THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of General Sessions
Court of Common Pleas

Dianne S. Goodstein, Circuit Court Judge
Deandrea G. Benjamin, Circuit Court Judge

Case No. 2011-CP-18-1497

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S.C. Supreme Court

Tiffany Sanders, ... Appellant,

vs.

State of South Carolina ..... Respondent,

APPELLANT'S BRIEF

August 6, 2013

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II. Did the trial judge err in failing to grant the appellant a new trial when the overwhelming evidence is that her trial counsel deviated from the minimum standard of care by failing to cross examine the eyewitness on the scene, Jessica Hans?

STATEMENT OF THE CASE

(TRIAL)

On June 8, 2007, Sean Kammerer shot and killed Jessie Ham in the Publix/Tire Kingdom parking lot on Dorchester Road in Dorchester County, South Carolina. On June 26, 2007, the Dorchester County Sheriff's Department arrested the appellant and charged her with the crime of accessory before the fact of murder on the theory that she drove the victim to the scene at the request of the shooter, Sean Kammerer. Thereafter, on September 8, 2008, the Dorchester Grand Jury indicted the appellant for this charge. See Record on Appeal at page 351 for Indictment Number 2007-GS-18-1206. For reasons that are not clear in the record, almost two years later, the Dorchester County indicted the appellant for murder on May 6, 2010 at Indictment number 2010-GS-18-707. (R.O.A. page 357) The inference is since the appellant would not plea to the 2007 charge for accessory, 88 days before trial, the State increased the charge from accessory to murder. 88 days after being indicted for murder, the appellant appeared before Judge Goodstein and a jury on August 3, 2010, for trial on both charges. She entered a plea of not guilty to each charge, waived arraignment on the new charge of murder, and the Court of General Sessions tried her on both charges. The State called seven witnesses as follows:

1. Detective David Watson (North Charleston Police Officer)

2. Kevin King (Jessie Ham's friend who rode to scene of the shooting in back seat of Tiffany Sander's Honda and who sat behind Jessie Ham)

3. David Hughey (Jessie Ham's friend who rode to scene after the shooting on bicycle while carrying a gun)

4. Brandon Frye (Jessie Ham's friend who rode to scene on bicycle with David

Hughey)

5. Jessica Hans (North Charleston Police Officer, formerly Publix employee, who witnessed the shooting)

6. DeJuan Jenkins (driver of Sean Kammerer's Jeep Cherokee who drove Sean Kammerer to the scene of the shooting—the Jeep belong to Sean's mother, and the witness testified he was driving it because Sean lost his driver's license.)

7. James Sturkie (North Charleston Police Detective)

8. The appellant did not testify, but the parties stipulated to the introduction of her uncounseled, written statement given on June 9, 2007. (See page __ R.O.A. for her written statement.)

In addition to these seven witnesses, the parties stipulated that on June 8, 2007, another defendant, Sean Kammerer, shot and killed Jessie Hamm by shooting him three times in the back and one time in the neck. (See page 67 of R.O.A. for stipulations and page 341 of the R.O.A. for the written stipulation—Court's Exhibit 1.) The Defendant, after colloquy with the Court, declined to testify, and the defendant called no witnesses. R.O.A. page 230. (The appellant's trial counsel's decisions are the subject of a petition for *certiorari* being filed separately but simultaneously.) On August 5, 2010, after requesting that the Court replay the testimony of Jessica Hans (the Publix employee, later N. Charleston police officer on the scene) and Kevin King (Jessie Ham's friend who rode with him to the scene), Court's Exhibit 3, page 345 R.O.A., and for clarification of the court's instruction on "intent and malice" and thereafter the definition of "principal," Court's Exhibits 7 and 8, R.O.A. pps. 346 and 348, the jury returned a verdict of not guilty on the charge of accessory before the

fact of murder and a verdict of guilty on the charge of murder. The Court sentenced the appellant to 30 years in prison, giving credit for time served in pre-trial detention. See Record on Appeal page 314 and sentencing sheets at page 356.

