

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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SEP 11 2014

S.C. Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson, Presiding Circuit Court Judge

Docket No. 2010-CP-46-0436

2014-000281

Berry Bolin, ... Appellant.

v.

State of South Carolina, ... Respondent,

APPENDIX VOLUME 1 OF 4

The Appellant, Berry Bolin, appeals the final order in this Post Conviction Relief Application case. The Final Order was issued and served on January 21, 2014. Appellant's motion to reconsider and/of for rehearing was denied on February 10, 2014.

September 9, 2014

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FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP4600436**

Berry Scott Bolin

South Carolina State Of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (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. ☐ See Page 2 for additional information.
- ☐ **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; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

s/Edgar W. Dickson

Circuit Court Judge

2153

Judge Code

2/06/2014

Date

For Clerk of Court Office Use Only

2/17/14

2/18/14

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

T Micah Leddy 2008 Lincoln Street Columbia, SC 29201

Rutledge Johnson SC Attorney Generals Office- PCR P O
Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Berry S. Bolin, 317414,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2010-CP-46-0436

**ORDER DENYING APPLICANT'S RULE 59(e)
MOTION TO ALTER OR AMEND THE
JUDGMENT**

This matter comes before the Court by way of Applicant's Rule 59(e) Motion to Alter or Amend the Judgment filed January 21, 2014. The Order of Dismissal in this matter was signed by me on December 27, 2013.

After due deliberation and careful reconsideration of all of the evidence, memoranda, case law, and documents submitted in this case and upon full consideration of Applicant's motion, this Court is not persuaded to alter or amend the judgment. In the motion, Applicant reiterates arguments made in his application, at the evidentiary hearing, and in his motion to file a second amended application. This Court, having addressed these issues repeatedly, sees no reason to depart from its earlier ruling. This Court further finds that oral argument would not aid in the reconsideration of the original judgment.

Accordingly, the Rule 59 (e) Motion to Alter or Amend the Judgment is denied.

FILED-RECEIVED
2014 FEB 17 PM 12:22
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

1/2 

AND IT IS SO ORDERED this 6th day of Feb., 2014.



Edgar W. Dickson
Presiding Judge
16th Judicial Circuit

Orangeburg, South Carolina.

2/2 

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

2010-CP-46-0436

BERRY S. BOLIN, #317414

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

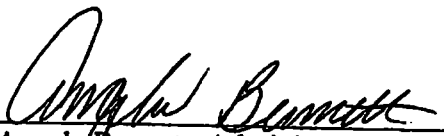
STATE OF SOUTH CAROLINA,

Respondent.

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Order Denying Applicant's Rule 59(e) Motion to Alter or Amend the Judgment** in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

T. Micah Leddy, Esquire
2008 Lincoln Street
Columbia, South Carolina 29201

DATED this 10th day of February, 2014


Angela Bennett, Administrative Assistant
For Respondent

FILED-RECEIVED
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DAVID HAMILTON
C.C. CP & S.
YORK COUNTY, SC

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP4600436

Berry Scott Bolin

South Carolina State Of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: J. Rutledge Johnson

Attorney for: ☐ Plaintiff ☒ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (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. ☐ See Page 2 for additional information.
- ☒ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☒ Other: Order of Dismissal
- ☐ **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; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

s/Edgar W. Dickson

Circuit Court Judge

2153

Judge Code

1/7/2014

Date

For Clerk of Court Office Use Only

This judgment was entered on January 7, 2014, and a copy mailed first class or placed in the appropriate attorney's box on January 7, 2014, to attorneys of record or to parties (when appearing pro se) as follows:

T Micah Leddy 2008 Lincoln Street Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

Rutledge Johnson SC Attorney Generals Office- PCR P O
Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Berry S. Bolin, 317414,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2010-CP-46-0436

ORDER OF DISMISSAL

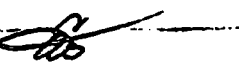
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DAVID HAMILTON
C.C.P. & J. SC
YORK COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 1, 2010, and First Amended Application for Post-Conviction Relief submitted December 29, 2011. The State made Return to the application on June 30, 2010.

By motion dated December 15, 2011, Applicant requested leave to conduct discovery and on February 8, 2012, requested permission to conduct limited discovery, both pursuant to S.C. Code Ann. section 17-27-150 (2003). The State made Return on January 3, 2012 and March 9, 2012. A hearing respecting the discovery request was held on July 13, 2012, before the Honorable Lee S. Alford, and the matters were ruled on at the hearing. Applicant also submitted a Case History Brief to this Court dated October 10, 2012.

An evidentiary hearing into the merits of the post-conviction relief action was convened on October 11, 2012, at the Moss Justice Center in York, South Carolina. Applicant was present at the hearing and was represented by T. Micah Leddy, Esquire. The Respondent was represented by Salley W. Elliott, Senior Assistant Deputy Attorney General.

The Applicant did not testify but presented the testimony of his trial attorney, Leland

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Greeley. He also presented the testimony of Roger Nivens, and Eric Brown. Also testifying at the hearing were Deputy Solicitor Willy Thompson and Rodney Nivens. In addition, this Court also had before it a copy of the transcript of Applicant's trial, the transcript of the motion hearing in this case held in July 2012 before Judge Alford, the records of the York County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the briefs and opinions from the direct appeals, the exhibits introduced into evidence at the hearing, and pleadings and letters submitted by the parties to this Court.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted at the May 2006 term of the Grand Jury for York County for murder (2006-GS-46-1595), discharging a firearm into an occupied vehicle (2006-GS-46-1600), two counts of assault with intent to kill (2006-GS-46-1598 and 1599), assault and battery with intent to kill (2006-GS-46-1596), possession of a weapon during the commission of a crime of violence (2006-GS-46-1597), and possession of a pistol by a person under the age of twenty-one (2006-GS-46-1601). He was represented by Leland Greeley, Esquire. Applicant proceeded to trial on August 28, 2006 to September 6, 2006, before the Honorable John C. Hayes, and a jury. Judge Hayes granted Applicant's motion to quash as to the charge of possession of a pistol by a person under the age of twenty-one and denied Applicant's motion to quash the remaining indictments pursuant to the Protection of Persons and Property Act. Applicant was acquitted of possession of a weapon during the commission of a crime of violence ~~and~~ was found guilty of voluntary manslaughter as the lesser offense of murder, guilty of two counts of assault of a high and aggravated nature as

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lesser offenses of assault with intent to kill, assault and battery of a high and aggravated nature as the lesser-included offense of assault and battery with intent to kill, and discharge of a firearm into a vehicle. He was sentenced to confinement for thirty (30) years for voluntary manslaughter, ten (10) years for the remaining charges, concurrent, and restitution of \$31,000.00.

A timely notice of appeal was filed on the Applicant's behalf and an appeal was perfected. The State also appealed the trial court's decision quashing the indictment for the charge of possession of a pistol while under the age of twenty-one. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences, State v. Bolin, 381 S.C. 557, 673 S.E.2d 885 (Ct. App. 2009). The South Carolina Supreme Court affirmed the trial court's decision to quash the indictment for the charge of possession of a pistol while under the age of twenty-one. State v. Bolin, 378 S.C. 96, 662 S.E.2d 38 (2008).

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

1. Ineffective assistance of trial counsel:
 - (a) "due to counsel's failure to adequately advise applicant to accept the state's plea offer made during trial"; and
 - (b) "due to counsel's failure to challenge the imposition of restitution in the amount of \$31,000 without adequately considering the factors set forth in S.C. Code Sec. 17-25-322 (B)."

In his First Amended Application for Post-Conviction Relief, Applicant also alleges:

- _____2._____ Ineffective assistance of trial counsel in that:
 - (a) trial counsel failed to "call several witnesses who were present at the scene who would

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testify that they saw gunfire coming from the alleged victims' automobile, which would have bolstered Applicant's claim of self-defense . . .";

(b) trial counsel failed "to subpoena or otherwise obtain the videotape surveillance from the location where the alleged victims stopped their vehicle on the way to the police station, even though it was Counsel's contention at trial that they disposed of weapons at the stop";

(c) "trial counsel was deficient in his efforts to get (Applicant) to accept the guilty plea offer of 15 years to manslaughter" and "in failing to attempt to get the plea offer reinstated after the trial judge ruled that the 'Castle Doctrine' statute did not apply to the case because the statute was prospective in its application only."

3. Ineffective assistance of appellate counsel in that counsel failed to file a petition for writ of certiorari to the South Carolina Supreme Court.

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 at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (2003).

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I.

Ineffective Assistance of Trial Counsel

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 441. 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, 466 U.S. at 668. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. Where counsel articulates a valid reason for employing a particular trial strategy, counsel's conduct will not be determined ineffective assistance of counsel Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006);

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Watson v. State, 370 S.C. 68, 634 S.E.2d 642 (2006).

A. Failure to Call Witnesses

Applicant contends he received ineffective assistance of trial counsel for counsel's failure to call witnesses he claims were present at the scene and could testify that they saw gunfire coming from the victims' automobile to support his claim of self-defense. Applicant asserts counsel's inaction allowed the State to argue in closing that Applicant had no witnesses to corroborate his theory of defense.

In support of his allegation, Applicant presented the testimony of Eric Brown. Mr. Brown testified that he has known Applicant since childhood and has been around Applicant and Applicant's family his entire life. He testified that he was present when the incident occurred. Brown stated that he was initially inside the house but stood on the front porch after learning the victims were in front of the house. Brown observed the victims' car and a second car in front of the house and saw gunfire coming out of the second car. He stated that Applicant and co-defendant Lee Owens returned fire. He testified that the person who fired the first shot from the second car looked like Jeff Buck. He admitted that he did not provide this information in his first statement to officers because he was uncertain that the person he saw was Jeff Buck. He also admitted that Buck is dead now and that he would like to see Applicant get a new trial. He further admitted that he was a "fighting" person and had prior convictions for fraudulent checks and failure to stop for a blue light. Brown denied that he and Christine Moss hid under a jeep but said he stood in place in the face of the gunfire. Brown stated that he was interviewed by the prosecutor and an investigator for Applicant's attorney before trial and told them he saw gunfire from a car before anyone from the house began shooting.

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Brown testified that he appeared at trial pursuant to subpoena and submitted to a polygraph examination the day of trial but was not called as a witness after the polygraph examination. He denied telling the polygraph examiner during the pre-test interview that he was uncertain that he saw a gun in the second car and that what he thought was gunfire from that car might have been reflections of flashes. He admitted he never saw flashes from the victims' car but only from a second car. He also testified that Applicant shot at the wrong car.

Applicant did not call Samantha Eason as a witness but introduced the statements provided by Eason to law enforcement officers right after the incident and also shortly before trial. In the first statement handwritten by Ms. Eason on February 19, 2005, Ms. Eason stated that "I was at the party, when a car pulled up outside. When I walked outside Lee Owens started shooting a gun. He shot the gun in the back window of the car. Then the people in the car started firing shots back towards us. So Barry (sic) had no choice but to fire back." (Applicant's exhibit 1). In an e-mail from Deputy Solicitor Willy Thompson dated August 21, 2006, Applicant's counsel was notified that Eason's version of the events was constantly changing and that she asked to provide a new statement. (State's exhibit 1). In a second statement dated August 11, 2006, Eason stated that the victims' car pulled up outside. She indicated that a second car also pulled up and that Jeff Buck started shooting at them from the second car. She stated that Lee Owen fired two shots in the air but Jeff Buck continued to fire. She also stated that Berry Bolin fired at Jeff Buck in self-defense. She indicated that the person who shot into the victims' car was not Owen but an unknown "short guy with dark hair." (Applicant's exhibit 2).---

Deputy Solicitor Willy Thompson testified that he and former Solicitor Pope worked together on this case. Thompson testified that he was provided with the statements given by

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witnesses and produced those statements along with other discovery material to Applicant's trial counsel on an on-going basis as information was discovered or provided, including discrepancies or conflicts between earlier statements provided by witnesses to officers and information given in later interviews with the individuals. Thompson communicated with trial counsel orally and by email. (See also State's exhibit 1).

Respecting Eric Brown, Thompson testified that Brown failed to appear for several scheduled meetings but that he ultimately spoke with Brown after discovering him at another witness' home. Thompson indicated that the statements and information provided by many of the witnesses about what happened at the scene changed wildly such that he had the witnesses testify as to the version which suited them at trial and then examined them on the inconsistencies between their trial testimony and earlier statements provided to officers. Deputy Solicitor Thompson testified that Brown agreed to take a polygraph on the first day of trial after failing to appear for a polygraph scheduled at an earlier time. The information provided by Brown in the pre-polygraph interview and as reflected in the polygraph report conflicted with the earlier statement Brown provided shortly after the incident, including equivocation as to whether he saw a gun and whether he ~~reflections~~ ^{saw} reflections or gunfire. Brown indicated in the pre-polygraph interview he would have returned gunfire to the second car from which the shots were fired, and that the wrong car was fired upon. Thompson testified that he provided information to trial counsel about the results of the polygraph and the discrepancies between the information provided by Brown during the pre-polygraph interview and the prior statement given by Brown to officers, including uncertainty about whether he saw a gun and whether he saw reflections or gunfire as well as

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Brown's comment that "they" shot at the wrong car because the gunfire did not come from the victims' vehicle.

As to Samantha Eason, Thompson stated he provided Applicant's attorney with the first statement Eason wrote for officers in which she stated she observed a car pull up in front of the house, Lee Owens shoot into the back window of the car, the car return gunfire, and Applicant firing a gun. Thompson stated that he had difficulty speaking with Eason before trial but was ultimately able to do so. When Eason was interviewed, she provided completely different information from that contained in the statement she prepared for officers. She asked to prepare a written statement at that time and was permitted to do so. Thompson indicated that Eason's subsequent statement conflicted significantly with her earlier statement. He provided the statement to Applicant's attorney and confirmed the fact of the discrepancy in an email to counsel. Thompson testified that, at the time of the incident, Eason had been dating Robert Beverly who testified at trial but was dating co-defendant Owens by the time of trial. Eason altered her subsequent statement to say that the individuals in a car were shooting and Owens responded.

