THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS



APPEAL FROM HORRY COUNTY
Court of General Sessions

Honorable, R. Ferrell Cothran Jr., Circuit Court Judge
Honorable, Larry B. Hyman, Circuit Court Judge

APPELLATE CASE NO. 2020-001497

THE STATE RESPONDENT

V.

THEODORE J. BOLICK APPELLANT

# INITIAL BRIEF OF APPELLANT

Theodore Bolick, pro se
Evans Correctional Inst.
610 Highway # 9 West
Bennettsville, S.C. 29512

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## STATEMENT OF ISSUES ON APPEAL

I. Did The Trial Court Err In Finding Appellant Voluntarily Waived His Right To Counsel?

II. Did The Trial Court Err In Allowing The State To Proceed To Trial Without Appellant Having Counsel?

III Did The Trial Court Err In Allowing The State To Combine Three Seperate Unrelated Burglaries From Three Seperate Indictments In One Trial?

IV Did The Trial Court Err In Considering The States Motion For Reconsideration?

V Did The Trial Court Err In Doing More Than Instructed By The Court Of Appeals On Remand?

## STATEMENT OF THE CASE

Appellant was arrested on August 28, 2016 by Myrtle Beach Police Officers for three (3) counts of non-violent second degree burglary. Appellant was indicted in case Numbers 2016-GS-26-04947 and 2016-GS-26-04953 on October 20, 2016. Appellant was indicted in case number 2016-GS-26-05081 on November 17, 2016

From the face of the indictments it is manifested that these three (3) burglaries occurred on three seperate dates, at three seperate locations, at three seperated unrelated businesses. Further, different officers/witnesses testified before the Grand Jury in each case.

For the most part Appellant proceeded in most of the pre-trial hearings pro se. However, on July 22, 2019 when the Honorable, Larry B. Hyman notified the Appellant that his trial would begin the next day July 23, 2019, the Appellant asked the Court to appoint him counsel.

The Court then instructed Public Defender, Martin Spratlin that he, (Judge Hyman) wanted him to represent the Appellant during trial. Appellant signed a "waiver of conflict of interest" form and left the courtroom.

The next day, July 23, 2019 the Appellant failed to appear for trial. Honorable, Larry B. Hyman summarily found that Appellant voluntarily waived his right to be at trial, and voluntarily waived his right to counsel. Sometime after entering this ruling on the record, Honorable Larry B. Hyman asked Martin Spratlin a very leading question so as to justify his finding that Appellant voluntarily waived his right to counsel.

Thereafter, the State by and through Thomas Groom Terrell III proceeded to trial on these matters. Appellant was tried absentia, without counsel, and the State was allowed to join all three unrelated indictments for one trial.

Appellant was found guilty on July 24, 2019. Because appellant was absent,

Honorable, Larry B. Hyman sealed the Appellant's sentence.

On April 22, 2020, before the Appellant's sentences were unsealed, the Appellant filed a pro se motion for mistrial.

Also before Appellant's sentences were unsealed, on June 6, 2020 the Appellant filed a pro se motion for new trial.

On September 16, 2020 Appellant was taken before Honorable, William Seals Jr. at the Horry County Courthouse. Judge Seals refused to hear the Appellant on his pro se motion for mistrial. Judge Seals also refused to hear Appellant on his pro se motion for new trial. Judge Seals refused to allow the Appellant to speak, and refused to consider appointing Appellant counsel. Judge Seals opened Appellant's sentences, pronounced them, and had the Appellant summarily sent to the South Carolina Department of Corrections the next day, September 17, 2020

On November 13, 2020 Appellant

was finally able to perfect his pro se notice of appeal.

The Honorable South Carolina Court of Appeals immediately noticed sua sponte that the Appellant had several outstanding motions which had not been considered still pending. Subsequently, on February 5, 2021 the Honorable Court of Appeals issued an Order remanding this case back to the Circuit Court for consideration of all the Appellant's outstanding motions.

On April 15, 2021 the Appellant appeared before the Honorable Ferrell Cothran Jr.. At this hearing the Appellant was granted his motion for mistrial. Appellant was also granted his motion for new trial. On April 16, 2021 Judge Cothran signed two Form 4 Orders to that effect. The hearing, the ruling, and the Orders all occurred during the April 12, 2021 term of Horry County Circuit Court which expired on April 16, 2021.