STATEMENT OF FACTS

On June 8, 2007, the appellant was driving her Honda Accord automobile near her home in Summerville. The only person in the car with her was her 33 year-old sister, Amanda Sue Fender. At approximately 7:30 that night, the appellant and her sister came upon four young men walking in her neighborhood. These four men were Brandon Frye, David Hughey, Kevin King, and the victim, Jessie Ham. (R.O.A. pages 133-134). After some light-hearted bantering with the four boys, Tiffany and her sister drove off. Later that same night, Tiffany and her sister, Amanda, drove back to Brandon Frye's house, where they met Brandon Frye and David Hughey in the front yard about 9:00 or 10:00 o'clock at night. After talking with Brandon and David in the front yard, Jessie Ham and Kevin King came from the backyard of Brandon's house and joined the conversation. Jessie identified himself as "Benjamin." Kevin identified himself as "Kyle." (R.O.A. page tr. 135) As a result of conversation, two of the four men—Jessie Ham and Kevin King—got in the appellant's Honda automobile. The four arranged themselves in the car so that the appellant was driving her Honda automobile with Kevin King sitting beside her. R.O.A. page 138) The victim, Jessie Ham, sat next to her sister, Amada, in the back. (As discussed more fully below in the argument section, Sean Kammera's friend, Dejuan Jenkins—who drove Sean Kammerer to the scene—says Jessie Ham was sitting in the back seat—see R.O.A. page 203) The

appellant drove the four to the Publix/Tire Kingdom parking lot where the two men got out. She then left the scene, and shortly thereafter, the killer, Sean Kammerer, fired four shots, killing Jessie Ham. There is no dispute that the appellant left the scene prior to the shooting because the Publix employee, Jessica Han, who later became a North Charleston police officer, was an eyewitness to the shooting, having just left her job at Publix. At the time of the shooting, she was standing in the parking lot talking to a co-worker when Sean Kammerrer shot and killed Jessie Ham. Officer Hans is clear that the only vehicle present was the Jeep Cherokee in which DeJuan Jenkins drove to the scene with Kammerrer as a passenger. See R.O.A. page 196. Officer Hans's testimony corroborates the appellant's June 9th uncounseled written statement in which she informed the police that she was not present at the time of the shooting.

In his opening statement to the jury, the Solicitor conceded that the appellant was not present at the time Kammerer killed Ham. He told the jury in his opening statement: "She [appellant] was in her car when the murder happened outside her car." R.O.A. page 109) The Solicitor also conceded: "If she was present at the scene, you can't find her guilty of accessory before the fact, but you can find her guilty of murder, because she aided and abetted and helped and joined in with this crime." (R.O.A. page 110) As discussed in the argument below, this record demonstrates that at the time of the killing, the appellant was approximately a mile from the scene, and looking at the evidence in the light most favorable to the State, no one other than Sean Kammerer knew there was a gun present until he displayed it and fired it. See the testimony of Dejuan Jenkins, who drove Sean Kammerer to the scene in the R.O.A. at page 204:

Q. Did you see him with the gun before y'all got to the Tire Kingdom parking lot?

A. No, sir.

Q. When's the first time you saw him with a gun?

A. When he went out there shooting with it.

At the conclusion of the trial, the jury returned a verdict of not guilty on the 2008 indictment for accessory before the fact of murder, and a verdict of guilty on the 2010 indictment for murder. The lower court sentenced her to 30 years, with credit for time served in pre-trial detention. (See Sentencing Sheets in the Record on Appeal at page 356.)