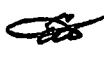
Thompson acknowledged that Bradley Deal and Robert Beverly indicated they saw gunfire coming out of a car and that Beverly recanted that version of the facts. Thompson stated that despite recantations about that fact, the jury was presented with the evidence that at some point more than one witness said they saw gunfire coming from a car. Thompson elected not to present Eason and Brown as State's witnesses because he was able to establish the pertinent facts without them and preferred to cross-examine them on the inconsistencies in their statements, difficulty interviewing them and possible bias arising from their close relationships with the

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individuals involved.

Trial counsel testified respecting his vast experience in the trial and appeal of criminal matters as a prosecutor and defense attorney. He stated he was retained to represent Applicant the week following the incident. Counsel testified that he initially conferred with the Applicant about Applicant's version of the facts and surrounding circumstances, including the statements Applicant provided to officers and the identity of individuals present at the scene who might have been witnesses to the incident. Counsel discussed the pending charges and the elements necessary for the State to meet its burden of proof. He also discussed possible defenses for trial and reviewed all of the discovery material with Applicant, including witness statements, photographs of the victims' car, 911 recordings, diagrams, the autopsy, ballistics and gunshot residue reports, and admissions from Applicant during telephone conversations with his father. Counsel conducted an independent investigation into the ballistics evidence and hired a private investigator to assist in the investigation of this case, including contacting and interviewing witnesses. Counsel discussed the results of counsel's investigation with Applicant, including the shifting versions of the facts provided by potential witnesses. Counsel testified that the defense at trial was an attack upon the State's case and presentation of the defense of others. Counsel testified that he was aware of all of the evidence the State planned to present and discussed the evidence and State's case with Applicant prior to trial.

The individuals identified by Applicant as present at the scene and as noted in the _____ discovery material received from the State were independently interviewed. Counsel determined that some individuals at the scene provided different versions from each other and from their own prior statements. Prior to trial, counsel identified potential defense witnesses but as time

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passed, the potential witnesses equivocated about what transpired at the scene and became unconvincing. Counsel determined that Bradley Deal would be called as a defense witness. However, the State called Mr. Deal as a witness and the information necessary to the defense was elicited from Deal without the necessity of calling him as a defense witness. Applicant admitted to counsel that he fired the gun and never told counsel that he saw a second car.

Counsel testified that he did not call Eric Brown as a witness because the purported shooter in the second car, Jeff Buck, died of a drug overdose approximately six weeks after the incident and counsel's investigation did not support Brown's claim that there was a second vehicle at the scene. Counsel also did not call Brown as a witness because counsel did not want to elicit testimony that a defense witness saw shots being fired from a second car without also testifying that shots were also observed coming from the victims' car. Further, counsel did not want the jury to hear Brown's statement that Applicant shot the wrong car as conveyed by Brown to the polygraph examiner and testified to by Brown during the post-conviction relief hearing. Counsel also stated that the other information Brown could offer was cumulative to evidence elicited at trial. Counsel further stated that he would have not have presented Brown to testify at trial in the same manner as Brown testified at the post-conviction relief hearing because — it would have destroyed any reason for Applicant to shoot at the victims' car if shots were fired from a second car that was not that of the victims.

~~Counsel stated Samantha Eason was under consideration as a defense witness until he~~
~~conferred with counsel for Applicant's co-defendant in early August and learned that she was~~
equivocating in her version of the facts and was not reliable as a defense witness. It was
counsel's testimony that the Brown and Eason lacked credibility and would reflect negatively

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upon Applicant if called as witnesses for the defense. Counsel testified that he made a strategic decision not to call Brown and Eason as witnesses for the defense and the decisions were based upon the facts of the case, counsel's investigation and experience, the manner in which Brown and Eason would come across to the jury, the testimony they would offer, their believability, and whether they would be tied to the Applicant in a negative manner.

The record reflects that Bradley Deal testified that he saw an arm extend out of the front passenger side of the victims' car followed by three muzzle flashes. Other witnesses presented by the prosecutor admitted giving prior statements indicating that someone was firing from the car. It was counsel's testimony that, in addition to the testimony offered by Bradley Deal and admissions from other witnesses about their prior statements, other circumstantial evidence was developed to support the fact that someone in the victims' car was shooting a gun, including the examination of Travis Falls, forensic evidence respecting the bullet holes and the location of the victims in the car, and Holly McCarter's testimony that she pulled the victims' car over at American Auto to change drivers but was still driving the car when it arrived at the Clover Police Department. It was counsel's defense theory that the victims stopped at American Auto to dispose of the gun. The fact that Holly McCarter was driving the victims' car when it arrived at the Clover Police Department and that the victims were uncooperative was established through the prosecutor's direct examination of Sergeant Trabue and was later emphasized in counsel's cross-examination of Sergeant Trabue. Moreover, three law enforcement officers testified that individuals present at the scene reported that shots were fired from the victims' car.

This Court finds that Applicant failed to establish that counsel's failure to call Eric Brown and Samantha Eason as defense witnesses constituted ineffective assistance of counsel.

First, this Court finds that Applicant failed to present Eason to testify at the post-conviction relief hearing. Therefore, any claim of prejudice for failing to present Ms. Eason as a defense witness is purely speculative. See Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) (stating any finding of prejudice is purely speculative in a claim counsel was ineffective for failing to present a witness at trial where the applicant fails to present the testimony of the witness at the post-conviction relief hearing); see also Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (same); Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993) (same). Mere speculation as to what Ms. Eason's testimony might have been is insufficient to satisfy the Applicant's burden of showing prejudice. "In a post-conviction relief action, the Applicant "may not simply posit suppositions and speculations in an attempt to establish that counsel was ineffective." Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701, FN 2 (2006). This Court refuses to engage in speculation particularly in view of Ms. Eason's widely divergent prior statements. Applicant can only speculate what Ms. Eason might have said when called to testify under oath. Moreover, counsel considered Eason's version of the facts to be even more inconsistent ~~than~~ that of Eric Brown. Eason's wildly inconsistent versions of the facts would cause the jury to question Eason's credibility in a manner that might be negative to Applicant's defense. The claim respecting Ms. Eason is without merit.

Second, this Court finds that trial counsel employed a reasonable trial strategy of eliciting evidence that shots were fired from the victims' car through the testimony of Bradley Deal, law enforcement officer testimony and other evidence rather than using the ever-shifting, recanting, and unreliable witnesses now suggested by Applicant. This Court notes counsel's concern that Eric Brown's version of the facts was not consistent, that his testimony regarding a "second car"

would have conflicted with Applicant's theory of the case, and his testimony that Applicant shot the wrong car would have been harmful to the defense. This Court agrees and so finds. Deputy Solicitor Thompson testified that he was not surprised that counsel declined to call either of these witnesses.

This Court finds that counsel employed a trial strategy of using evidence other than the testimony of Brown and Eason to corroborate testimony that shots were fired from the victims' automobile. This Court finds counsel's trial strategy in this respect to be reasonable based upon the facts of the case, counsel's investigation, and counsel's experience in the trial of murder cases. Eric Brown and Samantha Eason were potentially harmful to Applicant's defense and counsel was able to present the necessary evidence in a manner that was more favorable to Applicant. See Simpson v. Moore, 367 S.C. 587, 603, 627 S.E.2d 701, 709-710 (2006) (stating where counsel articulates a valid reason for employing a particular trial strategy, counsel's conduct will not be determined ineffective assistance of counsel); Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) (same). McLaughlin v. State, 352 S.C. 476, 483-484, 575 S.E.2d 841, 844-845 (2003) (same). This Court finds that counsel's action respecting these witnesses fell within the range of expected professional norms and was neither deficient nor prejudicial. Rather, it was a matter of reasonable trial strategy. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). Applicant's allegation respecting counsel's failure to call Eric Brown and Samantha Eason as defense witnesses is without merit and is denied.

B. Failure to Subpoena or Obtain Videotape

The Applicant next complains that counsel provided ineffective assistance of counsel for counsel's failure to subpoena or otherwise obtain a videotape from surveillance cameras located

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at American Auto Sales to support the defense theory that the victims disposed of a gun at that location. He complains that counsel's inaction resulted in the loss of the evidence.

Applicant presented the testimony of Roger Nivens, the owner of American Auto Sales in Clover, South Carolina. Nivens testified that he had a surveillance system at American Auto at the time of the incident. He stated that unidentified county officers were aware of the surveillance system because officers obtained a video from him in the past when a driver backed into the building there. Roger Nivens testified that no one asked him for the video from the surveillance equipment for the night of the incident and that he would have provided it if asked. He described the property as having a long drive-way leading to a sales lot. He stated that the surveillance cameras were focused on car lot. He admitted that he never reviewed the videos and does not know whether the cameras were functioning properly or recorded anything on the night in question. He also was unaware that a search of his business and surrounding area was later conducted by law enforcement officers. He admitted that he is not always present at the business and stated that his son is present as is Applicant's co-defendant, Lee Owens, who worked for the business at the time of the incident. He admitted that Owens would have known about the existence of the surveillance cameras and that Owens never requested the recordings from the surveillance equipment. He admitted he knew of co-defendant Lee Owen's "trouble" when it occurred and that Owens returned to work for him after Owens was released from prison. He also did not recall speaking with the prosecutor's investigator about the surveillance video or recording and believes the system automatically recycled every thirty (30) days. He indicated the system was discarded when he moved the business in 2010.

Deputy Solicitor Willy Thompson testified that the initial information received about the

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American Auto Sales location was from the female victim who advised that she stopped there on the way to the Clover Police Department to change drivers. Thompson stated that the sheriff's department also received a call from Applicant's investigator advising that a gun purportedly used by the victims was possibly discarded by the victims at that location. Thompson directed the sheriff's department to search the area. Several months later, Thompson directed a detective to inquire whether American Auto had surveillance equipment but learned that a video or other recording was not available. Thompson visited American Auto Sales and the surrounding area prior to trial. Thompson understood that the victims' car, if it stopped to change drivers, did so at the edge of the parking lot, barely off of the road. Thompson testified that he recently sent his investigator to American Auto to speak with Rodney Nivens about the existence of a video surveillance on the night of the incident and the information provided by Nivens to the investigator and to Thompson in the courtroom on the day of the post-conviction relief hearing differed with the testimony Nivens offered at the hearing.

Thompson testified that the ballistics evidence established that the shots fired into the victims' car occurred as the car was pulling away from the scene and refuted the defense theory that a gun was being fired from the victims' vehicle. The front passenger window was closed when the car was fired upon; otherwise, it would have broken when bullets entered the middle of the front passenger door and the window was found in an upright and undamaged condition. The window was found rolled up with blood smears on the interior side which could not have happened if the window was rolled down and recessed into the door frame to allow shots to be fired. The smears also lined up with smears on a portion of the window that could not be rolled down. Also, the configuration of the back passenger compartment would have made it extremely

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difficult for someone to point and fire as alleged by the defense. The person shooting out of the car would have to lean out considerably and aim back at an angle, all of which was inconsistent with the location of the blood on the interior of the car. Also, no shell casings were found for the rounds allegedly fired from the victims' car and no bullets were imbedded in the homes or cars parked in the line of fire. Lastly, Applicant, in his statement to officers, admitted he never saw gunfire from the victims' car and admitted in a telephone conversation with his father that he did not see a second car and did not recall anyone shooting except himself and his co-defendant, Lee Owens.

Thompson also stated that the fact that some of the individuals present at the scene reported gunfire from the victims' car was presented to the jury even if the witnesses attempted to recant certain versions of their earlier statements. The earlier statements clearly presenting these facts were explored in testimony during trial. Bradley Deal testified to that fact and did not recant.

Trial counsel testified that he asked his investigator to begin witness interviews in March after the February incident. At some point thereafter, counsel's investigator received information that the victims stopped at American Auto on the way to the Clover Police Department. A video was not mentioned. Counsel directed the investigator to go to the area of American Auto to search for a gun. The investigator contacted the sheriff's office and deputies conducted a search for a gun in the area of American Auto as well. A gun was not located. Counsel was uncertain when the investigation of American Auto occurred but indicated it would have been at some point after the investigator was contacted for investigative services on March 3 but likely in May. Counsel testified that Applicant also told him the victims stopped at American Auto but did so

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after it had been discovered by counsel's investigator. At some point counsel explored the possibility of obtaining a video from the surveillance cameras but counsel was not successful. Nevertheless, counsel developed a trial strategy for establishing that the victims had a gun through cross-examination of officers. testimony about the location of Travis Falls' wound, evidence indicating the victims were aware guns were present at scene before the victims traveled there, Holly McCarter's statement indicating that she traded drivers at American Auto when other evidence revealed she was driving upon arrival at the Clover Police Department, the failure of officers to test the victims for gunshot residue, and the absence of a large stick.

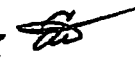
Rodney Nivens testified that he manages American Auto for his father. Rodney Nivens testified that in 2006, American Auto had one video camera located to record the parking area in front of the building, two other cameras facing the car lot, and another camera inside the building. He testified that he reviews the surveillance recordings only when an issue arises with the property or one of his cars. Rodney Nivens vaguely recalled that officers visited the property. He did not reveal the existence of the surveillance equipment to officers and conceded that there were areas of the property that would not be captured by the surveillance equipment. He also stated that the recording from the surveillance cameras recycled approximately every 28 or 29 days. He acknowledged that Lee Owens worked for him at the time of the incident, was charged as a co-defendant in this case, was aware of the existence of the surveillance equipment at the time, and did ask for access to the recordings. The evidence reflects that Eric Brown also worked at American Auto.

This Court finds that Applicant failed to establish that counsel's failure to obtain surveillance camera footage of the victims' alleged stop at American Auto Sales constituted

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ineffective assistance of counsel. Specifically, this Court finds that Applicant failed to establish the requisite prejudice - that there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668 (1984). Other than by pure speculation, Applicant failed to establish that the surveillance equipment was in working condition, that it produced a video or other depiction that could have been obtained by counsel if requested earlier, or that the video or other depiction was favorable to Applicant's defense. The investigating law enforcement officers were never able to acquire a video or other depiction of the alleged stop and Deputy Solicitor Thompson testified that the view range of the surveillance cameras would likely have not included the area where the victims pulled over. The owner and manager of American Auto Sales testified that the security camera footage is automatically recycled or wiped clean every twenty-eight (28) to thirty (30) days and therefore any footage that might have existed would not have been available. It should be noted that counsel expressed doubt that the victims stopped at American Auto. Moreover, counsel developed a trial strategy in which he used the possibility that the victims disposed of a gun at American Auto to his advantage at trial. Had counsel obtained the video, it might have precluded that favorable use at trial.

