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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Georgetown County

Larry B. Hyman, Circuit Court Judge

RECEIVED
DEC 09 2019
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JODY L. WARD,

APPELLANT

Appellate Case 2018-000402

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. When Appellant alleged that Juror 19 failed to disclose her familial relationship to a State's witness during *voir dire*, did the circuit court err in summarily dismissing Appellant's Motion for a New Trial Based on After Discovered Evidence?

STATEMENT OF THE CASE

Appellant was indicted by the Georgetown County Grand Jury for two counts of Murder arising from the shooting deaths of Wilford Brown and Elton Rutledge. On March 15, 2004, Appellant was called to trial before the Honorable Paula Thomas and a jury. ROA 2. Appellant was represented by Margaret Ann Kneece and J. Wesley Locklair. ROA 2. The State was represented by J. Gregory Hembree and Robert Bryan. ROA 2.

At the conclusion of the trial, Appellant was found guilty of both counts of murder. ROA 150. Appellant was sentenced life imprisonment. ROA 159.

Petitioner appealed his conviction. For the Appeal, Appellant was represented by Robert M. Dudek. Appellate counsel filed an *Anders*[1] brief. ROA 160-170. Appellant filed a *pro se Anders* response on September 13, 2005. ROA 234-298. On January 26, 2007, this Court dismissed the direct appeal. ROA 425.

On April 14, 2007, Appellant filed a *pro se* Petition for Writ of Certiorari with the South Carolina Supreme Court. ROA 299-313. Appellant then moved to withdraw the Petition for Writ of Certiorari. ROA 314. The Petition for Writ of Certiorari was dismissed on July 5, 2007. ROA 315. Remittitur was sent on July 6, 2007. ROA 317.

On July 11, 2007, Appellant filed an Application for Post-Conviction Relief ROA 171-177. The State filed its return on October 5, 2007. ROA 183-185. An evidentiary hearing was convened on May 1, 2008 before the Honorable Steven John. ROA 186. At the hearing, Appellant was represented by Bobby Frederick and the State was represented by Christina J. Catoe. Appellant's Application for Post-Conviction Relief was dismissed on May 15, 2008. ROA 186.

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[1] *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967).

Appellant appealed the denial of the Application for Post-Conviction Relief. For this appeal, Appellant was represented by Robert Pachak. ROA 318. The Petition for Writ of Certiorari was denied on August 20, 2009. ROA 330.

On July 13, 2009, Appellant filed a subsequent *pro se* Application for Post-Conviction Relief. ROA 331. This application, for case number 2009-CP-22-1074, for PCR was dismissed on December 30, 2009 by the Honorable Benjamin Culbertson. ROA 341. Appellant appealed the denial of this application for PCR; however, that appeal was dismissed on March 15, 2010. ROA 357. Remittitur was sent on March 31, 2010. ROA 358.

On May 4, 2010, Appellant filed another pro se Application for Post-Conviction Relief. ROA 347. On July 10, 2010, this PCR application, 2010-CP-22-733, was dismissed. ROA 355. Appellant appealed the denial of this application for PCR; however, certiorari wad denied on August 18, 2011. ROA 357. Remittitur was sent on September 7, 2011. ROA 358.

On October 25, 2011, Appellant filed a Petition for Writ of Habeas Corpus in the original jurisdiction of the South Carolina Supreme Court. ROA 359-384. This Petition was denied on November 16, 2011. ROA 385.

On December 1, 2011, Appellant filed a Petition for Writ of Habeas Corpus in South Carolina District Court. ROA 202. This action was dismissed on March 20, 2013. ROA 386-424.

On May 16, 2012, Appellant filed a *pro se* Motion for a New Trial Based on After Discovered Evidence. ROA 439-450. On July 31, 2012, this motion was denied by the Honorable Benjamin Culbertson. ROA 451-452.

Appellant Filed a *pro se* Notice of Appeal. On September 22, 2014, Natasha Hanna filed a Notice of Appearance on the Appeal for the limited purpose of filing a Motion to Suspend the Appeal and For Leave to File a Motion for a New Trial Based on After Discovered Evidence. ROA

453-461. In an Order dated October 8, 2014, this Court denied the Appellants Motion to Suspend Appeal and For Leave to File Motion for a New Trial Based on After Discovered Evidence noting the following:

> 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."

ROA 462-463. On November 12, 2014, this Court affirmed the ruling on 2012 Motion for a New Trial Based on After Discovered Evidence. ROA 464.

On October 30, 2014, Appellant, through his attorney Natasha Hanna, filed a Motion for a New Trial Based on After Discovered Evidence. ROA 467-470. On September 11, 2015, the Honorable Benjamin Culbertson filed a Form 4 Order denying Appellant's Motion for a New Trial Based on After Discovered Evidence. ROA 471. On September 22, 2015, Ms. Hanna e-mailed Judge Culbertson, asking for a hearing. Supp. ROA 42-43.

A hearing was scheduled for December 10, 2015 before the Honorable Steven John. ROA 473. At the hearing, Ms. Hanna was relieved. The Court ordered that Appellant be evaluated for competence to represent himself. ROA 490-497.

On September 8, 2017, Respondent filed a Motion to Dismiss [Appellant's] Motion for a New Trial Based on After Discovered Evidence. ROA 542-544. Appellant, through counsel, submitted a Memorandum in Support of Defendant's Motion for a New Trial Based on After Discovered Evidence. Supp. ROA 21-68.

A Hearing was convened on October 2, 2017 before the Honorable Larry B. Hyman. ROA 498. Prior to the hearing, Appellant had requested to proceed *pro se*. however, at the hearing Appellant indicated that he wanted an attorney and the Court did not order him to proceed *pro se*. ROA 507, l. 15—511, l. 20.

After the hearing, the Court allowed briefing on the State's motion. Supp. ROA 21-68. Appellant also renewed his motion to allow Mr. Ward to proceed *pro se*.

In an order clocked on December 7, 2017, the circuit court granted the State's Motion to Dismiss and denied the motion to proceed *pro se*. ROA 561. This appeal follows.

ARGUMENT

I. When Appellant alleged that Juror 19 failed to disclose her familial relationship a State's witness during *voir dire*, the circuit court erred in summarily dismissing Appellant's Motion for a New Trial Based on After Discovered Evidence.

Relevant Facts

During the Appellant's trial, the State alleged that Appellant shot Wilford Brown and Elton Rutledge in "a drug deal gone bad." ROA 98, l. 22—99, l. 7. 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 with a 9mm handgun and buried their bodies. The State also alleged that Appellant dumped the Suzuki in Dawhoo Lake in Georgetown County to destroy evidence of the shooting. ROA 98, l. 22—130, l. 8.

Kevin Cooper was a key witness for the State against Appellant. ROA 83, l. 20—96, l. 27. Mr. Cooper claimed to have seen Appellant with one of the decedents prior to the shooting. ROA 90, ll. 7-15. Mr. Cooper allegedly overheard a conversation were Appellant was mad that he lost money. ROA 90, l. 16—91, l. 3. Mr. Cooper testified that Appellant asked him to go buy 9mm bullets. ROA 91, ll. 3-20. This testimony ultimately would fit into the State's theory that Mr. Ward shot the decedents with a 9mm because they owed him money. ROA 97, l. 22—130, l. 8.

On October 30, 2014, Appellant, through his then attorney Natasha Hanna, filed a motion for a new trial based on after discovered evidence alleging the juror misconduct. In the motion, Appellant alleged that Marissa Cooper, Juror 19, failed to disclose a relationship State's witness Kevin Cooper. Supp. ROA 1-20. Juror 19 was asked along with the other jurors, whether she was related by blood or marriage to any of the potential witnesses. ROA 48, l. 1—50, l. 15. At no point did Juror 19 respond to that she was related to Kevin Cooper. ROA 50, l. 15. However,

Appellant submitted an affidavit which supported his position that Juror 19 was related to Kevin Cooper. Supp. ROA 63-64. Appellant alleged Juror 19 intentionally concealed this information. Supp. ROA 3.