Subsequently, on May 4, 2021 Judge Cothran issued a supplemental

Order to the South Carolina Department of Corrections stating the Appellant's sentences had been "vacated", and specifically ordered "Appellant's release."

However, and unbeknownst to the Appellant, the State, by and through Assistant Solicitor, Thomas Groom Terrell III, on April 23, 2021 had filed a very belated and untimely Motion For Reconsideration. This motion was belated and untimely as it was filed seven (7) days after the term of court in which the motion for mistrial and motion for new trial had been granted had expired.

On May 6, 2021 Appellant was taked to the Horry County Detention Center to await a hearing.

On June 8, 2021, nearly two full months after the Appellant was granted a motion for mistrial, the Appellant again appeared before Judge Cothran. Despite the Appellant's written objections made by way of motion, and the Appellant's

verbal objections made in open court, Judge Cothran entertained the State's very untimely Motion For Reconsideration.

On June 10, 2021 Judge Cothran instructed Thomas Terrell to prepare an order which denied Appellant's motion for mistrial and motion for new trial. Thereafter, Judge Cothran signed the Order. However, this Order did not vacate the previous orders granting the Appellant his motion for mistrial and motion for new trial. The Order did not reinstate the Appellant's sentences, nor did it order that the Appellant be returned to the South Carolina Department of Corrections. The Appellant gave notice of appeal in open court.

On June 15, 2021 the Appellant was returned to the South Carolina Department of Corrections. The Appellant remains a prisoner by way of judgments and sentences that have been vacated by lawful and valid judicial orders.

## ARGUMENTS

I. Because Appellant Specifically Asked For Counsel, The Trial Court Abused His Discretion In Finding Appellant Knowingly And Voluntarily Waived His Right To Counsel.

## STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State V. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial judges factual findings unless they are clearly erroneous. Id.; State V. Preslar, 364 S.C. 466, 477, 613 S.E. 2d 381, 384 (Ct. App. 2005).

The appellate courts are bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law. Reed V. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999) (Citing State V. Anderson, 311 S.C. 316, 326, 428

S.E. 2d 871, 873 (1993).

A defendant may surrender his right to counsel through (1) waiver by affirmative, verbal request, (2) waiver by conduct, and (3) forfeiture. State V. Thompson, 355 S.C. 255, 584 S.E. 2d 131 (2007)

Defendant's failure to appear at trial does not constitute an affirmative waiver of his right to counsel. State V. Roberson, 371 S.C. 334, 638 S.E. 2d 93 (2009).

## DISCUSSION

In the case at hand, although the Appellant initially requested and was allowed to proceed pro se in pre-trial matters and hearings, when the trial court began to explain the pitfalls and consequences of representing one's self to the Appellant, the Appellant quickly began to waiver in his decision to represent himself. (Trial Transcript, pgs. 12-23). In fact, the Appellant on at least two occasions specifically asked the court to appoint him counsel. (Trial Transcript, pg. 12, lns. 17-20, and pg. 18,

ln. 24) Thereafter, the court specifically appointed public defender, Martin Spratlin to represent the Appellant. (Trial Transcript, pg. 23, lns. 5-7). The colloquy between the court, Mr. Spratlin, Mr. Terrell, and the Appellant located in the Trial Transcript between pages 12 through 23 makes it beyond peradventure that Appellant did in fact ask the court to appoint him counsel, and the court actually appointed Martin Spratlin to represent Appellant.

Even if the court could possibly find that Appellant did not specifically request counsel, it is undisputable that Appellant began to waiver in his insistence to represent himself. "Even if [a] defendant requests to represent himself, however the right may be waived through [the] defendant's subsequent conduct indicating he is vacillating on the issue or has abandoned his request altogether." Brown, V. Wainwright, 665 F.2d 607, 611 (5th Cir. 1982).

