ☐ See Order of the Court below ☐ See attached order
☐ Formal Order to follow; to be prepared by: ☐ State ☐ Defendant ☐ Other: _____

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk :

FILED
GEORGETOWN COUNTY, S.C.
2015 SEP 11 AM 8:48
ALICIA Y. WHITE
CLERK OF COURT

M Benjamin H Culbertson

Circuit Court Judge

2148
Judge Code

Sept. 4, 2015
Date

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For Clerk of Court Office Use Only

This judgment was entered on the 11th day of Sept. , 2015 and a copy emailed placed in the appropriate attorney's box on this 11th day of Sept. , 2015 mailed first class or to parties (when appearing pro se) as follows: to attorneys of record or

Alicia Richardson
Jimmy Richardson

ATTORNEY(S) FOR THE STATE

Pro Se

ATTORNEY(S) FOR THE DEFENDANT(S)

Jessica M. Spratt, Deputy
CLERK OF COURT

Court Reporter: None

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF GENERAL SESSIONS**
COUNTY OF GEORGETOWN	)	**2003-GS-22-01031**
STATE OF SOUTH CAROLINA,	)	
Plaintiff,	)	**Transcript of Record**
vs.	)	
JODY WARD,	)	December 10, 2015
Defendant.	)	

B E F O R E:

Honorable Steven H. John
Georgetown County Courthouse
Georgetown, South Carolina

A P P E A R A N C E S:

Scott R. Hixson, Esquire
Attorney for Plaintiff

Tristan M. Shaffer, Esquire
Natasha M. Hanna, Esquire
Attorney for Defendant

TAKEN BY:

Dixie C. Eubank
Retired Circuit Court Reporter

PREPARED BY:

Kay H. Richardson
Circuit Court Reporter

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EXHIBITS

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S2	Certificate of Service (with attachments)		13

DECEMBER 10, 2015

THE COURT: All right. Solicitor?

MR. HIXSON: Yes, Your Honor. Standing before you is Jody Ward. I believe he is here on two post-trial motions. Those indictments 2003-GS-22-1031 and 2003-GS-22-1030. Both of those were indictments for murder. I believe there is -- the defendant was convicted of those on a trial back March 18th of 2014. I believe we are before the Court today on a post-trial status.

There are substantial procedural history behind that, if Your Honor wants to hear that, I'll read that into the record at the appropriate time. There's been substantial -- all direct appeals have been exhausted. The state court remedies were exhausted back, I believe, 2007, around there. The direct appeal, two post-conviction relief, I believe those were exhausted. His action last action filed, he filed for writ of certiorari to the Supreme Court; that was denied and a remittitur was sent back. Then there's been, I think -- and Mr. Ward has filed, I think, four successive motions for a new trial based on after-discovered evidence.

Judge Culbertson -- the most recent action by the Court was Judge Culbertson denied that back in 2012. I believe Mr. Ward at that time then filed a -- an appeal to the South Carolina Court of Appeals, appealing Judge Culbertson's denial of that motion. The opinion of that is in fact, if Your Honor

cares, it's in the Court's file as well. That was denied. Subsequently, back in 2014, in September, subsequent to that in October of 2014, I believe Ms. Hanna was retained and filed a subsequent motion for a new trial and after-discovered evidence. I believe that motion is what prompted us to be before the Court today with a rash of filings and affidavits from there. Then, subsequent to the hearing on that, I believe, as Mr. Shaffer filed a motion -- I guess a motion to be relieved by Ms. Hanna. And Mr. Shaffer -- now that's turned into a motion to substitute counsel and I believe that's what brings us into the courtroom today, Your Honor.

THE COURT: All right. So, Ms. Hanna, as far as why this Court would have jurisdiction of this matter at all regarding its long history is because of an action you filed on behalf of Mr. Ward; is that correct?

MS. HANNA: Yes, sir, Your Honor; that is correct.

THE COURT: And that action, again, was for ---

MS. HANNA: A motion for new trial based on newly discovered evidence. Mr. Ward had retained two private investigators that, to my knowledge, have recently discovered this new information that the grand jury foreman was the actual tow truck driver who pulled the vehicle out of the way. He had knowledge about it. So, based on that, I agreed to represent Mr. Ward. I filed a motion for new trial. It was scheduled to be heard, actually today. However, prior to that

time, Mr. Ward and I have had some disagreement on how best to proceed at trial. We have respectfully agreed to disagree. I filed a motion to be relieved as counsel. Since that time, Mr. Tristan Shaffer has kindly agreed to step in and represent Mr. Ward. So, I am here today, first, on my motion to be relieved as counsel.

THE COURT: All right. Mr. Shaffer, would you like to comment on that?

MR. SHAFFER: Yes, Your Honor. That is accurate. I have agreed to step back in. I -- this is very recent. I met with Jody before he hired Ms. Hanna, and actually had done a little bit of work and have reviewed his transcript. That was a year and half ago. Quite honestly, I didn't even know a whole lot about it. About two weeks ago, they came to me again and said that they wanted to hire me. I told him that there was no way that I would prepared by the 10th. He said he actually wanted to be pro se. And at that point -- and I went go to speak with him and prepared the motion to allow him to proceed pro se, which is filed, but I'm not counsel of record yet, obviously, Your Honor.

THE COURT: All right, sir.

All right. Mr. Ward, you had retained Ms. Hanna at some point in the past to file a motion for a new trial; is that correct?

MR. WARD: Yes, sir. That's correct.

THE COURT: All right, sir. And she did so?

MR. WARD: Yes, sir.

THE COURT: All right. Now, she has indicated to the Court that there has developed some disagreement, and I'm not asking you to detail y'all's discussions, but there has been apparently some disagreement as to how to proceed or how the matter should be presented to the Court regarding that motion for a new trial; is that a correct assessment of the situation?

MR. WARD: Yes, sir.

THE COURT: All right, sir. And she has filed a motion to be relieved of representation, to be relieved as your counsel in this matter; you're aware of that?

MR. WARD: Yes, sir.

THE COURT: All right, sir. What is your position regarding that?

MR. WARD: I kinda disagree in a way, because my son paid Ms. Hanna -- I'm not gonna say how much money an hour, but she's actually in violation of South Carolina Appellate Court rules ---

THE COURT: Sir, okay, well, I ---

MR. WARD: --- Rules of Professional Conduct.

THE COURT: Sir, sir, that is for another time, another place, another proceeding.

MR. WARD: Okay.

THE COURT: That has nothing to do ---

MR. WARD: I thought it should go on the record.

THE COURT: No, sir. It has nothing to do with this. All right? My question was very simple and straightforward to you. She has filed a motion to be relieved as your counsel in this matter.

MR. WARD: Yes, sir.

THE COURT: Do you agree or disagree with that?

MR. WARD: I agree with it.

THE COURT: You want her to be relieved as your counsel in this matter?

MR. WARD: Yes, sir.

THE COURT: Have you or your representatives communicated with Mr. Shaffer to assist you in this matter?

MR. WARD: Yes, sir, I have.

THE COURT: And are you asking him at this point in time to be your attorney?

MR. WARD: I did. He's gonna be my standby counsel. I was invoking *Faretta v. California*.

THE COURT: All right, sir, if the Court allows it.

MR. WARD: That's right.

THE COURT: All right, sir. Before we get into that, Solicitor, do you have any matters you need to bring to the Court's attention?

MR. HIXSON: Yes, Your Honor. Just to begin with, I have

a case specifically that I wanted to address relating to it. The state's position is it doesn't have any objection relating to Ms. Hanna. Just that Mr. Ward, the defendant, does have counsel. And the standings for that really come out of *Anders* and its progeny, *Anders v. California* progeny, leading up to *State v. Jones*, and I have the case cite and provided the packet to the Court and also to defense counsel. And mainly, this is important to remember the procedural posture that we're in is post-appellate, post-habeas relief, successive post PCR applications, post multiple motions for a new trial procedural status. So, we're not in a pretrial status as it relates to an absolute right of counsel to have the ability to go forward pro se. There becomes a virgin interest where the Courts and the state's interest and the orderly and efficient disposition of these charges increase as the defendant's right to do whatever he wants in his defense starts to decrease. That's why the procedural posture on the record is somewhat important to realize he does not have an absolute right to go pro so. That would be -- the state's position -- we advocate that, it would be under the Court's discretion on whether you believe it's in the interest of justice to do that. And I would cite *State v. Jones* for that proposition. A quote from that indicates -- the Supreme Court of Pennsylvania indicated that when faced with a situation relating to should a client be able to go pro se and file repetitive applications for

relief, after the *Anders* initial appeal was going forward. And that Court -- the state court adopted this, is tails shouldn't wag dogs, merely because an appellate believes that the irrelevant is irrelevant is no reason to turn the system on its head and solemnly contemplate the wisdom of a person does not have the sense to be guided by experts and in the area where he himself possessing no expertise. Now, certainly, the defendant is not an average litigant and that he clearly, through his filings, is educated himself and is well versed in that regard. But the holding of the Court basically indicates that there has to be some level -- the orderly disposition of these charges becomes the interest if the Court has to manifest in determining -- and we would assert extending *Faretta* into this post-trial extended litigation, post successive applications. That -- we just want the Court to be aware of that.

THE COURT: All right, sir.

MR. HIXSON: As it relates to the necessity for the Court to make certain findings under *Faretta*, we certainly think the defendant's being able to comprehend and understand the legal issues he faces and things like that. The defendant has filed multiple filings and there are some concern from the state that Mr. Ward understands the nature of self-representation. In that regard, I think I gave to Mr. Shaffer two exhibits that are affidavits filed by Mr. Ward in the past. The first

one is dated August 6th of 2012. In that case, they're titled Affidavit of Jody Ward as the pro se litigant in support of his motion to reconsider, his motion for new trial based on after-discovered evidence and that was an order denying that. On Page 2 of that at the top, Mr. Ward indicates that this is a sworn affidavit that he -- where he resides in a mental health dorm as a mental health patient. And further down there at the bottom, on the bottom, the Oklahoma cite he indicates I'm a mental health patient denied of legal counsel. So, in these filings, Mr. Ward indicated that he wanted legal counsel and his concerns about his ability to understand what was going on and he needed help. The second page of that Exhibit C indicates once again he's applying as a pro se litigator and a mental health patient as well in asking for the assistance of counsel. Subsequent to that would be during the term ---

THE COURT: Could we -- if you don't mind, and I believe you gave a copy to the Court. We'll have that marked by the court reporter as a State's exhibit then.

MR. HIXSON: I have, Your Honor -- Mr. Ward and counsel have all ---

THE COURT: I appreciate that, but we need to have it marked.

MR. HIXSON: Okay.

MR. SHAFFER: Your Honor, the August 6th is marked 1; is

that correct?

THE COURT: The -- it's -- the first page says Exhibit B, Affidavit of Jody Lynn Ward Acting as Pro Se Litigant is using this exhibit to support his motion for reconsideration of the motion for a new trial based on after-discovered evidence, order denying it, and then it's the sworn affidavit of Jody Lynn Ward, two pages, then there's an Exhibit C, and a attachment thereto, South Carolina Department of Corrections Inmate Grievance form. That's the document that's going to be the State's 1.

MR. SHAFFER: Thank you, Your Honor.

STATE'S EXHIBIT NUMBER 1

ADMITTED INTO EVIDENCE

THE COURT: All right, sir. I believe there's another document?

MR. HIXSON: Yes, Your Honor. This would -- this document was notarized and forwarded during the pendency of Ms. Hanna's subsequent motion. Once the appeal, that one was denied, the first -- State's 1 was denied, the subsequent motion, I believe, was October 28th of 2014. So, the second document, Your Honor, entitled -- well, the certificate of service and cover page addressed to Solicitor Richardson, Ms. Hanna, as well as Office of Disciplinary Counsel, that's the third addressee. On Page 9 of that filing, Your Honor, and that filing was July 1st of 2015, so three years later after

that. On Page 9 of that, at the top of the page, on the -- underlined on 6, referring to his prior counsel, Ms. Kneece, he indicates that he was a mentally ill patient, that to him being a mentally ill patient being incapacitated, and he uses the language incapacitated. As well as on Page 10, at the bottom of it, Mr. Ward is concerned about a denial of his due process rights and that he should be afforded all those rights regardless of whether he's a mental health patient or not. I think he's referring to *Brady* violations and Rule 5 violations, Rule 5 violations, Your Honor.

The state has no idea about Mr. Ward's capacity and we don't comment on that because we don't know. But, in the filings, there are repeated requests for counsel because of Mr. Ward's own statements that he is concerned about his capability to do that, and we certainly think it's important for the Court to be aware of that as you determine whether the Court deems it appropriate that he have counsel or he's able to proceed pro se.