On September 8, 2017, the State filed a motion to summarily dismiss, Defendant's motion for a new trial based on after discovered evidence. In that motion, the State argued that Appellant's 2014 motion was filed in violation of Rule 29(b), SCRCrimP because Appellant had an appeal pending on a different Motion for a New Trial Based on After Discovered Evidence.[2] The State also argued that "the information cited by [Appellant] was known to [Appellant] and counsel or could have been ascertained by the exercise of reasonable diligence prior to and at the time of trial in 2004..." ROA 543.

On October 2, 2017, hearing was convened before circuit court. The State argued that the relationship between Juror 19 and Mr. Cooper could have been known by Appellant at the time of trial. ROA 519, l. 13—520, l. 19. However, the State also took the position that Juror 19 and Mr. Cooper's relationship was so distant as not to arise to the level of juror misconduct. ROA 520, l. 20—521, l. 8.

In it order granting summary dismissal, the circuit court found the following:

> The Claim before the Court must be reviewed under the standard set forth in *State v. Spann*, 334 S.C. 618 (1999)...The Court finds the information cited by the [Appellant] in the current motion, even if true, is not material evidence as to [Appellant's] guilt or innocence and would not change the result if a new trial were granted.

[2] This motion was filed while Appellant had an appeal pending from a previous unrelated motion for a new trial based on after discovered evidence. Appellate Case 2012-213222 concerns allegations of newly discovered evidence involving allegations that an individual named Michael Abner hired the two decedents to kill Defendant. ROA 427-438. Although Defendant's motion to suspend the appeal was denied by this Court, the order denying the motion to suspended the appeal indicated "Nothing in this order shall prohibit the lower court...from proceeding with matters not affected by this appeal." Since the subject matter of 2014 Motion does not deal with the same matters alleged in Appellate Case 2012-213222, the 2014 Motion was properly filed.

ROA 563. The circuit court also found that Appellant could have ascertained the relationship based on the exercise of reasonable diligence. The circuit granted State's motion to summarily[3] dismiss Appellant's Motion for a New Trial Based on After Discovered Evidence.

Argument

The Supreme Court has found that juror misconduct is not based on the factors listed in *Spann*[4] but rather "is governed by a separate standard." *McCoy v. State*, 401 S.C. 363, 371, 737 S.E.2d 623, 627, (2013). "[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." *Id.* "[E]valuating the merits of a juror misconduct claim is a fact-intensive inquiry, which is most appropriately conducted after a hearing." *Id.*, 401 S.C. at 371, 737 S.E.2d at 628.

The circuit court applied the wrong standard in assessing whether to summarily dismiss Appellant's 2014 motion for a new trial. In its order of dismiss the circuit court found the following:

> 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.

ROA 562-563. However, *Woods* was properly brought in a motion for a new trial. *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001). Additionally, there are other cases where this issue was raised in a motion for a new trial. *See e.g. State v. Savage*, 306 S.C. 5, 409 S.E.2d 809 (1991); *State v.*

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[3] Although in the order the circuit court writes "[A]s to the merits of the [Appellant's] motion..." Appellant was not allowed to call witnesses to address the merits of his motion. R*(Tr. 14, l. 21—15, l. 8). Therefore, this matter was summarily dismissed.

Sparkman, 358 S.C. 491, 596 S.E.2d 375 (2004).

Moreover, the circuit court erred in summarily ruling that even if Juror 19 was related to Kevin Cooper it "would not change the result if a new trial were granted." ROA 563. To the extent a harmless error analysis is proper in a case of juror misconduct, the harmless error analysis should only be made after a hearing. *See Remmer v. United States*, 347 U.S. 227, 230, 74 S.Ct. 450, 451-452 (1954) ("We therefore vacate the judgment of the Court of Appeals and remand the case to the District Court with directions to hold a hearing to determine whether the incident complained of was harmful to the petitioner, and if after hearing it is found to have been harmful, to grant a new trial.") Therefore, the circuit court erred by holding that Appellant was not entitled to a hearing on his motion because he had not filed it as a PCR action.

Additionally, the Court notes that Appellant could have discovered this relationship through "reasonable diligence." The standard of reasonable diligence requires a person to act after they are put on notice that they should act. *See Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998) ("A cause of action should have been discovered through exercise of reasonable diligence when the facts and circumstances would have put a person of common knowledge and experience on notice that some right had been invaded or a claim against another party might exist."). A juror and a witness both having the common last name "Cooper" is not sufficient to put Appellant on notice that the two were related. To require defendants and defense counsel to do genealogical research on prospective jurors is not reasonable.

Therefore, the circuit court erred in summarily dismissing Appellant's motion for a new trial and this matter should be remanded for an evidentiary hearing.

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[4] *State v. Spann*, 334 S.C. 618, 513 S.E.2d 98 (1999).

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CONCLUSION

For the foregoing reasons Appellant respectfully requests that this Court remand the case for a hearing on the Motion for a New Trial Based on After Discovered Evidence.

Respectfully submitted,

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December 2, 2019

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ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County
Larry B. Hyman, Circuit Court Judge

THE STATE,

Respondent,

v.

JODY L. WARD,

Appellant

Appellate Case No. 2018-000402.

FINAL BRIEF OF RESPONDENT

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SC Court of Appeals

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Ward's allegation that Juror 19 failed to disclose that she was second cousins, by marriage, to one of the State's witnesses was reasonably discoverable within one year of trial and is further too remote and unsubstantiated to meet any standard warranting a new trial when Juror 19 otherwise answered the court during voir dire that she had read about the case in the newspaper and could be impartial 18

A. Juror 19's alleged relation to one of the State's witnesses (second cousins through marriage) could been discovered within one year of trial with exercise of reasonable diligence because any potential relation was provided to the defense prior to jury selection and was likewise available to Ward within one year of trial 20

B. Juror 19's alleged sixth-degree relation to one of the State's witnesses was "not new 'evidence' as to the defendant's guilt" because the alleged relation was dubiously presented and too remote to be found to materially affect the outcome of the trial under any standard applicable to Rule 29(b), SCRCrimP 21

C. *Res judicata* precludes an alternative outcome on appeal because Ward had a full and fair opportunity to litigate this claim during his other numerous pursuits of collateral relief 28

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APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL

I. When Appellant alleged that Juror 19 failed to disclose her familial relationship to a State's witness during *voir dire*, did the circuit court err in summarily dismissing Appellant's Motion for a New Trial Based on After Discovered Evidence?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE ON APPEAL

I. Did the trial court err when it denied Appellant's Rule 29(b), SCRCrimPro motion made ten years after trial when Ward's trial counsel was provided with the State's witness list and juror information prior to jury selection in 2004 and when the alleged relationship of second cousins, through marriage, between Juror 19 and one of the State's witnesses existed at the time of trial, could have reasonably been discovered within the constraints enunciated in Rule 29(b), and was too remote and dubious to constitute a *prima facie* case of after-discovered evidence?

STATEMENT OF THE CASE

Appellant Jody Lynn Ward is presently confined in the South Carolina Department of Corrections (SCDC), as the result of two Georgetown County murder convictions and accompanying sentence, which this Court affirmed in 2007. Ward's case has a lengthy procedural history. Ward has pursued the instant Rule 29(b), SCRCrimP allegation since some time in 2014, at which time Ward was party to another pending appeal taken from the circuit court's denial of a previous Rule 29(b), SCRCrimP motion. Thus, the present action is an appeal from a successive Rule 29(b), SCRCrimP motion. Betwixt and among those actions, Ward has also initiated no less than four post-conviction relief actions and a federal habeas corpus action, each of which have been resolved in favor of the State.[1]

A. Original State court proceedings

The Georgetown County Grand Jury indicted Ward in July 2003 for two counts of murder. (Indictment Nos. 2003-GS-22-0130 and -01031). Margaret Ann Kneece, Esquire, and J. Wesley Locklair, III, Esquire, represented him on these charges. After a series of pre-trial hearings, Ward proceeded to a jury trial on March 15-18, 2004, over which the Honorable Paula H. Thomas presided. The jury convicted Ward of both murders. Judge Thomas sentenced him to concurrent terms of life imprisonment. Ward timely perfected an appeal. On August 29, 2005,