The Applicant failed to establish there is a reasonable probability the result of the trial would have been different had counsel been able to obtain and present the surveillance footage from American Auto at trial. Instead, the Applicant engages in pure speculation. See Porter v. State, 368 S.C. 378, 629 S.E.2d 353 (2006) (stating applicant failed to meet his burden of proof when he failed to show that further investigation would have led to a different result). Counsel

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was able to use other evidence and inferences to suggest the victims disposed of a gun at that location. The allegation is without merit and is denied.

C. Failure to accept plea offer

The Applicant also alleges in his application for post-conviction relief that counsel was "deficient in his efforts to get (Applicant) to accept a guilty plea offer of 15 years to manslaughter." He also complains that Counsel "was deficient in failing to attempt to get the plea offer reinstated after the trial judge ruled the 'Castle Doctrine' statute did not apply to this case because the statute was prospective in its application only."

Trial counsel testified that he engaged in plea negotiations with the State but did not receive an acceptable offer from the State before trial. At the conclusion of the first day of trial during which pre-trial matters were presented, the trial court denied Applicant's motion respecting the Protection of Persons and Property Act at that point but indicated it would entertain the matter as it might relate or impact directed verdict and or other matters later during trial. The trial court indicated that the facts of the case did not appear to fall within the provisions of the Act but the court would review the issue further. The record reflects that Applicant was present in court when these statements were made by the trial court.

On the second day of trial, the State extended an offer to allow Applicant to enter guilty pleas to a series of charges, the most serious of which was voluntary manslaughter for a negotiated sentence of fifteen (15) years and concurrent sentences on the other charges. Prior to that time, the State's offer had been for a sentence of twenty (20) years. Applicant's co-defendant, Lee Owens, entered a nolo contendere plea pursuant to the State's offer when the trial resumed the second morning. It was counsel's recollection that this more favorable plea offer

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was extended to Applicant by the State on the heels of Owens' plea and sentencing. Counsel discussed the State's plea offer, the trial judge's rulings up to that point and the trial judge's comments to co-defendant Owens when Owens was sentenced. Counsel recommended that Applicant accept the plea offer and provided specific reasons for his recommendation, including the trial judge's comments during co-defendant Owens' plea, the results of his investigation, the facts of the case, strengths and weaknesses of the State's case and the defense, the Protection of Persons and Property Act, counsel's experience in the trial of murder cases and counsel's specific experience with the trial judge. In addition to discussions with Applicant, counsel made arrangements for Applicant's family to meet with Applicant to discuss the plea offer. Counsel advised Applicant's family members that it was his recommendation that Applicant accept the plea offer. Despite counsel's discussion and recommendation, Applicant rejected the plea offer. It was counsel's recollection that once the plea offer was declined, the offer would not be revisited or reinstated by the State.

Deputy Solicitor Willy Thompson testified that he engaged in plea discussions with Applicant's attorney. Thompson initially extended an offer which allowed Applicant to plead "straight up" to voluntary manslaughter and some of the companion charges. Later, he offered a cap of twenty (20) years, which was rejected. During trial, he offered voluntary manslaughter for a negotiated sentence of fifteen (15) years and concurrent sentences on the other charges. Thompson testified that the trial judge provided Applicant the opportunity to speak with his family and attorney after which Applicant rejected the plea offer. Thompson stated that he did not and would not have agreed to the guilty plea after that point in the trial.

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-This Court finds that Applicant failed to establish that counsel provided ineffective assistance in connection with Applicant's rejection of the guilty plea offer or in failing to revisit the matter with the prosecutor later during trial. Counsel conferred with Applicant extensively about his options and the possible consequences of accepting or rejecting the offer extended by the State on the second morning of trial. Counsel also extensively conferred with Applicant's family member about the offer and counsel's recommendation and made arrangements for them to meet with Applicant prior to Applicant's decision to reject the plea offer. Deputy Solicitor Willy Thompson confirmed that counsel looked "dejected" when he returned to the courtroom after failing to convince Applicant to use the offer to his advantage. The Court is satisfied that counsel did everything he could to convince Applicant to accept the plea offer and finds that Applicant freely, knowingly and voluntarily rejected the plea offer. This Court also finds that, once the plea offer was rejected, it was no longer available to Applicant and any efforts by counsel to revisit the offer later during trial would have been rejected by the prosecutor.

Applicant's complaints respecting counsel and the guilty plea offer are without merit and are denied.

D. Victim's Gang Tattoo

To the extent Applicant suggested at the evidentiary hearing that counsel provided ineffective assistance for failing to present autopsy photographs of the deceased victim's gang tattoos, this Court finds the claim to be lacking in merit and must be denied. When questioned about the matter, trial counsel testified that the jury was already aware of the victim's _____ background and propensity for violence through presentation of other evidence and that presenting autopsy photographs of the deceased victim to make a point about a gang tattoo

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would have been detrimental to Applicant's case. It was counsel's opinion that the evidence would have caused greater harm to Applicant than any benefit to be gained in view of the other evidence presented to the jury of the deceased victim's propensity for fighting and violence. This Court finds counsel did not offer the photographs as a matter of trial strategy and in an effort to present the most favorable defense possible to the jury. This Court finds counsel's strategy to be reasonable and that counsel's failure to present the photographs did not constitute deficient performance. This Court also finds that Applicant failed to establish the requisite prejudice in view of the other evidence presented at trial. The allegation is without merit and is denied.

II.

Ineffective Assistance of Appellate Counsel

The Applicant alleges in his Application for Post-Conviction Relief and First Amended Application that he received ineffective assistance of appellate counsel for counsel's failure to pursue a Petition for Writ of Certiorari to the South Carolina Supreme Court after he was unsuccessful in the South Carolina Court of Appeals. This Court finds the allegation to be without merit.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to

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appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, Id. at 537. When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

To prove prejudice when an Applicant claims ineffective assistance of counsel, he must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Strickland, supra; Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). That is, he must prove prejudice by showing he would have prevailed on appeal had counsel made the argument he claims he did not make. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003); see Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

This Court finds that counsel was successful in representing Applicant in the State's appeal from the trial court's decision to quash the indictment on the charge of possession of a weapon by a person under the age of twenty-one. Counsel also represented Applicant in the appeal pursued on Applicant's behalf challenging the convictions and sentences. Counsel testified that, at the time of Applicant's trial, the Protection of Persons and Property Act, S.C.

Code Ann. Section 16-11-410 et seq, was a recent enactment and the issues of interpretation, proper procedure and retrospective application of the provisions of the Act had not been addressed. Counsel stated he hoped the Act would be applied retroactively at trial but

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acknowledged that the Act contained a saving clause that could be interpreted as unfavorable to retroactive application. Counsel pursued the issues at trial because the question had not been resolved and counsel hoped the interpretation might be favorable to Applicant but conceded it likely would not be applied to Applicant's case. Counsel discussed all of these factors with Applicant before trial and made a pre-trial motion to quash the indictments and end prosecution pursuant to the Act in an attempt to invoke immunity. He also moved for a directed verdict at trial on the indictments based upon S.C. Code Ann. Section 16-11-450. He further asked the trial court to charge the jury on the presumptions contained in the Act. The motions and requests were denied by the trial court.

In preparing for the appeal, counsel reviewed his trial notes and the transcript to refresh his recollection on all matters presented to the trial court and preserved for appeal. Counsel devised an appellate strategy as is reflected in the briefs submitted on Applicant's behalf, based upon the facts of the case, the research conducted and counsel's experience in the trial and appeal of criminal matters. Counsel also consulted with and received input from other defense attorneys about the Protection of Persons and Property Act. On appeal, counsel argued that the trial court erred in refusing to instruct the jury on the legal presumptions contained in S.C. Code Ann. Section 16-11-440 and in refusing his motion for a directed verdict based upon the Act.

The South Carolina Court of Appeals opined that the Act went into effect four months after the events leading to the charges in this case, that the Act did not apply retroactively to Applicant's case, and that the trial court did not err in refusing Applicant's requests. State v. Bolin, 381 S.C. 557, 673 S.E.2d 885 (2009).

Counsel considered filing a petition for rehearing in the South Carolina Court of Appeals

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and petition for writ of certiorari in the South Carolina Supreme Court and discussed those options with Applicant and his family. Based upon his reasonable professional judgment, the facts of the case and his experience as a criminal trial and appellate practitioner, counsel ultimately concluded that the petitions would not be successful given the rulings of the court and would only further delay Applicant's ability to seek post-conviction relief as a potential remedy. Applicant alleges that counsel provided ineffective assistance on appeal for failing to pursue a Petition for Writ of Certiorari from the Court of Appeals to the South Carolina Supreme Court. This Court finds the claim to be without merit.

First, the allegation presented by Applicant in his Application for Post-Conviction Relief and First Amended Application is not whether appellate counsel was ineffective for failing to raise a meritorious issue; rather, the issue is whether appellate counsel was constitutionally ineffective for failing to pursue a discretionary appeal. This Court finds that appellate counsel was under no duty to do so, and that Applicant had no constitutional right to effective assistance of counsel when seeking discretionary appellate review. Our Supreme Court has held appellate counsel is under no duty to pursue rehearing and/or a petition for writ certiorari following the decision of the Court of Appeals in a direct appeal of a criminal case. Douglas v. State, 369 S.C. 213, 215, 631 S.E.2d 542, 543 (2006). In addition, the Sixth Amendment right to assistance of counsel extends only to the first right of appeal. State v. Clinkscales, 318 S.C. 513, 515, 458 S.E.2d 548, 549 (1995); *see also* Wainwright v. Torna, 455 U.S. 586, 587, 102 S.Ct. 1300, 1301 (1982) (a criminal defendant has no constitutional right to counsel to pursue discretionary state appeals). Thus, appellate counsel's failure to pursue review in the South Carolina Supreme

Court did not deprive Applicant of the effective assistance of counsel because Applicant had no constitutional right to counsel for a discretionary writ.

Even assuming appellate counsel had a duty to pursue certiorari, this issue is without merit. Applicant failed to show that our Supreme Court would likely have granted review, and thereafter issued a decision favorable to Applicant. In view of the unanimous determination by our Supreme Court that the Protection of Persons and Property Act does not apply retroactively to crimes committed before the effective date of the Act and that Court's specific approval of the Court of Appeals decision in this case that the Act cannot be applied retroactively, no deficiency or prejudice can be established by Applicant. See State v. Isaac, 405 S.C. 177, 747 S.E.2d 677 (2013) (stating that right to immunity from criminal liability under Protection of Persons and Property Act did not apply retroactively to defendant charged with murder prior to the Act's effective date).

On the contrary, this Court finds that counsel exceeded what was required for reasonable effective assistance of appellate counsel in his treatment of the then-newly enacted Protection of Persons and Property Act and in calling upon our Court of Appeals to interpret the language in the Act and rule on whether it would benefit Applicant. This Court finds that counsel properly preserved the issues and thereafter pursued the most meritorious of the claims in our Court of Appeals. Counsel understood that our appellate court might ultimately determine the Act would not be applied retroactively but felt it best to preserve and pursue the issues for Applicant with the hope he might be successful. This Court finds the Applicant's allegation respecting appellate counsel is without merit and is denied.

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III.

Admission of the Prosecutor's File

The record before this Court reflects that Applicant moved for leave to conduct discovery in this post-conviction relief action pursuant to S.C. Code Ann. Section 17-27-150 which requires a showing of good cause before discovery is permitted in a noncapital post-conviction relief case such as is involved here. Applicant requested access to all files and documents in the possession of the solicitor relating to Applicant and Travis Falls. He also moved for a privilege log of materials not made available. The Respondent made Return to the motion and a hearing was held. The deputy solicitor who prosecuted Applicant's case appeared on behalf of his agency and opposed Applicant's request for unfettered access to the prosecutor's files, asserting work product privilege and Applicant's failure to show "good cause." The Honorable Lee S. Alford presided and ruled that absent a showing of good cause for some specific document or set of documents, Applicant would not be granted unfettered access to all of the State's documents and files respecting Applicant's prosecution. Judge Alford ruled that Applicant would not be allowed access to everything in the State's files "unless [Applicant] can show me something specific that you think you will find there [and] have good reason to believe [Applicant is entitled to it]." (July 2012 Tr. 42). Judge Alford further held, "But I simply am not going to set the precedent of requiring the solicitor to open their file in every single case when there is absolutely no good cause shown and simply just [let Applicant] explore their files." Id. Judge Alford directed the prosecutor to provide all notes and information relating to a possible video from American Auto Sales as well as anything else relating to the grounds raised in the Application for Post-

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Conviction Relief and First Amended Application for Post-Conviction Relief. Judge Alford ruled that Applicant would be permitted access to other portions of the prosecution files if and when Applicant was able to identify the specific documents and support the request with specific reasons why Applicant should be provided with the documents, material or information. The reasons advanced by Applicant to support good cause was that access to the file in discovery will avoid delay at the hearing and speculation that Brady or Rule 5 material might be found.

In addition to information about American Auto, Applicant also specifically requested all of the notes taken by the prosecutor and his investigator while interviewing possible witnesses in preparation for trial on the ground the notes might contain exculpatory or impeaching information that was not disclosed to Applicant for trial. The prosecutor opposed the request asserting work product privilege. The prosecutor also asserted that he provided Applicant's trial attorney with any exculpatory and impeaching information as well as any information that might be unfavorable to the defense that was revealed during interviews as the information became known to the prosecutor for trial. Applicant did not revisit discovery before the evidentiary hearing by identifying the specific documents sought other than a possible video from American Auto which was never in the prosecutor's possession.

Thereafter, Applicant subpoenaed the prosecutor entire file for the post-conviction relief evidentiary hearing. The prosecutor produced four large boxes of materials. The contents of one box had been fully disclosed to Applicant and counsel for the Respondent prior to Applicant's discovery motion. Counsel for Respondent has also not been provided access to any documents or files in the prosecutor's possession except for the one box of documents provided to both

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parties. Applicant offered the contents of all of the boxes as evidence at the hearing. Respondent opposed wholesale admission of the entire contents of the four boxes on the ground Applicant failed to show that the entire content of each of the boxes was material and relevant to the issues presented for litigation at the hearing as alleged in the Application for Post-Conviction Relief and First Amended Application for Post-Conviction Relief. Respondent also opposed admission of the contents of the boxes into evidence on the ground Applicant was attempting to revisit and circumvent Judge Alford's earlier ruling on the discovery without following the directions and procedures outlined by Judge Alford at the motion hearing for obtaining access.