THE COURT: All right. Let's mark this then as State's Exhibit Number 2.

Mr. Shaffer and Ms. Hanna, y'all have a copy of that document?

MR. SHAFFER: Yes, Your Honor, we do.

THE COURT: Thank you.

STATE'S EXHIBIT NUMBER 2

ADMITTED INTO EVIDENCE

THE COURT: Anything further, Solicitor?

MR. HIXSON: No, Your Honor.

THE COURT: All right.

RULING OF THE COURT:

THE COURT: In *State v. Barnes*, the decision of the South Carolina Supreme Court, beginning of 2014, the Supreme Court indicated that before we would get to the question of *Faretta* evidence where they indicated probably -- or not indicated that but that *Faretta* was more appropriate in South Carolina then *Edwards*, that the Trial Court would be using the same standard regarding the waiver of other rights in the issue of self-representation. And whether or not the defendant was competent to stand trial to assist in his own defense, those standards were the relevant standards in addition to the *Faretta* questioning. Circuit Court does have the inherent authority to order an independent examination of a criminal defendant when the Court finds it necessary. And I believe that to be the question that needs to be answered now.

So, Ms. Hanna or Mr. Shaffer, y'all want to make any comments on the filings by the State of South Carolina whereby the defendant questions his own mental capacity?

MR. SHAFFER: Your Honor, my understanding is that at least SCDC has recently changed his status. He is no longer receiving mental health treatment as of Monday of last week, I

believe that he stopped receiving any sort of treatment for mental health. He's actually in general population at McCormick from my understanding now. That being said, obviously, it's in the Court's discretion whether or not he would like to order an evaluation or if he would like to speak with -- if the Court would like question the defendant directly on that.

THE COURT: Well, he's made a filing where he says himself that he is mentally ill, not that the State of South Carolina is declaring him to be mentally ill or that the Department of Corrections thinks he mentally ill and have been giving him treatment; he says he's mentally ill. He's made that filing a sworn filing with the Court stating it's the truth. I don't know if it's true or not. I don't know his mental capacity. He may or may not be mentally ill. He may or may not have the capacity to understand the proceedings. He may or may not be a -- have the ability to assist in his own defense or to present a defense or to represent himself. I don't know. That's the problem. Therefore, based upon the matters presented to the court, I am going to order an evaluation of the defendant as to whether or not the State of South Carolina believes him to be competent to stand trial and assist in his own defense.

Solicitor, you prepare that order and give it to the defense for their signature and the Court will sign it and an

evaluation will be done forthwith. And after that then, and only on this issue -- I'm not retaining to jurisdiction in this case, I'm not gonna do that -- but only for the issue of whether or not he may represent himself in this matter. I will continue this hearing to a later date, once we receive the evaluation from the State of South Carolina. It appears that the Defendant wants Ms. Hanna to be relieved.

And as I understand it, Mr. Shaffer, you are saying to me that you want to step in the shoes of Ms. Hanna and accept full and complete responsibility for the representation at this time pending the Court's decision on the issue of self-representation?

MR. SHAFFER: Yes, Your Honor, I'm willing to do that.

THE COURT: Since I don't know Mr. Ward's mental capacity, I can't take into consideration his agreement or disagreement with it because I don't know whether he has the ability to agree with it or not, but since there is competent counsel here ready, willing, and able to step into the shoes of Ms. Hanna and assume full and complete responsibility of this matter pending the Court's decision on the *Faretta* issue, I'm going to relieve Ms. Hanna of her duties and responsibilities.

Now, Mr. Shaffer, you understand that I will in the future at some point in time when the evaluation is done hold a hearing as to whether or not Mr. Ward can represent himself

and you could maybe act as a resource. If I decline to give him that ability, you understand you are his attorney, you will represent him and you will proceed with this matter to its conclusion, whatever it may be. Do you understand that?

MR. SHAFFER: Yes, Your Honor, I do.

THE COURT: And you will accept those duties and responsibilities?

MR. SHAFFER: Yes, Your Honor, I will.

THE COURT: Very good. Under that, I will relieve Ms. Hanna of her duties and responsibilities in this matter, and then we'll have the evaluation and then the Court will make a decision on the motion of self-representation.

Thank you very much.

MR. HIXSON: Thank you, Your Honor.

MS. HANNA: Your Honor, may I approach with the order?

THE COURT: Yes, ma'am, please. Have you shown it to Mr. Shaffer?

MS. HANNA: Yes, sir. He signed it.

THE COURT: Okay. Very good.

ADJOURNED

C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of State of South Carolina v. Jody Ward, held in the Court of General Sessions for Georgetown County, Georgetown County Courthouse, Georgetown, South Carolina, on December 10, 2015, as reported by Dixie C. Eubank.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.

Kay H. Richardson
Official Court Reporter

August 19, 2019.

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STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	IN THE COURT OF GENERAL SESSIONS Indictment No.(s): 2003GS2201030 & 1031 A/Warrant No.(s): H248669 & H248670
The State of South Carolina, Plaintiff v.	ORDER FOR COMPETENCY TO STAND TRIAL EVALUATION PURSUANT TO STATE V. BLAIR EVALUATION BY: (Select Only One) ☒ Department of Mental Health (Mental Illness) OR ☐ Department of Disabilities and Special Needs (Mental Retardation or Related Disability)
Jody Lynn Ward Defendant.	

This matter is before me for an order requiring defendant Jody Lynn Ward, charged with Murder, to submit to an evaluation for competency to stand trial pursuant to State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981) and S.C. Code Ann. § 44-23-410 (1976).

BASIS FOR ORDER. I have considered the showing made in support of the motion requesting this evaluation and have reason to believe defendant may lack the competency to understand the criminal proceedings or to assist with the defense as a result of a lack of mental competence.

This order is issued for the following reasons:

based on Defendant's sworn statement in multiple court filings that he is mentally incapacitated.

THEREFORE, IT IS ORDERED: Defendant shall be examined and observed at an appropriate facility by two examiners of the Department of Mental Health if suspected of having a mental illness or by two examiners designated by the Department of Disabilities and Special Needs if suspected of having mental retardation or a related disability, to render an opinion whether defendant is competent to stand trial.

COMPLIANCE DEADLINE/TRANSPORT FOR EVALUATION. The examining facility shall schedule the ordered examination no later than thirty (30) days from the examining agency's receipt of this order. If defendant is currently free on bond or personal recognizance, defendant is responsible for making transportation arrangements to attend the examination. In the event defendant does not appear at the scheduled examination, upon written notice of such failure by the examining agency to the Sheriff of

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the county in which this case arose, defendant shall be taken into custody by the Sheriff and held until an examination can be scheduled and completed, and thereafter shall be released. Defendant's bond or bail is hereby revoked to the extent necessary to carry out the provisions of this order, and upon completion of the examination and release of defendant, any previous bail or bond issued by the Court shall remain in effect. If defendant is in custody at the time of the scheduled examination, the Sheriff is hereby authorized and required to transport defendant to and from the examination, arriving at the examining facility at the time established by confirmed appointment with the staff of the examining facility. In the event defendant is in custody of a law enforcement agency other than a Sheriff's department, nothing herein prevents such agency from carrying out the provisions of this order.

TRANSFER TO ALTERNATE AGENCY. If the initial examination is performed by the Department of Mental Health, and examiners find indications of mental retardation or a related disability but not mental illness, the Department of Mental Health shall not render an opinion on mental competency, but shall inform the Court, prosecutor, and defense counsel that defendant is "not mentally ill" and shall provide a copy of such notification and a copy of this order to the Department of Disabilities and Special Needs. Likewise, if the initial examination is performed by the Department of Disabilities and Special Needs, and examiners find indications of mental illness but not mental retardation or a related disability, the Department of Disabilities and Special Needs shall not render an opinion on mental competency, but shall inform the Court, prosecutor, and defense counsel that defendant does "not have mental retardation or a related disability" and shall provide a copy of such notification and this order to the Department of Mental Health.

In either case, the examining agency shall make copies of any records gathered or created in connection with its examination available to examiners designated by the alternate agency, and the alternate agency shall thereafter designate examiners to evaluate defendant as to competency to stand trial within thirty (30) days of receipt of the notification from the initial examining agency.

FINDING OF DUAL DIAGNOSIS. If examiners of either the Department of Mental Health or the Department of Disabilities and Special Needs find an indication of a dual diagnosis of mental illness and mental retardation or a related disability, no opinion on defendant's mental competency shall be rendered, and the dual diagnosis must be reported to the Court, prosecutor, and defense counsel. The examining agency shall also provide notification of the finding and a copy of this order to the other agency. Thereafter, the Department of Mental Health and the Department of Disabilities and Special Needs shall arrange for an examiner from each agency to further evaluate defendant to render a final report on

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defendant's mental competency. Both agencies are authorized and required to make copies of all relevant records within their possession or control available to examiners for purposes of completing the dual evaluation.

AUTHORIZATION FOR INPATIENT EVALUATION. In the event examiners from either agency determine defendant requires an inpatient examination, upon written notice to this Court from the director of the examining agency or his designee, defendant shall be committed to an appropriate facility of the requesting agency for no more than fifteen (15) days for examination and observation related to defendant's mental competency to stand trial.

REQUEST FOR EXTENSION. Before the expiration of the examination period or the examination and observation period, the Department of Mental Health or the Department of Disabilities and Special Needs, as appropriate, may apply to a judge designated by the Chief Justice of the South Carolina Supreme Court for an extension of time up to fifteen (15) days to complete the examination or the examination and observation.

DETENTION BEYOND EVALUATION PERIOD. If, in the judgment of the designated examiners, defendant is in need of immediate hospitalization or inpatient treatment, upon written request to this Court from the director of the examining facility or his designee, defendant may be detained by the requesting agency in a suitable facility for so long as deemed clinically necessary or until a hearing required and provided by S.C. Code Ann. § 44-23-430 (1976) may be conducted by this Court. An additional Court order **shall** be necessary for ongoing pre-trial inpatient detention of defendant as discussed in this paragraph.

ISSUANCE AND ADMISSIBILITY OF WRITTEN REPORT. Within ten (10) days of all examinations or the conclusion of the observation period, a written report shall be made to the Court pursuant to S.C. Code Ann. § 44-23-420 (1976). A copy of the report shall also be forwarded to the prosecutor and defense counsel. This evaluation report shall be admissible as evidence in subsequent hearings pursuant to S.C. Code Ann. § 44-23-420(c) (1976); thus, the report is a statutory exception to the rule against hearsay and shall be admissible without need for foundational testimony. However, the report shall be inadmissible in any other proceedings except as expressly permitted by South Carolina law.

OWNERSHIP AND DISCOVERABILITY OF EXAMINING AGENCY FILES. The examining agency is an independent entity, conducting this evaluation pursuant to Court order, and is not aligned with any party before the Court. To promote full disclosure and to assure the cooperation of defendant during the evaluation process, ownership of the examining agency's files shall be vested with the

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examining agency, including clinician's notes, staff reports, evaluation documents, memoranda, test results, etc. Neither these files nor any of their contents shall be provided to any party except upon presentation of a Court order authorizing such or a release authorization signed by defendant. In the event the examining agency's evaluation opinion is contested, an examiner may be appropriately and fully questioned as to the basis for the examiner's opinion at any hearing pursuant to S.C. Code Ann. § 44-23-430 (1976). However, examiners and agency staff may not be compelled to testify regarding statements made during the competency examination for any purpose other than to establish competency. Also, statements made during the examination may not be used to impeach defendant at trial. Hudgins v. Moore, 337 S.C. 333, 524 S.E.2d 105 (1999).

MEDICAL PROVIDERS/SCHOOLS MUST RELEASE NECESSARY RECORDS. State agency examiners conducting the evaluation may need clinical and school records concerning defendant to assist in forming an opinion. It is therefore ordered, upon presentation by the examining agency of this order with a written request for specific records attached thereto, that any physician or clinician, licensed health care facility, licensed health care provider, or any school district is hereby authorized and required to furnish copies of all records concerning defendant to the Department of Mental Health or the Department of Disabilities and Special Needs, or both.

COUNSEL REQUIRED TO FURNISH NECESSARY RECORDS. Upon written request from the examining agency, counsel for the prosecution and defense shall furnish to the agency such records and information in counsel's possession as the agency requests, including but not limited to copies of law enforcement reports, investigations, witness statements, statements by defendant (both written and electronic), defendant's medical records, and prior psychiatric or psychological evaluations of defendant. Nothing herein shall be construed to require counsel to divulge any information, documents, notes, or memoranda that are protected by attorney-client privilege or work-product doctrine.