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

Assistant Appellate Defender Robert M. Dudek filed a Final *Anders* Brief of Appellant[2] on Ward's behalf and petitioned to be relieved as counsel. The Final *Anders* Brief set forth one issue for review:

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

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

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

[3] Initially, he presented the following issues:

> Issue One: THE GRAND JURY DID NOT HAVE JURISDICTION TO ISSUE AN INDICTMENT WHEN THERE WAS INSUFFICIENT EVIDENCE PRESENTED TO MEET ALL THE ELEMENTS OF THE CRIME CHARGED IN VIOLATION OF ARTICLE I, § 3.
>
> Issue Two: APPELLANT WAS INDICTED UPON AN ILLEGAL AND INSUFFICIENT PROCESS OF THE GRAND JURY IN VIOLATION OF S.C. CONST. Art. I, § ll, and Art. V, § 22 WHEN THE FOREMAN, SCOTT MCKENZIE WAS DIRECTLY INVOLVED AT THE CRIME SCENE AND HAVING PRIOR BIAS KNOWLEDGE OF THE EVENTS PRIOR TO SERVICE ON GRAND JURY; TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT THIS ISSUE AT TRIAL PRIOR TO THE VERDICT BY THE JURY IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE U. S. CONSTITUTION AND VIOLATION OF SC. CONST. ART. I, § 3.
>
> Issue Three: THE INDICTMENT IN APPELLANT'S CASE WAS FLAWED WHERE MISINFORMATION STATED THAT THE DECEASED DIED DUE TO GUN SHOT WHEN AT TRIAL TESTIMONY STATED OTHERWISE IN THIS "NO BODY CASE." TRIAL COUNSEL WAS INEFFECTIVE FOR NOT SEEKING TO QUASH INDICTMENT AND/OR MAKE MOTION FOR MISTRIAL; THE GRAND JURY IN INCLUDING SAME ON INDICTMENT MISREPRESENTED THE EVIDENCE AND ESTABLISHED IN THE MINDS

OF THE TRIAL JURY THAT DECEASE[D'S] DEATH WAS DUE TO GUN SHOT IN WHICH WAS NOT EVIDENCED AT TRIAL AND INDICTMENT WAS THEREFORE FLAWED. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT PURSUING THESE ISSUES; INDICTMENT WAS ISSUED IN VIOLATION OF S.C. CONST. AND THE UNITED STATES CONSTITUTION THE 5TH, SIXTH, AND FOURTEENTH AMENDMENTS AND S.C. CONST. ART. I,§ 3.

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

Issue Five: THE SOLICITOR'S HIGHLY INFLAMMATORY AND PREJUDICIAL REMARKS IN OPENING AND CLOSING STATEMENTS, BOLSTERING AND VOUCHING FOR STATE WITNESSES, ACTING AS WITNESS BEFORE THE JURY, TESTIFYING AS IF STATEMENTS MADE WHERE FACTUAL, AND THE FAILURE OF TRIAL COUNSEL TO OBJECT VIOLATING APPELLANT'S RIGHT TO A FAIR TRIAL, INFECTED THE JURY PRIOR TO EVIDENCE, AND DENIED APPELLANT DUE PROCESS AND EQUAL PROTECTION[] OF THE LAWS IN VIOLATION OF THE FOURTEENTH AND SIXTH AMENDMENT[S] OF U.S. CONSTITUTION AND ART. [I], § 3, ART. IV, § VI OF THE S.C. CONSTITUTION.

Issue Six: DID THE TRIAL COURT LACK SUBJECT MATTER JURISDICTION TO ENTER A CONVICTION OR IMPOSE SENTENCE UPON INDICTMENT 03-GS-22-1031 DUE TO THE FATAL VARIANCE BETWEEN THE PROOF AT TRIAL AND THE ALLEGATIONS WITHIN THE FACE OF THE INDICTMENT?

Issue Seven: TRIAL COUNSEL WAS INEFFECTIVE COUNSEL WHEN FAILING TO MAKE CONTEMPORANEOUS OBJECTIONS IN A TIMELY MANNER IN ORDER TO PRESERVE FOR APPEAL PURPOSES VIOLATING APPELLANT'S RIGHTS OF DUE PROCESS AND EQUAL PROTECTIONS OF THE LAWS UNDER S.C. CONST. ART. I, § 3 AND ART. I, §4 AND THE 6TH AND 14TH AMENDMENTS OF THE U.S.

granted counsel's petition to be relieved in an unpublished Opinion. *State v. Jody Lynn Ward*, 2007-UP-048 (S.C. Ct. App. filed Jan. 26, 2007).

Ward filed a Petition for Rehearing (*pro se*), dated February 1, 2007. At the Court's direction, the State made a Return to *Pro Se* Petition for Rehearing on February 15, 2007. This Court denied rehearing on March 22, 2007.

Ward then filed a *pro se* Petition for Writ of Certiorari which the State received on April 30, 2007. It raised four allegations. On May 14, 2007, the State filed a Return to *Pro Se* Petition for Writ of Certiorari. However, Ward voluntarily withdrew his Petition in a June 29, 2007 letter to counsel, Mr. Dudek. Counsel forwarded this letter and, on July 5, 2007, the South Carolina Supreme Court granted his request to dismiss the appeal. This Court sent the Remittitur to the Georgetown County Clerk of Court on July 6, 2007, thus ending Ward's direct appeal of his convictions and sentence.

CONSTITUTIONS.

> Issue Eight: THE COURT ERRED IN CHARGING THE JURY WITH HANDS OF ONE HANDS OF ALL WHERE THE APPELLANT WAS INDICTED AS A PRINCIPLE ONLY AND THE CHARGE OF HANDS OF ONE HANDS OF ALL WAS INSUFFICIENT, VAGUE, MISLEADING, CONFUSING AND ALONG WITH PRINCIPLE CHARGE DEPRIVED THE APPELLANT OF A FAIR TRIAL AND DUE PROCESS; COUNSEL WAS ALSO INEFFECTIVE IN FAILING TO OBJECT TO THIS CHARGE AND REQUEST A MORE SPECIFIC CHARGE.

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

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

B. Post-conviction proceedings.

Ward filed **his first** *pro se* Post-Conviction Relief (PCR) Application on July 11, 2007. *Ward v. State*, Georgetown Cnty. Ct. of Common Pleas, Case No. 2007-CP-22-00915 (filed July 11, 2007). He later supplemented the claims in his Application. The Honorable Stephen H. John held an evidentiary hearing into the matter on at the Horry County Courthouse on May 1, 2008. On May 15, 2008, Judge John signed an Order of Dismissal, in which he denied relief and dismissed the Application with prejudice. The Order of Dismissal addressed Ward's claims that trial counsel was ineffective because they (1) failed to object to the Solicitor's comments regarding Ward's "lack of remorse;" (2) failed to object to the Solicitor's vouching for the State's witnesses; (3) failed to object to the Solicitor's comments on the Ward's credibility and the defense's theory; and (4) failed to request jury instructions on voluntary and involuntary manslaughter. Ward filed a Motion to Amend or Alter the Judgment on May 20, 2008. Judge John thereafter filed an "Order Denying Applicant's Motion To Alter Or Amend In Part And Clarifying Order Of Dismissal."

Ward then timely served and filed a notice of appeal. Assistant Appellate Defender Robert M. Pachak represented him in collateral appellate proceedings. On December 30, 2008, Ward filed a petition for writ of certiorari.[4] The State filed a Return to Petition for Writ of Certiorari on February 13, 2009. The South Carolina Supreme Court filed an Order denying

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[4] The two issues presented in the petition were:

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

certiorari on August 20, 2009, and it sent the Remittitur to the Georgetown County Clerk of Court on September 8, 2009.

Ward filed **a second** *pro se* Post-Conviction Relief (PCR) Application on July 13, 2009. *Ward v. State*, Georgetown Cnty. Ct. of Common Pleas, Case No. 2009-CP-22-915 (filed July 13, 2009). Here, Ward claimed that he received ineffective assistance of counsel because counsel failed to convey a plea offer to him. He asserted that this claim was a "new rule of law" under S.C. Code Ann. § 17-27-45(B) & (C) (2009), and the decision in *Davie v. State*, 381 S.C. 601, 675 S.E.2d 416 (2009). The State thereafter filed a Return and Motion to Dismiss, in which it argued for summary dismissal because the 2009 Application was barred by the statute of limitations and because it was successive to the 2007 Application.