After the hearing and pursuant to Applicant's letter dated October 24, 2012 in response to a privilege log submitted by the prosecutor, Applicant moved to have the post-conviction relief court conduct an *in camera* review of the polygraph report of Eric Brown and the content of two folders in the prosecutor's file containing handwritten notes of the prosecutor and the prosecutor's investigator on the ground the notes might contain Rule 5 or Brady material. The prosecutor listed the two folders of notes as privileged work product. Applicant also asked that all of the remaining material in the prosecutor's boxes of files be filed with the court for examination, if necessary. By letter dated November 21, 2012, Respondent did not oppose admission of the polygraph report into evidence but opposed the wholesale admission of the solicitor's entire file respecting the underlying prosecution as well as Applicant's request that this Court conduct an *in camera* review of the contents of the two folders based purely upon Applicant's speculation the items may contain Rule 5, SCRCrimP, and Brady material. Respondent objected on the grounds Applicant failed to show the entire prosecution file was

relevant to any of issues identified by Applicant in the pleadings requesting post-conviction relief, access to the material in the file was previously denied to Applicant, and Applicant made an insufficient showing allowing for an *in camera* review. The prosecutor also responded to Applicant's request by letter dated December 11, 2012, agreeing to release the contents of the folder relating to Eric Brown's polygraph and indicating the contents were made known to counsel for Applicant at the time the original trial. As to the handwritten notes, the prosecutor indicated the notes were taken in preparation for trial, were work product not subject to discovery, did not relate to any issues alleged by Applicant in his pleadings, access had been ruled upon by Judge Alford, and that all impeachable or exculpatory information was disclosed to Applicant at the time of the original trial. Applicant responded by letter dated December 18, 2012 contending the prosecutor failed to establish that the notes are work product.

This Court finds that the discovery of the folders sought by Applicant containing notes taken by the prosecutor and the prosecutor's investigator during interviews with potential witnesses in preparation for trial constitutes attorney work product. See Rule 26(b)(1), SCRCP ("Parties may obtain discovery regarding any matter, *not privileged....*") (emphasis added). Pursuant to the Rules of Civil Procedure, a party seeking protected work product must show a substantial need for the materials and that he cannot obtain the material sought, or a substantial equivalent thereof, without undue hardship. Rule 26(b)(3), SCRCP. The only item to which Applicant cited specifically as potentially discoverable within the State's files was possible surveillance footage from American Auto Sales. Deputy Solicitor Thompson testified, and this Court is satisfied, that the State was never in possession of any such surveillance footage. As this

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was the only potentially discoverable material contained within the State's files to which Applicant could specifically and with good cause point, the Court is sustaining the objection to admission of the four boxes of documents and other material in bulk as evidence in this case for Applicant's failure to establish the contents are material and relevant to the issues raised by Applicant in his Application for Post-Conviction Relief and First Amended Application for Post-Conviction Relief and otherwise admissible pursuant to our evidentiary rules. The relevance of all of the documents in the prosecution file and admission of the documents must be reviewed on an individual basis rather than by way of wholesale admission of the entire file which precludes this Court from being able to adequately consider and rule upon the propriety of admitting each document or category of documents in the file into evidence.

This Court also denies Applicant further access to the State's files. To allow Applicant the access he requests would amount to a proverbial fishing expedition. The Court hereby finds that the documents contained in the State's files that have not yet been produced to Applicant are privileged work product, not subject to discovery, and not shown to be relevant to the issues as alleged at the time of the evidentiary hearing. Applicant does not identify any specific material that he alleges should have been provided before trial. He simply wants this Court to survey trial preparation notes made by the prosecutor and the prosecutor's investigator for a determination whether anything contained in the notes might be subject to Brady or Rule 5. The showing is not sufficient and a similar argument has already been rejected in this case by Judge Alford. See State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999) (stating that Rule 5 exempts internal prosecution documents made in connection with an investigation and Brady only requires

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disclosure of impeachment or exculpatory evidence); State v. Myers, 359 S.C. 40, 596 S.E. 2d 488 (2004) (stating Rule 5 exempts work product and internal prosecution documents made by an attorney for prosecution.). Applicant merely speculates that notes taken during interviews with witnesses in preparation for trial might contain exculpatory or impeaching information which was not previously disclosed. Contrary to Applicant's contention, Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006) and Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999), do not require the prosecution to provide any and all notes of witness interviews taken for or during trial preparation. Disclosure is only required as to facts and information learned that are exculpatory or impeaching. Deputy Solicitor Thompson testified at the evidentiary hearing that anything of that nature was provided to trial counsel and that the notes in question pertain to internal prosecution documents made in preparation for trial, including personal recollections, mental impressions, and matters respecting case theory and strategy. See Hickman v. Taylor, 329 U.S. 495 (1947). Applicant did not allege or establish that any evidence was suppressed by the State, favorable to him or otherwise.

IV.

Request to Amend

Subsequent to the evidentiary hearing in this case and this Court's communication to the parties that it intended to deny the application for post-conviction relief, Applicant moved for this Court to permit him to amend his pleadings to add new allegations as set forth in a Second Amended Application for Post-Conviction Relief filed by Applicant after a January 8, 2013, letter expressing his desire to amend. Respondent opposed the request in a response dated

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January 18, 2013, asserting that it had no notice of the new or altered claims at the time of the evidentiary hearing, that lack of notice precluded investigation and presentation of evidence respecting the new or altered claims, and that the new claims were untimely, were matters that could have included in the application or amended application through the exercise of due diligence, leave Respondent without the opportunity to defend and would greatly prejudice Respondent. Respondent asserted it did not agree to litigate these new or altered claims at the evidentiary hearing, tacitly or otherwise and that Applicant was taking an unfair advantage. Applicant thereafter filed and served the Second Amended Application for Post-Conviction Relief and supported the request for permission to amend with argument presented in a letter dated January 25, 2013. Respondent submitted a reply by letter dated February 1, 2013, reiterating its objections.

This Court denies Applicant's request to amend as provided in the Second Amended Application for Post-Conviction Relief. Rule 71.1(a), SCRCP, provides that post-conviction relief actions are governed by the South Carolina Rules of Civil Procedure to the extent they are not inconsistent with the Uniform Post-Conviction Relief Procedure Act. Inasmuch as the request to amend is formally before the Court, this Court is treating the Applicant's request to amend with the Second Amended Application for Post-Conviction Relief as a Motion under Rule 15(b), SCRCP.

In South Carolina, pleadings may be amended to conform to evidence presented at trial as long as the amendment does not prejudice the opposing party's effort to maintain his case. See Rule 15(b), SCRCP. Generally, courts seek to ensure the opposing counsel has notice that the new issue is going to be tried and an opportunity to refute it. Pool v. Pool, 329 S.C. 324, 328-

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329, 494 S.E.2d 820, 823 (1998). Our Supreme Court has specifically determined that prejudice "occurs when the amendment states a [claim or defense] which would require the opposing party to introduce additional or different evidence to prevail in the amended action." Lee v. Bunch, 373 S.C. 654, 661, 647 S.E.2d 197, 201 (2007). When courts observe that both sides have thoroughly contested an issue that is not in the original pleadings, they will generally allow the pleading to be amended to include that issue. Simpson v. Moore, 367 S.C. 587, 599, 627 S.E.2d 701, 708 (2006); see also, Sossamon v. Peeler, 291 S.C. 256, 258, 353 S.E.2d 152, 154 (Ct. App. 1987); Lee, 373 S.C. 661-62, 64 S.E.2d 197, 201.

This Court convened the evidentiary hearing on October 11, 2012 in York County and devoted an entire day to testimony and presentation of other evidence in this case. The Court is of the opinion that the matters presented at the hearing respecting the issues alleged in the Application for Post-Conviction Relief and First Amended Application were thoroughly litigated. Any and all evidence offered at the hearing was considered by this Court in its deliberation and in its decision to deny the application for post-conviction relief. Applicant's Motion to File a Second Amended Application after the evidentiary hearing appears to pertain, in part, to a purported surveillance video alluded to, and allegedly presented for the first time by Applicant's trial counsel in his testimony. Certainly if Applicant's sole source for the purported existence of this video is his trial counsel's testimony, Applicant cannot contend its existence was unknown or is the source of any prosecutorial misconduct.

Moreover, this Court acknowledges Respondent's assertion that it was not on notice of the new or altered allegations at the time of the evidentiary hearing and would be greatly prejudiced because the hearing has been concluded, all evidence has been presented it was

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unable to conduct an appropriate investigation into the issues and develop a record to refute allegations about which it had no notice. This Court notes that at the call of this case, Respondent announced on the record its understanding of the claims or allegations the Applicant intended to pursue and received verification of those claims from Applicant. This Court finds that this not a situation where both parties fully litigated some new issue.

The case law fully supports Respondent's objections and the Applicant's request to amend must be denied. See Harvey v. Strickland, 350 S.C. 303, 314, 566 S.E2d 529, 535 (2002)

— (stating that when the court determines one party requires additional or different evidence to accurately refute a claim that is not in the original pleading, the amendment is not permitted);

Continental Radio and Television Corp. v. Furman, 193 S.C. 357, 8 S.E.2d 902, 904 (1940)

(court would not permit amendment when plaintiff originally asserted defendant breached contract by advertising, offering for sale and selling radios, and plaintiff sought to amend to

assert advertising, offering for sale, and sell of radios by third party without defendant's

knowledge and permission); see also White v. Benedict Coll., Inc., 288 S.C. 572, 344 S.E2d 147

(1986) (plaintiff's request to amend complaint at the close of evidence to include a claim of

assault and battery when the original complaint alleged sexual harassment was not permitted

because it would require additional and different evidence); Lane v. Berry, 288 S.C. 54, 57, 339

S.E2d 521, 523 (Ct. App. 1986) (stating amendment requested at the at the close of plaintiff's

case was not permitted because defendant not afforded adequate opportunity to gather additional

evidence and prepare additional testimony to counter the new claim.); Ball v. Canadian

Amendment Am. Exp., Inc., 314 S.C. 272, 276, 442 S.E.2d 620, 623(Ct. App. 1994) (stating

plaintiff may not amend after the trial was concluded to convert a claim of fraud in the

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inducement to a claim of fraud in the breach after the trial because the new claim would require presentation of different evidence).

"Prejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action." Ball v. Canadian American Express, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994) (internal citations omitted). As Respondent contends, leave to file a Second Amended PCR Application would require it to undertake not only a thorough, unanticipated investigation of evidence it had no prior notice would be at issue, but would also likely require this Court to reopen the record and reconvene to elicit further testimony from, not only Applicant's witnesses on the matter, but any additional witnesses Respondent deems necessary to defend the Applicant's additional allegations. Applicant's Second Amended PCR Application raises claims of prosecutorial misconduct and the potential existence of a video alluded to in Applicant's trial his testimony. Undoubtedly, these additional claims would require the Respondent to "introduce additional or different evidence." Accordingly, this Court finds prejudice herein. The Court is therefore denies Applicant's Motion to Amend the Pleadings.

CONCLUSION

Based on the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court advises Applicant that a notice of appeal must be served within thirty (30) days from the receipt of notice of entry of this Order to secure the appropriate appellate review.

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The Applicant's attention is also directed to South Carolina Appellate Rule 227 for appropriate procedures after notice has been timely served and filed.

IT IS THEREFORE ORDERED:

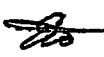
1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 27th day of Dec., 2013.



Edgar W. Dickson
Presiding Judge
Sixteenth Judicial Circuit

Orangeburg, South Carolina

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South Carolina Case Law

STATE v. BOLIN, 378 S.C. 96 (2008)

662 S.E.2d 38

The STATE, Appellant, v. Berry Scott BOLIN, Respondent.

No. 26494.

Supreme Court of South Carolina.

Heard March 5, 2008.

Decided May 19, 2008.

Appeal from the Circuit Court, York County, John C. Hayes,
III, J.

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Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, of Columbia; and Kevin Scott Brackett, Solicitor, of York, for appellant.

Leland B. Greeley, of Rock Hill, for respondent.

Page 98

Justice MOORE.

Respondent was indicted for murder, assault and battery with intent to kill, possession of a firearm during commission of a violent offense, assault with intent to kill, discharging a firearm into an occupied vehicle, and possession of a pistol by a person under 21 years of age pursuant to S.C. Code Ann. § 16-23-30 (2003 & Supp. 2007).

Respondent argued that the possession of a pistol indictment should be quashed because § 16-23-30 (B) under which he was charged is unconstitutional. The motion to quash was granted by the trial court. The State appeals and we affirm.

ISSUE

Did the trial court err by quashing the indictment for possession of a handgun while under the age of 21 on the ground that the criminal statute making such possession illegal is unconstitutional?

DISCUSSION

When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution. *State v. Gaster*, 349 S.C. 545, 564 S.E.2d 87 (2002). This presumption places the initial burden on the party challenging the constitutionality of the legislation to show it violates a provision of the Constitution. *State v. White*, 348 S.C. 532, 560 S.E.2d 420, cert. denied, 537 U.S. 825, 123 S.Ct. 114, 154 L.Ed.2d 37 (2002).

Section 16-23-30 (A) provides:

[i]t is unlawful for a person to knowingly sell, offer

to sell, deliver, lease, rent, barter, exchange, or transport for sale into this State any handgun to: (3) a person under the age of twenty-one, but this shall not apply to the issue of handguns to members of the [military or other like organizations or to those receiving instruction on handgun use under the immediate supervision of a parent or adult instructor].

Page 99

Subsection (B) states that "[i]t is unlawful for a person enumerated in subsection (A) to possess or acquire handguns within this State."^[fn1]

Respondent argues that because he was old enough to be *sui juris* and the state constitution granted him the right to bear arms, then he could not be charged with a crime for handgun possession. See S.C. Const. Art. I, § 20 (a well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed).