STANDARD OF REVIEW

Directed Verdict

On appeal from the denial of a directed verdict, this Court must view the evidence in the light most favorable to the State. *State v. Lollis*, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001). The defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. *State v. McHoney*, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001) However, if there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. *State v. Pinckney*, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (200) A circuit judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. *State v. Schrock*, 283 S.C. 129, 132, 322 S.E.2d 450, 451-52 (1984). *State v. Brown*, 402 S.C. 119, 740 S.E.2d 493 (2013)

Jury Instruction

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "An appellate court will not reverse the trial judge's decision regarding jury charges absent an abuse of discretion." *State v. Santiago*, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006). Generally, the trial court is required to charge only the current and correct law of the South Carolina. *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). A charge to the jury is correct if it contains the correct definition of the law when read as a whole. *Id.* At 665, 594 S.E.2d at 472-73. *State v. Kinard*, 373 S.C. 500, 646 S,.E.2d 168 (Ct. App. 2007)

Direct Appeal from Judge Goodstein and a Jury

ARGUMENT

I THE LOWER COURT ERRED IN FAILING TO DIRECT A VERDICT OF ACQUITTAL WHEN THE STATE FAILED TO PRODUCE A SCINTILLA OF EVIDENCE THAT THE APPELLANT KNEW SEAN KAMMERER POSSESSED A GUN.

As set forth above, a trial judge must direct a verdict when the State fails to produce any evidence of guilt on each and every element of a crime. Since the jury acquitted the appellant on the charge of accessory before the fact, this appeal involves only whether there is any evidence to support a jury's finding of murder. The necessary elements the State must prove to sustain a conviction for murder is set forth in the statute: "Murder" is the killing of any person with malice aforethought, either express or implied." § 16-3-10. The essential element to sustain a murder conviction is "malice aforethought." Since no one knew Sean Kammerrer possessed a handgun; since no one knew he intended to shoot Jessie Ham; since Sean Kammerer admitted shooting Jessie Ham; since Tiffany Sanders was not present at the time of the shooting; and since Sean Kammerer was in the exclusive control of the State, and the State did not call him, the record is devoid of any evidence to support a jury's finding that Tiffany Sanders committed a murder. There is not a scintilla of evidence in the record that Tiffany Sanders harbored malice toward the victim, without which the lower court is required to direct a verdict:

> In its popular sense the term 'malice', conveys the meaning of hatred, ill-will, or hostility toward another. In its legal sense, however, as it is employed in the description of murder, it does not of necessity import ill-will toward the individual

injured, but signifies a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief; in other words, a malicious killing is when the act is done without legal justification, excuse or extenuation, and malice has been frequently substantially so defined as consisting of the intention doing of a wrongful act toward another without legal justification or excuse.

State v. Heyward, 197 S.C. 371, 375, 15 S.E.2d 669, 671 (1941)

As our Supreme Court held in *Lowry v. State*, 376 S.C. 499, 657 S.E.2d 760 (2008):

Petitioner's claim [for post-conviction relief] arises out of the Due Process Clauses to the Fifth and Fourteenth Amendments, which protect an accused against conviction unless the State supplies proof beyond a reasonable doubt of each element necessary to constitute the crime with which the accuse is charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed2d 368 (1970). The principle prohibits the use of evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of proof beyond a reasonable doubt as to every essential element of the crime. *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed2d 39 (1979)

Here, the State never provided any evidence from which a jury could infer that the appellant possessed malice toward the victim. All of the State's evidence proved beyond

a reasonable doubt that not only was the appellant not present at the scene of the shooting, but also no one had any idea that Sean Kammerer possessed a hand gun on June 8, 2007. Here are the salient points summarized for the Court's convenience and viewed in the light most favorable to the State:

- The only independent witness present at the scene, Jessica Hans, testified that at the time of the shooting, the appellant's automobile was not present. See the testimony of Jessica Hans at page 195 of R.O.A.: A. Yes, sir. After I walked to my car, another employee and I stood in the parking lot for a few minutes. We were talking about work and other things. Some point between 11 and 12, I'm not sure the exact time, we heard several loud pops. I thought they might have been fireworks. I'm not 100 percent positive. But at some point my attention was drawn across the parking lot to the Papa John's/Tire Kingdom area, which is on the other side, which is where I actually continued to see a person standing—standing pointing at the ground.