The Honorable Benjamin H. Culbertson, resident judge to the Fifteenth Judicial Circuit, ultimately filed a January 13, 2010 Final Order of Dismissal, in which he summarily dismissed the 2009 Application because (1) *Davie v. State* did not apply to the facts of the Ward's case; (2) the 2009 Application was a successive application; and (3) the 2009 Application was barred by the statute of limitations. Ward timely served a notice of appeal.

The Honorable Daniel E. Shearouse, Clerk of Court for the South Carolina Supreme Court, sent Ward a letter On February 23, 2010, informing Ward that he had to comply with the requirements of Rule 243(c), SCACR. Ward made a response in a March 2, 2010 document styled "Petition for Writ of Certiorari." The South Carolina Supreme Court dismissed the appeal. It found that Ward "failed to show that there is an arguable basis for asserting that the determination by the lower court was improper," as required by Rule 243(c). *Ward v. State*, Order of Dismissal (S.C. Sup. Ct. filed Mar. 15, 2010) (Trial Court Case No. 2009-CP-22-01074). The Court sent the Remittitur to the Georgetown County Clerk of Court on April 1,

2010.

Undaunted, Ward filed **a third** PCR Application on May 4, 2010. *Ward v. State*, Georgetown Cnty. Ct. of Common Pleas, Case No. 2010-CP-22-00733 (filed May 4, 2010). He claimed that "[t]he jury instructions in my case are unconstitutional under Belcher's opinion." Again, he maintained that this was "a new rule of law" and, therefore, the statute of limitations and the successiveness bar did not bar his filing. The State made a Return on June 1, 2010, arguing that the 2010 Application should be summarily dismissed because *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) did not apply to Ward's case because the South Carolina Supreme Court indicated that *Belcher* "'will not apply to convictions challenged on post-conviction relief'" *Id.* at 613, 685 S.E.2d at 810.

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

Ward timely served and filed a notice of appeal, which was accompanied by a petition for writ of certiorari dated July 20, 2010.[5] The State filed a return to petition for writ of certiorari on August 17, 2010. On August 18, 2011, the South Carolina Supreme Court filed an order denying certiorari. It sent the remittitur to the Georgetown County Clerk of Court on September 7, 2011.

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[5] That petition raised the following issue:

> Did the circuit court err in holding that Petitioner was not entitled to the benefit of *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965 (1985) and *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450 (1979), on collateral review to invalidate his conviction due to improper Burden-shifting instruction at his trial on malice charge?

C: Habeas corpus proceedings.

Despite having each of his three previous PCR Applications denied, Ward made a fourth attempt at collateral relief in State court when he filed **a Petition for Writ of Habeas Corpus in the original jurisdiction of the South Carolina Supreme Court**. That court received the petition on October 31, 2011.[6] The South Carolina Supreme Court denied his Petition on November 16, 2011, based upon Ward's failure to meet the standard for state habeas corpus relief: "Because petitioner has not shown that 'there has been a violation which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice,' the petition is denied. *Simpson v. State*, 329 S.C. 43, 495 S.E.2d 429 (1998)."

Petitioner's **fifth** collateral action initiated when he sought a federal writ of habeas corpus. On December 1, 2011, Ward raised seven allegations in **a Petition for Writ of Habeas Corpus in the United States District Court for the District of South Carolina**.[7] *Ward v.*

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[6] He raised three issues therein:

> 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?

[7] Here are his federal habeas claims:

> 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

Warden of Leiber Corr. Inst., C/A No. 0:11-3277-RBH-PJG.

Respondent filed a Return and Memorandum of Law in Support of Motion for Summary Judgment and a Motion for Summary Judgment on May 11, 2012. *Id.* at ECF No. 22. Ward subsequently filed a response in opposition to Respondent's motion. However, United States Magistrate Judge Paige J. Gossett filed a Report and Recommendation on February 15, 2013, recommending that Respondent's motion for summary judgment be granted. *Id.* at ECF No. 70.

Although Ward filed objections to the Report and Recommendation, the Honorable R.

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was aware that petitioner had invoked his right to counsel upon his arrest and therefore under the facts of the case the statement should have been suppressed.

GROUND TWO: The state courts erred in failing to find defense counsel's ineffective in failing to object to numerous errors in the solicitor's closing argument that such argument rendered petitioner's trial as being unfair and a denial of due process.

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

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

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

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

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

Bryan Harwell, United States District Judge, filed an Order granting Respondent's summary judgment motion on March 20, 2013. *Id.* at ECF No. 73. Judgment was entered that same day. *Id.* at ECF No. 74.

Ward filed a timely notice of appeal to the Fourth Circuit Court of Appeals. He filed an Informal Opening Brief on May 14, 2013 and a Supplemental Informal Opening Brief on May 20, 2013. The Fourth Circuit dismissed in an unpublished per curiam opinion filed August 13, 2013. *Ward v. Warden of Leiber Corr. Inst.*, 538 Fed.Appx. 257 (4th Cir. 2013) (App. Case No. 13-6518, Doc. 15). Ward petitioned for rehearing *en banc*, which the Fourth Circuit denied on September 27, 2013. *Id.* at Doc. 19. The Fourth Circuit issued its mandate and entered its judgment finally dismissing the appeal on October 7, 2013. *Id.* at Doc. 20. Ward also petitioned the United States Supreme Court for certiorari and was denied. *Ward v. McCabe*, 572 U.S. 1019, 134 S. Ct. 1543 (2014).

D. Initial Rule 29(b), SCRCrimP action (Appellate Case No. 2012-213222).

Prior to the issuance of the Report and Recommendation by the United States Magistrate Judge, Petitioner initiated **a sixth** pursuit of collateral relief, this time back in the South Carolina Circuit Court. Pursuant to Rule 29, SCRCrimP, Ward filed a Motion for a New Trial Based on After Discovered Evidence in the Georgetown County Court of General Sessions, on May 16, 2012. The filings in this action were pinned to the General Sessions case numbers pertaining to Ward's criminal convictions for murder: 2003-GS-22-01030 and -01031. Eventually this case was assigned Appellate Case No. 2012-213222 by this Court.

Ward argued that he was entitled to a new trial based upon a purported letter from Michael Andrew Abner to Ward's mother, in which Abner supposedly claimed to have hired the victims in this case to kill Ward. This was a novel proposition compared to the remainder of

Ward's prior proceedings. Without hearing argument or requiring a response by the State, the Honorable Benjamin H. Culbertson, Administrative Judge for the Court of General Sessions of the Fifteenth Judicial Circuit, filed an "Order Denying Motion for New Trial, Motion for Appointment of Counsel and Motion for Expenses," on July 31, 2012. In denying the new trial motion, Judge Culbertson found that "the letter [from Abner] referenced by [Ward] in his motion and attached as an exhibit thereto makes no such admission and [Ward] has not presented anything to corroborate such an admission." Judge Culbertson further found that "[Ward] has not only failed to establish that he has new evidence that will probably change the result of his convictions if a new trial is granted, he has failed to show even the existence of newly discovered evidence. Therefore, [Ward's] motion for a new trial should be denied." Finally, Judge Culbertson found that Ward's remaining motions for the appointment of counsel and for funding were moot because he had denied the new trial motion. Judge Culbertson also denied Ward's subsequent motion for reconsideration and motion for arrest of judgment on August 20 and September 25, 2012, respectively. These denials were based on the contents of Ward's motions and were issued without a hearing or response by the State. **(R. pp. 439-52).**

Ward served a notice of appeal on October 4, 2012, and it was received by this Court on October 9, 2012. **(R. p. 426).** Ward submitted his brief of appellant (*pro se*), to which the State submitted its brief in response. **(R. pp. 427-38)**; *State v. Ward*, App. Case. No. 2012-231222 (Ct. App.) (Final Br. of Resp. served Sept. 23. 2013).[8] Ward served a brief in reply (*pro se*) on or

[8] Ward raised the following issues on appeal from the denial of his Rule 29(b), SCRCrimP, motion:

> 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 to Appointment of Counsel, and Motion for private Investigative, And expert Funds/Expenses,

Under Due Process And Equal Protection of Law, U.S. Const. Amend. xIV §1 And *Ake v. Oklahoma*, 470 U.S. 68 (1985)?

