

# The Supreme Court of South Carolina

Melvin Devale Thomason,                      Petitioner,

v.

State of South Carolina,                      Respondent.

The Honorable G. Edward Welmaker  
Greenville County  
Trial Court Case No. 2010-CP-23-02300

---

## ORDER

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For good cause shown, the request for an extension until April 30, 2012 to serve and file the Petition for Writ of Certiorari and Appendix in this matter is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what measures are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

  
Clerk

Columbia, South Carolina

April 2, 2012

cc: Appellate Defender Breen R. Stevens  
Assistant Attorney General Karen Ratigan

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

 ORIGINAL

Appeal from Greenville County  
G. Edward Welmaker, Circuit Court Judge

---

RECEIVED

MAR 30 2012

MELVIN DEVALE THOMASON,

S.C. Supreme Court  
PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

MOTION FOR AN EXTENSION OF TIME  
IN WHICH TO FILE THE PETITION FOR WRIT OF  
CERTIORARI AND APPENDIX

---

(3)

Counsel for Melvin D. Thomason respectfully requests a **final extension of thirty (30) days until April 30, 2012** in which to file the petition for writ of certiorari and appendix in this case. This motion is made pursuant to the Order of the South Carolina Supreme Court dated March 18, 2009. This is a final request for an extension. In support of this request, counsel shows:

1. The petition for writ of certiorari and appendix is due to be served and filed with the Court today. The Court has granted two previous extensions.
2. Counsel for Mr. Hester respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage his caseload, counsel hopes that no further extension requests will be required.

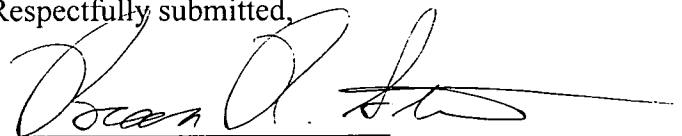
3. On March 26, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Samuel Dingle in the Court of Appeal. On March 23, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Brandon Rogers in the Court of Appeals. On March 19, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Bernaldino Ocasio in the Court of Appeals. On March 16, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Christopher Watson in the Court of Appeals. On March 12, 2012, counsel filed the petition for writ of certiorari and appendix in the case of Claude Jones v. State in this Court. On March 5, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Allen Capers and the brief of petitioner in the case of State v. Jason Black in this Court. On February 29, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Randy Blythe in the Court of Appeals. On February 22, 2012, counsel filed the Motion to Supplement the Appendix in the case of Damon Jackson v. State in this Court. On February 21, 2012, counsel filed the petition for writ of certiorari and appendix in the case of Christopher Strope v. State and the petition for writ of certiorari and Brief of Appellant Pursuant to White v. State in the case of Labrontae Agnew v. State in this Court. On February 16, 2012, counsel had an oral argument in the case of State v. Shawn Miller in the Court of Appeals. On February 13, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Stanqwaner Wiggins in the Court of Appeals. On February 9, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Rico Brown in the Court of Appeals. On February 7, 2012, counsel had an oral argument in the case of State v. Joey Ellis in this Court. On February 6, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Ronald McCauley in the Court of Appeals.

4. Counsel makes this request in good faith and not for purpose of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become more manageable in the near future, and less extensions will need to be requested.

5. Counsel for the Attorney General's office consents to this request as shown by signature below.


WHEREFORE, the undersigned counsel would respectfully request a **final thirty (30) day extension until April 30, 2012**, in which to file the petition for writ of certiorari and appendix in this case based upon the above exigent circumstances. Counsel requests that time limits for filing the petition be held in abeyance pending a ruling on this motion.

Respectfully submitted,



Breen R. Stevens  
Appellate Defender

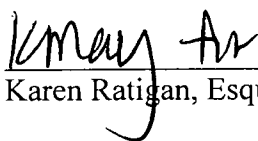
Attorney for Petitioner



Robert M. Dudek  
Chief Appellate Defender

This 30<sup>th</sup> day of March, 2012

I Consent:



Karen Ratigan, Esquire

# The Supreme Court of South Carolina

Melvin Devale Thomason,                      Petitioner,

v.

State of South Carolina,                      Respondent.