The portions of § 16-23-30 regarding persons under the age of 21 do not violate the constitutional right of a person under the age of 21 to keep and bear arms. While a person under the age of 21 is prohibited from possessing a handgun, except in certain circumstances, this does not prevent a person under the age of 21 from possessing other types of guns. Our constitution simply requires that a persons right to keep and bear "arms" not be infringed upon. The legislatures regulation of who may have access to handguns does not infringe upon that right because persons under the age of 21 have access to other types of guns. Cf. *State v. Johnson*, 76 S.C. 39, 56 S.E. 544 (1907) (city ordinance prohibiting tiring of guns within city limits is not unconstitutional as infringing on right to bear arms); *State v. Johnson*, 16 S.C. 187 (1881) (purpose of act was to prohibit, as far as consistent with a citizens right to bear arms, the carrying of deadly weapons, with a view to prevent acts of violence).^[fn2] Accordingly, § 16-23-30 does not

Page 100

violate S.C. Const. Art. I, § 20, regarding a persons right to keep and bear arms.

Respondent further argues that § 16-23-30 violates the state constitution because the age group of 18- to 20-year-olds is being treated differently than adults aged 21 and above. South Carolina Const. Art. XVII, § 14, provides:

Every citizen who is eighteen years of age or older, not laboring under disabilities prescribed in this Constitution or otherwise established by law, shall be deemed *sui juris* and endowed with full legal rights and responsibilities, provided, that the General Assembly may restrict the sale of alcoholic beverages to persons until age twenty-one.

Article XVII, § 14, specifically makes reference to the fact the General Assembly can restrict the sale of alcoholic beverages to persons until age 21. By expressly allowing the regulation of the sale of alcoholic beverages to the 18- to 20-year-old age group and not stating any other situation in which the General Assembly may restrict the rights of this age group, the state constitution precludes the General Assembly from prohibiting this age group's possession of hand-guns. See *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000) (the canon of construction "*expressio unius est exclusio alterius*" or "*inclusio unius est exclusio alterius*" holds that "to express or include one thing implies the exclusion of another, or of the alternative");

see also *Strickland v. Strickland*, **375 S.C. 76**, **650 S.E.2d 465** (2007) (when interpreting a statute, the words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limit or expand the statute's operation).

We find the General Assembly's prohibition on hand gun possession by the 18-to 20-year old age group does not infringe upon the right to bear arms; however, § **16-23-30** violates the plain language of Article XVII, § 14, of our state constitution. Accordingly, the decision of the trial court is

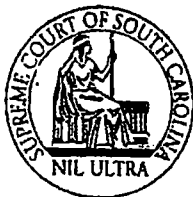
AFFIRMED.

TOAL, C.J., WALLER, BEATTY, JJ., and Acting Justice E.C. BURNETT, III, concur.

[fn1] The General Assembly recently passed and the Governor signed a bill amending § **16-23-30**. The amendment makes it unlawful for a person under the age of eighteen to possess a handgun. Therefore, the 18-to 20-year-old age group may now legally possess a handgun. However, this amendment does not apply to the instant case because the General Assembly provided that this amendment does not affect pending actions.

[fn2] See also *Robertson v. City and County of Denver*, **874 P.2d 325** (Colo. 1994) (ban of assault weapons was a reasonable exercise of police power despite the right to bear arms); *Benjamin v. Bailey*, **234 Conn. 455**, **662 A.2d 1226** (1995) (ban on sale and possession of assault weapons did not infringe on right to bear arms because access to a wide array of weapons was still permitted); *Mosby v. Devine*, **851 A.2d 1031** (R.I. 2004) (right to possess a handgun, whether fundamental or not, is not absolute and is subject to reasonable regulation; statute was not a total ban on the right to bear arms).

Page 101



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

June 5, 2008

REMITTITUR

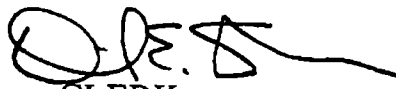
The Honorable David Hamilton
1675 -1G York Highway
PO Box 649
York, SC 29745-0649

Re: The State v. Bolin, Berry Scott - 2006-GS-46-01601

Dear Mr. Hamilton:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Very truly yours,


CLERK

DES/jjp

Enclosure

cc: (without enclosure)

Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General S. Creighton Waters
Solicitor Kevin Scott Brackett
Leland B. Greeley, Esquire



The South Carolina Court of Appeals

JEANETTE F. BARBER
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
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February 5, 2009

Leland B. Greeley, Esquire
Leland B. Greeley, PA
P.O. Box 2981
Rock Hill, SC 29732

Assistant Atty General S. Creighton Waters
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Kevin Scott Brackett, Esquire
16th Circuit Solicitor's Office
1675-1A York Hwy.
York, SC 29745-7422

Re: The State v. Bolin, Berry Scott

Dear Counsel:

Enclosed is the opinion of the Court of Appeals in this case.

Pursuant to Rule 221(b) of the South Carolina Appellate Court Rules, the remittitur in this case will be sent to the Clerk of Court for York County after fifteen (15) days, exclusive of the date of filing of this opinion.

No extension for a petition for rehearing will be granted except in the most extraordinary circumstances and, except in the rarest cases, with seven days' notice.

Sincerely,

A handwritten signature in black ink, appearing to read "Renee S. Johnson".

Renee S. Johnson
Administrative Specialist

JFB/rj

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

State of South Carolina,

Respondent,

v.

Berry Scott Bolin,

Appellant.

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 4497
Heard January 21, 2009 – Filed February 5, 2009

AFFIRMED

Leland B. Greeley, of Rock Hill, for Appellant.

Attorney General Henry D. McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Donald J.
Zelenka, Assistant Attorney General S.
Creighton Waters, all of Columbia; and
Solicitor Kevin S. Brackett, of York, for
Respondent.

PIEPER, J.: In this criminal matter, Berry Scott Bolin (Bolin) asserts the trial court erred in (1) denying a requested jury charge on certain provisions of the "Castle Doctrine" contained in Section 16-11-440 of the

South Carolina Code, and (2) denying his motion for a directed verdict. We affirm.

FACTS/PROCEDURAL HISTORY

On the night of February 18, 2006, Bolin and several other individuals were guests in the home of Bradley Deal (Deal). Travis Falls (Falls), Holly McCarter (McCarter), Bobby Hovis (Hovis), and two others decided to drive to Deal's home to attack Deal, his brother, and various other people at the home.

Falls, having been released on bond only a few days earlier for charges of assault and battery on Deal, was under a bond provision forbidding any contact with Deal or his home. Despite the bond provision, Falls and the others drove to Deal's home, pulling up on the roadside just past the front of the driveway. Upon Falls' arrival, people began to rush outside of Deal's home, including Bolin. Falls and the others exited the car and proceeded up the driveway. One of the men yelled to start a fight and threw a beer bottle onto the driveway, shattering the bottle. As this was occurring, a fight ensued near the car between McCarter and Lori Moss (Moss), who was also a guest at Deal's home. Falls joined the fight and hit Moss, knocking her to the ground.

As Bolin exited the home, he heard someone yell to get a gun. Bolin went to his truck parked in the yard in front of Deal's home and retrieved a pistol stored in the glove compartment of the truck. Bolin heard gunfire near the car and to his side. Falls and several others ran to their car and got inside. As they entered the vehicle, Bolin heard more shots being fired near the car.¹ McCarter got in the driver's seat with Falls directly behind her while Hovis sat in the rear passenger seat next to Falls.

As the car began to pull away, Bolin and another individual who was standing beside Bolin fired several shots at the vehicle. A bullet of the same

¹ At oral argument, Bolin's counsel acknowledged that the record contained no evidence Bolin saw gunfire or gun smoke coming from the car; the record only suggests Bolin heard gunfire.

caliber as Bolin's pistol shattered the rear window, passed through Falls' wrist and hit Hovis in the head. The car proceeded away from the scene and headed to the Clover Police Department. An ambulance was dispatched and Falls and Hovis were taken to the hospital. Hovis was pronounced dead at the hospital; Falls received treatment and was released.

On May 18, 2006, Bolin was indicted by the York County Grand Jury on charges of murder, assault and battery with intent to kill, discharging a weapon into an occupied vehicle, unlawful possession of a pistol, and possession of a weapon during the commission of a violent offense. The case was tried before a jury on August 28, 2006. Prior to trial, the court quashed the indictment of unlawful possession of a pistol and the case proceeded on the remaining indictments.

At the close of the State's case, Bolin moved for a directed verdict on all indictments asserting Section 16-11-440(C) of the South Carolina Code. The motion was denied and the case proceeded. Following closing arguments, the court instructed the jury on the law of the case. Although requested by Bolin, the court refused to charge the jury on the presumptions contained in § 16-11-440(A) and (E). The jury returned a verdict finding Bolin guilty of voluntary manslaughter, assault and battery of a high and aggravated nature, and discharging a weapon into an occupied vehicle. Bolin received concurrent sentences of thirty years. This appeal followed.

LAW/ANALYSIS

Bolin asserts the circuit court erred in refusing to instruct the jury on the legal presumptions contained in Section 16-11-440 of the South Carolina Code (Supp. 2008), also referred to as the Protection of Persons and Property Act (the Act). Specifically, Bolin asserts that the Act, which codified the common law Castle Doctrine and substantively expanded the law of self defense in this State, should have been applied in the instant case.² We disagree.

² Bolin requested the jury to be charged on § 16-11-440(A) and (E) based on the assumption that pursuant to § 16-11-440(E), the aggressor intended to commit an unlawful act and that pursuant to § 16-11-440(A), Bolin was,

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). Thus, in interpreting statutes, we look to the plain meaning of the statute and the intent of the legislature. State v. Gaines, 380 S.C. 23, 32, 667 S.E.2d 728, 733 (2008). A statute's language must be construed in light of the intended purpose of the statute. Id. at 33, 667 S.E.2d at 733. Whenever possible, legislative intent should be found in the plain language of the statute itself. Id. "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Pittman, 373 S.C. at 561, 647 S.E.2d at 161(citing Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)).

Where the legislative intent is not clear, we adhere to the presumption that statutory enactments are to be given prospective rather than retroactive application. See State v. Varner, 310 S.C. 264, 266, 423 S.E.2d 133, 134 (1992). The exception to the presumption of prospective operation arises when the statute is remedial or procedural in nature. State v. Davis, 309 S.C. 326, 334, 422 S.E.2d 133, 139 (1992), overruled on other grounds by Brightman v. State, 336 S.C. 348, 352 n. 2, 520 S.E.2d 614, 616 n. 2 (1999). However, as indicated, legislative intent is paramount in determining whether a statute will have prospective or retroactive application. Jenkins v. Meares, 302 S.C. 142, 146, 394 S.E.2d 317, 319 (1990).

Turning to the case at bar, the Act went into effect on June 9, 2006, four months after the events leading to the instant matter. Thus, in order for the Act to apply, the legislature must have either intended the Act to be retroactive or, in the absence of such legislative intent, the Act must fall under the exception to the presumption of prospective application by being remedial or procedural. Here, as indicated in this court's recent holding in State v. Dickey, ___ S.C. ___, 669 S.E.2d 917 (Ct. App. 2008), there is no evidence of legislative intent that the Act be applied retroactively. Id. at ___,

therefore, acting within reasonable fear of imminent peril of death or great bodily injury to himself or another. See S.C. Code Ann. § 16-11-440(A), (E) (Supp. 2008).

669 S.E.2d at 928. In fact, the plain language of the Act specifically indicates the legislature's intent that the Act be applied prospectively. Id. Section 4 of the Act expressly provides:

The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

2006 S.C. Act No. 379 § 4. By stating that the Act is to have no effect on pending actions, criminal prosecutions, rights, duties, or liabilities, and that all laws repealed or amended by the Act must be treated as remaining in full force and effect, the clear language of the Act indicates that it is prospective. Dickey, __ at __, 669 S.E.2d at 928. Thus, because the legislature clearly and unambiguously specified the Act be applied prospectively, the Act cannot be applied retroactively to Bolin's case.³ See id. (holding retroactive application of the Act to prosecution that was pending before the effective date of the Act was precluded because the Act is prospective). Therefore, the trial court committed no error in refusing the requested charge.

³ Given that the legislature clearly specified the Act to apply prospectively, we need not determine whether the Act is remedial or procedural in nature. Notwithstanding, Dickey resolved this issue by holding the Act is neither remedial nor procedural. Dickey, __ at __, 669 S.E.2d at 928.

Because we find the Act does not retroactively apply to Bolin's case, we need not address Bolin's remaining argument concerning the court's refusal to direct a verdict based upon § 16-11-450 of the Act. Additionally, counsel withdrew this ground of appeal at oral argument and proceeded only with the jury charge issue.

CONCLUSION

Accordingly, for the foregoing reasons, the order of the circuit court is

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.



The South Carolina Court of Appeals

JEANETTE F. BARBER
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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February 23, 2009

REMITTITUR

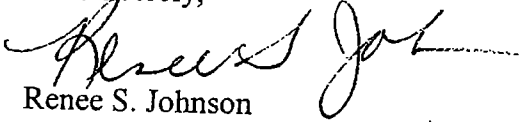
The Honorable David Hamilton
1675 -1G York Highway
PO Box 649
York, SC 29745-0649

Re: The State v. Bolin, Berry Scott
2006-GS-46-01595 2006-GS-46-01596 2006-GS-46-01598
2006-GS-46-01599 2006-GS-46-01600

Dear Mr. Hamilton:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Sincerely,


Renee S. Johnson
Administrative Specialist

 JFB/rj

cc: Leland B. Greeley, Esquire
Assistant Atty General S. Creighton Waters
Kevin Scott Brackett, Esquire

 2/23/09

 prepare closing, letter,
etc.

2010 CP4600436

STATE OF SOUTH CAROLINA

FEB -5 AM 10:50

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

Berry Scott Bolin, SCDC #317414

Full name and prison number (if any) of Applicant.