2. Whether the court erred by denying appellant's Motion For Reconsideration, And Motion To Arrest of Judgment of Order denying Motion for New Trial, In a violation of Due Process and Equal Protection of Law, U.S. Const. Amend XIV §1, And in 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 correctional mailroom to hold affidavit?

4. WHETHER THE COURT ABUSED ITS DISCRETION AMOUNTING TO AN ERROR OF LAW: BY FAILING TO GRANT AN EVIDENTIARY HEARING WHICH AMOUNTED TO A DEPRIVATION OF LEGAL RIGHTS OF APPELLANT, BY DENYING HIM FULL ACCESS TO THE COURTS JUST BECAUSE HE IS AN INDIGENT PRO SE LITIGANT, AND MENTAL HEALTH PATIENT, THE RULING WAS AN ERROR AND APPELLANT WAS /DID RESULT IN PREJUDICE TO DENYING MOTION FOR NEW TRIAL BASED ON AFTER DISCOVERED EVIDENCE PURSUANT TO S.C.CRim.P. 29 (b), MOTION FOR APPOINTMENT OF COUNSEL, AND MOTION FOR INVESTIGATIVE, AND EXPERT FUNDS/EXPENSES , UNDER DUE PROCESS AND EQUAL PROTECTION OF LAW, U.S. CONST. AMEND. XIV §1, is for all?

5. WHTHER 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 CONVICTING 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 SUPPOTED NEW TRIAL MOTION U.S. CONST. AMEND. XIV §1, IS

about August 14, 2013. *Id.*

Thereafter, this Court notified the parties that "this case will be submitted to the Court on the record and briefs during the September 2014 term without oral argument." Letter from S.C. Ct. App. to Ward, *et. al.* dated Sept. 2, 2014 (App. Case No. 2012-213222). In an unpublished Opinion, this Court affirmed the trial court.[9] *State v. Jody Lynn Ward*, 2014-UP-402 (S.C. Ct. App. filed Nov. 12, 2014); **(R. pp. 464-66)**. Following this Court's denial of Ward's petition for rehearing and for rehearing *en banc*, this Court issued the remittitur in this action on March 3, 2015.

E. Instant Rule 29(b), SCRCrimP action.

On September 22, 2014—after the appeal from the initial 29(b) motion was submitted to the appellate panel for resolution, but prior to the issuance of any opinion—Ward retained Natasha M. Hanna, Esquire, who in this Court filed a Motion to Suspend Appeal and for Leave to File Motion for New Trial Based on After-Discovered Evidence. **(R. pp. 453-61)**. The State opposed in a Return to that motion filed September 29, 2014. *State v. Ward*, App. Case. No. 2012-213222 (Ret. To Mot. to Suspend Appeal, filed Sept. 29, 2014). By and through Counsel

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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,"?

[9] Nearly eight years after this Court's initial opinion dismissing Ward's initial direct appeal of his convictions and sentence. *State v. Jody Lynn Ward*, 2007-UP-048 (S.C. Ct. App. filed Jan. 26, 2007).

Hanna, Ward filed a reply. *Id.* (Reply filed October 6, 2014). On October 8, 2014, this Court issued an Order denying Ward's motion and therein noting that nothing in the Appellate Court Rules prohibited the lower court "from proceeding with matters not affected by the appeal." *Id.* **(R. pp. 462-63).**

Three weeks later, Hanna filed a Motion for a New Trial Based on After Discovered Evidence in the Georgetown County Court of General Sessions. *State v. Ward*, Georgetown Cnty. Ct. of General Sessions, 2003-GS-22-01030 and -01031 (filed Oct. 30, 2014). **(Supp. R. pp. 1-20).** According to this motion:

> 1) Juror Number 19 [name omitted] 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, [name omitted] 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) Juror Number 48... 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 [name omitted] had knowledge of the incident before the grand jury proceedings. [He] was the tow truck driver that pulled the vehicle, that was alleged to be the scene of the shooting, out of Dawhoo Lake.

(Supp. R. pp. 2-5).

Initially, Judge Culbertson denied the motion "on the defendant's brief and affidavits in support of the motion without oral arguments" in a Form 4 Order dated September 4 and filed September 11, 2015. **(R. pp. 471-72).** Thereafter, the matter was scheduled for a December 10, 2015 hearing before the Honorable Steven John at which, upon Petitioner's motion, counsel Hanna was relieved and Petitioner was ordered to undergo a competency examination prior to

the court ruling upon any pending motion for *pro se* or other representation. **(R. pp. 487-88; *see* R. pp. 490-97).**

On September 8, 2017, the State filed a "Motion to Dismiss Defendant's Motion for a New Trial Based on After Discovered Evidence". **(R. pp. 542-44).** By and through newly retained counsel Tristan Shaffer, Esquire, Ward filed a memorandum in opposition. **(R. pp. 545-60).**

Ultimately, the State's motion to dismiss and Ward's Rule 29(b), SCRCrimP motion were heard on October 2, 2016 by the Honorable Larry B. Hyman. Shaffer appeared on Ward's behalf and Deputy Solicitor Scott Hixson appeared on behalf of the State. **(R. pp. 498-99).** By Order dated and filed December 7, 2017, the Honorable Larry B. Hyman, Jr. granted the State's motion to dismiss and denied the motion for a new trial. **(R. pp. 561-64).** Applicant timely appealed the order of the lower court. **(R. p. 565).** This is Ward's **seventh** collateral action.

F. Additional post-conviction proceedings.

Ward was undeterred by this pending appeal. In **an eighth** collateral action, Ward filed a fourth PCR Application (*pro se*) on May 21, 2018. *Ward v. State*, Georgetown Cnty. Ct. of Common Pleas, Case No. 2018-CP-22-00488 (filed May 21, 2018).[10] Therein, he alleged "newly discovered evidence § 17-27-45(C) . . . Juror Misconduct McCoy v. State." In a memorandum attached to the Application, Ward alleged that a Juror 19 failed to disclose a business relationship with one or more potential witnesses.

This successive PCR Application was dismissed in a Final Order of Dismissal issued by the Honorable William H. Seals, Jr. in his capacity as the Chief Administrative Judge for

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10 All filings in this action are available at: https://publicindex.sccourts.org/Georgetown/PublicIndex/PISearch.aspx (enter case # 2018CP2200488).

Fifteenth Judicial Circuit Court Common Pleas. Judge Seals dismissed the application as untimely, successive, barred by *res judicata*, and for failing to set forth a *prima facie* case of newly discovered evidence. Specifically in regards to the newly discovered evidence allegation, Judge Seals ruled that Ward had been "ferreting out new reasons well enough known to him, or which could have been known to him, through the process in order to try and secure new hearings as soon as the prior effort is defeated," and further declining to "enable Applicant in his pattern of harassing the jurors who convicted him." *Ward v. State*, Georgetown Cnty. Ct. of Common Pleas, Case No. 2018-CP-22-00488 (Order of Dismissal filed Jan. 7, 2019).

Ward appealed, submitting a *pro se* "SCACR Rule 267 Brief of Appellant Writ of Certiorari SCACR Rule 243(d)." *Ward v. State*, App. Case No. 2019-00400 (S.C. Sup. Ct. filed April 2, 2019). On June 27, 2019, the South Carolina Supreme Court filed an order dismissing the appeal pursuant to Rule 243(c), SCACR, for Ward's failure to "show that there [was] an arguable basis for asserting that the determination by the lower court was improper." The remittitur was issued to the Georgetown County Clerk of Court on July 15, 2019.