DUTIES OF DEFENSE COUNSEL. Unless the prosecution is the party moving for this evaluation, defense counsel has the responsibility to file, serve, and transmit this order as outlined in the final paragraph below. Defense counsel does not have the right to attend any clinical interview scheduled pursuant to this Order, nor does defendant have a constitutional right to compel counsel's attendance. State v. Hardy, 283 S.C. 590, 325 S.E.2d 320 (1985). The Court recognizes, however, that circumstances may arise through which the examining agency may request counsel's attendance to facilitate the examination. In the event that such a determination is made, the examining agency may request counsel's attendance in writing, and counsel's level of participation shall be prescribed by the examining agency's written

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evaluation protocol. In this event, because of the substantial number of individuals awaiting examination, such interviews cannot be rescheduled, postponed, or canceled to accommodate counsel except upon presentation to the examining agency of a written statement from a circuit court judge that counsel's attendance is required in Court at the time the examination is scheduled. Whether or not defense counsel is requested to attend the clinical interview, defense counsel must meet with defendant prior to the interview to discuss this Court order, the evaluation process, the clinical interview, defendant's rights with regard to the clinical interview, and penalties associated with non-appearance and non-cooperation. Failure to comply with these requirements may result in sanctions for defense counsel. Defendant's refusal to participate at the interview because of the absence of counsel will be deemed non-cooperation. Failure of defendant to cooperate or participate in the interview may result in cancellation of the interview, examiners being unable to offer an opinion on competency to stand trial, and the case being called for trial without completion of the evaluation.

FILING, SERVICE, AND TRANSMITTAL OF ORDER. It is the responsibility of counsel for the party requesting the evaluation to file and serve this order as outlined herein. In the event the evaluation has been requested by consent, or the moving party cannot be determined, defense counsel shall be responsible. After being signed by the Court, the original order without attachments shall be immediately filed with the Clerk of Court and a certified copy served upon the opposing party. Further, within five (5) business days, a certified copy of this order, together with the attachments listed at the end of this order, must be served upon the examining agency at the address listed below. To expedite commencement of the evaluation process and scheduling of the clinical interview, counsel is instructed to immediately contact the examining agency to advise of the issuance of this order and forthcoming service upon the agency:

Evaluation Order Service Information

Department of Mental Health	Department of Disabilities and Special Needs
Forensic Evaluation Service Paralegal	Office of Clinical Services
S. C. Department of Mental Health	Department of Disabilities and Special Needs
CBHS Forensic Center	Post Office Box 4706
7901 Farrow Road	Columbia, S.C. 29240
Columbia, S.C. 29203-3220	
(803) 935-5540 (Phone)	(803) 898-9694 (Phone)
(803) 935-5544 (Fax)	(803) 898-9660 (Fax)
Email: FES-PARALEGAL@SCDMH.ORG	Email: OBSForensics@ddsn.sc.gov

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The following documents must be attached to this order upon submission to the Department of Mental Health or to the Department of Disabilities and Special Needs whichever is applicable:

1. Completed DMH/DDSN Outpatient Information Appointment Sheet
2. Copy of the indictment(s) (if issued)
3. Copy of the arresting agency's incident report
4. Copy of the warrant(s)
5. Law enforcement investigative reports
6. Defendant's statements to law enforcement, written or electronically recorded
7. Witness statements to law enforcement
8. Defendant's school psychological records (if available)
9. Autopsy reports (if applicable)

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AND IT IS SO ORDERED.

~~Presiding~~ Circuit Judge
Resident

Steven H. John
Printed Name of ~~Presiding~~ Circuit Judge
Resident

Georgetown, South Carolina

Dated: 1/20, 2016

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COVERSHEET FOR DMH AND DDSN EVALUATION ORDERS

1. The Competency to Stand Trial Evaluation orders (SCCA 221 and SCCA 487) and the Criminal Responsibility (McNaughten) Evaluation order (SCCA 222) should **not** be altered. It is important for purposes of compliance with the statutes as well as timeliness, efficiency and quality control in conducting evaluations that the applicable form order be used **exactly** as published, **without alterations or additions** to the terms of the form order.

2. Additional records **must** be attached to the order for a complete evaluation. It is the duty of counsel requesting the evaluation to obtain these records in advance and have them ready at the time the judge signs the order so that the evaluation will not be delayed. Within five (5) days of its issuance, counsel must file the order with the Clerk and serve the order on the examining agency. A list of the necessary records is available on the last page of the order, and may include:

- ☐ Completed DMH/DDSN Outpatient Information Appointment Sheet
- ☐ Copy of the indictments(s)
- ☐ Copy of the arresting agency's incident report
- ☐ Copy of the warrant(s)
- ☐ Law enforcement investigative reports
- ☐ The defendant or juvenile's statements to law enforcement, written or electronically recorded
- ☐ Witness statements to law enforcement
- ☐ Autopsy reports
- ☐ Defendant's school psychological records
- ☐ Defendant's Rule 5(f) notice of insanity records
- ☐ Copy of the Juvenile Petition
- ☐ Special education records, including psychological evaluations and IEPs
- ☐ School records, including disciplinary and attendance records
- ☐ Mental health records, including inpatient and outpatient evaluation and/or treatment

3. Only **one** Competency to Stand Trial evaluation can be ordered. For Defendants with mental illness, the order is addressed to the Department of Mental Health. For Defendants with mental retardation, the order is addressed to the Department of Disabilities and Special Needs. The order may not be addressed to both agencies. In the event there is a dual diagnosis or uncertainty as to the correct diagnosis, the order is first addressed to the Department of Mental Health, and the examiners will determine whether further referral is necessary. All orders for criminal responsibility evaluation, regardless of the diagnosis, are forwarded to the Department of Mental Health.

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STATE OF SOUTH CAROLINA) **TRANSCRIPT OF RECORD**

COUNTY OF GEORGETOWN) CASE NO.:2003-GS-22-1030, 1031

October 2, 2017

BEFORE: The Honorable Larry B. Hyman

STATE OF SOUTH CAROLINA,

Plaintiff,

vs.

JODY LYNN WARD,

Defendant.

APPEARANCES:

Scott Hixson, Esq.
Attorneys for the State.

Tristan Shaffer, Esq.
Attorneys for the Defendant.

P-R-O-C-E-E-D-I-N-G-S

THE COURT: All right, Mr. Shaffer, Mr. Hixson, what do we have here?

MR. HIXSON: I believe what brings us into the courtroom is -- I'll get into more detail as a caption -- Natasha Hanna represented Mr. Ward, filed a motion for a new trial based on discovery of new evidence.

THE COURT: Is that in the form of a PCR? Is it a civil matter, or is it a matter that should be before the chief administrative judge for general sessions?

MR. HIXSON: Interestingly enough, that is one of the bases for my concern is the case is captioned by Ms. Hanna, and subsequent to the hearing I guess the defendant was relieved -- I mean defendant's counsel was relieved. Mr. Shaffer is representing the defendant and is present in the courtroom with Mr. Ward. That case caption is under 2003-GS-22-1030 and 1031. Those are the indictments for murder that the defendant was convicted of back in Georgetown County.

As such, it is couched as a Rule 29(a) motion. It is not a PCR motion. There is three subsequent PCR applications in the procedural history of it, and as such, I believe a Rule 29 motion is an effort to kind

of get around the concerns of subsequent PCR applications.

THE COURT: Well, is it a matter that should be before me or addressed by the chief administrator judge for general sessions? Which is it?

MR. HIXSON: Can I add something for the record, also?

THE COURT: Yes.

MR. HIXSON: Judge John heard another matter in that and Judge John specifically in an e-mail chain back and forth to Mr. Shaffer indicated that he wanted another circuit court judge to hear that. He was the chief administrative judge. In conversations I had with Mr. Shaffer, when we were talking about it, he specifically mentioned that they were going to -- Mr. Shaffer was going to ask for Judge John to be recused, as well as Judge Culbertson, because both ruled on his prior PCR applications, so that is one of the reasons.

THE COURT: Well, okay. I don't mind hearing it, but I just wonder in what context of the circuit court am I hearing this? Am I hearing it as a general sessions court matter, or as a PCR would be in a common pleas?

MR. HIXSON: You are hearing it in a term of general sessions court, which the record reflects that

is what you are here for currently. In addition, I would note that initial counsel, Ms. Hanna's caption of the case couches a Rule 29 motion of after discovered evidence under the general sessions GS-26 indictment number, not the appellant case numbers.

THE COURT: All right. Mr. Shaffer, you are the moving party? I'll hear from you.

MR. SHAFFER: Yes, Your Honor. I believe we're here to discuss three matters related to this motion for a new trial based on behalf of newly discovered evidence. To add something -- I believe Mr. Hixson may have misspoke -- this was initially captioned as a Rule 29(b) motion.

MR. HIXSON: I apologize.

MR. SHAFFER: Motion for a new trial.

MR. HIXSON: I apologize, Your Honor, that is correct.

MR. SHAFFER: They, essentially, Natasha Hanna filed this for my client back in 2014, and at some point along the line, before I got involved it appears, that landed on Judge Culbertson's desk who then said to Natasha that basically we should have a hearing on it. A hearing was convened in front of Judge John back in December, I believe, 9th of 2015. At that hearing, Judge John had -- or probably about

three weeks before that hearing actually took place, Mr. Ward moved to relieve Natasha Hanna and to proceed pro se. He also at that point engaged me. He told me basically, essentially, that he wanted me to act as his attorney or to act as stand-by counsel at that time.

THE COURT: Let me just ask you something. I did read both of your memos that you had kindly gotten to me before this hearing. You gave me a chance to read them. It is my understanding that this matter was under appeal, I think it was from his last PCR, and leave to stay the appeal to permit this motion was denied by the court of appeals; is that correct?

MR. WARD: May I please the Court, Your Honor?

THE COURT: No, sir. Sit down, Mr. Ward.

MR. SHAFFER: Your Honor, I believe what happened -- I believe it was actually properly filed after the appeal had actually been resolved, Your Honor.

THE COURT: So it had been resolved, right?

MR. SHAFFER: Yes, Your Honor.

THE COURT: Well, I just want to know whether or not we're going forward on something that was prohibited by the court of appeals? I think I have a copy of the order that was just handed up.

MR. HIXSON: I just want to clarify the record

for Mr. Shaffer so we're all on the same page. The date stamps on the filing from the court of appeals and the leave to file a new motion are self-evident on the face of the documents. Ms. Hanna's initial motion, the date that this was clocked, stamped by the Clerk of Court's Office, make sure that those are kind of self-evident also.

THE COURT: I have here something from the court of appeals. It appears to be an order. It basically says, We note that pursuant to 205 nothing in these rules shall permit the lower court from proceeding in matters not affected by the appeal.

Are they saying there that it doesn't make any difference?

MR. HIXSON: No. I think the first sentence, Your Honor, is probative of the first page of that document, the appellant's motion to suspend the appeal and for leave to file a motion for a new trial based on newly discovered evidence is denied. You see that Ms. Hanna filed a motion subsequent to that, and then the last attached document I provided counsel also is the ruling by the court of appeals after Ms. Hanna -- meaning there was a motion that was filed, is what I was trying to indicate by the document.

THE COURT: Okay. All right. Well, let's just

hear it. Go ahead, Mr. Shaffer.

MR. SHAFFER: Your Honor, before we actually begin, there is actually still a pending -- since November of 2015 there has been a pending motion to allow him to proceed pro se.

THE COURT: We don't have hybrid representation in this state.

MR. SHAFFER: Yes, Your Honor.

THE COURT: Now, what's it going to be?

MR. SHAFFER: I think the issue was when we appeared before Judge John, what happened is that Judge John said he wouldn't rule on that motion, he would not rule on that until he was evaluated. He was evaluated later on. I don't think there is any sort of issue with the evaluation, but there is a pending motion right now whether or not he's allowed to proceed pro se.

MR. HIXSON: Just for procedural clarification, what brings us into court today is the initial filing by Ms. Hanna under a 2014 filing, that is before the court. Subsequent to that, there was a motion filed, and Mr. Shaffer actually -- we did an order substituting counsel so Mr. Shaffer became counsel for Mr. Ward down in Georgetown County. Months subsequent to that, then there was a filing of a motion to

proceed pro se. That was a hearing in Georgetown. During the course of the hearing in Georgetown, there was a fair amount of supporting documentation of prior applications by Mr. Ward asking for representation and for indigent funds and there was a common theme indicating that I'm a mental health patient, I'm mentally ill, I can't represent myself, I need assistance, I cannot go pro se, I need money for investigators and things like that. At that hearing, I brought that to the attention of the Court, as well as certain filings that Mr. Ward had filed.