The Honorable G. Edward Welmaker  
Greenville County  
Trial Court Case No. 2010-CP-23-02300

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## ORDER

---

For good cause shown, the request for an extension until March 30, 2012 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Brenda J. Shealy*  
Clerk

Columbia, South Carolina *Chief Deputy*

March 1, 2012

cc: Appellate Defender Breen R. Stevens  
Assistant Attorney General Karen Ratigan

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

G. Edward Welmaker, Circuit Court Judge

RECEIVED  
FEB 29 2009  
S.C. Supreme

MELVIN DEVALE THOMASON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

(2)

MOTION FOR AN EXTENSION OF TIME  
IN WHICH TO FILE THE PETITION FOR WRIT OF  
CERTIORARI AND APPENDIX

Counsel for Melvin D. Thomason respectfully requests an extension of thirty (30) days in which to file the petition for writ of certiorari and appendix in this case. This motion is made pursuant to the Order of the South Carolina Supreme Court dated March 18, 2009. This is a second request for an extension. In support of this request, counsel shows:

1. The petition for writ of certiorari and appendix is due to be served and filed with the Court today. The Court has granted one previous extension.
2. Counsel for Mr. Hester respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage his caseload, counsel hopes that no further extension requests will be required.

3. Counsel is preparing to file the initial brief of appellant and designation of matter in the case of State v. Randy Blythe in the Court of Appeals today, February 29, 2012. On February 22, 2012, counsel filed the Motion to Supplement the Appendix in the case of Damon Jackson v. State in this Court. On February 21, 2012, counsel filed the petition for writ of certiorari and appendix in the case of Christopher Strope v. State and the petition for writ of certiorari and Brief of Appellant Pursuant to White v. State in the case of Labrontae Agnew v. State in this Court. On February 16, 2012, counsel had an oral argument in the case of State v. Shawn Miller in the Court of Appeals. On February 13, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Stanqwanner Wiggins in the Court of Appeals. On February 9, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Rico Brown in the Court of Appeals. On February 7, 2012, counsel had an oral argument in the case of State v. Joey Ellis in this Court. On February 6, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Ronald McCauley in the Court of Appeals. On January 30, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Raymond Flores in the Court of Appeals. On January 27, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Robert Johnson in the Court of Appeals. On January 25, 2012, counsel had an oral argument in the case of State v. Phillip Coker in the Court of Appeals. On January 23, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Cordelle Washington in the Court of Appeals. On January 19, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Azikiwe Archie in the Court of Appeals. On January 17, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Phillip Parsons in the Court of Appeals. On January 12, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Henry Ross in the Court of

Appeals. On January 9, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Mark Elliott in the Court of Appeals.

4. Counsel makes this request in good faith and not for purpose of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become more manageable in the near future, and less extensions will need to be requested.

5. Counsel for the Attorney General's office has been informed of this request.

WHEREFORE, the undersigned counsel would respectfully request a thirty day extension, in which to file the petition for writ of certiorari and appendix in this case based upon the above exigent circumstances. Counsel requests that time limits for filing the petition be held in abeyance pending a ruling on this motion.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Breen R. Stevens", with a long horizontal flourish extending to the right.

Breen R. Stevens  
Appellate Defender

Attorney for Petitioner

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

G. Edward Welmaker, Circuit Court Judge

RECEIVED  
FEB 29 2012  
S.C. Supreme Court

MELVIN DEVALE THOMASON,

PETITIONER,

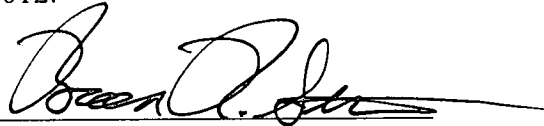
v.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

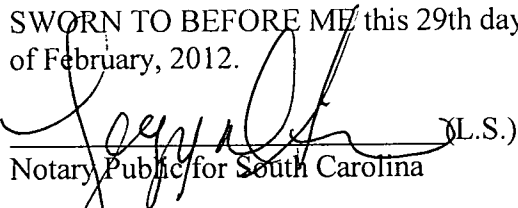
I certify that a true copy of the motion for an extension of time in which to file the petition for writ of certiorari and appendix in the above case has been served upon Karen Ratigan, Esquire, this 29th day of February, 2012.



Breen R. Stevens  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day  
of February, 2012.