STATEMENT OF FACTS

Ward's procedural history is lengthy but the relevant facts are narrow. In 2004, the trial court presented Ward's jury panel with standard questions including whether any member of the panel had any preformed opinions about the case, any outside knowledge about the case, and whether any potential juror could not be impartial due to the nature of the charges. **(R. pp. 5-19)**. In response to one question, Juror 19 informed the court that she had read about the case in the newspaper. The juror represented she could be fair and impartial during the trial of the case. **(R. pp. 35-36)**. Later, the State read its list of potential witnesses which included "Officer Danny Cooper," and "Kevin Cooper." **(R. pp. 48-49)**. The trial court questioned: "All right, is there any member of the jury panel who is related by blood or marriage or friends or business acquaintance with any of these potential witnesses? If so, please stand." **(R. p. 49)**. No potential juror responded. **(R. p. 50)**. Juror 19 was seated on the jury. **(R. p. 57)**. At no time before, during, or after the trial did Juror 19 respond to the trial court that she believed she had any type of meaningful relationship to anybody listed as a witness. Other jurors did. **(R. pp. 62-82)**.

Years post-trial, Ward alleges in a successive Rule 29(b), SCRCrimP motion that Juror 19 "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." **(R. p. 467)**. Ward alleges that Juror 19's husband's grandfather is a brother of witness Kevin Cooper's grandfather. **(Supp. R. pp. 2-4)**. Ward supports this contention with a sworn affidavit by Nicole Ward. Her affidavit provides a family tree linking witness Kevin Cooper and the *husband* of Juror 19 as second cousins. It does not disclose her own connection to Appellant Ward. **(Supp. R. pp. 18-20)**.

STANDARD OF REVIEW

"The decision whether to grant a new trial rests within the sound discretion of the trial court, and this Court will not disturb the trial court's decision absent an abuse of discretion." *State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009). This deferential standard of review constrains this Court "to affirm the trial court if reasonably supported by the evidence." *Id.* at 167, 672 S.E.2d at 565; *State v. Harris*, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011). "The granting of a new trial because of after-discovered evidence is not favored." *State v. Irvin*, 270 S.C. 539, 545, 243 S.E.2d at 197-98.

Ward's allegation that Juror 19 failed to disclose that she was second cousins, by marriage, to one of the State's witnesses was reasonably discoverable within one year of trial and is further too remote and unsubstantiated to meet any standard warranting a new trial when Juror 19 otherwise answered the court during voir dire that she had read about the case in the newspaper and could be impartial.

Ward alleges that the Circuit Court erroneously and summarily dismissed his motion for a new trial based on after-discovered evidence because the court did not apply the standard for allegations of juror misconduct from *McCoy v. State*, 401 S.C. 3623, 371, 737 S.E.2d 623, 627 (2013)[11] and did not take testimony on the issue of Juror 19's alleged familial connection to witness Kevin Cooper. A post-trial motion made in the Court of General Sessions pursuant to Rule 29, SCRCrimP, "may, in the discretion of the court, be determined on briefs filed by the parties without oral argument." Rule 29(a), SCRCrimP. However, after oral argument, the trial court disposed of Ward's motion on the basis that the alleged after-discovered evidence was not timely made and "not new 'evidence'":

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[11] "For the benefit of the bench and bar," *McCoy* addressed "the frequent but erroneous application of the standard newly discovered evidence framework in summarily dismissing *PCR claims* involving juror misconduct. . . ." *McCoy v. State*, 401 S.C. 363, 370-71, 737 S.E.2d 623, 627 (2013) (emphasis added).

> 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 Defendant filed this motion in violation of the limitations contained in SCRCrimP Rule 29(b). . . .
>
> 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.

(R. pp. 561-64).[12]

While the underlying claim can be classified as one of juror misconduct due to Juror 19's alleged concealment of a relationship through marriage to an extended family member of witness Kevin Cooper, the allegation found its way before the court pursuant to a motion for new trial based on after-discovered evidence and was appropriately dismissed based upon procedural constraints appearing within and arising out of Rule 29(b), SCRCrimP.

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[12] The court also ruled the motion was improperly filed during the pendency of the appeal from his initial Rule 29(b), SCRCrimP motion. **(R. p. 562).** However, Appellant does not take issue with this and that court's other contemporaneous rulings in the instant action and that conclusion is not before this Court's review. *See State v. Lindsey*, 394 S.C. 354, 714 S.E.2d 554 (Ct. App. 2011) (argument abandoned on appeal if not briefed); *State v. Dicapua*, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) (defendant's statement he had no objection to entry of evidentiary item "amounted to a waiver of any issue").

A. Juror 19's alleged relation to one of the State's witnesses (second cousins through marriage) could been discovered within one year of trial with exercise of reasonable diligence because any potential relation was provided to the defense prior to jury selection and was likewise available to Ward within one year of trial.

Foremost to the consideration of a Rule 29(b), SCRCrimP motion is its timing. "A motion for a new trial based on after-discovered evidence must be made within one year after the date of actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence." Rule 29(b), SCRCrimP.

Ward stood trial in March 2004. **(R. p. 2).** As represented by the State during the motions hearing subject to the appeal, Ward's counsel was provided the State's witness list and background information on the potential jurors during voir dire. **(R. p. 520).** Ward does not contest the availability of that information; he only contests the reasonableness of its discovery. **(Br. of App. at 11; R. p. 528).** However, as pointed out by the trial court, Juror 19 and the State's witness Kevin Cooper share a last name and hail from Georgetown County. **(R. pp. 3, 83-84, 529).** The Circuit Court therefore appropriately denied the motion for new trial and granted the State's motion to dismiss because the information forming the basis for the allegation was previously available to Ward and could have been raised within the time limit delineated within Rule 29(b), SCRCrimP. *See State v. Allen*, 276 S.C. 412, 414, 279 S.E.2d 365, 366-67 (1981) ("Here, Ballard's federal conviction was a matter of public record. It was available to the respondent and his counsel through due diligence and did not constitute after-discovered evidence.").

For the same reason, the Circuit Court also correctly declined to apply the substantive legal standard pertaining to claims of juror misconduct. Because juror misconduct is a separate basis for a new trial, it is governed by a separate standard." *McCoy v. State*, 401 S.C. 363, 371,

737 S.E.2d 623, 627 (2013). "**Provided a claim is timely raised,**" a defendant may garner a new trial "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." *Id.* (emphasis added) (citing *State v. Woods*, 345 S.C. 583, 587-89, 550 S.E.2d 282, 284 (2001)). As discussed, Ward's claim was untimely pursuant to Rule 29(b), SCRCrimP. It was then unnecessary for the Circuit Court to proceed to the merits of the motion as it pertained to Juror's 19's alleged concealment. *McCoy v. State*, *supra*. Thus, to the extent the Circuit Court distinguished *McCoy*, a PCR action, from Ward's case and found Ward not entitled to an evidentiary hearing on the matter, the Circuit Court correctly concluded that "the analysis set forth in *State v. Woods*," *supra*, "is of no import in the present matter." **(R. pp. 562-63).**

Respondent accordingly asks this Court to affirm the denial of Ward's 29(b) motion. Rule 220(c), SCACR; *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (on appeal, a respondent may raise on appeal any additional reason the appellate court should affirm, regardless of whether the lower court ruled upon that reason).

B. Juror 19's alleged sixth-degree relation to one of the State's witnesses was "not new 'evidence' as to the defendant's guilt" because the alleged relation was dubiously presented and too remote to be found to materially affect the outcome of the trial under any standard applicable to Rule 29(b), SCRCrimP.

The Circuit Court also found that the information pertaining to Juror 19 "is not new 'evidence' as to the defendant's guilt." **(R. p. 563).** As cited by the Circuit Court, "to obtain leave to seek a new trial based upon after-discovered evidence, an appellant must make a *prima facie* showing before this Court of the following elements:

(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. Prince, 316 S.C. 57, 69, 447 S.E.2d 177, 184 (1993) (cited by *State v. Spann*, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999)); *see also State v. Mercer*, 381 S.C. at 166, 672 S.E.2d at 565; *State v. Needs*, 333 S.C. 134, 157-58, 508 S.E.2d 857, 869 (1998).