THE COURT: A hearing on that motion?

MR. HIXSON: On that motion. And then from there, Judge John chose to have him evaluated by Department of Health to see if he is a competent -- I don't know how to evaluate that issue.

THE COURT: Isn't that matter before Judge John?

MR. HIXSON: Yes. And then that matter -- an E-mail -- when Tristan Shaffer was doing a good job trying to keep this case moving forward, Judge John, through an e-mail chain, said you have an evaluation that said Mr. Ward is competent to stand trial, which doesn't talk about the issues here, and then it says please have the substantive motion heard in front of anyone else, which is part of our frustration, you can

tell, on why we are here, and obviously in discussions in scheduling this with Mr. Shaffer he indicated his intention of filing a motion to recuse Judge John or Culbertson because both heard this case in PCR and denied the PCR claims. Your Honor, that is why we bring it before Your Honor.

THE COURT: Well, what is the status of the motion to proceed pro se?

MR. HIXSON: It is pending after the initial filings for a motion for a new trial. The issue of that was never resolved. In essence, it was deferred over.

THE COURT: What am I here today on?

MR. HIXSON: Substantive motion that -- Natasha Hanna's 2014 motion that Mr. Shaffer has adopted, basically, and added into research and done a good job with, but the substantive motion of what brings this into the courtroom. The pro se representation is representing for this motion, which has been filed by two different attorneys.

THE COURT: Well, what is the status of the pro se motion?

MR. HIXSON: It is still pending subsequent to the substantive motion that was filed. That is -- does that adequately address what is going on? And

then I have an additional affidavit also that was given to me through Mr. Shaffer that indicates, once again, the initial concerns of -- I don't know Mr. Ward's mention health status, how he is doing, but indicating of being mentally ill on Prozac and things which are part of the substantive filings and affidavit.

I guess, directly, Your Honor, to answer your question, I would ask that Your Honor find as a hybrid representation that Mr. Shaffer is representing Mr. Ward at this time, deny the motion to proceed pro se so we can get to the substantive motion, is the request from the State.

THE COURT: Let me hear from you, Mr. Shaffer.

MR. SHAFFER: I'll ask if the Court at least questions my client whether or not he still wants to proceed pro se. I believe that probably needs to be addressed before anything else. There is two other issues before we actually get to the merits of --

THE COURT: Tell me what he wants to do.

MR. SHAFFER: Your Honor, I believe that -- I believe the best thing for the Court to do is to ask -- get his input. I think that he probably wants to proceed pro se based off of conversations I've had. I had other conversations where he told me he wanted

me to continue to represent him. I think -- Your Honor, in an open hearing I feel a little hesitant to comment on our discussions between each other, you know, what we have discussed and strategy differences we had.

THE COURT: Short answer: I don't know what he wants, is that what you are telling me?

MR. SHAFFER: Yes, Your Honor.

THE COURT: Okay. Well, Mr. Ward, stand up. Place him under oath.

(JODY WARD, having been duly sworn, testified as follows:)

THE COURT: What do you want to do? What is your position?

MR. WARD: The only thing that kind of worries me -- the very first trial -- first page on Page 3, the only thing that concerns me with this whole matter, my lawyer filed it is on Page 3, Line 7:

Mr. Locklear: Your Honor, the --

THE COURT: I'm not concerned with that. I don't want to get into that yet. I don't even want to get there yet. I want to know what you want to do? We're here in this motion. Do you want to proceed pro se, or proceed with Mr. Shaffer?

MR. WARD: Well, I want to have an attorney the

same way my family and friend hired Natasha for me.

THE COURT: You can't do both.

MR. WARD: Listen, I was trying to explain. I had Ms. Natasha. They gave perjured testimony in violation of Little v. Osmond and Bank v. Drakey (phonetics) when they presented a pair of tennis shoes to my jury they knew didn't belong to the victim to begin with. Just like he says right here, Let the record reflect I just served the 15th Solicitor's Office, Greg Hembree, personally with a motion to permit --

THE COURT: Mr. Ward, we're not getting into that yet. We're not getting into that. What I want to know --

MR. WARD: That is my concern, Your Honor.

THE COURT: -- is do you want to have Mr. Shaffer represent you or not?

MR. WARD: Well, I mean, I don't have a problem with my lawyer. I have a problem with the 15th Solicitor's Office. They continue to hide --

THE COURT: That goes into the context of your motion. We're not there yet.

MR. WARD: Yes, sir.

THE COURT: I want to know if you want Mr. Shaffer to continue to represent you? Now, you can

have all the conversations you want with him, but this state does not allow hybrid representation.

MR. WARD: I understand that, Your Honor.

THE COURT: You have a right to represent yourself. I thought that never was a smart decision anyone made. I never have seen anyone adequately represent themselves if they weren't trained, like a lawyer is. Now, whether or not you proceed pro se or whether or not you have your lawyer is a matter to be decided by me, and the primary concern that I have, first of all, is whether you want a lawyer or you don't want a lawyer?

MR. WARD: I mean, I've hired two. Of course I want a lawyer.

THE COURT: Okay. You have a lawyer.

MR. WARD: I had him for two years.

THE COURT: Good. He should know about the case.

MR. WARD: Mr. Shaffer, for two years tell Your Honor everything I've asked you to do and what you ain't done and then we can get back where the same position I was at the beginning.

THE COURT: Mr. Shaffer.

MR. SHAFFER: If responsible, could we have an ex parte hearing essentially on this, because I don't want to get into strategy of what I told him and what

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he wanted me to do in open court.

THE COURT: What are you proposing?

MR. SHAFFER: Clear the courtroom to tell the Court any information relevant to this that is not going to necessarily be public knowledge about, you know, confidential communication between us.

THE COURT: We have a court reporter here. We have a clerk. We have deputies here.

MR. HIXSON: I ask -- that is inappropriate to know anything about the private conversations between those two for everyone's sake. When Mr. Ward just indicated that he wanted a lawyer, he said pretty aggressively he wants one, and Mr. Shaffer is here.

THE COURT: I didn't think it is necessary. Mr. Shaffer, he wants a lawyer. He's hired you. You are his lawyer, okay. I'm not going to get into any disagreements you may have between the two of you as to how you proceed or what is the best way to proceed. That is something you have to determine. You are a lawyer. He's hired you. Now, present his case.

MR. SHAFFER: Your Honor, we actually have a couple different -- because in our discussions through e-mails, this was actually going to be to resolve preliminary matters. The State has a motion pending whether or not we actually get a hearing. My

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client -- and, you know, my client had asked me to subpoena quite a few people. I would need to subpoena quite a few people. We need to go into probably, at minimum, a full day, probably closer to a day-and-a-half of hearing on this in order to get all of the witnesses.

THE COURT: Let's hear the issues as to whether or not you are entitled to a hearing. Mr. Hixson.

MR. HIXSON: Thank you, Your Honor. Procedurally, I think Your Honor has a basic understanding. I know that you are aware of the court's filings relating to the defendants in trial. I think it is important to have some basic understanding of the appellant -- I mean of the procedural status where we find ourselves. There is a substantive procedural basis where we find ourselves after Mr. Ward's conviction in 2003, as I recall --

THE COURT: This is a 29(b) motion?

MR. HIXSON: That's correct. My motion I filed with the court is actually -- there is an initial caption asking for relief under 29(a), but since we're having a hearing, 29(a) is fine. That just means the Court can decide this issue based on the briefs of the parties. Having said that, we're here, so let's not worry about 29(a).

So this specific basis for my request is this comes up to be direct appeal, appeal to supreme court, habeas relief, multiple appeals of PCRs. This is the third PCR application to be denied. Those PCR applications have been gone up on appeal. The reason why some of that is important is because some of the allegations contained in the third motion for a new trial, I think it was an assignment of error -- second assignment of error concerning the foreman of the grand jury also being involved with a tow company. That was heard and ruled by the court of appeals as cited. I guess my brief has specifics of it. That filing was issued October 12, 2015 Anders final brief of appellant. That was reviewed and dismissed by the South Carolina Supreme Court, 2007.

So there is basically two reasons: It is a successive PCR application, even if you read the caption of the case under a Rule 29 motion, the allegations contained in there are the PCR application under the relief -- under post-conviction procedures as promulgated. I can go into more detail, I'm just getting highlights.

Of more concern, on October 8th the court of appeals denied this exact right to appeal because in the rules it is a discretionary motion. You have to

suspend an appeal, you can't file another --

THE COURT: That is what Rule 29(b) says. It says if you don't get -- you cannot file it during the pendency of an appeal without the appellant court suspending the appeal to hear the motion.

MR. HIXSON: That's correct. That is my understanding as well.

THE COURT: Was this filed during the pendency of the appeal, or not?

MR. HIXSON: I'm just using the captions of it, and the captions that I provided to the Court support -- this is October 9th of 2014, appellant's motion to suspend appeal and for leave to file a motion for a new trial is denied. Ms. Hanna's motion was stamped in the interim with a filing cover sheet that indicated that it was -- let me make sure the dates are right. October 28, 2014. And then the third document I provided to the Court was a final ruling on the appeal, November 12, 2014.

THE COURT: Which was September the first of 2014, right? Or filed -- yeah.

MR. HIXSON: Case was filed and then the rule.

THE COURT: Order was submitted September 1 of 2014, which would have ended the appeal, I would imagine, technically. So he filed -- it was filed

after the appeal, right?

MR. HIXSON: What I have is the court of appeals issued the ruling of affirmative dismissal of the PCR -- new trial claims on November 12, 2014.

THE COURT: When?

MR. HIXSON: November 12, 2014.

THE COURT: Well, I'm looking at this and it would say that that is when it was actually filed -- okay. The order was filed.

MR. HIXSON: Yes, November 12, 2014. That is when it became final because, otherwise, if -- otherwise it would have been over when they ruled October 8th. You don't have permission to file a new motion. That is when the first copy of the first order from the court of appeals I handed up.

THE COURT: I see what you are saying now.

MR. HIXSON: So in the interim, this motion was filed, the motion and all of them stemming from them was improper.

THE COURT: Why would Ms. Hanna file a motion if it was in violation of the rule?

MR. HIXSON: There are voluminous motion practices in this case, pro se motions as well as -- it is voluminous, I know that. I know at some point in time we didn't consent to a substitution of counsel

because we were kind of aware of this. We didn't oppose it if Mr. Shaffer wanted to represent him, so he was relieved of counsel in December. Subsequently, Mr. Shaffer did not file a new motion, but continued to support the merits of the existing motion.

THE COURT: So that is one of your issues, that it was filed in violation of the rule?

MR. HIXSON: Yeah. That's basically the easy enough. The second one is this is third substantive PCR application. There is time limits on a PCR application.

THE COURT: And time limits on a 29(b).

MR. HIXSON: Very similar limits as well. If we go to the specific merits of the allegations contained in the motion, and I have case law to support the merits of the other one. The first one is straightforward enough, and that is the grand jury issue with Scott McKenzie assisting investigation by pulling the vehicle out, being the tow truck driver, and pulling the vehicle out. The exact same allegation was entered into the defendant's substantive appeal on his Anders brief.

THE COURT: Appeal from the --

MR. HIXSON: Direct appeal.

THE COURT: Direct appeal from the conviction,

which was done back in 2000 --

MR. HIXSON: Roughly 2005, in there.

THE COURT: Mr. Shaffer, what about that? That was raised on direct appeal in 2005. I mean, good gracious, and you file it again on a motion filed 2014. That is nine years.

MR. SHAFFER: Your Honor, one of the things in the attachments to my memorandum, I had affidavits in there. Essentially this is what happened. My client didn't have any proof of it at the time. He just had a name. That is all he had, a name. Then -- and then he actually had somebody go question Mr. McKenzie.

THE COURT: In nine years why didn't he have someone question him?

MR. SHAFFER: He did, Your Honor, have someone question him. The thing is that Mr. McKenzie said something different and then changed his story later.

THE COURT: The key is this: What was available now that was not available then?

MR. SHAFFER: Your Honor, I think that he basically sent out a private investigator -- and was able to financially hire his own private investigator to go out.

THE COURT: Why didn't he do it back then, nine years ago?

MR. SHAFFER: I don't think he had the financial resources to do so, Your Honor.

THE COURT: Okay.

MR. HIXSON: I have been provided by counsel an affidavit of the tow truck driver, and specifically on that I don't know the merits of it. I know it is in an affidavit, but in that he -- I think Mr. Ward indicates a prior difficulty with Mr. McKenzie and fights with him in the year or so leading up to the substantive murder. Mr. McKenzie was known to Mr. Ward and the family prior to trial. Of course you see that the charging document, the signature of the foreman is on the face of the grand jury.