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

DAVID J. HAMILTON
J.C. Crp. & GS
YORK COUNTY, SC

2010 FEB -1 PM 3:27

FILED-RECEIVED

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee Correctional Institution
2. Name and location of Court which imposed sentence York County Court of General Sessions
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2006-GS-46-1595 Voluntary Manslaughter
 - (b) 2006-GS-46-1596, 1598, 1599 Assault and Battery of a High and Aggravated Nature
 - (c) 2006-GS-46-1600 Discharging a Weapon into an Occupied Vehicle
5. The date upon which sentence was imposed and the terms of the sentence:

Revised 3/2003

- (a) 9/6/06 -- 30 years imprisonment for Voluntary Manslaughter
 - (b) 9/6/06 -- 10 years concurrent on each of the remaining indictments
 - (c) 9/6/06 -- \$31,000 Restitution
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
 - (b) after a plea of not guilty X
 - (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
 - i. S.C. Court of Appeals
 - ii. _____
 - iii. _____
 - (b) the result in each such Court to which you appealed:
 - i. Affirmed
 - ii. _____
 - iii. _____
 - (c) the date of each such result:
 - i. February 5, 2009
 - ii. _____
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. State v. Bolin, 381 S.C. 557, 673 S.E.2d 885 (Ct. App. 2009)
 - ii. _____
 - iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
 - (b) _____
 - (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in

Revised 3/2003

custody unlawfully:

(a) Ineffective assistance of counsel in violation of the Sixth Amendment due to counsel's failure to adequately advise applicant to accept the state's plea offer made during trial.

(b) Ineffective assistance of counsel in violation of the Sixth Amendment due to counsel's failure to challenge the trial court's imposition of restitution in the amount of \$31,000 without adequately considering the factors set forth in S.C. Code Sec. 17-25-322(B).

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) During the trial for murder, the state offered a negotiated plea to voluntary manslaughter and a sentence of 15 years imprisonment. Counsel failed to adequately advise the applicant to accept the plea offer.

(b) During sentencing, the court imposed a restitution payment of \$31,000 to cover funeral and medical expenses. There was no discussion of the statutory factors or clarification of the nature of medical expenses and whether a portion of these expenses actually related to maintaining the victim on life support for more than 24 hours so that his organs could be donated.

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

Revised 3/2003

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

Revised 3/2003

- iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) The issue was not presented during direct appeal because claims of ineffective assistance are not appropriate for direct appeal and rely on evidence outside the record of trial
- (b) Same
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? _____
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Leland B Greeley, P.O. Box 2981, Rock Hill, SC 29732
- ii. _____
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Trial, sentencing, and direct appeal
- ii. _____
- iii. _____
19. State clearly the relief you seek in filing this application:
- Vacation of the convictions and sentence and reinstatement of the negotiated plea offer and/or set aside the order of restitution
20. Are you now under sentence from any other court that you have not challenged?
- No

Post Office Box 6454
Columbia, South Carolina 29260
Voice 803.782.1663
Fax 803.787.0374
Email DianaHolt@alumni.utexas.net

January 29, 2010

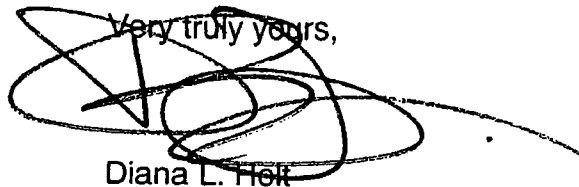
Honorable David Hamilton
Clerk of Court
P. O. Box 649
York, SC 29745

Re: *Berry Scott Bolin v. State*, 2010-CP-46-_____

Dear Mr. Hamilton:

Enclosed for filing in the above-referenced case is the original and one copy of the application for Post Conviction Relief by Berry Bolin. I do not represent Mr. Bolin. He is filing the application pro se and will need counsel appointed to him for this effort. Please return the file-stamped copy to Mr. Bolin in the SASE enclosed for your convenience. Please feel free to call if you have any questions. With highest personal regards, I remain

Very truly yours,

A handwritten signature in black ink, appearing to be "Diana L. Holt", written over a horizontal line.

Diana L. Holt

Encl.

David Hamilton
Yorl. County Clerk of Court
P.O. Box 649
York, SC 29745-0649



Berry Scott Bolin SCDC 317414
Lee Corr. Inst.
990 Wisacky Hwy
Bishopville, SC 29010

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
Case No.: 2010-CP-46-0436

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
Case No.: 2010-CP-46-0436

Respondent, making its Return to the application for post-conviction relief (PCR) filed February 1, 2010, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted at the May 2006 of the York County Grand Jury for Discharging a Firearm Into an Occupied Vehicle (2006-GS-46-1600), two counts of Assault With Intent to Kill (2006-Gs-46-1599, 1598), Assault and Battery With Intent to Kill (2006-GS-46-1596), and Murder (2006-GS-46-1595). Leland B. Greeley, Esquire, represented him. During September 2006 Applicant proceeded to trial pursuant to which the jury convicted him of Discharging a Firearm Into an Occupied Vehicle, Assault and With Intent to Kill, Assault of a High and Aggravated Nature, Assault and Battery of a High and Aggravated Nature, and Voluntary Manslaughter. After the jury rendered its verdict, the Honorable John C. Hayes, III, sentenced Applicant on September 6, 2006, to confinement for a period of thirty (30) years for Voluntary Manslaughter, and ten (10) years for each of the remaining convictions, sentences running concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences. State v. Bolin, 381 S.C. 557, 673 S.E.2d 885 (Ct. App. 2009).

Attached herewith and incorporated herein by reference are the records of the York County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the appellate court records including the trial transcript.

II.

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

1. Ineffective Assistance of Counsel.

III.

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). First, a PCR applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Alexander v. State, 303 S.C. 539, 541, 402 S.E.2d 484, 485 (1991). Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry v. State, 300 S.C. 115 at 117, 386 S.E.2d 624 at 625 (1989), *citing Strickland*.

Second, an applicant must show there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; Alexander, 303 S.C. at 541-42, 402 S.E.2d at 485. The Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of

reasonable professional judgment. Strickland, Id. Applicant must overcome this presumption in order to receive relief. Cherry, Id.

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the State requests that a hearing be held.

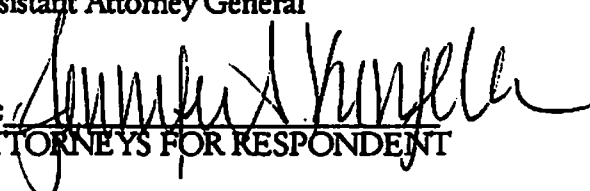
Respectfully submitted,

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By: 
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June 30th, 2010.

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

2010-CP-46-0436

BERRY S. BOLIN, #317414

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA,

Respondent.

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

W. Chaplin Spencer, Jr., Esquire
P.O. Box 790
Rock Hill, SC 29731

DATED this 7th day of July, 2010.


Norma Bigbee, Legal Assistant

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

Case No. 2006-GS-46-1595, 1596, 1598, 1599, 1600

State of South Carolina. Respondent,

v.

Berry Scott Bolin Appellant.

INITIAL BRIEF OF APPELLANT

Leland B. Greeley
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Rock Hill, South Carolina
May 7, 2007

RECEIVED

JUL 06 2007

SC Court of Appeals

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ISSUES ON APPEAL

1. Whether to trial Court erred in denying Defendant's request for the jury to be charged the legal presumptions contained in Section 16-10-440, South Carolina Code of Laws, 2006.
2. Whether the trial Court erred in denying Defendant's motion for a direct verdict on all charges based on Section 16-10-450.

STATEMENT OF THE CASE

On May 18, 2006 Berry Scott Bolin was indicted by the York County Grand Jury on charges of Murder; three counts of Assault and Battery With the Intent to Kill; Firing a Weapon into an Occupied Vehicle; Unlawful Possession of Pistol (Being Under the Age of 21 Years at the time); and Possession of a Weapon during the Commission of a Violent Offense. (See Indictment for each Offense)

The case was called for a jury trial on August 28, 2006. Prior to the oath of the jury panel, Mr. Bolin made a motion to quash indictment 2006-GS-46-1601 alleging Unlawful Possession of a Pistol. The trial court granted Mr. Bolin's motion.¹

The trial proceeded on the remaining indictments. At the close of the State's case, Mr. Bolin moved the Court for a directed verdict on all indictments relying on Sections 16-11-410, et seq., of the South Carolina Code of Laws, 2006. The Court denied Mr. Bolin's motion and the case proceeded. (Tr. p. 1042, ln 23 – p. 1044, ln. 25) . At the close of Mr. Bolin's case, he renewed his motion for a directed verdict on the grounds previously stated to the Court. (Tr. p. 1045, lns. 12-16). Following closing arguments by counsel for Mr. Bolin and the State, the Court instructed the jury panel as to the law of the case. Although requested of the Court by Mr. Bolin, the Court refused to charge the

¹ The Order of the Honorable John C. Hayes quashing the indictment is currently on appeal by the State before the South Carolina Supreme Court.

jury the presumptions presented in Section 16-11-440, South Carolina Code of Laws, 2006. To the Court's denial Mr. Bolin objected. (Tr. p. 1056, ln 17-21 also See Request to Charge #12).

The jury returned a verdict finding Mr. Bolin guilty of Voluntary Manslaughter (2006-GS-46-1595), three counts of Assault and Battery of a High and Aggravated Nature (2006-GS-46-1596, 1598, 1599); and Discharging a Weapon into an Occupied Vehicle (2006-GS-46-1600). The jury found Mr. Bolin not guilty of Possession of a Weapon during the Commission of a Violent Offense (2006-GS-46-1597). (See Jury Verdict Form). Following the verdicts, the Court imposed concurrent sentences totaling 30 years. (See Sentencing Sheets on each Indictment).

STATEMENT OF THE FACTS

Prior to midnight on February 18, 2006, Travis Falls, 26 years of age, accompanied by his confederates, which included girlfriend Holly McCarter, Bobby Hovis, Kenny Norris, and Michael Hubbard, decided to travel to a residence in Clover, South Carolina. (Tr. p. 558, ln. 22 – p. 564, ln.13). The residence was owned by the parents of Jonathon Bradley Deal. (Tr. p. 917, ln.25 – p.918, ln. 23) The purpose of the trip was to attack Mr. Deal, his brother and other people at the house.

At the time of making this plan, and attempting to carry it out, Mr. Falls was under the authority of a bond provision forbidding him from having any contact with Jonathon Bradley Deal or going around his property. Mr. Falls had been released on bond only a few days earlier after having been charged with committing an Assault and Battery of a High and Aggravated Nature on Mr. Deal. (Tr. p. 918, ln.24 – ln. 25). Mr.

Falls was aware of this provision. Yet it would not prevent him from attempting to carry out the attack. (p. 577, ln. 16 – p. 579, ln.10).

Also that evening Berry Scott Bolin was a guest at the house, having arrived with his girlfriend, Michelle Barfield, a friend of Jonathon Bradley Deal. There were many people at the house at the time Mr. Falls arrived with his pack. Upon their arrival, people began to rush outside of the house. Berry Scott Bolin exited the house. (See Statements of Berry Scott Bolin, Exhibits 27, 28, 29, 30, and 31)

The Falls car passed by the house, made a U-turn and returned, pulling up on the roadside just past the front of the driveway. The men exited the car. Mr. Norris proceeded up the driveway yelling to begin a fight, throwing a beer bottle he was carrying onto the driveway shattering it. (Tr. p. 518, ln. 21- p. 519, ln. 24).

As this occurred, a fight ensued near the car between Holly McCarter, of the Fall's pack, and Laurie Moss, a guest at the house. Mr. Falls then joined by attacking Ms. Moss, 17 years old at the time, resulting in Mr. Falls knocking out Ms. Moss. (Tr. 913, ln. 2 – ln. 8).

As Mr. Bolin was exiting the house, he heard someone yell to get a gun. Mr. Bolin proceeded to his truck which was parked in the front yard of the residence. Mr. Bolin retrieved his pistol which was stored in the glove box of his truck. (See Statements of Defendant, Exhibits 27, 28, 29, 30 and 31).

As Mr. Bolin moved away from his truck, he heard gunfire near the car. He also heard gunfire away from him, to his side. (See Statements of Defendant, Exhibits 27, 28, 29, 30 and 31) Mr. Falls and 3 of his 4 confederates ran to their automobile, getting inside. Holly McCarter was the driver with Mr. Falls seated behind her, and Mr. Hovis

seated in the rear seat on the passenger side of the car. As the car began to move, muzzle fire was seen coming from the car by Jonathon Bradley Deal who was on the front porch of the residence. (Tr. p. 929, ln. 21 – ln. 25) At this time, Mr. Bolin fired several shots in the direction of the car. Mr. Falls was seated next to Mr. Hovis, with his right arm extended behind the head of Mr. Hovis, and his hand toward the rear side window. A bullet of the same caliber as Mr. Bolin's pistol shattered the rear window of the car, passed through the wrist of Mr. Falls, and into the rear right area of Mr. Hovis' head. (Tr. p. 588, ln. 17 – p. 590, ln. 24).

The car proceeded away from the scene on its way to the Clover Police Department a few miles away with the two wounded occupants. Prior to arriving at the Clover Police Department, the car pulled off the roadway into the parking lot of a closed auto parts store where it remained for a short period. (Tr. p. 573, ln. 18 – p. 574, ln. 9) After this short period, the car, continuing to be driven by Holly McCarter (p. 256, lns. 9 – 13), left the lot, and a short way down the road pulled into the rear parking lot of the Clover Police Department. An ambulance was dispatched and Mr. Hovis and Mr. Falls were taken to the hospital. Mr. Hovis was pronounced dead at the hospital and Mr. Falls received treatment and was released.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSABLE ERROR IN REFUSING TO CHARGE THE JURY THE LEGAL PRESUMPTIONS CONTAINED IN SECTION 16-10-440, SOUTH CAROLINA CODE OF LAWS, 2006.

Prior to the Court's charge to the jury, Mr. Bolin requested the Court include in its charge the presumption language contained in Section 16-10-440, South Carolina Code of Laws, 2006. The Court refused and Mr. Bolin preserved his objection to the omission.

In June of 2006, the Protection of Persons and Property Act was passed into law. The statute is an expansion of the common law castle doctrine which this State has historically recognized in a limited capacity, concentrating the application on the dwelling. In 1908 the Court ruled on the castle doctrine in two cases. In State v. Stockman, the Court found that indeed a man's house was his castle, and had the right to protect every member occupying it and make take life if necessary in carrying out the protection. However, the Court ruled that the danger must be imminent. That once the danger had ceased, the man did not have the right then to take life. 82 S.C. 388, 401 (1908). The Court ruled also that the castle doctrine would not apply in a situation where the man left his property and took the life of the other in the street where the other had a legal right to be. State v. Brooks, 79 S.C. 144, 148 (1908). The castle doctrine has primarily supported the law that a man has no duty to retreat from conflict on his own property.