(L.S.)  
Notary Public for South Carolina

My Commission Expires: December 4, 2017.

# The Supreme Court of South Carolina

Melvin Devale Thomason,                      Petitioner,

v.

State of South Carolina,                      Respondent.

The Honorable G. Edward Welmaker  
Greenville County  
Trial Court Case No. 2010-CP-23-02300

---

## ORDER

---

The request for an extension until February 29, 2012 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Brenda J. Shealy

Chief Deputy Clerk

Columbia, South Carolina

January 31, 2012

cc: Appellate Defender Breen R. Stevens  
Assistant Attorney General Karen Ratigan



Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

January 30, 2012

RECEIVED

JAN 30 2012

The Honorable Daniel E. Shearouse  
Clerk of Court, S.C. Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

(1)

S.C. Supreme Court

Re: Melvin Thomason v. The State

Dear Mr. Shearouse:

The petition for writ of certiorari and appendix in this case are due to be served and filed with the Court today, January 30, 2012. However, because of my heavy workload at this time, I am requesting an extension for 30 days, in which to serve and file the petition.

By copy of this letter, I am informing Karen Ratigan, of the Attorney General's Office, of my request.

Sincerely,

Breen R. Stevens  
Appellate Defender

BRS/pds

cc: Karen Ratigan, Esquire



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1343  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

November 29, 2011

RECEIVED

NOV 29 2011

S.C. Supreme Court

The Honorable Daniel E. Shearouse  
Clerk, S.C. Supreme Court  
Post Office Box 11330  
Columbia, SC 29211

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

Melvin Devale Thomason v. State of South Carolina

11/29/2011

I would appreciate you beginning our time limits from the above date, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Sharon A. Graham  
Administrative Coordinator



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

September 12, 2011

RECEIVED

SEP 12 2011

S.C. Supreme Court

Ms. April P. Herron  
Circuit Court Reporter  
P O Box 17675  
Greenville, SC 29606

Dear Ms. Herron:

Please provide us with the following transcript:

Melvin Devale Thomason v. State of South Carolina      Case #:      10-CP-23-02300

County: Greenville      Date of Trial: May 12, 2011

Presiding Judge: G. Edward Welmaker

To ensure prompt payment, please sign and complete the enclosed CID FORM 3500 and include the original criminal case number (Indictment number) where the space is provided.

Please number the lines on the paper from 1-25, and include any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments.

If you are aware of any co-defendants or if the Attorney General's Office has already requested a transcript, please let us know.

Sincerely,

Sharon A. Graham  
Administrative Coordinator

cc: S.C. Supreme Court  
Attorney General's Office

PCR

**AK**  
**Alex Kornfeld**  
Attorney at Law

RECEIVED  
JUL 22 2011  
S.C. SUPREME COURT  
July 20, 2011

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

RE: Melvin Devale Thomason, SCDC #280112 v. The State of South Carolina  
C.A. No.: 2010-CP-23-2300

Dear Mr. Shearouse:

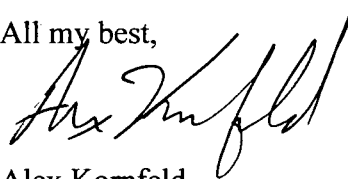
Enclosed for filing are the original and three copies of the following documents:  
a) notice of appeal; b) proof of service of the notice of appeal on the Respondent; and c) a  
copy of the judgment which is being challenged on appeal. No filing fee is enclosed as  
this is an appointed case.

I would appreciate your filing the originals and returning the filed copies to me in  
the envelope provided.

By copy of this letter to opposing counsel, I am hereby serving her with same.

Thank you for your attention. If you wish to discuss this or any other matter,  
please do not hesitate to contact me.

All my best,



Alex Kornfeld

ASK

cc: Karen C. Ratigan, Esq.

Alex Kornfeld, Attorney at Law, LLC  
309 Rae's Creek Dr.  
Greenville, SC 29609

IN THE STATE OF SOUTH CAROLINA  
In The Supreme Court

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMERS

2011 JUL 20 P 1:48

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

RECEIVED

G. Edward Welmaker, Circuit Court Judge

JUL 22 2011

S.C. SUPREME COURT

Case Number: 2010-CP-23-2300

State of South Carolina .....Respondent

v.