THE COURT: That is Mr. McKenzie?

MR. HIXSON: Yes. And in addition to that, certainly if there was some confusion, you know, the rules provide for one year after discovery this information, one year after trial, that doesn't cover -- I mean, that is substantially further after. I haven't even gotten to the merits where we're piercing into a grand jury proceeding in a grand jury room and elicit testimony and transcripts, which Your Honor knows you can't do that.

THE COURT: How in the world can you do that?

MR. HIXSON: I have case law that cites

specifically why we do not -- improper to do that.

THE COURT: I mean, it is only in the most extreme cases that the Court allows an inquiry into subpoenaing of jurors, grand jury members.

MR. HIXSON: I'm referring to State versus Sanders. Anyway, I'm not relying on that at this point in time. This is a motion to dismiss, so I'm not talking specifically, I'm referring to the prima fascia evidence that the information was known certainly within one year after the conviction on the grand jury issue.

THE COURT: What other issues does he have?

MR. HIXSON: The other two issues cited was composition of the jury testimony. I want to be sure that I have Ms. Hanna's motion correctly. Juror No. 39, elements of -- 29, excuse me, Melissa Cooper. The allegations was at the time of the trial was related by marriage to one of the State's witnesses, Kevin Cooper.

THE COURT: Second cousin by marriage or something?

MR. HIXSON: Yes, interestingly enough. I have an affidavit provided by counsel as it relates to Ms. Cooper. There is two different affidavits filed by counsel, sworn affidavits. They are inconsistent.

The first claims that she was related to Kevin by her third cousin by marriage, and then the other affidavit indicates second cousin. So I'm not sure -- second or third cousins are contradictory affidavits filed by counsel.

THE COURT: Those relationships would have been discoverable.

MR. HIXSON: At the time of trial. The specific allegations contained in the motion itself is that the witness list was provided, and there is voir dire. The background information was provided through normal jury selection process that we have. Kevin Cooper, apparently, testified to some degree -- paraphrasing -- that ammunition -- somehow relating to ammunition in the trial. So Mr. Ward had a personal relationship, apparently, or knew Kevin Cooper, according to the vague transcripts. But the point is at jury selection, certainly one year after, that relationship was known.

In addition to that, I actually had tried to pull out the charts and the question asked: Is anyone related by blood or marriage to any potential witnesses -- and I'm paraphrasing, and Mr. Shaffer can correct me if there is a more in-depth question there, but third cousins by way of marriage, it is like

9 degrees of consanguinity on the marriage side that I'm not even sure -- you know, to try to get to a juror misconduct claim we're talking to a level of juror misconduct that, for instance, not telling someone you are married to a victim advocate or you are cooperating with a victim advocate as you are prosecuting the case, but not third levels of consanguinity. The point is that goes to the merits as it specifically relates to was there any information known one year after -- known at the time of trial, and certainly one year after. It was not installed in any of the three prior PCR applications either.

The last one is Juror 39, Bernadette Gardner, knew the defendant before trial as she went to school with his brother and failed to disclose the relationship during voir dire. So that was a preexisting relationship. In the memorandum supplementing the information, Mr. Shaffer indicates in his memorandum that he went to school with them. They didn't indicate any friendship or business relationship. The question asked of the jurors at that time were do you have any close personal relationship, friendship -- and I'll try to find Mr. Shaffer's memo, but he flushes a little bit out of

the nature of the voir dire question. On Mr. Shaffer's filings it indicates, Ms. Gardner had prior knowledge of the defendant and his family as a result of his connection. She went to school with Mr. Ward's brother. The Court asked on voir dire whether any juror was friends or business acquaintances with Mr. Ward; there was no response.

That is the allegation. That was certainly known prior to trial. If there was a close relationship, it was known prior to trial or certainly after.

THE COURT: Is there any evidence that any of this was prejudicial or that the witness had any prejudice for or against him?

MR. HIXSON: No, Your Honor. The case law provided by counsel I think specifically talks about -- and this goes to the merits of it -- if there was an innocent -- if it was an intentional misconduct then it may go to bias, and Your Honor may find an intentional lack of disclosure. But an innocent disclosure is presumed non-bias. If it is an innocent disclosure like under that question someone that went to the school with the defendant's brother, it was known during that time period, and the question was are you friends or business acquaintances, and it is pretty -- quite possible that failure to answer -- if

it is true, I don't even know if it is true or not, but I'm talking about just allegations on its face to talk about I'm not a friend or business acquaintance, well, someone went to school with my brother, you don't necessarily know that. So that just runs to if it is an innocent omission, not an intentional disclosure like I'm married to a victim's advocate in the Solicitor's Office. That is hard to not know when the question is asked do you help with victim organizations. That is tough to imagine. The case law provides some of that delineation.

So those are the three specific motions. Mr. Shaffer, in his memorandum, includes another one that is not included in the motion. I think it is appropriately to address it. It is related to Juror 48, Judy Harper. Ms. Harper was related by marriage to a witness listed by the defense, Tony Harper. She failed to disclose the relationship. She, along with others, were asked if they were related by blood or marriage. Mr. Ward or Mr. Shaffer at some point in time provided an affidavit of Priscilla Harper who specifically in the affidavit says I'm not really sure if they are related, I'm not sure if we are related by blood or not. The point is beyond that, and the allegation contained in it, it is a defense witness.

It is their own witness relating to that issue. That would be something that their own witness would know at the time of the trial, and certainly one year after to disclose it under the Rule 29(b) motion or one of the three PCR applications, and none was included at that time.

THE COURT: Mr. Shaffer.

MR. SHAFFER: Relating to these jurors that heard the case, the ones I listed, I think the case law that I sent the Court is pretty definitive that the Court has to have a hearing to determine the failure to disclose was intentional or not intentional. I think we've certainly established there is some evidence that they were related, that they would violate these questions; therefore, I think a hearing is appropriate based on both Bryant and McCoy. McCoy is obviously a PCR case, but there is also Spartman and Woods that I also would sent to the Court. That says, basically, that the inquiry you make is whether or not it is intentional. If it is intentional, then it could be -- if it could be the basis, if he could have had the right to challenge or strike that person, then it basically is grounds for a new trial.

THE COURT: Haven't you raised these issues prior to this?

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MR. SHAFFER: Your Honor, I think the issue was is through the affidavits you can see that he got the grounds for these -- after the fact. These are all the things that he discovered later whenever he hired the private investigator when he went out there and talked to them. I think these were grounds after the fact.

THE COURT: Well, talk to me about evidence in the case and what you suspect might have been juror misconduct. How does Rule 29(b) look at the two? I mean, if we tried the case again, we ostensibly again would hear exactly the same evidence.

MR. SHAFFER: Your Honor --

THE COURT: What new evidence would your client present? What evidence would he show?

MR. SHAFFER: Evidence present to the Court? I think that he would have certainly --

THE COURT: Don't tell me what he would have, because "would have" doesn't count. I'm talking about something new.

MR. SHAFFER: Your Honor, he would have the DNA tested off the shoes he believes that several witnesses perjured themselves.

THE COURT: Did you have DNA you had tested?

MR. SHAFFER: No, we do not.

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THE COURT: So that is pure speculation?

MR. SHAFFER: Your Honor, that is -- and I understand. I'm addressing the Court's question. That is the reason it was not included in the motion. I think if you look at the case law and everything related to 29(b) get sort of muddled. Since the enactment of the PCR Act, clearly the courts have allowed 29(b) to go forward. There is many cases out there, appellant cases, where they address appeals from 29(b)s after the enactment of the PCR act. But the issue is it seems to be two different things. It seems to be basically the regular span evidence -- I'm using the case span factors. There is like five factors that basically defines what new evidence that you would submit to a jury would be.

THE COURT: Tell me this: Under what rule, under what theory, has the courts traditionally approached cases involving alleged juror misconduct? Have they approached it from the Rule 29? How have they done it? Or has it been PCR? How has the court looked at these issues?

MR. SHAFFER: Both, Your Honor. Basically there is cases that go both ways. If you look at McCoy, McCoy is a PCR case, the most recent case is the reason I'm talking about it, but if you look at McCoy

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basically all of the cases that are cited in the McCoy opinion, which includes Bryant, Sparks and Woods, all of those are basically 29(b) motions. So the Court has allowed them to actually look at -- has allowed the court of general sessions to look at motions for a new trial. Also under McCoy, you can do it as a PCR. They basically say McCoy is proper for a PCR as well.

THE COURT: Why wasn't it raised in the PCRs?

MR. SHAFFER: Whenever he filed his previous PCRs, these are new issues he did not know about. I understand the State's position on the grand juror, and I'm not waiving that, I'm saying that we discovered new evidence relating to that. But the other petite jurors, all of that is newly discovered evidence, Your Honor.

THE COURT: These relationships existed. He's from Georgetown County. If he can discover it now, what has happened that would make it so that he could discover it that wasn't available back during trial? I mean, the facts are there. Relationships are relationships.

MR. SHAFFER: Whenever he goes up -- you know, what the rule requires is that he uses reasonable efforts. He's been incarcerated since the trial, Your Honor. He has limited resources. He hasn't been --

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THE COURT: How about before the trial?

MR. SHAFFER: Your Honor, you wouldn't know all of this stuff before the trial about whether or not witnesses made mistakes or -- unless he automatically knew who the witness was and their background and family tree, he would not know that before the trial, Your Honor. And I think that probably it would be -- if reasonableness is his attorneys have to go look at family trees of all of the jurors --

THE COURT: Wouldn't that be the case in every single trial then?

MR. SHAFFER: Whenever it comes up that jurors lie, I believe it would be the case in every single trial, that you could raise this as an issue in any trial if you found out that a witness lied about a relationship.

THE COURT: What witness lied about a relationship? Jurors or?

MR. SHAFFER: I apologize. I misspoke. If you found out that the jurors lied about the relationship or failed to disclose the relationship, then the question is, well, why did you fail to disclose it? If they failed to disclose it because I didn't know he was related to me, then you don't get a new trial.

THE COURT: Years ago we had a probate judge --

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actually, it was -- he was the father of Judge Sidney Floyd, Judge W.C. Floyd years ago when I first started practicing. He made an interesting comment to me one day. He said, you know, if you're third generation Horry County, you're related to every other third generation Horry County somehow. So you are going to find -- it is not true now because we've had so many people come in now, but at that time, everyone was related to everyone. I'm probably related to Mr. Gerald back there somehow, but who knows. I mean, if you dig deep enough, you'll find someone is related. The only person I'm sure I'm not related to is Ms. Dahl here, and she's from Colorado. I don't think I am, but could be anyone else. I mean, what do you propose to do, Mr. Shaffer?

MR. SHAFFER: Your Honor, I would like a hearing to question these witnesses about why they did not -- I mean these jurors on why they did not disclose relationships to witnesses. Also, the question would be to officers because there is a second side to this, essentially related to that grand juror. There is officers that testified in front of them, which if you look at the affidavits submitted, basically it shows that they did not disclose this. They were clearly there whenever the grand juror helped pull the car out

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of the water and then testified in front of them at grand jury, and no one bothered to mention this to the defense, Your Honor. So I ask to question those witnesses as well.

THE COURT: Since when does the defense get to interfere with the grand jury?

MR. SHAFFER: Your Honor.

THE COURT: You don't even know when the grand jury is taking your case up.

MR. SHAFFER: I understand, but it is a challenge. If we were pretrial and I moved to quash an indictment because of the fact that a grand jury assisted officers in the investigation of the case, I think that motion would likely be granted.

THE COURT: You know that the grand jury has investigative powers of its own? Are you aware of that?

MR. SHAFFER: I'm aware of that. The thing is --

MR. WARD: You need to read that right there. The case right in the law book.

THE COURT: Sit down, Mr. Ward, let your attorney address the Court.

MR. SHAFFER: Your Honor, I understand the grand jury can question and bring witnesses into question them. The thing is what we have is the foreman of the

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grand jury who happened to actually --

THE COURT: Towed the car.

MR. SHAFFER: Yes. He was present at the scene.

THE COURT: What do you think that had to do with anything?

MR. SHAFFER: Your Honor, I think he assisted the officers in doing --

THE COURT: Towed the car.

MR. SHAFFER: He also -- he basically was in custody of some of the evidence.

THE COURT: He towed the car, right, Mr. Shaffer?

MR. SHAFFER: Yes, he towed it out of the lake and witnessed the bullet holes in the car. He had seen, you know, the condition of it when it got pulled out of the lake as well.