Thus, in 2006 the South Carolina Legislature expanded this doctrine through codification with Sections 16-11-410 et seq. known as the Protection of Persons and Property Act. Section 16-11-410, South Carolina Code of Laws, 2006. The codification has expanded the applicability of the castle doctrine to houses, tents, mobile homes,

businesses, and automobiles by its general and expansive definitions, including that of "Dwelling" and "Residences". Sections 16-11-430 (1), (3), and (4), South Carolina Code of Laws, (2006). The definition of residence also expands the protection of the statute to an invited guest.

Additionally, the statute sets out two legal presumptions of fact addressing reasonable fear of bodily harm or serious injury. The first, Section 16-11-440 (A) states:

A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

(1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and

(2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

The second legal presumption of fact is provided in Section 16-11-440 (E) which states:

A person who by force enters or attempts to enter a dwelling, residence, or occupied vehicle in violation of an order of protection, restraining order, or condition of bond is presumed to be doing so with the intent to commit an unlawful act regardless of whether the person is a resident of the dwelling, residence, or occupied vehicle including, but not limited to, an owner, lessee, or titleholder.

It is submitted the legislative intent of this presumption is specific in Section 16-11-420 (E) that provides "The General Assembly finds that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack."

The Protection of Persons and Property Act is applicable to the facts of this case.

Berry Scott Bolin was an invited guest at the house of Jonathon Bradley Deal. Although the State may assert the house was not an active dwelling, it certainly fits squarely within the broad definition of residence afforded by the statute. Jonathon Bradley Deal was the victim of a crime committed against him by Travis Falls for which Travis Falls was out of jail on bond. Travis Falls admitted that he and his confederates were traveling to the residence for the purpose of attacking the Deal brothers and the others at the residence, and in fact did so. When confronted regarding the bond provision of staying away from Jonathon Bradley Deal, Travis Falls admitted knowing and understanding the provisions of the bond, but further admitted that he did not know what would stop him from doing such a thing. Additionally, at no time was there evidence presented by the State that would conclude that Mr. Bolin was involved in illegal activity. The activity of him possessing a firearm despite being the age of 19 years was never presented, for the indictment containing that allegation had been quashed by the Court during pretrial motions. Yet despite the existence of these facts, the Act was not allowed to be a part of this case when requested by Mr. Bolin.

A trial court is required to charge the current and correct law of South Carolina. State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006); Sheppard v. State, 357 S.C. 636, 665, 594 S.E.2d 462, 472-73 (2004); State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005); State v. Brown, 362 S.C. 258, 261-62, 607 S.E. 2d 93, 95 (Ct. App. 2004). At the time of this trial in August 2006, the Act was a current law of the State of South Carolina and was the correct law in these circumstances. The trial court has a duty to give a requested instruction that is supported by the evidence and correctly states the law applicable to the issues. State v. Peer, 320 S.C. 546, 553, 466

S.E.2d 375, 380 (Ct. App. 1996); see also State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989) (acknowledging that a defendant is generally entitled to a requested jury instruction if it is a correct statement of the law on an issue raised by the indictment); State v. West, 138 S.C. 421, 136 S.E. 736, 737 (1927) (finding the court has a duty to charge jury as to law applicable to facts brought out in testimony). Prior to the Court's jury charge, Mr. Bolin requested that the presumptions supplied in the Act be instructed to the jury. This was denied. The evidence presented raised the issue of the presumption of intent to commit a crime, to have the intent to bring about death or serious bodily injury due to the violation of the bond provision. The refusal by the court to charge the requested charge was an abuse of discretion in that the Court's decision was an error of law. The error was omitting the applicable statutory law for the circumstances raised by the evidence. Fontaine v. Peitz, 291 S. C. 536, 538, 354 S.E.2d 565, 566 (1987); State v. Peay, 321 S.C. 405, 410, 468 S.E.2d 669, 672 (Ct. App. 1996) (concluding that the trial court commits reversible error when it fails to give requested charge on issue raised by indictment and evidence presented).

The State may argue that if the omission of the charge was error, it was harmless error. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. State v. Pagan, 369 S.C. 212, 212, 631 S.E.2d 262, 267 (2006) (citing Arnold, 309 S.C. at 172, 420 S.E.2d at 842 (1992)). "An error is not reversible unless it is material and prejudicial to the substantial rights of the appellant." Visual Graphics Leasing Corp., Inc. v Lucia, 311 S.C. 383, 489, 429 S.E.2d 839, 841 (Ct. App. 1993).

No definite rule of law governs finding an error harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. State v. Gillian, 360 S.C. 433, 454-55, 602 S.E.2d 62, 73 (Ct. App. 2004) (citing State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990)); State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985); State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006); State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct. App. 2004) aff'd as modified 369 S.C. 201, 631 S.E.2d 262 (2006). Further, in cases involving an omitted charge requested by the Defendant, it has been found to be reversible error if the charge involves an issue raised by the evidence. State v. White, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004); State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999); Harrison, 343 S.C. at 172, 539 S.E.2d at 74; State v. Hill, 315 S.C. 260, 433 S.E.2d 848 (1993). Finally, on review of a jury charge, an appellate court considers the charge as a whole in view of the evidence and issues presented at trial. Welch v. Epstein, 342 S.C. 311, 536 S.E.2d 408, 425 (Ct. App. 2000).

Therefore, it is important to review the affect the omission of the requested charge of the statutory presumptions had when compared with the charge that was given to the jury in this case. The Court did charge the jury the common law defense of self defense and defense of others. The requested statutory charge would have dealt directly with the third element of common law self defense. The statute provides for the legal presumption of fact given a particular circumstance. In this case, as has been stated, the particular circumstance involves the violation of a bond provision which is directly addressed in Section 16-11-440 (E). Rather than charging this statutory presumption, the Court instructed the jury regarding the third element as follows:

If he was actually in imminent danger it must be shown that circumstances would have warranted a person of ordinary firmness and courage to strike a fatal blow to prevent their own death or serious bodily injury. If Mr. Bolin believed he was in imminent danger of death or seriously bodily injury, it must be shown that if a reasonable prudent person of ordinary firmness and courage would have had the same belief in deciding whether Mr. Bolin actually was or believed he was in imminent danger or death or seriously bodily injury, you should consider all the facts and circumstances surrounding the crime including the physical condition and characteristics of Mr. Bolin and the victims.

A defendant does not have to show that he was actually in danger. It is enough if he believed he was in imminent danger and a reasonable prudent person of ordinary firmness and courage would have also believed they were in imminent danger. A defendant has a right to act on appearances even though those beliefs may have been mistaken. *It is for you to decide whether Mr. Bolin's fear of imminent danger of death or seriously bodily injury was reasonable and would have been felt by an ordinary person of the same situation. Words accompanied by hostile acts may depending on the circumstances establish self defense.* (Tr. p. 1158, ln. 7 – p. 1159, ln. 12).

Thus, Mr. Bolin's right to have the jury hear that the statutory law had determined that there was a factual presumption of imminent danger or death or seriously bodily injury was denied. The Court required the jury alone to determine the reasonableness of Mr. Bolin's actions. The statutory condition of the violation of the bond provision by Travis Falls was omitted and therefore ignored by the Court. This is in direct contravention to the intent of the legislature for there not to be a need for a factual determination of "reasonableness" when the necessary pre-existing condition for the presumption was present. This is an essential element of self defense that could very well have changed the determination of the jury had it been instructed the current and correct law of these presumptions.

It is essential that a jury in cases such as this, where there is evidence of the applicability of this law, know about the law and what the position of the legislature is, and the presumptions provided by the legislature. The same type of instruction is given

daily across this State in cases of alleged Driving Under the Influence, or Driving with an Unlawful Alcohol Content when the juries are instructed as to the statutory inferences provided by the State Legislature regarding the alcohol content of a person's breath. As it is done in those cases, likewise, the presumptions should be instructed in cases falling under the Protection of Persons and Property Act.

To warrant reversal based on the trial court's failure to give a requested jury instruction, the failure must be both erroneous and prejudicial. State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003); State v. Patterson, 367 S.C. 219, 232, 625 S.E.2d 245, 239 (Ct. App. 2006) cert pending; State v. Harrison, 343 S.C. 165, 172, 539 S.E.2d 71, 74 (Ct. App. 2000) (citing State v. Hughey, 339 S.C. 439, 450, 529 S.E.2d 721, 727 (2000)). In this case, it is clear that the Court's failure to instruct the jury as requested by Mr. Bolin was not only error, but was also prejudicial due to the effect the omitted charge surely had on the jury's analysis of the third element of self defense and defense of others. For this reason, the jury verdicts on all indictments for which he was found guilty should be reversed and the matter remanded to the trial court for a new trial.

II. THE TRIAL COURT COMMITTED REVERSABLE ERROR IN REFUSING TO GRANT DEFENDANT'S MOTION FOR A DIRECT VERDICT CONTAINED IN SECTION 16-10-450, SOUTH CAROLINA CODE OF LAWS, 2006.

At the close of the State's case, Mr. Bolin made a motion for a directed verdict on all indictments based on Section 16-11-450, South Carolina Code of Laws, 2006. The Court committed error in denying this motion, as well as when it denied the renewed motion at the close of all the evidence.

In almost all criminal cases, unless precluded by other law, that standard by which the Court is to rule on the motion is well settled. When a motion for a directed verdict of acquittal is made in a criminal case, the trial court is concerned with the existence or non-existence of evidence, not its weight. The accused is entitled to a directed verdict when the evidence merely raises a suspicion of guilt. The accused also is entitled to a directed verdict when the State fails to present evidence on a material element of the offense charged. However, if the State presents any evidence which reasonably tends to prove the defendant's guilt, or from which the defendant's guilt can be fairly and logically deduced, the case must go to the jury. On appeal, the Court must view the evidence in light most favorable to the State. State v. Pittman, Op. No. 26339 (2007); State v. Brown, 360 S.C. 581, 586-87, 602 S.E.2d 392, 395 (2004).

Section 16-11-450 however, provides a person whose actions come within the applicability of the statute with immunity from prosecution. Subsection (A) states:

(A) A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force, unless the person against whom deadly force was used is a law enforcement officer acting in the performance of his official duties and he identifies himself in accordance with applicable law or the person using deadly force knows or reasonably should have known that the person is a law enforcement officer.

In light of practicality and judicial efficiency, it must be determined when and how such immunity one is entitled to should be enforced. When a solicitor has the sole discretion in carrying forward a prosecution, he may do so until either a court or jury ends the prosecution with a favorable ruling to the Defendant. If the applicability of this provision is solely left up to the prosecutor in every case, then the affect of this provision passed by the legislature could become completely hollow, and merely be used as a tool

of the prosecutor in explaining away cases the prosecutor has no desire to continue. It is submitted it was not the intent of the legislature in passing this law for this to be controlled solely by the prosecutors, but was passed for the benefit of victims of crime, and for aiding their ability to protect themselves from unlawful activity in certain circumstances. Therefore, it is only logical for the Court to be empowered to enforce the immunity provision of the statute through rulings on motions of the defendant, such as the one made by Mr. Bolin at the time he made it.

The evidence presented in Court, as stated above, brings this case into the parameters of the statute and should be the basis for the Court enforcing the immunity granted in the law. For a Defendant to bring a pretrial motion seeking the enforcement of the immunity provision against the State, such motion would require an extensive evidentiary hearing. Therefore, in the interests of judicial economy, if the State refuses to abide by the immunity provisions of the statute, the Court should grant the immunity if the evidence of the case shows the elements needed for the granting of the immunity have been met, as was done in this case.

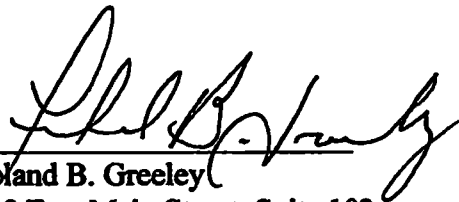
When this Act is applicable in a case, it is submitted that the standard for a directed verdict consistent with the purpose of the act should be if there is credible evidence that the Act applies, as in this case, notwithstanding any evidence the State may present that does not negate the applicability of the Act.

In applying this standard, it is submitted the Court plainly erred in not granting a directed verdict in favor of Mr. Bolin on all charges before the jury.

CONCLUSION

The Court erred in not granting a directed verdict on all indictments against Mr. Bolin in this matter under the Protection of Persons and Property Act. Due to the error of the Court, Mr. Bolin respectfully requests this Court to reverse the verdicts of the jury.

IN the alternative, it was harmful error for the court to refuse to instruct the jury on the statutory presumptions provided by the Protection of Persons and Property Act. Due to the error of the Court, Mr. Bolin respectfully requests this Court to set aside the jury verdicts on all indictments and remand all matters to the trial court for a new trial.



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July 6, 2007

**IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

v.

BERRY SCOTT BOLIN,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN REFUSING REQUESTED INSTRUCTIONS BASED IN THE PROTECTION OF PERSONS AND PROPERTY ACT, WHERE THE ACT IS PROSPECTIVE ONLY; THE CHARGES AS REQUESTED WERE INCOMPLETE AND INCORRECT; AND THE ACT WAS INAPPLICABLE UNDER THE UNDISPUTED FACTS OF THIS CASE?

II. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN REFUSING TO GRANT A DIRECTED VERDICT BASED ON THE ACT, WHERE THE ACT IS PROSPECTIVE ONLY; THE ISSUE AS ARGUED IS NOT PRESERVED; THE COURT APPLIED THE CORRECT STANDARD; AND THERE WAS AMPLE EVIDENCE TO SEND THE CASE TO THE JURY EVEN UNDER THE ACT?