Melvin Devale Thomason, #280112 .....Appellant

NOTICE OF APPEAL

Melvin Devale Thomason appeals the Order of Court filed July 6, 2011. Counsel for Appellant received written notice of the entry of the order on July 7, 2011.

Greenville, South Carolina  
July 20, 2011

Alex Kornfeld, Attorney At Law, LLC



Alex Kornfeld (SC Bar #79046)  
309 Rae's Creek Dr.  
Greenville, South Carolina 29609  
telephone: (864) 325-6227  
fax: (864) 268-8890

Other Counsel of Record:  
Karen C. Ratigan  
Post Office Box 11549  
Columbia, South Carolina 29211-11549

RECEIVED  
JUL 20 2011  
S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA  
In The Supreme Court

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMER

2011 JUL 20 P 1:48

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

RECEIVED

G. Edward Welmaker, Circuit Court Judge

JUL 22 2011

Case Number: 2010-CP-23-2300

S.C. SUPREME COURT

State of South Carolina .....Respondent

v.

Melvin Devale Thomason, #280112 .....Appellant

PROOF OF SERVICE

I certify that on July 20, 2011 I served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail, sufficient first class postage prepaid, addressed to it attorney of record, Karen C. Ratigan, Post Office Box 11549, Columbia, South Carolina 29211-11549.

Greenville, South Carolina  
July 20, 2011

Alex Kornfeld, Attorney At Law, LLC



Alex Kornfeld (SC Bar #79046)

309 Rae's Creek Dr.

Greenville, South Carolina 29609

telephone: (864) 325-6227

fax: (864) 268-8890

Other Counsel of Record:  
Karen C. Ratigan  
Post Office Box 11549  
Columbia, South Carolina 29211-11549

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF GREENVILLE

CASE NO: 2010CP2302300

IN THE COURT OF COMMON PLEAS

RECEIVED  
JUL 22 2011  
S.C. SUPREME COURT  
CLERK OF COURT  
GREENVILLE, SC  
PAUL B. STOVALL

Melvin D Thomason vs. South Carolina State Of

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**
  - Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);
  - Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**
  - Rule 40(j) SCRPC;  Bankruptcy;
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
  - Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
  - Affirmed;  Reversed;  Remanded;
  - Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order;  Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

**PRESIDING JUDGE - G. Edward Wellmaker**

This judgment was entered on the 6th Day Of July, 2011, and a copy mailed first class this 6th Day Of July, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Melvin D Thomason Perry Corr Insti 430 Oaklawn  
Rd Pelzer, SC 29669  
Chase Harbin 1405 E Washington St Greenville, SC

29607

**William Blair Rawls** 118 Continental Dr. Greenville,  
SC 29615

**Alex Kornfeld** 309 Rae'S Creek Dr Greenville, SC  
29609

---

ATTORNEY(S) FOR THE PLAINTIFF(S)

---

ATTORNEY(S) FOR THE DEFENDANT(S)

---

Paul B. Wickensimer Greenville County Clerk Of Court  
- Clerk of Court

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Melvin Devale Thomason, )  
 S.C.D.C. No. 280112, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2010-CP-23-2300

RECEIVED

JUL 22 2011

S.C. SUPREME COURT

ORDER OF DISMISSAL

FILED  
 2010 JUL -6 PM 2:46  
 CLERK OF COURT  
 GREENVILLE CO. S.C.  
 JILL B. WIGGINS

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed March 23, 2010. The Respondent made its return on August 20, 2010. An evidentiary hearing into the matter was convened on May 12, 2011 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Alex Kornfeld, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, Daniel J. Farnsworth, Esquire. The Court had before it the trial transcript, the records of the Greenville County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the Respondent's return, and the appellate records.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the March 2006 term of the Greenville County Grand Jury for assault and battery

1 

of a high and aggravated nature (ABHAN) (2006-GS-23-2307) and armed robbery (2006-GS-23-2308). He was represented by Daniel J. Farnsworth, Esquire.

After the State called the case to trial, the Applicant was found guilty. On October 3, 2007, the Honorable Larry R. Patterson sentenced the Applicant to concurrent terms of ten (10) years for ABHAN and seventeen (17) years for armed robbery.