THE COURT: Mr. Hixson.

MR. HIXSON: Two clarifications. On the application of McCoy and Wood, one of the reasons why it is important to recall this is not couched as a PCR application, and that is key because we've already done three. What McCoy does is eliminate one of the key parts. We're not talking about Rule 29(a), and that is, is the material -- is the information material to the issue of guilt or innocence, not just impeachment. So if you apply a Rule 29(b) standard to

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this, Clark versus State clearly says to obtain a new trial, that would probably change the result if a new trial was granted, has been discovered since trial, could not be discovered before, is material to the issue of guilt or innocence and merely accumulative or impeaching. A PCR claim eliminates that guilty or innocence problem, so it is easier to get relief under a jury misconduct claim under a PCR status because it eliminates that that Your Honor has to apply since we're here on a Rule 29 motion.

So this information has to be material to the issue of guilt or innocence, and that is why your question as to what would the State do differently based on this information goes to the fourth element of Clark. In those cases, I would bring the Court's attention to State versus Spartman provided by counsel. State versus Wood, in that case it was a Rule 29(b) failure to disclose the voluntary victim advocate in the Solicitor's Office that prosecuted the case worked there for three years, and after the jury returned its verdict, but before the Court imposed the sentence, the defendant moved for a new trial based on that right then.

THE COURT: I mean, Mr. Shaffer, do you suppose that they could -- would fail to get an indictment?

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MR. SHAFFER: Your Honor --

THE COURT: If they submitted this case to the grand jury again, do you suppose they wouldn't get an indictment?

MR. SHAFFER: Your Honor, I think there wouldn't be a problem with the indictment. There wouldn't be an issue. My client has asked me to submit, and I think I put in an e-mail, I did not send a copy of the case, but it is called Vasquez versus Hillary, U.S. Supreme Court Case that says that the indictment -- if there is.

MR. WARD: It says right there in the law book.

MR. SHAFFER: If there is a history of prosecutorial misconduct, it can invalidate the process and create a structural error.

THE COURT: Do you have a history?

MR. SHAFFER: Yes, Your Honor. I think there is multiple pretrial motions in this. Your Honor, I apologize. There is multiple pretrial motions where there was discovery issues that ultimately led to -- at one point I think the defense attorney said, hey, I can't possibly be prepared with all of the discovery violations that have taken place. There is also the issue related to the fact --

THE COURT: Was that addressed on direct appeal?

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MR. SHAFFER: Your Honor --

(Mr. Ward confers with Mr. Shaffer.)

MR. SHAFFER: He raised a prosecutorial misconduct issue. It wasn't directly related --

MR. WARD: Yes, it was.

MR. SHAFFER: The issue related to -- obviously the two officers who were involved in -- testified in front of the grand jury failed to disclose this. I think that they were required to do so, and to not do so is prosecutorial misconduct. I'm not saying that they necessarily went to the Solicitor's Office and made a decision as a whole not to do it, but their actions are imputed to the State as well. That was not disclosed to my client prior to trial.

THE COURT: What wasn't disclosed?

MR. SHAFFER: The relationship between Scott McKenzie and the -- the foreman of the grand jury.

THE COURT: But it is on indictment and your client knows who he is, right?

MR. SHAFFER: Yes, Your Honor. I think that there was an issue related to whether or not he towed that vehicle or towed a separate vehicle that was questionable. My understanding is that -- I think we can probably get a witness here to say, essentially, he misled Mr. Ward beforehand.

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THE COURT: Did anyone from the defense go and ask him?

MR. HIXSON: Yes, Your Honor.

MR. SHAFFER: Not prior to trial, Your Honor.

MR. WARD: No, not prior to trial.

MR. HIXSON: We want to clarify. I have a written order signed by Judge Breeden. Judge Thomas was the trial judge at the time. Procedurally, it indicates that she asked Judge Breeden to hear these pretrial motions concerning any allegation of prosecutorial misconduct and discovery violations. I handed Counsel a copy of the order. We want to make sure that is a copy of the Court's exhibit for those allegations, that they were heard and denied.

THE COURT: Allegations of?

MR. HIXSON: Of prosecutorial misconduct for failure to provide discovery by Judge Breeden prior to trial. That is stamped and in the clerk's file in Georgetown County. That was held with Judge Thomas, Paula Thomas, excuse me, to have Judge Breeden hear those issues.

Specifically as it relates to Scott McKenzie, counsel provided -- defense counsel provided an affidavit alleging it to be Scott McKenzie's affidavit where he states his role in towing the truck. I'll

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provide, if need be. He specifically refers to his role as a grand jury juror, doesn't remember any specific details of that, but he was forthright. Defense counsel provided that affidavit to our office.

As it relates to the case law concerning grand jury secrecy, I have a couple of cases for the Court to consider, State versus Bradford. The take-away on Bradford, 256 South Carolina 51, the Court -- our supreme court says it is a set rule that grand jury jurors cannot testify as to how they, or any other fellow, voted, what induced them to find an indictment or as to opinions voiced by fellows or themselves upon any questions properly before the Court. While we find there is no factual basis to support the motion, it was also properly denied because it was not timely made.

THE COURT: That is?

MR. HIXSON: Bradford, Your Honor. That is just relating to grand jury secrecy and impaneling grand jury. State versus Sanders, 251 South Carolina 431. It specifically refers to the grand jury such as prohibited by the cloak of secrecy which has always been flown around the deliberations of that body. State versus Rector, no one, not even the presiding judge, may evade the secrecy of the grand jury's

deliberations to inquire what influences moved them in their acts or ascertain how any members may have voted. So the trial judge in this case is clearly right when he ruled that he could take no step looking to obtaining the information as to the number of grand jury jurors concurring in the indictment, and that is a copy for the Court.

THE COURT: All right. All right. This is what I want you to do. I want you to both to submit proposed orders to me on the one issue of whether or not this Rule 29(b) motion should be dismissed, and then we'll schedule a hearing if it is necessary, okay.

MR. WARD: May I please the Court?

THE COURT: No.

MR. WARD: A hearing has already been granted.

THE COURT: Sit down, Mr. Ward.

MR. WARD: I've already been granted --

THE COURT: Sit down.

MR. WARD: It is in the transcript.

MR. SHAFFER: He did actually -- in front of Judge John back in December of 2015, Judge John did say on the record that there was going to be a hearing at a later date.

THE COURT: Why is it being argued before me for

the last hour then?

MR. WARD: That is what I asked him.

THE COURT: Sit down and shut up, Mr. Ward. Don't say another word or I'll hold you in contempt. Mr. Ward, you have an attorney. You interrupted all afternoon. I don't want to hear from you again, Mr. Ward. Mr. Shaffer is here to speak to me. Those outbursts will not be tolerated.

MR. WARD: I apologize.

THE COURT: Mr. Gerald, one more word out of Mr. Ward, remove him from the courtroom, okay.

DEPUTY: Yes, sir.

THE COURT: Why have I been hearing this for the last hour and questioning you about it if Judge John already heard the same motion? I thought Judge John recused himself? Where are we with this thing?

MR. HIXSON: He did not hear a motion. He didn't hear any substance of any of this, didn't hear any of this discussion. It simply was scheduled and then it went to a pro se -- motion for the pro se proceeding. That drug on for a year or so with the Department of Mental Health not figuring out how to evaluate a client to see if he could represent himself. Ultimately, we figured out a way, provided a packet of information so they could evaluate Mr. Ward to see if

he could. Once that information came back that he is competent, which we knew that. He is competent. That is not the issue. Then it said let's schedule this for hearing on the merits, and we received an e-mail from Judge John, who then was the chief administrative judge, schedule this in front of any other judge. When I had a discussion with Mr. Shaffer about it, Mr. Shaffer indicated to me in conversations he had with Mr. Ward that they intended to file a motion to recuse Judge Culbertson, because he denied PCR, and Judge John, because he denied PCR prior to this.

So, Your Honor, absent of a visiting judge, the only other judge scheduled in this circuit was in front of Your Honor.

THE COURT: I understand, but why am I hearing now a motion to dismiss that was heard?

MR. HIXSON: No. None of the merits was ever heard. None of this was ever heard before.

THE COURT: Mr. Shaffer just told me it was.

MR. SHAFFER: Your Honor, Judge John merely said we're going to schedule a hearing in an actual case. This is essentially what Judge Culbertson ordered previously, that there be a hearing on merits. Judge John confirmed there would be a hearing on the merits, that is my client's primary concern is that,

essentially, the State moved to dismiss fairly recently off of that -- I think it was in between the last --

THE COURT: I find that is included in the hearing of the merits. You filed a motion to dismiss, I understand, right?

MR. HIXSON: It is clocked and filed based on --

THE COURT: All right. I want briefs filed on that within ten days. I want briefs on it from each of you, that one issue, okay? Thank you. Mr. Hixson, I don't know what got introduced there or not.

MR. HIXSON: I will attach them to my brief on the merits.

THE COURT: Okay, then. Thank you.

(whereupon, the hearing concluded.)

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CERTIFICATE OF REPORTER

State of South Carolina)
County of Georgetown)

I, Natalie Dahl, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the evidence introduced in the hearing of the above-captioned case, relative to appeal, in the Court of General Sessions for Georgetown County, South Carolina, on the 2nd day of October, 2018.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

September 26, 2018

_____

Natalie Dahl, RPR
Court Reporter

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STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	IN THE COURT OF GENERAL SESSIONS FIFTEENTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA	CASE No: 2003-GS-22-1030, 1031
V.	**STATE'S MOTION TO DISMISS DEFENDANT'S MOTION FOR A NEW TRIAL BASED ON AFTER DISCOVERED EVIDENCE**
JODY LYNN WARD Defendant.	

Now comes the State of South Carolina in response to Defendant's Motion for a New Trial Based on After Discovered Evidence filed on October 28, 2014. The State respectfully requests the Court dismiss the motion as a matter of law as the relief requested is improper and procedurally barred. SCRCrimP Rule 29(a) provides that a post-trial motion "may, in the discretion of the court, be determined on briefs filed by the parties without oral argument."

This motion fails as a matter of law as a violation of SC Code of Laws §17-27-90, and the time limits in §17-27-45(C) and the Court's holding in State v Hunter, 271 S.C. 48 (1978). The substance of the motion contains information that was known to the Defendant and the Defendant's trial counsel at the time of trial. In fact the Defendant included the exact same allegation of improper grand jury conduct as issue two in his October 12, 2005 Anders Final Brief of Appellant, which was reviewed and dismissed by the South Carolina Supreme Court on January 26, 2007.

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The Defendant has filed 3 PCR applications which have been denied and the denial affirmed on appeal. The claims cited by the Defendant in the current motion were known to the Defendant at the time of all the previous successive PCR applications. Rule 3 of the Post-Conviction Procedure rules promulgated by the Supreme Court under the authority of §17-27-110 states in relevant part, "Under Section 8 of the Act, successive applications for relief are not to be entertained, and the burden shall be on the applicant to establish that any new ground raised in a subsequent application could not have been raised by him in the previous application."

Additionally, on October 8, 2014 the South Carolina Court of Appeals denied the Defendant's Motion to Suspend Appeal and for Leave to File Motion for a New Trial Based on After Discovered Evidence. The Defendant, through Counsel apparently disregarded this order and filed this Motion on October 28, 2014 in violation *SCRCrimP Rule* 29(b) and Rule 4(b) *Subsequent Application for Order after Refusal.* The Court of Appeals issued their ruling affirming the dismissal of the Defendant's PCR and new trial claims on November 12, 2014. The Court granted a substitution of counsel on or about December 10, 2015.

Finally, if the Court does rely on Rule 29(b), in ruling on this motion, the State asserts that the information cited by the Defendant was known to the Defendant and counsel or could have been ascertained by the exercise of reasonable diligence prior to and at the time of trial in 2004 and certainly within one year after conviction. The grand jury foreman signed his name to the face of indictment which is the quintessential notice document to the Defendant prior to trial. Juror background information and the State's witness list was provided to the Defense during

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voir dire which occurred prior to jury selection. That information continued to be available for one year after conviction and is not new "evidence" as to the defendant's guilt.

For all the foregoing reasons the State respectfully requests the Court dismiss without oral arguments the Defendant's motion as procedurally barred and factually insufficient.