Ward alleges the Circuit Court erroneously denied application of the alternate standard applicable to claims of juror misconduct enunciated in *McCoy*, *supra*, and arising from *State v. Woods*, *supra*. In *Woods*, our Supreme Court granted a new trial where the defendant established, pursuant to a timely Rule 29(b), SCRCrimP motion, that a seated juror failed to disclose prior work as a volunteer victims' advocate in the same prosecuting office. The court found that had counsel been informed of the juror's prior volunteerism, that information would have materially affected counsel's intelligent use of peremptory challenges. 345 S.C. at 590-91, 550 S.E.2d at 285-86. But Ward's case is distinguishable from *Woods* for several reasons, each of which demands affirmance of the Circuit Court's conclusion, and none of which were specifically cited by the Circuit Court in this case. *Ex parte Morris*, 367 S.C. 56, 65, 624 S.E.2d 649, 653-54 (2006) ("Although the family court judge erred in rejecting Custodian's request for an evidentiary hearing, we affirm the result in this case."); *Columbia Architectural Grp., Inc. v. Barker*, 274 S.C. 639, 642, 266 S.E.2d 428, 429 (1980) (appellate court may affirm when satisfied the circuit court reached the correct result); *Potomac Leasing Co. v. Otts Mkt., Inc.*, 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct. App. 1987) ("In this state it has long been recognized

that a right decision based upon a wrong ground will be affirmed.").

According to Ward's motion, "Juror Number 19 . . . 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." **(R. p. 467).** Within the affidavit of Nicole Ward affixed to the motion, Juror 19 is described as second cousins by marriage to Kevin Cooper. **(R. pp. 558-60; Supp. R. pp. 18-20).** "Technically speaking, a second cousin is one who is descended from a common greatgrandfather and bears the relationship in the sixth degree" of consanguinity. *S.C. Nat. Bank of Columbia v. Bates*, 175 S.C. 168, 178 S.E. 611, 613 (1935). Thus, a second cousin can be described as the grandchild of a grandparent's sibling, or as a child of a parent's first cousin. It is a relationship of collateral, rather than vertical, consanguinity because it terms a relationship "between persons who have the same ancestor but do not descend or ascend from one another." CONSANGUINITY, Black's Law Dictionary (11th ed. 2019). This alleged relationship is quite different from that requiring a new trial in *Woods* because it bears no straightforward relation to either party to the trial *or* to the State's witness like Woods' juror, who used to volunteer as a victims' advocate in the prosecuting office.

Respondent would additionally note that the allegation is of dubious credibility, since Ward would have the Court believe that Juror 19 violated instructions of the trial judge during voir dire. Contrary to Ward's unsubstantiated allegations, jurors are presumed to follow jury instructions. *E.g.*, *State v. Young*, 420 S.C. 608, 623, 803 S.E.2d 888, 896 (Ct. App. 2017). In fact, Juror 19 reacted to the court's instructions during voir dire when she disclosed that she had read about the case in the newspaper, thus indicating she was capable of and interested in following the Court's instructions. **(R. pp. 35-36).** Worse, Ward failed to lay a record as to when or how he supposedly discovered the information that gave rise to these allegations by him. In

other words, he has made no demonstration that he could not have raised these assertions at some earlier point in the fifteen years that he has been litigating his convictions and sentence. He likewise does not indicate why he believes that any juror, let alone Juror 19 whom he challenges on appeal, deliberately failed to reveal a relationship to the sixth degree of consanguinity that he alleges was actually known by the juror.

Indeed, in addition to the motion's untimeliness, Ward's motion was properly denied because he did not submit an affidavit, *by him*, averring the after-discovered evidence and the facts to which the witnesses will testify, as well as the fact he did not know of the existence of such evidence at the time of the trial and that he used due diligence to discover such evidence, or that he could not have discovered it by the exercise of due diligence. Rule 220(c), SCACR; *I'On, L.L.C. v. Town of Mt. Pleasant*, *supra.* Nearly fifty years ago, the Supreme Court found that such an affidavit is necessary when a criminal defendant seeks a new trial based upon after-discovered evidence

> As is heretofore stated, the appellant did not file his own affidavit setting forth the after-discovered evidence and the facts to which the witnesses will testify. It is essential to the consideration of a motion for a new trial based on after-discovered evidence that such motion shall be supported by an affidavit of the accused himself. Unless a valid and sufficient reason for the omission to file such an affidavit is shown, the affidavit of the accused must show that he did not know of the existence of such evidence at the time of the trial and that he used due diligence to discover such evidence, or that he could not have discovered it by the exercise of due diligence. An affidavit of the appellant's counsel showing these matters is not sufficient. 24 C.J.S. *Criminal Law* s 1484c, page 286. *Chilton v. Commonwealth*, 170 Ky. 491, 186 S.W. 191. *Nothaf v. State*, 91 Tex.Cr.R. 378, 239 S.W. 215, 23 A.L.R. 1374.
>
> Viewing the record in this case in the light of the affidavit made in support of the motion and in the light of the foregoing principles of law, we find no abuse of discretion, amounting to an error of law, on the part of the trial judge in refusing the motion of the appellant for a new trial based on after-discovered evidence.

State v. DeAngelis, 256 S.C. 364, 371-72, 182 S.E.2d 732, 735 (1971).

Furthermore, if a juror fails to disclose a relationship during voir dire, that juror may only be inferred to have been impartial only if there is no justification for the failure to disclose—but "where the failure to disclose is innocent, no such inference may be drawn." *State v. Woods*, 345 S.C. at 587-88, 550 S.E.2d at 284. There is a demonstrable difference between intentional and unintentional concealment which precludes Ward from meeting any standard demanding the relief requested. "Although it may be inferred that a juror is not impartial if she fails to disclose a relationship without justification, such an inference may not be drawn where there is information to the contrary or the failure to disclose is innocent." *State v. Guillebeaux*, 362 S.C. 270, 275, 607 S.E.2d 99, 102 (Ct. App. 2004) (citing *State v. Stone*, 350 S.C. 442, 448, 567 S.E.2d 244, 247 (2002) (finding juror's failure to disclose acquaintance with witness was innocent and too "scant" to materially affect the fitness or any challenge for cause)).

Intentional concealment occurs when a reasonably comprehensible question is presented to the juror "and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." *Id.* at 588, 550 S.E.2d at 284. Even then, "relief is required only when the court finds the concealed information would have supported a challenge for cause, or would have been a material factor in the use of the party's peremptory challenges." *Thompson v. O'Rourke*, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986). This final inquiry requires focus on the character of the information alleged to have been concealed. *Id.*

"Unintentional concealment, on the other hand, occurs . . . where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances." *State v. Woods*, 345 S.C. at 588, 550 S.E.2d at 284. It is not unreasonable to fail to disclose a relationship by marriage to the sixth degree of consanguinity,

even assuming the relation was actually known and inexistence at the time of Ward's trial in March 2004.[13] *State v. Galbreath*, 359 S.C. 398, 403-04, 597 S.E.2d 845, 847-48 (Ct. App. 2004) (no intentional concealment where the juror accurately answered the specific question posed and the alleged relationships did not amount to close personal friends or business associates). Ward's submission of an affidavit by one Nicole Ward fails to establish that the juror at issue had any intent to conceal information from the court in a manner warranting an inference of bias, and Ward himself failed to file his own affidavit setting forth any belief in support of Juror 19's intentional concealment of that information. On the record, Juror 19 responded that she could be fair and impartial towards each side in this case. **(R. p. 36).** Respondent submits any non-disclosure was justifiably innocent based upon the existing record and that no inference of impartiality should be drawn. *State v. Guillebeaux*, *supra.*

The record in Ward's case lends itself to the decision reached by this Court in *State v. Guillebeaux* rather than that reached in *Woods*, *supra.* Guillebeaux moved for a new trial, alleging that a juror failed to disclose a social relationship with the State's chief witness even though the juror only recognized that witness from the community had never conversed with the witness "beyond saying 'hi' in passing on the street." 362 S.C. at 273, 607 S.E.2d at 101. This Court affirmed the resolution by the trial court, finding no intentional concealment, finding that it was "a reasonable response" to fail to reveal her limited knowledge of the witness, and finding that the rare exchange of greetings did not constitute a "social relationship," which was the degree of relationship the jurors were asked to disclose during voir dire. *Id.* at 275-76, 607 S.E.2d at 102. "Further, [the] Juror indicated during voir dire that she knew of no reason she