A notice of appeal was filed at the South Carolina Court of Appeals. Kathrine H. Hudgins, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders<sup>1</sup> brief. The Court of Appeals dismissed the appeal. State v. Thomason, Op. No. 2010-UP-017 (S.C. Ct. App. filed January 25, 2010).

### **ALLEGATIONS**

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel:
  - a. Failure to file a timely motion to quash indictments.
  - b. Failure to object during solicitor's closing argument.
  - c. Failure to object to improper jury instruction.
2. Trial court error:
  - a. Court issued a defective reasonable doubt charge.
  - b. Court refused to direct a verdict of not guilty.

At the evidentiary hearing, the Applicant proceeded solely upon several allegations of ineffective assistance of trial counsel.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their

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<sup>1</sup> Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

### **Ineffective Assistance of Counsel**

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated he had approximately four (4) meetings with trial counsel before the trial. The Applicant stated he told trial counsel his version of what happened and that they reviewed the pictures, videotape, and forensic evidence. The Applicant stated they did not review the charges or the defense strategy. The Applicant argued trial counsel should have challenged the armed robbery indictment because it did not advise him of the elements of the offense and did not indicate whether he was charged under subsection (A) or (B). The Applicant

argued trial counsel should have objected to the portion of the trial judge's jury charge about armed robbery (and its lesser-included offense).

Trial counsel testified he had several meetings with the Applicant prior to trial. Trial counsel testified the facts of this case were that the Applicant brandished an unopened wine bottle as a weapon in robbing a store. Trial counsel testified there was a videotape (and still photographs) of the robbery. Trial counsel testified his trial strategy was to argue the unopened wine bottle was not a deadly weapon under the armed robbery statute. Trial counsel testified he reviewed the armed robbery indictment as part of the discovery materials in this case. Trial counsel testified he did not move to quash the indictment because it gave adequate notice of the charge he had to defend against. Trial counsel testified he did not object to the solicitor's closing argument because it was based on trial testimony. Trial counsel testified he did not catch the trial judge's misstatement in the armed robbery jury charge, but could not say the jury charge prejudiced the jury.

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not adequately review or discuss his case with him prior to trial. This Court notes both the Applicant and trial counsel testified they had several meetings in preparation for trial. This Court further notes trial counsel articulated that the defense strategy in this case was to show that the object used in the robbery – a full and corked wine bottle – would not qualify as a deadly weapon. The Applicant failed to present any evidence of what trial counsel could have discovered or what

defenses could have been pursued if trial counsel had been more fully prepared. See Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (finding the failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have challenged the armed robbery indictment. The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet. State v. Gentry, 363 S.C. 93, 103, 610 S.E.2d 494, 500 (2005). This Court further notes that indictments are not evidentiary or jurisdictional documents – they are merely notice documents. Id. at 102, 610 S.E.2d at 500. The indictments in this case were true-billed and clearly sufficient to put the Applicant on notice of the charges he was facing. See State v. Tumbleston, 376 S.C. 90, 95-96, 654 S.E.2d 849, 852 (Ct. App. 2007).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected during the State's closing argument when the solicitor stated the wine bottle could have been broken and used as a jagged edge.<sup>2</sup> This Court notes that trial attorneys have been held to be ineffective for failing to object to closing arguments that are not supported by evidence in the record. See Mincey v. State, 314 S.C. 355, 444 S.E.2d 510 (1994). In this case, however, the solicitor did elicit the testimony (that the victim was afraid of the Applicant using

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<sup>2</sup> Trial transcript, p.86.

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the bottle to hurt her) that provided the basis for his closing argument.<sup>3</sup> Therefore, as the solicitor's closing argument was a proper view of the facts in evidence, trial counsel was not ineffective in failing to object.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to a portion of the jury charge. This Court finds the trial judge misspoke when he said that if the State failed to meet its burden of proving either armed robbery or robbery then the jury must give the defendant the benefit of the doubt and find him "guilty of the lesser included offense." (Trial transcript, p.98). While trial counsel did not object to this error, it did not constitute ineffective assistance. When reviewing a jury charge for alleged error, the charge must be considered as a whole in the light of the evidence and issues presented at trial. Daves v. Cleary, 355 S.C. 216, 224, 584 S.E.2d 423, 427 (Ct. App. 2003). If the jury charge is reasonably free from error, isolated portions which might be misleading do not constitute reversible error and the charge is considered correct if it contains the correct definition and adequately charges the law. Id. "The test for the sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean." State v. Benjamin, 345 S.C. 470, 474, 549 S.E.2d 258, 260 (2001). This Court finds that, taken as a whole, the trial judge's charge was more than sufficient under our case law and, therefore, the Applicant suffered no prejudice from trial counsel's failure to object to one specific portion of that charge.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant.