Scott Hixson
Chief Deputy Solicitor
15th Judicial Circuit

Conway, S.C.
September 6, 2017

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	
	)	
The State of South Carolina,	)	Case No.: 2003-GS-22-1030; 2003-GS-22-1031
	)	
Plaintiff,	)	
	)	MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR A NEW TRIAL BASED ON AFTER DISCOVERERED EVIDENCE
v.	)	
	)	
Jody Lynn Ward,	)	
	)	
Defendant.	)	
	)	

On October 30, 2014, Defendant, through his then attorney Natasha Hanna, filed a motion for a new trial based on after discovered evidence. In addition to the arguments raised in Defendant's October 30, 2014 and the arguments to be raised at a hearing on this matter, Defendant respectfully request that the Court Grant his Motion for a new trial based on the following:

BACKGROUND

Procedural History

The record in this case is rife with examples the Defendant being limited by the State's failure to disclose information. There were three pre-trial hearings related to the State's failure to disclose information. App. 1-198. At one point trial counsel stated, "nobody could properly prepare with the statements that [the prosecution has] made, what they've presented to us as what we thought was true." App. 185, ll. 15-17.

In keeping with trial counsel's statement, Defendant was convicted. Appellate Counsel, Robert Dudek, filed a direct appeal pursuant to *Anders v. California*. App. 931-943. This appeal was dismissed.

Defendant the filed a PCR. For the PCR Defendant was represented by Bobby Frederick. An evidentiary hearing was convened on May 1, 2008 before the Honorable Steven John. The PCR court denied the PCR in an order dated May 15, 2008. Defendant's PCR appeal was also dismissed.

On October 30, 2014, Defendant, through his then attorney Natasha Hanna, filed a motion for a new trial based on after discovered evidence.

Summary of Allegations

At trial, the state's theory was that Defendant shot and killed Wilford Brown and Elton Rutledge. The State argued that on August 2, 2002, Defendant borrowed his wife's Suzuki and meet up with Brown and Rutledge. The State alleged that Defendant then killed Brown and Rutledge and buried their body in the woods, and then dumped the Suzuki in Dawhoo Lake.

DISCUSSION

I. The foreman of the grand jury in Defendant's case, Scott McKenzie, assisted the investigation by pulling the vehicle, that was alleged to be at the scene of the shooting, out of Dawhoo Lake.

Relevant Facts

During the pendency of his direct appeal, Defendant became suspicious that the foreman of his grand jury, Scott McKenzie, also assisted law enforcement in pulling the vehicle out of Dawhoo lake. Although he had no proof or record of this suspicion he raised this in a *pro se Anders* brief.

Sometime between 2005 and 2006, Defendant requested that his uncle question McKenzie. (See Exhibit A—Affidavit of Rondie Ward). At that time, Mr. McKenzie informed Rondie Ward

that he did not assist in pulling out the Suzuki. (See Exhibit A—Affidavit of Rondie Ward). Although Defendant continued to expect that Mr. McKenzie was lying, Defendant was limited on pursuing this matter without proof.

On June 12, 2014, Defendant obtained an affidavit from Deputy Gary Todd of the Georgetown. County Sheriff's Department. Mr. Todd indicated that he worked on Defendant's investigation with Investigator Ernest Hampton. Mr. Todd indicated that he was present when the Suzuki was pulled out of the lake. Mr. Todd further indicated that Scott McKenzie was the tow truck driver that pulled the Suzuki out of the lake. (See Exhibit B—Affidavit of Gary Todd). Ernest Hampton indicated that he presented Ward's case to the grand jury. (See Exhibit C—Affidavit of Ernest Hampton). However, Mr. Hampton was uncertain whether that information was provided to the Solicitor's office.

Defendant's Fourteenth Amendment Right to Due Process was violated when the Grand Jury Foreman was involved in assisting law enforcement in recovering evidence.

An indictment returned by an unbiased grand jury is insufficient to call the trial on the merits of the case. *See Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406 (1956) (holding that an indictment returned by a legally constituted and unbiased grand jury, if valid on its face, is enough to call for trial the charge on the merits). State law gives criminal defendants the right to have their cases presented in a fair grand jury system prior to facing trial. *See* S.C. Const. art. I, sec. 11.

In this case, Scott McKenzie swore witnesses over the grand jury proceedings in this case. *See* S.C. Code § 14-7-1550. Since, Scott McKenzie, was actively involved in the gathering of evidence in this case he should not have been allowed to sit on the grand jury in this case.

Defendant is entitled to a new trial based on the State's failure to disclose that the Grand Jury Foreman's connection to the investigation.

The State engages in misconduct when they fail to disclose potential juror is not impartial. *Cf. Williams v. Taylor*, 529 U.S. 420, 441, 120 S. Ct. 1479, 1493, 146 L.Ed.2d 435, 454 (2000) (remanded a case for further hearings on prosecutorial misconduct claims when the prosecutor failed to disclose information of potential juror bias). Additionally, the knowledge that the Grand Jury foreman assisted in pulling the car out of the lake is imputed to the prosecutor even if the officers did not advise them of it. *See Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567, 131 L.Ed.2d 490, 508 (1995) ("This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

The record clearly indicates that Scott McKenzie was the foreman of the grand jury that indicted Defendant on the above referenced charges. If Ernest Hampton and Gary Todd were present during when the sidekick was pulled from the lake by Scott McKenzie, and then presented the case to a grand jury including Scott McKenzie, this information should have been disclosed to Defendant. Failure to do so was prosecutorial misconduct.

II. Petit Juror Misconduct

"[A] new trial is warranted on the basis of juror misconduct if it is shown that (1) the juror intentionally concealed information; and (2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." *McCoy v. State*, 401 S.C. 363, 371, 737 S.E.2d 623, 627, (2013).

Juror 19-Marissa Cooper

Marissa Cooper failed to disclose a relationship the a State witness. Kevin Cooper was listed as a potential witness. Juror Number Nineteen, Marissa Cooper, was asked along with the other jurors, whether she was related by blood or marriage to any of the potential witnesses. At no point did she respond to this question. Kevin Cooper testified for the State against the Defendant. Marissa Cooper was in fact; at the time, related by marriage to Kevin Cooper. The juror, Marissa Cooper, was married to James D. Cooper. James D. Cooper's grandfather was Walter Cooper. The witness, Kevin Cooper's, grandfather was Walter Cooper's brother. (See Exhibit D—Affidavit of Nicole Ward). Therefore, Marissa Cooper and Kevin Cooper were second cousins by marriage. Marissa Cooper intentionally concealed this relationship.

Juror 48- Judy Harper

Judy Harper was related by marriage to a witness listed by the Defense, Tony Harper. She failed to disclose this relationship. She, along with the other jurors, were asked in voir dire whether they were related by blood or marriage to any of the potential witnesses. Tony Harper was listed and read as a potential witness for the defense. There was no response from the jury. Ms. Harper was called and served as a juror in the trial against Mr. Ward.

Juror 39-Bernadette Gardner

Bernadette Gardner went to school with the Defendant's brother. Ms. Gardner had prior knowledge of the Defendant and his family as a result of this connection to the Defendant's brother. The Court asked on voir dire whether any juror was friends or business acquaintances with Mr. Ward. There was no response from any member of the jury. The question was reasonably comprehensive and the answer would have supported a challenge for cause. Therefore, Ms. Gardner intentionally concealed this relationship from the Court. Ms. Gardner was called and served as an alternate juror in the trial of Mr. Ward.

III. Testimony Concerning Elton Rutledge's Shoes

During the trial, the state introduced two white Adidas shoes that were found in the autopsy. The State re-called Latrese Rutledge and Elton Rutledge, Sr. to identify the shoes as belonging to Elton Rutledge Jr. Defendant asserts that this testimony was False. Defendant will present evidence that the shoes did not belong to Rutledge.

Respectfully Submitted,

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ATTORNEY FOR DEFENDANT

Date: 3/14/17

State of South Carolina
County of Georgetown

Affidavit of Rondie James Ward

Personally appeared before me, the undersigned Notary Public, the affiant, Rondie James Ward, who being duly sworn states as follows:

1.) My name is Rondie James Ward and I am over 18 years of age.

2.) I reside at 152 Bear Loop, Georgetown, SC.

3.) This affidavit is true and correct and it is based on my own personal knowledge, information, and belief.

4.) I am fully competent to make this affidavit. I am not under the influence of drugs, alcohol, or inducement of any kind or nature.

5.) Jody Lynn Ward is my nephew as his dad is my brother.

6.) On or about 2005-2006, I went to Scott McKenzie's residence at the request of Jody Lynn Ward. I think this was during the time Ward was on Direct Appeal in the SC Court of Appeals from his guilt trial verdict on two alleged murders. Ward requested me to ask Scott McKenzie several questions.

7.) I asked Mckenzie if he pulled out my nephew Jody Ward's red Firebird and/or his Suzuki Sidekick out of Dawhoo Lake. McKenzie stated he did not tow the Suzuki Sidekick out, but he did tow the Red Firebird out of Dawhoo Lake on or about August-September 2002.

8.) I believe Scott McKenzie was untruthful when he told me he did not pull out Ward's Suzuki Sidekick because I saw an affidavit from McKenzie where he stated that he did pull out and tow the Sidekick.

9.) On a separate instance, on or about 2002-2003, I received a phone call from my cousin Michael Andrew Abner. My wife, Carol S. Ward initially answered the phone and Abner told her he wanted to talk to me. My wife remained on the other line after I picked up the phone and Abner told me that he paid two black males to kill Jody Ward. My wife can corroborate that Abner told me this information. These are the same two males that Ward was charged with murdering. I told this information to Ward's trial attorneys, Margaret Ann Kneece and Wesley Locklair.

10.) I think that Michael Abner was charged in 2010 for three murders in Kentucky. Some of these murders dated back before Jody Ward went to trial in 2004.

12.) I do not have any further information about the Jody Ward case.

Rondie James Ward, Affiant

Sworn to before me this

4th Day of March 2015

NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: 7/27/2019

SOUTH CAROLINA COUNTY OF GEORGETOWN

AFFIDAVIT: GARY TODD

RE: JODY WARD (TRIAL 3/2004)

PERSONALLY APPEARED BEFORE ME, the undersigned Notary Public, the affiant, Gary Todd who being duly sworn stated as follows;

1. My name is Gary Todd and I am over 18 years of age. I and a resident of Georgetown County, S. C.

2. That this affidavit is true and correct and is based on my own personal knowledge and information provided to me by those persons named.

3. I am currently employed with the Georgetown County Sheriff's office as a training officer and have been so employed with this office as a training officer for the last two years. I have been in law enforcement for the past 20 years. I previously served with the Georgetown City Police for two years.

4. In 2002 or 2003 I was an investigator with the Georgetown County Sheriff's office and was called upon to work a homicide case with another investigator, Ernest Alexander Hampton. Information had been developed regarding two persons who were missing and reports filed with the Sheriff's Office. About the same time a Firebird had also been reported missing or stolen from a local convenience store. The owner, Jody Ward or his wife was the owner of the vehicle and was also a suspect in the homicide case. Wards other vehicle a Suzuki Sidekick had been observed with the two missing person in the vehicle about the same point in time the persons were reported missing.

5. Information had been obtained that the Sidekick maybe located at Lake Dawhoo near Andrews, SC and was registered to our suspect Ward. I along with deputy sheriff Earnest Hampton and other personnel from SLED and several divers went to that location and confirmed that a Sidekick had been in fact located in the water.

6. I recall that we contacted the dispatcher who sent a local wrecker service on rotation who was unable to pull the vehicle out of the lake due to other vehicles in the same water. Therefore, another wrecker service known to me as, Winston's Wrecker service. Sometime later a larger wrecker knows as "Big Bertha" arrived on the scene and was operated by Scott McKenzie who was the owner's son. Within a short period of time McKenzie who was assisted by others at the scene was able to pull the Sidekick from the lake and then it was taken to the Georgetown County Sheriff's office. It was determined that this Sidekick and the Firebird belonged to Jody Ward, who was the last individual known to be in contact with the two missing persons who had been reported to the Georgetown County sheriff's office.

7. I along with Earnest Hampton completed the investigation and then made a presentation to the Grand Jury sometime in 2003. I was not present at the time that grand jury presentation was made. Investigator Hampton usually made all the presentations to the grand jury on behalf of the Georgetown County sheriff's office on most criminal cases.

8. I am not personally acquainted with Scott McKenzie; however I did know that he did work for his father in the wrecker service business known as Winston's Wreckers in Georgetown, S. C. I do not know whether Scott McKenzie served on a grand jury at any point in time especially in 2003 or 2004. I am not aware whether the wrecker driver Scott McKenzie was ever in the sheriff's office report that was given to the solicitor's office in regard to the Sidekick recovery at Lake Dawhoo.
9. That I make these true and accurate statements on my own freewill and that I am not under the influence of any drug either prescribed or over the counter or illegal, or alcohol or under duress of any kind.