[13] Nicole Ward's 2014 affidavit omits the dates any marriage was established that would create the relationship of second cousins by marriage. **(R. pp. 558-60; Supp. R. pp. 18-20).**

could not be impartial to both the defense and the State and there [was] no evidence to the contrary." *Id.* Finding no intentional concealment, this Court declined to further address "whether the information would have been a material factor in the exercise of Guillebeaux's peremptory strikes." *Id.* Juror 19's relation, if established, is similar in nature. Like Guillebeaux's juror, Juror 19 otherwise indicated during voir dire that she could be fair and impartial. **(R. pp. 35-36).** Given the record in Ward's case, the marital, sixth-degree connection cited within the affidavit at issue fails to demonstrate a significant connection to the jury's determination of Ward's guilt or innocence as found by the Circuit Court. *See also Wilson v. Childs*, 315 S.C. 431, 437-38, 434 S.E.2d 286, 290 (Ct. App. 1993) (trial court's refusal to exclude jurors for cause justified where appellant identified no circumstances suggesting any juror dishonestly declared his or her impartiality and jurors otherwise state their ability to be impartial).

As to impartiality in a broader sense, Ward's presentation continues to fall short of the standard demanding relief. "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 217, 102 S. Ct. 940, 946 (1982). A criminal defendant is guaranteed "a fair trial by a panel of impartial and indifferent jurors." *State v. Bryant*, 352 S.C. 390, 581 S.E.2d 157 (2003). Yet "due process does not require a new trial every time a juror has been placed in a potentially compromising situation." *Smith v. Phillips*, *supra*. "The safeguards of juror impartiality, such as voir dire and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Id.* Ward's affidavit fails to make a *prima facie* showing that

Juror 19 intentionally failed to disclose a known material relationship and, as such, the allegation, even if true, was not laden with potential to change the result of the trial. *See, e.g.*, *Hayden v. State*, 278 S.C. 610, 612, 299 S.E.2d 854, 856 (1983) (holding after-discovered evidence of an alleged setup could have been discovered before trial by the exercise of due diligence and would not change the outcome in a new trial due to it being hearsay made by an unimportant and impeachable witness). This Court should affirm the result reached by the Circuit Court.

C. *Res judicata* precludes an alternative outcome on appeal because Ward had a full and fair opportunity to litigate this claim during his other numerous pursuits of collateral relief.

As an additional sustaining ground, Respondent submits that *res judicata* bars the relief Ward requests. Rule 220(c), SCACR. *Res judicata* can act to bar collateral allegations brought after a defendant has elsewhere pursued collateral relief. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981) (PCR action); *see S.C. Pub. Interest Found. v. Greenville Cty.*, 401 S.C. 377, 385, 737 S.E.2d 502, 506 (Ct. App. 2013) (a litigant is barred from raising any issues which could have been raised, or which were raised, in a prior suit). Ward bears "the burden of showing that a new ground for relief could not have been raised in a previous application." *Carter v. State*, 293 S.C. 528, 530, 362 S.E.2d 20, 21 (1987). As delineated in Respondent's Statement of the Case, Ward has filed no less than eight collateral actions attempting to obtain relief from his conviction and sentence. Thus, not only was the instant claim regarding Juror 19 discoverable within one year, but Ward had the opportunity to fully and fairly litigate the instant claim in any of those actions and failed to do so. Accordingly, *res judicata* bars relief on the present issue.

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CONCLUSION

For all of the foregoing reasons, Respondent respectfully asks that the Court affirm the denial of Ward's Rule 29(b), SCRCrimP motion and end over a decade of litigation.

Respectfully submitted,

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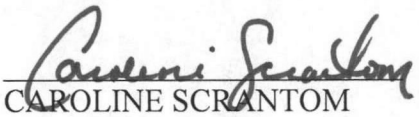

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ATTORNEYS FOR RESPONDENT

48

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County
Larry B. Hyman, Circuit Court Judge

RECEIVED
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SC Court of Appeals

THE STATE,

Respondent,

v.

JODY L. WARD,

Appellant

Appellate Case No. 2018-000402.

CERTIFICATE OF COMPLIANCE

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

This 19th day of November, 2019.

CAROLINE SCRANTOM
Assistant Attorney General

ATTORNEY FOR RESPONDENT

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jody Lynn Ward, Appellant.

Appellate Case No. 2018-000402

Appeal From Georgetown County
Larry B. Hyman, Jr., Circuit Court Judge,

Unpublished Opinion No. 2021-UP-184
Submitted April 1, 2021 – Filed May 19, 2021

AFFIRMED

Tristan Michael Shaffer, of Chapin, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Assistant Attorney General Caroline Scranton, all of Columbia, for Respondent.

PER CURIAM: Jody Lynn Ward appeals his double homicide conviction and concurrent sentences of life imprisonment. On appeal, Ward argues the circuit court erred in denying his motion for a new trial based on after-discovered

evidence. He alleges a juror intentionally withheld the fact she was the second cousin, by marriage, of a State's witness. Ultimately, Ward asserts this information constitutes after-discovered evidence because it was not discoverable at the time of trial.

We find the circuit court did not abuse its discretion in denying Ward's motion for a new trial based on after-discovered evidence. The State provided Ward with a list of potential witnesses during voir dire in March 2004. At that time, the relationship between the juror and the witness could have been ascertained by the exercise of reasonable diligence. Ward did not file his motion for a new trial based on after-discovered evidence until October 30, 2014, almost a decade after Ward was on notice that the juror and the witness shared a common last name. Accordingly, we affirm pursuant to Rule 220(b) of the South Carolina Appellate Court Rules, and the following authorities: *State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) ("The decision whether to grant a new trial rests within the sound discretion of the trial court, and [an appellate court] will not disturb the trial court's decision absent an abuse of discretion."); *id.* at 167, 672 S.E.2d at 565 ("The deferential standard of review constrains [this court] to affirm the trial court if reasonably supported by the evidence."); Rule 29(b), SCRCrimP ("A motion for a new trial based on after-discovered evidence must be made within one year after the date of actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence.").

AFFIRMED.[1]

LOCKEMY, C.J., and HUFF and HEWITT, JJ., concur.

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

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County
Larry B. Hyman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JODY L. WARD,

APPELLANT.

Appellate Case No.: 2018-000402

Petition for Rehearing

Pursuant to Rule 221(a), SCACR, Appellant respectfully petitions this Court for a rehearing of its opinion in this case. To support the Petition, Appellant shows the following:

The standard of reasonable diligence requires a person to act after they are put on notice that they should act. *See Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998) ("A cause of action should have been discovered through exercise of reasonable diligence when the facts and circumstances would have put a person of common knowledge and experience on notice that some right had been invaded or a claim against another party might exist."). A juror and a witness both having the common last name "Cooper" is not sufficient to put Appellant on notice that the two were related. To require defendants and defense counsel to do genealogical research on prospective jurors is not reasonable.

s/ Tristan Shaffer

June 4, 2020

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County
Larry B. Hyman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JODY LYNN WARD,

APPELLANT.

Appellate Case No.: 2018-000402

CERTIFICATE OF SERVICE

I certify that on the date below I served the Petition for Rehearing on the State of South Carolina by e-mailing a copy to the Respondent at the address below.

June 1, 2021

s/ Tristan M. Shaffer
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The South Carolina Court of Appeals

The State, Respondent,

v.

Jody Lynn Ward, Appellant.

Appellate Case No. 2018-000402

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

James E. Lockemy C.J.

Thomas C. Huff J.

J.

Columbia, South Carolina

cc:
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Alan McCrory Wilson, Esquire
Melody Jane Brown, Esquire
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Donald J. Zelenka, Esquire
The Honorable Larry B. Hyman, Jr.

FILED
Jun 04 2021