"In ambiguous situations created by a defendant's vacillation or manipulation, we must ascribe a 'constitutional primacy'

to the right to counsel because this right serves both the individual and collective good, as opposed to only the individual interests served by protecting the right of self representation." Fields V. Murray, 49 F. 3d 1024, 1029 (4th Cir 1995) (En Banc). See also U.S. V. Gillis, 773 F. 2d 549, 559 (4th Cir 1985) (of the [rights to counsel and self representation] the right to be represented is preeminent)

In considering whether or not the Appellant voluntarily waived his right to counsel, the only evidence the trial court had to consider was the colloquy between the court and the Appellant contained in the Trial Transcript, pgs. 12-23, and the fact Appellant failed to appear for trial.

Because, "failure to appear at trial did not rise to the level of waiver [of counsel]." Thompson, Id. at 266, 584 S.E. 2d at 133, the only evidence left to consider is the colloquy contained in the Trial Transcript. However, this evidence is clearly contrary to the court's finding that Appellant voluntarily

waived his right to counsel

There are several other factors which makes the trial court's findings suspect that Appellant would ask the Honorable Court of Appeals to consider.

First, after the trial court specifically appointed the Appellant Mr Spratlin to represent him, (Trial Transcript, pg. 23, lns. 5-7) the court went into recess, (Trial Transcript, pg. 23, ln. 23, The next day, July 23, 2019 the trial court without hearing anything further from Mr. Spratlin or the Appellant issued the court's findings as to the Appellant voluntarily waiving his right to counsel, (Trial Transcript, pgs. 24 and 25). Not only is the trial court's findings suspect because they are contrary to the actual conversations that took place the previous day, but they are suspect because the things that are manifested by the transcripts of that day, July 23, 2019.

The Trial Transcript manifest that Mr Spratlin on July 23, 2019 tried several times to contact Appellant, (Trial Trans-

cript, pgs. 25 and 26). If Mr Spratlin was not representing Appellant, and was not a party in this case, on whose behalf was Mr. Spratlin attempting to make contact with the Appellant? Certainly at this point the Appellant had not informed Mr Spratlin that he did not wish his assistance as it becomes clear that Mr Spratlin was to some extent representing the Appellant by trying to contact him.

It is also manifested by the transcript that Mr Spratlin managed to contact the Appellant once on July 23, 2019, and that the only thing Mr Spratlin and the Appellant spoke of was concerning the Appellant's whereabouts, (Trial Transcript, pg 27, lns. 9-12). With these being the actual facts, then when is the Appellant alleged to have informed Mr Spratlin that Appellant did not want Mr Spratlin to represent him as Mr Spratlin purports to the trial court in response to the trial court's leading question concerning Appellant's want of Mr Spratlin to represent him? (See Trial Transcript, pg. 29, lns. 12-18).

Mr. Spratlin's propensity to outright lie before the court concerning this matter is irrefutably established on page 28, lines 3 and 4 of the Trial Transcript when Mr Spratlin stated, "Your Honor, I was not party to any conversations between the Court and him yesterday." This falsehood is easily exposed for what it is by the previous days' transcript. (See Trial Transcript, pgs 19-23). These proceedings and these transcripts make the trial court's findings that Appellant voluntarily waived his right to counsel highly suspect, and very unlikely.

II. Because Appellant Was Tried Without Counsel, Appellants Right To A Fair Trial, And Right To Counsel Protected By The Sixth Amendment Were Violated.

## STANDARD OF REVIEW

The South Carolina Constitution Article I, section 14 guarantees a persons right to counsel in a criminal trial.

The Sixth Amendment of the United States Constitution guarantees a person's right to counsel in a criminal trial.

The Sixth Amendment's Right To Counsel Clause is made applicable to all states through the Fourteenth Amendment's Equal Protection Clause.

## DISCUSSION

It is axiomatic that a defendant in a criminal trial has the right to counsel. If a defendant is wrongfully denied this right then the trial is fundamentally unfair, and a miscarriage of justice has occurred.

In the instant case, on the day before the trial was to begin, while being informed of the pitfalls of representing himself by the trial court, the Appellant changed his mind and asked the court to appoint him counsel. Thereafter, the trial court appointed Martin Spratlin to represent the Appellant.