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<sup>3</sup> Trial transcript, p.54.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel’s performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

#### **All Other Allegations**

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

#### **CONCLUSION**

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel’s representation. Therefore, this PCR application must be denied and dismissed with prejudice.

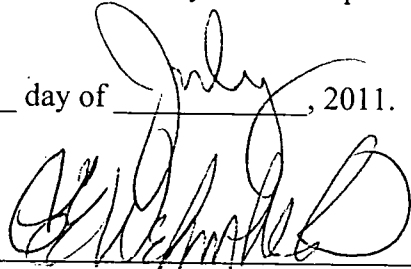
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

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AWB

**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED** this 1 day of July, 2011.

  
\_\_\_\_\_  
G. Edward Welmaker  
Resident Judge  
Thirteenth Judicial Circuit

Greenville, South Carolina.

STATE OF SOUTH CAROLINA )

COUNTY OF GREENVILLE )

Melvin Devale Thomason, 280112 )

Plaintiff )

v. )

State Of South Carolina )

Defendant. )

IN THE COURT OF COMMON PLEAS

CASE NO.

2010-CP-23-2300

MOTION AND ORDER INFORMATION  
FORM AND COVER SHEET

Plaintiff's Attorney:  
Alex S Kornfeld, Esquire, Bar No.  
Address:  
309 Rae's Creek Drive Greenville SC 29609  
phone: (864) 325-6227 fax:  
e-mail: other:

Defendant's Attorney:  
Karen C. Ratigan, Bar No.  
Address:  
Post Office Box 11549 Columbia SC 29211-1549  
phone: (803) 734-3737 fax: (803) 734-4113  
e-mail: other:

- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
- FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

**SECTION I: Hearing Information**

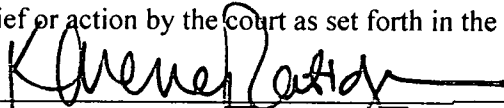
Nature of Motion:

Estimated Time Needed: Court Reporter Needed:  YES /  NO

**SECTION II: Motion/Order Type**

- Written motion attached
- Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

  
Signature of Attorney for  Plaintiff /  Defendant

June 16, 2011

Date submitted

**SECTION III: Motion Fee**

PAID - AMOUNT:

- EXEMPT:  Rule to Show Cause in Child or Spousal Support  
(check reason)  Domestic Abuse or Abuse and Neglect
- Indigent Status  State Agency v. Indigent Party
- Sexually Violent Predator Act  Post-Conviction Relief
- Motion for Stay in Bankruptcy
- Motion for Publication  Motion for Execution (Rule 69, SCRCPP)
- Proposed order submitted at request of the court; or,  
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

Other:

**JUDGE'S SECTION**

Motion Fee to be paid upon filing of the attached order.

Other:

JUDGE \_\_\_\_\_

CODE: \_\_\_\_\_ Date: \_\_\_\_\_

**CLERK'S VERIFICATION**

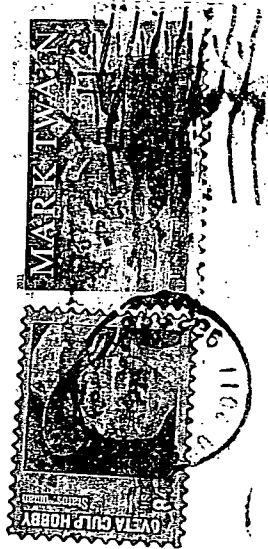
Collected by: \_\_\_\_\_

Date Filed: \_\_\_\_\_

MOTION FEE COLLECTED: \_\_\_\_\_

CONTESTED - AMOUNT DUE: \_\_\_\_\_

Alex Kaufeld, Esq.  
309 Rae's Creek Dr.  
Greenville, SC 29609



The Honorable Daniel E. Shearouse  
South Carolina Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

Melvin  
Dewale  
Thompson

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