  Eventually he actually fired a gun. There was another shot, I'm not sure if it was one or two, fired another shot. There was another person that was standing with that person that ran between the two buildings, because Publix is separate from Papa John's and Tire Kingdom.

  After that shot was fired, the person who actually held the gun in their hand ran to the other side of Tire Kingdom, which was even further away. They disappeared behind the side of the building between Tire Kingdom and the woods.

About 30 second later, a Jeep Cherokee pulled out from the side of the building, pulled out through the parking lot and turns left onto the little side street that is between the parking lot and the other restaurant s that are right there; and sped off in the direction opposite from where we were in the parking lot.

- The State proved that Dejuan Jenkins drove the Jeep Cherokee to the scene with Sean Kammerer as the passenger. (The Jeep Cherokee belonged to Sean Kammerer's mother, and Dejuan Jenkins drove it because Sean lost his driver's license. See R.O.A. page 200.
- Detective Han's eyewitness account corroborates the appellant's June 9th written statement that she was not present at the time of the shooting. "As soon as they [Jessie and Kevin] did [get out of my car] Shawn [*sic.*] ran up to Kevin pushed him & Jessi screamed drive and I took off & went to Brandon's house got Brandon went back up there to see if they ducked in the woods." (R.O.A. page 339, Exhibit 7 [statement of Tiffany Sanders])
- The State proved that no one knew Sean Kammerer possessed a gun until the moment he displayed it. See R.O.A. page 204.

Under these facts, the State's evidence invited the jury to speculate that the appellant knew Sean had "malice aforethought" and knew that he intended to shoot Jessie Ham. The State's theory is that Sean's malice is twice imputed, first imputed to Sean because he presented a firearm—no dispute between the parties here—and then imputed to Tiffany Sanders by some method the State never explains. There is not a shred of

evidence in this record to support the speculation that Tiffany Sanders knew Sean Kammerer's evil intent. She did not know Sean had a gun and was not present at the time Sean shot and killed Jesse Ham. In fact, the unchallenged testimony at trial was that Tiffany Sanders barely knew who Jessie Ham was and did not know Sean had a gun. The unchallenged testimony at trial was: "I had no knowledge of a gun until I heard the shot after me & Brandon didn't see anyone Brandon said alright you can take me home. . . . I had no knowledge of a gun being present to take a life the only knowledge that I had was Shawn wanting to fight Jessi because of Jessi beating Shawn in the head with a baseball bat. If I had known guns would have been involved I would have kept Jessi & Kevin at Brandon's house." (R.O.A. page 339, State's Exhibit 7, statement)

This is the sole evidence the State presented, and not one witness contradicted it. The only eyewitness to the shooting, Jessica Hans, now a police officer, corroborated it. Moreover, as argued more fully below in Argument II, appellant's counsel timely objected to the trial judge's incorrect instruction to the jury that it could find the appellant guilty of murder if it found she knew that Sean intended to commit **any** crime. This was an incorrect statement of law, highly prejudicial, and shifted the burden to the appellant to prove that she did **not** know that **any** crime might occur. A defendant is never required to prove a negative. "No court may justifiably ask a litigant to prove a negative—that is to say, no court may ask a party to specifically establish the contents of a document that the party has never seen or the substance of testimony a party has never heard—but Appellant's arguments are, at bottom, utter speculation regarding the possible content of documents that may never have even existed." *State v. Lee*, 375 S.C. 394, 653 S.E.2d

259 (2007), Toal dissent. Logicians term this impossibility "Russell's teapot," for Bertrand Russell's observation that he could assert that a teapot orbited the sun between Earth and Mars on the ground at no one could prove it did not.