However, on the next day when the Appellant did not appear for trial,

the trial court summarily found that the Appellant had voluntarily waived his right to counsel, and allowed the state to proceed in the trial of the matters without the Appellant having any representation. The Appellant was an indigent defendant who clearly requested the appointment of counsel, but was tried in his absence without representation. It is hard to find a trial more fundamentally unfair then that.

III Because The State Was Allowed To Join Three Seperate Unrelated Second Degree Burglary Charges From Three Seperate Indictments For One Trial, The Jury Was Able To Use Evidence Admissible In One Count To Infer A Criminal Disposition On All Counts, And The Evidence Was Able To Cumulate In The Juror's Minds To Create An Unfair Prejudice Against Appellant.

STANDARD OF REVIEW

Conversely, offenses which are of

the same nature, but which do not arise out of a single chain of circumstances and are not provable by the same evidence may not properly be tried together. State V. Simmons 352 S.C. 342, 350, 573 S.E. 2d 856, 860 (2002); See also State V. Middleton, 288 S.C. 21, 23, 339 S.E. 2d 692, 693 (1986) (holding the defendant's charges failed to meet the requirements for consolidation because "the crimes did not arise out of a single chain of circumstances, and required different evidence for proof"); State V. Tate, 286 S.C. 462, 464, 334 S.E. 2d 289, 290 (1985) (finding the joinder of two forgery charges of the same nature in one indictment and one trial was improper where the offenses did not arise out of a single chain of circumstances, the offenses were not provable by the same evidence, and joinder prejudiced the defendant). The South Carolina Court of Appeals (this Honorable Court) just recently used this very same standard of review in Tyler V. State, WL 191168 (2022).

DISCUSSION

A review of the Trial Trawscript in the case at hawd reveals there is sot awiota of evidesce that there was a chaid of circumstawces in these cases. There was sot a sivgle piece of evidesce that was the same in either case. There was so sivgle witsess that was the same in all three cases. Each burglary occurred on a seperate date at a seperate urel-ated business.

The first business was Barrell Bar sports Bar and Grill located at 2303 Kivgs Highway, Myrtle Beach, (Trial Trawscript, pg 60, lws. 17-23)

The secoad business was the China chef located at 1470 South Kivgs Highway, Myrtle Beach, (Trial Trawscript, pg 67, lws. 3-5

The third business was Giff's Ligsor located at 1490 South Kivgs Highway, Myrtle Beach, (Trial Trawscript, pg 72, lws. 18-22).

Prior to the trial in support of joining all three cases for trial at ance, the state misappropriated numerous facts to the trial court so as to improperly

join the cases for trial.

First, the State falsely informed the trial court that all three case arose out of a similar chain of circumstances, (Trial Transcript, pg. 8, lns 12 and 13).

Second, the State falsely informed the trial court that all three businesses were burglarized through the air conditioner vents, (Trial Transcript, pg. 8, lns. 20 and 21).

Third, the State falsely informed the trial court that the primary detective was the same in all three cases, (Trial Transcript, pg 11, lns, 11 and 12)

However, through the course of the trial the falsehoods the State proffered to the trial court for joining the cases is easily laid bare for the pretext it was. Through the course of the trial absolutely no evidence what-so-ever was presented as to a chain of circumstances.

Further, the only evidence that a business was burglarized through the air conditioning vent can be found on page 93, at lines 23 and 24 of the Trial Transcript. At no time during

course of the trial did any witness state that the Barrell Bar Sports Bar and Grill or Giff's Liquor was burglarized through an air conditioning vent.

Moreover, the State's false allegation that the primary detective was the same in all three cases is also laid bare for the evil pretext it is by the Trial Transcript. Officer Nate Howitt was the primary detective in the burglary at Barrell Bar Sports Bar and Grill, and the China Chef as is manifested by his testimony, (Trial Transcript, pgs 90-104) However, Nate Howitt never responded to the burglary at Giff's Liquor, (Trial Transcript, pg. 104, lns 5-7). Officer Tony Homes was the primary detective in the burglary at Giff's Liquor and had nothing to do with the burglaries at Barrell Bar or the China Chef, (Trial Transcript, pg. 81, lns 9-15).

When the falsehoods the State proffered to the trial court for joining the cases for one trial are exposed for the evil pretext it was, it leaves only a couple slight similarities in the cases. These

slight similarities certainly do not merit the joinder of the cases for trial.