AFFIANT SAYETH NOT:

GARY TODD

SWORN TO AND SUBSCRIBED

Before me this 12th day of June 2014

NOTARY PUBLIC

BRENDA BRANTLEY
My Commission Expires
NOTARY PUBLIC
04-03-2022
SOUTH CAROLINA

STATE OF SOUTH CAROLINA

My commission expires on

AFFIDAVIT OF ERNEST A. HAMPTON

RE: JODY WARD (TRIAL 3/2004)

PERSONALLY APPEARED BEFORE ME:

1. My name is Ernest A. Hampton. I am over 18 years of age.

2. I am a resident of Georgetown County, S. C.
3. That this affidavit is true and correct and is based on my own personal knowledge and information provided to me by those persons named.
4. I am currently employed with the Georgetown County Sheriff's office. I was formerly with the South Carolina Highway Patrol for over 9 years. I have served in the sheriff's office as the lead criminal investigator since leaving the patrol.
5. Sometime ago, possibly in 2002 or 2003 while I was working as the lead criminal investigator I received information that two persons had been reported missing in Georgetown County, S. C. At the same time a Jeep had been reported stolen from a local convenience store. Information had been developed by me that the stolen Jeep had possibility been located in Lake Dawhoo near Andrews S. C.
6. Myself along with investigator Gary Todd and other law enforcement officials from SLED and several divers went to the lake and determined that indeed a jeep was in the lake. A call was made to the dispatcher and asked for the next wrecker service on rotation to respond to this attempt to recover the jeep from Lake Dawhoo.
7. I recall that when this wrecker arrived on the scene it was unable to pull the jeep out of the water due to the steep embankment, and at that time we called for another wrecker owned by Winston's Wrecker service. That was a larger wrecker service which would be able to handle this particular job. A short time later Scott McKenzie driver of his father's wrecker which was known locally as, "big bertha" arrived on the scene at Lake Dawhoo, and was assisted by law enforcement personnel on the scene. It was determined that this Jeep was registered to Jody Ward.

8. My investigation continued along with Gary Todd and subsequently information was developed that Jody Ward may have been responsible for the disappearance of the two reported missing persons.

9. At a later point in time this matter was presented to the grand jury by me and Gary Todd. We make all the presentations to the grand jury on behalf of the Georgetown County Sheriff's office. I have known Scott McKenzie for a short period of time and did recall that he was on the grand jury for about two years some time. I do not recall whether or not that it was at this point in time nor do I recall whether he was just on the grand jury or the foreman when I presented the Jody Ward case in 2003.

10. I have known Jody Ward since he was 15 years of age. I do recall that he was indicted by the grand jury on charges of murder.

11. I do not recall whether the name of Scott McKenzie as the driver of the wrecker service was ever reported to the Georgetown County solicitor's office, or Greg Hembree or Bo Bryant. That information would be in the report that I made to the solicitor's office.

12. Over the years, having made presentations to the grand jury, I have known several members of the grand jury, however, that has never precluded my testimony or altered information that was presented to the grand jury by me. I presented the facts as they were known to me at the time I made the presentation.

Ernest A. Hampton

SWORN TO AND SUBSCRIBED

Before me this 1st day of June 2014

NOTARY PUBLIC

STATE OF SOUTH CAROLINA

My commission expires on 1/06/14.

SOUTH CAROLINA AFFIDAVIT

COUNTY OF GEORGETOWN NICOLE WARD

RE: JODY WARD (Trial 3/2004)

PERONALLY appeared before me, the undersigned Notary Public, the Affiant,

NICOLE WARD who being duly sworn stated as follows:

1. My name is Nicole Ward. And I am over the age of eighteen years.

2. I am a resident of Georgetown County, South Carolina.

3. That this affidavit is true and correct and it is based on my own personal knowledge and information provided to me by those persons named.

4. I currently reside at 341 Kensington Blvd, Georgetown, SC with my husband Rocky Ward. My father is James A. Cooper (Jimmy).

5. Jimmy Cooper is a cousin to (James) David Cooper. (James) David Cooper was married to Marisa Cooper for many years but they divorced about 3 years ago and David has remarried. Marisa is a single Mom and has not remarried. Cindy Cooper is David's sister and I and have known her many years having grown up with her in Georgetown.

6. I recall a telephone conversation I had with Jody Ward sometime in October of last year at which time we discussed the relationship of Marisa Cooper who was a juror in Jody's case some years ago, at which time Kevin Cooper testified as a witness. I told him at the time that Kevin was related to Marisa and that they were cousins by marriage.

7. Kevin's father was Tommy Cooper, now deceased and his mother is Carol Cooper. Based on this relationship Tommy and David are 2nd cousins. Tommy and David's father are 1st cousins.

8. Kevin has two brothers Bryan and Randall and one sister, Angel.

9 David Cooper father is W. D. Cooper age 70.

10 Based on the foregoing that would make David a 3rd cousin to Kevin and since Marisa, the juror was married to David during Jody's trial, Kevin was her third cousin by marriage.

11 That I make these true and accurate statements of my own free will and that I am not under the influence of any drugs either prescribe, over the counter, or illegal, or alcohol or duress of any type.

FUTHERMORE THE AFFIANT SAYETH NOT.

Nicole Ward.

SWORN TO AND SUBSCRIBED
Before me this 22 day of March 2014

NOTARY PUBLIC
STATE OF SOUTH CAROLINA
My commission expires: 3/24/2024

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

AFFIDAVIT OF NICOLE WARD

PERSONALLY APPEARED BEFORE ME, Nicole ward, who being first duly sworn, deposes and states as follows:

1. I am Nicole Ward. I am a resident of Georgetown County. I am over 18 and fully competent to make this affidavit. I swear these statements are true and correct to the best of my information and belief.

2. I currently reside at 341 Kensington Boulevard, Georgetown, South Carolina with my husband, Rocky Ward.

3. My father is James (Jimmy) A. Cooper.

4. James A. Cooper's brother is Tommy Cooper.

5. Tommy Cooper's son is Kevin Cooper.

6. My grandfather and Tommy Cooper's father was Walter Cooper's brother.

7. Walter Cooper's grandson is James David Cooper.

8. James David Cooper was married to Marisa Cooper for many years, including the time of the trial of Jody Ward.

9. This relationship makes Marisa M. Cooper and Kevin Cooper second cousins by marriage.

10. I make these statements of my own free will and I am not under the influence of any drugs or alcohol or under duress of any type.

FURTHER AFFIANT SAYETH NOT.

Nicole Ward

Sworn and subscribed to before me
this 28th day of October, 2014

George W. Hawkins
NOTARY PUBLIC
My commission expires: 7/27/2019

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STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	IN THE COURT OF GENERAL SESSIONS FIFTEENTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA	CASE No: 2003-GS-22-1030, 1031
V.	**ORDER GRANTING STATE'S MOTION TO DISMISS**
JODY LYNN WARD Defendant.	

This matter comes before the Court by way of the Defendant's Motion for a New Trial Based on After Discovered Evidence filed on October 28, 2014. The State of South Carolina filed its response in the form of a Motion to Dismiss Defendant's Motion on September 8, 2017.

Although *SCRCrimP* Rule 29(a) provides that a post-trial motion "may, in the discretion of the court, be determined on briefs filed by the parties without oral argument", the Court chose to hold a hearing on this matter on October 2, 2017. The Defendant and his retained attorney, Tristan Shafer were present before the Court. As a preliminary matter, the Defendant's counsel asked the Court to address the Defendant's previously filed motion to proceed *Pro-Se* on the record. The Court questioned the Defendant about this issue and if he wished to represent himself. The Defendant repeatedly stated he wanted Mr. Shafer to represent him. Therefore the Court finds the Defendant is satisfied with Mr. Shafer's representation and the motion to proceed *Pro-Se* is denied.

The Court heard oral arguments and reviewed the filings including supporting documents submitted by the parties on the remaining two pending motions. Initially, the Court finds that the

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Defendant filed this motion in violation of the limitations contained in SCRCrimP Rule 29(b). This rule states:

> 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; provided however, that a motion for a new trail 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."

The Defendant filed an appeal of a prior denial of a motion for a new trial in the South Carolina Court of Appeals under Appellate case No. 2012-213222. That appeal was pending when the Defendant filed a Motion to Suspend Appeal and for Leave to File Motion for a New Trial Based on After Discovered Evidence. On October 8, 2014 the South Carolina Court of Appeals denied the Defendant's Motion to Suspend Appeal and for Leave to File Motion for a New Trial Based on After Discovered Evidence. The Defendant, through Counsel apparently disregarded this order and filed this Motion on October 28, 2014 in violation *SCRCrimP Rule* 29(b) and Rule 4(b) *Subsequent Application for Order after Refusal*. After the improper filing of the present motion, the Court of Appeals filed their ruling affirming the dismissal of the Defendant's earlier PCR and new trial claims on November 12, 2014.

As to the merits of the Defendant's motion, it appears that the Defendant chose to file the present motion which includes allegations of juror misconduct under Rule 29(b) and not under a claim of Post-Conviction Relief (PCR). The record shows this Defendant has filed multiple PCR applications which have been denied and the denial affirmed on appeal. Had a juror misconduct claim been captioned as yet another PCR application, the Supreme Court's more recent holding in McCoy v. State, 401 S.C. 363 2013 may have applied and an evidentiary hearing on the claim

applying the analysis set forth in State v. Woods, 345 S.C. 583 (2001) possible. However that is of no import in the present matter.

The claim before the Court must be reviewed under the standard set forth in State v. Spann, 334 S.C. 618 (1999):

> To obtain a new trail based on after discovered evidence, the defendant must show that
> (1) the evidence is such as will probably change the result if a new trial is granted;
> (2) the evidence has been discovered since trial;
> (3) the evidence could not have been discovered prior to trial through the exercise of due diligence;
> (4) the evidence is material;
> (5) the evidence is not merely cumulative or impeaching.

The Court finds the information cited by the Defendant in the current motion, even if true, is not material evidence as to this Defendant's guilt or innocence and would not change the result if a new trial were granted.

The alleged new evidence cited in the Defendant's motion was known to the Defendant and counsel or could have been ascertained by the exercise of reasonable diligence prior to and at the time of trial in 2004 and certainly within one year after conviction. The claims are based on common last names with extended family relatives or based on personal relationships with named individuals the Defendant or Defendant's family knew personally prior to trial. Juror background information and the State's witness list was provided to the Defense during *voir dire* which occurred prior to jury selection. That information continued to remain unchanged and available for one year after conviction and is not new "evidence" as to the defendant's guilt.

Finally, the improper grand jury conduct allegation has already been adjudicated. It was included as issue two in the Defendant's October 12, 2005 Anders Final Brief of Appellant, which was reviewed and dismissed by the South Carolina Supreme Court on January 26, 2007.

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The Defendant contended during oral arguments on this motion that the claims of grand jury misconduct should be reheard due to an assertion of prosecutorial misconduct that occurred prior to the 2004 trial. The Court finds the misconduct claim was initially raised by the Defendant's trial counsel and a hearing on the merits of the claim conducted on February 27, 2004. The Court found no basis for Defendant's misconduct claims and filed a written order denying the Defendant's motion on March 8, 2004.

In conclusion, the Court finds the Defendant's allegations as evaluated by the Spann standard are insufficient and the Defendant's motion is denied.

Therefore it is ORDERED, ADJUDGED, AND DECREED that

The Defendant's Motion to proceed *Pro-Se* is **DENIED**.
The State's Motion to Dismiss is **GRANTED**.
The Defendant's Motion is **DENIED**.

AND IT IS SO ORDERED.

Judge Larry Hyman
15th Judicial Circuit

Conway, S.C.
~~October 9,~~ 2017
Dec. 6

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of General Sessions

Larry B. Hyman, Circuit Court Judge

Case No. 2003-GS-22-1030;1031

The State of South Carolina,

Respondent,

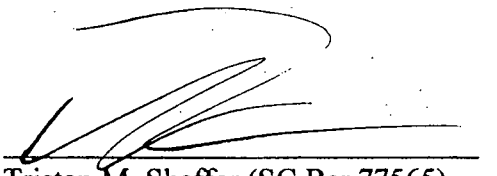
v.

Jody Lynn Ward, Appellant.

NOTICE OF APPEAL

Appellant appeals the order denying his Motion for a New Trial Based on After Discovered Evidence. The order was filed on December 7, 2017 and was received by Appellant on February 23, 2018.

March 5, 2018



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Attorney for Appellant

Other Counsel of Record:
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Attorney for Respondent

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Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

October 22, 2019

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(803) 941-7514
Attorney for Appellant

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

October 22, 2019

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