Like Russell's teapot, the State cannot rely on negatives to prove its case. The State has the burden of proving beyond a reasonable doubt that Tiffany Sanders committed each element of murder, and there is no evidence in this record to support the submission of that charge to a jury because all the State proved was that she drove the victim to the scene of the crime. Instead the State relied entirely upon the unsupported inference that she could not prove any other reason for driving Jessie Ham to the Publix/Tire Kingdom parking lot and is, therefore, guilty of murder. Without some proof of malice aforethought, the State failed in its constitutionally mandated burden. In other words, the State's entire theory is that because Tiffany knew there was animosity between Sean Kammerer and Jessie Ham that she therefore knew she was driving Jessie Ham to a murder. In other words, like Russell's teapot, unless Tiffany can show some other reason why she was driving Jessie Ham in her car, she must be driving him to his murder. The jury found the appellant guilty of murder. It did not find her guilty of arguing or fighting or bad blood, or, as discussed more fully below, "any crime," and thus, as discussed more fully in the next section, the lower court's erroneous instruction that the jury could find her guilty of murder if it found she was driving him to the scene of **any crime**, sealed her fate and impermissibly shifted the burden to her to show her state of mind. The State urged the jury to find the appellant guilty of murder if it found there was **any** evidence of **any** crime. Transporting Jessie Ham from Brandon Frye's home to the

Publix/Tire Kingdom parking lot is not evidence of an intent to commit murder. Under the State's theory of the case, the jury could find her guilty of murder if the boys had gotten into a dispute over football or gambling or trespassing or drugs, or for any other reason that then escalated to a shooting. However, the law does not permit the state to incarcerate its citizens for 30 years absent proof of more than mere presence at the scene of a crim. The law requires that there be a nexus, and this record is devoid of any evidence that Tiffany Sanders knew of a plan to commit murder, because the State proved only that she drove the victim from Brandon Frye's house to the Publix/Tire Kingdom parking lot where Sean Kammerer shot and killed the victim. Thus the lower court erred in submitting the case to a jury. While malice may be inferred in some cases—such as when a defendant presents a firearm—none of those cases are implicated here, unless this Court is prepared to change the law and say that an automobile used to transport a victim to the scene of a crime is a deadly weapon from which malice may be inferred. Rather, the State relied entirely upon the logical fallacy of *post hoc ergo propter hoc*, that is because Sean Kammerer shot and killed Jesse Ham at the Publix/Tire Kingdom parking lot after Tiffany Sanders drove him there, she is guilty of murder. See *Sellers v. State*, 362 S.C. 182, 607 S.E.2d 82 (2005): "The State alleged that Respondent gave Perry the gun in case he needed it during the [drug] deal. But Respondent's mother testified that Perry took the gun with Respondent knowing what Perry was going to do with it. Perry testified that Respondent did not tell him to shoot the supplier, but that Respondent gave him the gun prior to the meeting with the supplier. Respondent did not testify at trial." In evaluating this evidence, the Supreme Court found

that the evidence was sufficient to submit the case to the jury and therefore reversed the trial court's grant of a new trial. In the present case, all the State proved was that Tiffany Sanders drove Jesse Ham to the scene.

Thus, because there is no evidence of the essential elements of murder, the lower court erred in submitting the case to the jury and should have directed a verdict of acquittal.

II THE LOWER COURT ERRED IN INSTRUCTING THE JURY THAT IT COULD FIND THE DEFENDANT GUILTY OF MURDER IF IT FOUND EVDENCE THAT THE DEFENDANT WAS AWARE OF ANY CRIME.

As set forth above, the lower court charged the jury that it could find the appellant guilty of murder if it found she was aware that "any crime" was planned. Here is the lower court's charge on this point and the appellant's timely objection:

MR. O'NEAL: When we had our informal conference yesterday on the charges, I knew that it ended up that you were going to charge on accessory to a crime, that you were going to use the word "crime" in that charge.

And I kind of anticipated that Mr. Bell would argue a crime would be, for example, bringing a guy to a fight. And that's why yesterday I—I asked you if you always say, "the crime of murder."

Because I didn't—my fear was the jury would hear that charge, accessory before the fact to a crime, and figure, well, I agree with Mr. Bell that bringing a guy to a fight, a fight

in public is a crime, disorderly conduct, whatever you want to call it. And that's what she did, and there they've proved it.