Although the Appellate Courts have approved the joining of charges for trial in some cases, i.e. State V. Caldwell, 378 S.C. 268, 662 S.E. 2d 474 (2008); State V. Davis, 422 S.C. 472, 812 S.E. 2d 423 (2018); State V. Harris, 351 S.C. 643, 572 S.E. 2d 267, (2002); State V. McGaha, 404 S.C. 289, 744 S.E. 2d 602 (Ct App. 2013); and State V. Tallent, 430 S.C. 438, 845 S.E. 2d 508 (2020), none of these joinders was based on slight similarities in charges of the same general nature.

Actually the evidence in the Appellants cases in one charge should not be admissible in the others before a conviction is obtained. Even then the admissibility of evidence in one charge being admitted into the others is questionable. See State V. Hallman, 298 S.C. 172, 379 S.E. 2d 115 (1989), and State V. Perry, 430 S.C. 24, 824 S.E. 2d 654 (2020).

The Appellant is hoping by now he has the Honorable Court of Appeals full attention what with the trial court's

blatant abuse of discretion in finding the Appellant voluntarily waived his right to counsel, and the prosecutor's numerous falsehoods proffered in the record to justify joining three unrelated charges for trial. This behavior by officers of the court is beyond peradventure suspect, but it is only the tip of iceberg, so to speak, as this Honorable Court will realize in the subsequent Argument.

IV Because The Term of Court In Which Appellant's Motion For Mistrial And Motion For New Trial Were Granted Had Expired, The Trial Court Lacked Jurisdiction Or Authority To Consider The State's Motion For Reconsideration Which Was Also Filed After The Term Of Court Had Expired.

STANDARD OF REVIEW

"It is a long-standing rule of law that a trial judge is without jurisdiction to consider a criminal matter once the term

of court during which judgment was entered expires." State V. Mixon, 275 S.C. 575, 274 S.E. 2d 406 (1981); State V. Patterson, 272 S.C. 2, 249 S.E. 2d 770 (1978); State V. Best, 257 S.C. 361, 186 S.E. 2d 272 (1972); accord Rule 29 S.C.R. Crim. P..

"Each week of court is a seperate term of court." Mixon and Patterson.

"Trial judge lacked jurisdiction over motion to reconsider order denying new trial motion which was not filed until after expiration of term of court during which order was entered". State V Hinson, 303 S.C. 92, 399 S.E. 2d 422 (1990) (citing Mixon, Patterson, and Best)

"The term of court rule, under which a trial judge is without jurisdiction to consider a criminal matter once the term of court during which judgment was entered expires, is not a rule of subject matter jurisdiction." State V. Cambell, 376 S.C. 212, 656 S.E. 2d 371 (2008) (citing Best and Hinson)

In a criminal case, once the term of court ends, the trial court lacks jurisdiction to consider additional

matters unless a party files a timely post-trial motion. State v. Pfeiffer, 427 S.C. 10, 828 S.E. 2d 764 (2019.

Rule 29, South Carolina Rules of Criminal Procedure

"(a) Generally. Except for motions for new trials based on after-discovered evidence, post-trial motions shall be made within ten (10) days after the imposition of the sentence." (emphasis added).

"Where the term of court as fixed by law, has expired, the judge has no power, by order, to continue its existance, convene it at another time, and proceed to the trial of cases." Ex Parte Lilly, 7 S.C. 372, WL 5977 (1876).

## DISCUSSION

The Record On Appeal, (hearafter ROA) affirms Appellant's contentions. On July 24, 2019 Appellant was found guilty and his sentence was sealed, (ROA, pgs 1-3). On April 22, 2020 Appellant filed a Motion For Mistrial, (ROA, pgs 21-29). On June 15, 2020

Appellant filed a Motion For New Trial, (RDA pgs. 38-45).

On September 16, 2020 Appellant's sentences were unsealed by Judge William Seals Jr. and Appellant's sentences were imposed. Judge Seals abused his discretion and refused to allow Appellant to be heard, and refused to consider Appellant's Motion For Mistrial, or his Motion For New Trial.