And my exception really I suppose is an addition, I want you to add the words "of murder" to anytime you say the word "crime" in the charge on accessory.

THE COURT: Thank you so much. And I think, actually, I do that in the charge where it says—let me—let me just flip back to that portion because—the defendant—here's' what I stated (as read): "The defendant is charged with being an accessory before the fact of murder." And then I go on with the charge.

It comes up again—the only other place (as read): "The defendant may also be held criminally responsible for accessory before the fact for any other crime which is the natural or probable result of the agreed upon crime." I think that's the place you're talking about.

MR. O'NEAL: Yes ma'am.

THE COURT: You know, I don't—I don't speak of any other crime. And I told them earlier that—that the crime related to accessory before the fact is murder.

And then I go on to say (as reads): "The defendant may be held criminally responsible for accessory before the fact for any other crime which is naturally the—or probable result of the agreed upon crime.

And so, it wouldn't be appropriate to always charge the crime of murder, because this section is meant to explain to the jury probably that which you are concerned about. And that is, is that if you in fact were an accessory before the fact of a—of a crime such as assault and battery of a high and aggravated nature, and the jury was to determine that

the –that the natural or probable result of the crime of assault and battery of a high and aggravated nature was murder, then the defendant would also be responsible—held criminally responsible for that.

Because that—the murder in that instance would be the natural or probable result of the agreed upon crime of assault and battery with in—with intent to kill or of assault and battery of a high and aggravated nature.

And rather than giving specific examples in this section I just—I talk in terms of just crimes in—a little more in—in general. But that's on all fours with the case law that we went over yesterday.

R.O.A. pages 299-300

The lower court cited and relied upon the case of *State v. Peterson*, 287 S.C. 244, 335 S.E.2d 800 (1985)1 for its decision even though this case supports the appellant's timely objection and crystallizes the appellant's argument. In *State v. Peterson*, the Supreme Court reversed and remanded for new trial the convictions of two defendants convicted of murder, armed robbery, grand larceny of a motor vehicle and conspiracy. As to the conspiracy charge, the Supreme Court found that the trial court's charge on conspiracy was correct, but nonetheless reversed because "the jury reasonably could have found that the murder was not the natural or probable consequence of the larceny of a motor vehicle. Had the jury determined that either appellant conspired only to commit an unarmed larceny of a car, and had it further concluded that the state failed to establish beyond a reasonable doubt that a homicide was the natural or probable

consequence of a plan to steal the victim's car, the appellant would have been entitled to an acquittal on the charge of murder."

The Supreme Court's statement in *Peterson* is the precise objection raised by appellant, and in light of this holding, the lower court erred in refusing the appellant's timely objection to the charge. The lower court was obligated under *Peterson* to tell the jury that it could find the appellant guilty of murder only if the State proved beyond a reasonable doubt that murder was the "natural or probable consequence of a plan" to harm the victim. As the Supreme Court said in *Peterson*:

> It was therefore essential under the facts and circumstances of this case that the jury be instructed that it had to find the homicide was a natural or probable consequence of the acts actually agreed on by the appellant before the law would hold him responsible for such a homicide. The failure of the trial judge to so instruct was error because it permitted the jury to convict an appellant of murder merely by finding (1) that appellant had combined with another to commit the non-life threatening crime of grand larceny of a motor vehicle and (2) that appellant's accomplice thereafter took a life without appellant's prior knowledge, approval, or assistance."
>
> *Peterson* at page 247

The error identified in Peterson is precisely the same error here. Here, the jury was invited to speculate that because Tiffany Sanders drove the victim to a fight, that it could find that she agreed to murder the victim. Thus the charge below invited the jury to