On November 13, 2020 Appellant gave timely notice of appeal. The Honorable Court of Appeals noticed sua sponte that Appellant had outstanding motions that had not been considered, and after hearing from the Appellant and the State, the Court on February 5, 2021 Issued an Order remanding the case back to Circuit Court for consideration of all outstanding motions, (RDA, pg 5)

On April 15, 2021 Judge Ferrell Cothran granted Appellant's Motion For Mistrial and Motion For New Trial, (RDA, pgs 8-11) Thereafter, on May 4, 2021 Judge Cothran issued a supplemental order which "vacated" Appellant's sentences and ordered his release, (RDA, pg. 12)

However, on April 23, 2021 the State filed a belated "post-hearing" Motion For Reconsideration, (ROA, pg 49). This motion was not a "post-trial" motion because pursuant Rule 29 South Carolina Rules of Criminal Procedure, "post-trial motions shall be made within ten (10) days after the imposition of the sentence," (emphasis added). In this case, Appellant was sentenced on September 16, 2020 by Judge Seals (ROA, pgs 1-3). Therefore, it is beyond peradventure that the State's Motion For Reconsideration was a "post-hearing" motion. Thus, the State's "post-hearing" motion was belated as it was filed seven (7) days after the April 12-16, 2021 term of court had expired. As this "post-hearing" Motion For Reconsideration was filed after the term of court in which the "Mistrial" and "New Trial" were granted had fully expired, Judge Cothran had no jurisdiction or authority by long-standing law to consider it.

However, Judge Cothran blatantly abused his discretion and considered the State's untimely Motion For Reconsideration over Appellant's written and verbal

objections, (ROA, pgs 51-51)

Thereafter, Judge Cothan acting without jurisdiction or authority entered orders granting the State's untimely Motion For Reconsideration, and denying Appellant's previously granted Motion For Mistrial and Motion For New Trial, (ROA, pgs. 13-20). As a result of these Orders a travisty of justice has occurred as Appellant has been returned to prison and is being punished for a second time for sentences that were lawfully vacated. That is manifest double jeopardy.

V Because This Case Was On Remand From The Court Of Appeals The Trial Court Had No More Authority Other Than What The Court Of Appeals Had Instructed

STANDARD OF REVIEW

The Circuit Court on remand has only the jurisdiction and authority mandated by the appellate court. State v.

Slocumb, 412 S.C. 88, 770 S.E. 2d 436 (2015) (citing Prince V. Beaufort Memorial Hosp., 392 S.C. 599, 605, 709 S.E. 2d 122, 125 (Ct. App 2011), and S.C. Dept. of Soc. Servs. V. Basnight, 346 S.C. 241, 250-51, 551 S.E. 2d 274, 279 (Ct App. 2001) ("stating the trial court has no authority to exceed mandate of the appellate court on remand").

## DISCUSSION

On February 5, 2021 the Honorable Court of Appeals remanded this case back to the Circuit Court for consideration of all outstanding motions only. The Court of Appeals did not instruct the Circuit Court to reconsider anything, (RDA, pg5). The Court of Appeals certainly didn't instruct the Circuit Court to exceed it's jurisdiction and authority, and reconsider the orders it had entered after the term of court had expired. Not only did Judge Cothran ignore the long-standing rule of law of his jurisdiction in a criminal case ending with his term of court, but he

also exceeded the mandate from the Court of Appeals.

## CONCLUSION

WHEREFORE: Appellant prays this Honorable Court declare Judge Cothran's orders dated June 10, 2021 to be void and null for lack of jurisdiction, declare Appellant's sentences vacated by lawful order, and order Appellant's immediate release.

Respectfully Submitted
This 8th day of April, 2022
Theodore J. Bolick, pro se
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Theodore Bolick 384070
Evans Correctional Inst.
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4/11/22

TO Jenny Kitchens, clerk
P.O. Box 11629
Columbia, S.C 29211



Dear Honorable Clerk

Please find enclosed my:

1 Notice of Conflict of Intrest
2 Affidavit In Support
3 Motion For Assistance
4 Initial Beief on Appeal
5 Record on Appeal, and Transcripts

Please present these to a justice of the court. Thank You!

Sincerely
T. Bolick

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