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1 *State v. Peterson* was one of hundreds of cases overruled by the 1991 case, *State v. Torrence*, 406 S.E.2d 315,

speculate, and to arrive at a conclusion not only unsupported by any evidence, but also illogical. The instruction bellowed "constitute[d] either a burden shifting presumption or a conclusive presumption." Either one is unconstitutional. *Francis v. Franklin*, 471U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). *State v. Peterson*, 287 S.C. 244, 335 S.E.2d 800 (1985). The lower court compounded the error of "any crime," by instructing the jury that it could "infer" malice from anything at all:

Malice may be inferred from conduct showing a total disregard for human life. **Inferred malice may also arise from the deed that is done with a deadly weapon. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case.**

R.O.A. page 288 (emphasis added)

Thus the lower court instructed the jury that it could find the appellant guilty of murder because Sean Kammerer possessed a gun that no one knew about! In other words, *post hoc ergo propter hoc*. Since there is no evidence in the record to suggest, let alone prove, that Tiffany Sanders knew anything about a weapon, her trial counsel's timely objection to the inclusion of "any crime" in the charge permitted the jury to speculate that because Sean Kammerer possessed a gun; therefore, Tiffany Sanders knew it. As a result, the charge shifted the burden to the appellant to demonstrate she did not know

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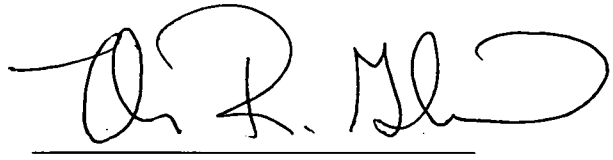
which overruled *in favorem vitae* in South Carolina.

there was a gun, which is not only an impermissible burden shifting charge, but also required the defendant to do the impossible in proving the negative. By allowing the jury to find the appellant guilty of murder if it found evidence of "any crime" denied her the fundamental right to a fair trial, and the verdict below should be reversed.

CONCLUSION

As may be seen by the record on appeal, the State failed to produce a scintilla of evidence that the appellant knew she was transporting the victim to an assailant with a firearm. The evidence viewed in the light most favorable to the State is that the appellant transported the victim to a place where she knew Sean Kammerer was. Once the lower court instructed the jury that it could find the defendant guilty of murder if it found she intended to transport the victim to the scene of "any crime," her fate was sealed and she did not have a chance of receiving a fair trial. As demonstrated above, the lower court's reliance on *Peterson* was misplaced, resulting in an highly prejudicial and incorrect charge. Likewise, defense counsel failed to mount an effective defense even though the defense knew he had a witness available to controvert the inferences, he failed to an eyewitness who was in a position to combat every inference relied upon by the State. her. He failed even to interview the shooter to learn what information he could provide. As a result, the appellant is entitled a reversal of her conviction and if not a directed verdict of acquittal, then at least an opportunity to receive a fair trial.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
General Sessions
Common Pleas

Dianne Goodstein, General Sessions Judge
Deandrea G. Benjamin, Common Pleas Judge

Case No. 2011-CP-18-1497

Tiffany Sanders, ... Appellant,

vs.

State of South Carolina ..... Respondent,

PROOF OF SERVICE

I certify that I have served the Appellant's Brief on the State of South Carolina by depositing a copy in the United States Mail, postage prepaid, on August 7, 2013, addressed to the State's attorneys of record, Sally W. Elliott, P. O. Box 11549, Columbia, S. C. 29211.

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August 7, 2013

Hon. Daniel E. Shearhouse
Clerk of Court
Supreme Court of South Carolina
P. O. Box 11330
Columbia, S.C. 29211

RECEIVED
AUG - 9 2013
S.C. Supreme Court

Re: Tiffany Sanders adv. State of South Carolina
2011-CP-18-1497

Dear Mr. Shearhouse,

I enclose the original and fourteen copies of Appellant's Brief. I also enclose our certificate of service for these documents. By copy of this letter I am serving a copy of the Appellant's Brief upon opposing counsel. I thank you in advance for your attention to this request. With kind regards, I am

Very truly yours,

Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein

enclosure: as stated
cc: Sally W. Elliott, Esq. (with enclosure)
Harrison Bell, Esq. (with enclosure)