STATEMENT OF THE CASE

At the May 2006 term, the Grand Jury of York County indicted Appellant, Berry Scott Bolin, for murder (2006-GS-46-1595), assault and battery with intent to kill (ABIK) (2006-GS-46-1596), possession of a firearm during commission of a violent crime (2006-GS-46-1597); two charges of assault with intent to kill (AIK) (2006-GS-46-1598 & -1599), discharging a firearm into an occupied vehicle (2006-GS-46-1600), and possession of a pistol under the age of 21. The indictment for the latter charge was quashed by the trial court, which is the subject of a now-pending state's appeal.

Appellant was represented at the trial level by Leland Greeley, Esquire. Petitioner was tried from August 28th to September 6th, 2006 before the Honorable John C. Hayes and a jury. The jury convicted Appellant of the lesser included offense of voluntary manslaughter on -1595; the lesser included offense of assault and battery of a high and aggravated nature on -1596; the the lesser included offense of assault of a high and aggravated nature on -1598; the lesser included offense of assault of a high and aggravated nature on -1599; and as indicted on -1600. The jury acquitted Appellant of -1597. {Tr. 1186-87}. Judge Hayes then sentenced Petitioner to concurrent sentences of thirty (30) years for voluntary manslaughter on -1595, and ten (10) years each on the remaining convictions. {Tr. 1199}.

This appeal follows.

STATEMENT OF FACTS

It is undisputed that Appellant, Berry Scott Bolin, fired his pistol and killed the victim. The issues on appeal concern the application of the recent Protection of Persons and Property Act to Appellant's claim of defense of others.

A. The Incident

Just past midnight on Sunday, February 19th, 2006, a car pulled into the Clover police station where Officer Michael Trabue was unloading a prisoner. A man who proved to be Travis Falls ran up with a gunshot wound to his wrist. Falls told Trabue that his friend was shot, and Trabue observed a bloody scene in which the victim, Bobby Hovis, was slouched in the back seat with a gunshot wound to his head – barely breathing. Also in the car was Holly McCarter and Michael Hubbard. {Tr. 247-54}.

Bobby never regained consciousness. {Tr. 260-65; 473-74; 536-37; 572; 976}. He had a single gunshot wound to the back of his head. The bullet struck the front of his skull and ricocheted back through his brain. A projectile was recovered from Bobby's head, which appeared to be a .45 caliber bullet. {Tr. 981-92}.

Meanwhile, 911 calls were coming in reporting shots fired at a home on Lawrence Road, including one from Bradley Deal, whose family owned the house. Officers responded to the home, where they found four young men still there. Nine millimeter and .45 caliber casings were found in the yard and near the culvert and where the driveway met the road. A stain and broken shards of brown glass were in the driveway where it appeared a beer bottle has been busted. {Tr. 274-85; 638-41; 645; 710; 712}. The victims' car has been clearly struck by bullets, but no casings were found within the car.

{Tr. 619-20; 658-67}. A hair scrunchie was found in the roadway that McCarter later identified as hers. **{Tr. 732; 737}.** Although they searched, officers found no other bullet holes in the surrounding areas. **{Tr. 637-38; 711-12}.**

All of the 9mm casings found in the yard were fired by one weapon **{Tr. 1024}**, and all of the .45 casings recovered were fire by Appellant's gun. **{Tr. 1030}.**

B. Appellant's various accounts of the events

Based on information the officers received, Deputy Mike Ferrell was asked to go to Appellant's house to see if he was at the party. Appellant and his girlfriend Michelle arrived just as Ferrell was about to leave, and Appellant denied having been at Lawrence Road. Appellant agreed to go to the station and voluntarily drove himself there. **{Tr. 266-72; 295-98}.**

While there, Petitioner consented to a gunshot residue "GSR" test as well as a search of his truck. After advising Appellant of his rights and securing a waiver, Sgt. Phillip Jamison of the York County Sheriff's Office took Appellant's first statement, which was completed at 2:37 a.m. **{Tr. 309-19}.** In it, Appellant stated:

Woke up at 11:30 p.m. at my house. Watched movies until two or three pm with my girlfriend. Took shower then went to Aunty's house. Girlfriend went home to take shower. I hung out in the back yard and the building and shot at a bird. Around 4:35 to Five O' Clock then hung up out a little longer. Drank alcohol until 8:30 or 9 o'clock then quit ant 9:30 went to Bradley Deal's house. Large commotion, went outside to see if was serious or not. Saw it was serious. Did not want to get, I'm not sure about that word, in possession of, minor possession or anything like that and drive to girlfriend's house. And then to my house.

{Tr. 321}. As the night proceeded on, Detective Doug Patterson and other officers asked Appellant upstairs to further discuss the matter. **{Tr. 334-40; 349-55}.** Petitioner ultimately

gave a second statement at about 4:30 a.m., which read as follows:

I was inside Brad's house and hear some yelling going on outside. I was going outside and I heard someone yell to give me a gun. I went to my truck and got my gun. Someone ran up to me and said give me your fucking gun. All of a sudden someone shot a gun two times near me. I didn't know who fired those shots. I looked toward the up at the end of the driveway. I saw a girl fall and someone said she had been shot. Then someone said no, they hit her. I then saw six or seven people run toward the car. I think it was all the people that had been in the house. I then heard two or three shots being fired near the car. After the shots were fired, the car started pulling away. That is when I started shooting at the car. I think that I shot about four times. All I know is that I shot all my bullets. At the same time I was shooting there was someone else beside me shooting. I'm not sure if it was the same person who shot near me right after I got my gun. I got rid of my gun but I don't remember what I did with it. I think that I have it to someone. I lied about who I have my gun to so that he would not get into trouble. I went to a party and gave it to my cousin Michael Wallace. I told him what happened and I told him to rid of the gun.

{Tr. 355-59}. The last paragraph was added because Appellant finally admitted – after being confronted with the knowledge of the police – that he had given his .45 Llama pistol to his cousin Mike Wallace and told him to get rid of it. Wallace ultimately brought to the pistol to the station and turned it over to police. {Tr. 622-23; 344-55; 595-607; 756-57}.

After the statement police took Appellant to the Lawrence Road location where he showed them he position when he fired the shots. Appellant said he was in the yard and not quite halfway from the road to the house. {Tr. 356-57}.

After Appellant admitted firing at the car he was arrested. Detective Russ Yeager was the case agent for this incident and he interviewed Appellant about 6 p.m. that afternoon, after Appellant again waived his rights. {Tr. 386-94}. Yeager's notes of that interview were as follows:

Berry Bolin states that he and his girlfriend Michelle, there is supposed to be Barfield, went to a party at Bradley Deal's house on

Lawrence Road.

Berry Bolin states that he had been drinking that day and he had fired his .45 caliber pistol at a bird around three o' clock that afternoon.

Berry states when they got to the party there were several people there. While at the party a car pulled up and white male subject with long hair got out of the vehicle. This person walked down the driveway saying, I quote: " I heard y'all carry guns. If you've got a gun, shoot me. Get your gun." Berry Bolin states that as this person was saying this, he saw two girls fighting in the road. The guy with the long hair was fighting with someone in the driveway.

When Berry heard the person say get your gun, he got his gun out of his truck console. He stuck the gun in the front of his pants. Somebody ran up to him and said give me your God dam gun. Berry states he told this person no.

Berry states as people were fighting in the road and in the yard, he saw a person shoot a gun up in the air. Berry states he then saw a male subject hit Lori Miss with his feet. Lori got knocked back and fell to the ground. Berry stated that people were getting back in their car. After seeing Lori get knocked out he pulled his gun out and aimed at the side of the car and fired rounds at the vehicle.

As the car was pulling off, he ran toward the vehicle and aimed toward the trunk and fired more rounds at the car as it was pulling off. He states he fired all the rounds he had in his gun. He states he was about 30 feet from the vehicle when he was firing a weapon. He also states while he was firing his weapon he saw a person to his left firing a gun also. He states he could see a horizontal flash coming from the other person's gun. He states the other person was close to the corner of the driveway near the road. The car left.

And Berry got his girlfriend and they drove to meet his cousin Michael Wallace who was at the party near the Clover Police Department. Berry stated he told his cousin what had happened and gave the gun to his cousin. Berry and Michelle then drove up, Berry and Michelle then drove to Michelle's house and she changed clothes then they drove to Berry's Aunt's house on Flatstone Drive. A sheriff's deputy pulled up and asked them to come to Clover Police which they did. Berry states he told officers he gave his gun to his cousin. His cousin was contacted and brought the gun to the Clover Police Department and turned over to police.

{Tr. 399-403}. Yeager then asked Appellant some specific questions, to which Appellant

responded as follows:

Berry Bolin was asked by detectives if he saw anyone shooting at him. He replied no. Berry Bolin was asked if saw any other cars in the roadway other than the victim's car. He replied no.

Berry Bolin was asked if anyone from the victim's car approached him in a threatening manner or tried to fight with him. He replied no.

Berry Bolin was asked if he saw anyone from victim's vehicle get out of the car with a gun. He replied no.

Berry Bolin asked if saw anyone in the yard with a gun. He replied the only other person he saw with a gun was the person he saw with a gun was the person that was standing beside him and that person was shooting up in the air.

Berry Bolin was asked why he shot at the car if the car was leaving. He replied I just lost it when Lori got hit.

Berry Bolin replied he used to date Lori and he doesn't even really like her now. He didn't know why he shot at the car.

Berry Bolin was asked if he knew the people in the car. He replied he did not know who was in the car.

Berry Bolin was asked if he was aiming at the car and he was trying to hit the car. He replied yes.

Berry Bolin was asked if he saw the other people standing beside them shoot at the car as the car was leaving. He replied yes.

{Tr. 403-04}.

C. Appellant's codefendant Lee Owens

Meanwhile, based on information received Deputy Jerry Hoffman made contact with Appellant's codefendant Lee Owens, who was going to be tried with Appellant but pled guilty to various charges right before trial. Owens also went with Hoffman to the Lawrence Road location and showed where he fired his gun, and officers found a grouping of two

9mm casings and another grouping of three 9mm casings in the yard. Owens told officers he threw his gun off a boat landing, but officers were unsuccessful in finding the gun in the lake. {Tr. 436-46}.

D. The people in the car

Officers set about interviewing the people in the victim's car and at the party. Not surprisingly, there were discrepancies in the various versions as to what happened.

Michael Hubbard was a friend of Bobby's who had just met Holly McCarter and Travis Falls. Michael was hanging with the group when Bobby and Travis returned from a beer run, stating that they had been talking to the now-deceased Jeff Buck who told them there were some guys who were going to come by and shoot the house up. Apparently, an arrangement was made with Buck whereby Bobby and his group would drive by the house on Lawrence Road, blow the horn, and people from Lawrence Road who wanted to fight would follow them to the "spot" – a field where young people liked to hang out. {Tr. 460-63}.

Michael, Holly, Bobby, and Travis got in the car and went out looking for reinforcements. They were turned down a couple of times, but eventually they picked up Travis's drunken cousin Kenny Norris at a bar. The group had no guns, but did have a stick. {Tr. 463-68}.

Once arriving at Lawrence Road, they blew the horn, drove by, turned around, and parked prior to the driveway. Bobby said "let's do it". Holly got out and was fighting Lori Moss in the street; Travis, Bobby, and Kenny got out and were proceeding up the driveway. Michael did not get out of the car and saw someone in the yard had a gun. He screamed

"they got guns; let's go", and heard a shot. Michael ducked down. {Tr. 468-71}.

Michael then heard as if several people were banging on or hitting the car. He saw Travis push Lori off of Holly, and Holly jumped in the driver's seat while Bobby came running. The group took off down the road in the car and Michael heard shots and bullets ricocheting off the car. The back window of the car shattered. Travis said he was hit and Michael turned around to see Bobby "crouched" over in the back seat. Holly became hysterical when she saw Bobby was mortally wounded and eventually they had to pull over so Michael could drive to the police station. {Tr. 471-77}.

Kenny Norris testified next. He admitted he had been at a bar drinking since 2 p.m. when Travis arrived and asked him if he needed a ride home. Kenny stated he did not know fully what was going to happen but Travis did say they were going to a party where there might be trouble. {Tr. 502-05}.

Kenny also testified as to the group blowing the horn, driving past the residence, turning around, and parking at the driveway. He admitted walking up the driveway, when the five to eight people in the yard ran down towards him. He saw Lee Owens fire a gun two times in the air, and a girl shoved him and hit him with an umbrella, so Kenny threw the beer bottle. Brad Moore came up to Kenny and the two shoved and punched each other, but then Kenny saw a girl lying in the street. He did not know if she was shot and ran down to see – at which point he heard more shots. Travis had jumped in their car and it took off, leaving Kenny behind. Kenny saw someone grab the girl and jump in the ditch, and Kenny jumped the fence and ran. He testified someone ran after the car shooting, but said no gunshots were coming from the car. Kenny ran back to the bar. {Tr. 506-13}.

Holly McCarter, the girlfriend of Travis Falls, was the next to testify. She also stated Jeff Buck had called inviting them to Lawrence to fight, and that the group was then supposed to go to the "spot" where the fight would happen. Buck gave them directions to get to the house on Lawrence, and along the way the group picked up Kenny. {Tr. 525-28}.

Like the others, she stated they blew the horn, drove past the house, turned around, came back, and stopped. Ten or so people were in the yard. Kenny – apparently not knowing the arrangement about going to the "spot" – jumped out and Travis went after him. The next thing Holly knew Lori was in her face and they were fighting. Travis broke it apart, and Holly got in the car. Lori then came at Travis and he pushed her down. {Tr. 528-32}.

Holly then heard shots and Bobby tried to drive away. He could not get the car in drive so he got out and ran to the back seat while Holly climbed over in the driver's seat. Travis yelled "wait on me" and jumped in the car, and they took off. As she drove away Holly heard gunfire. Holly was clear none of her group had guns and no gunfire was coming from her car. When she realized Bobby had been mortally wounded, she panicked, and Mike Hubbard had to drive to the Clover police station. {Tr. 532-39}.

Travis also testified similarly about the incident, recounting the traded phone calls with Jeff Buck and the invitation from Buck to come fight him and Brad and Rick Deal. Travis admitted he had as a condition of bond a prohibition against contact with Brad Deal from an earlier fight, but stated he was not thinking about that order when the invitation to rumble was extended. Travis also described their unsuccessful attempts to recruit some help until they picked up Kenny. The group had no guns, but did have a stick. {Tr. 559-

63}.

Travis testified about blowing the horn, driving past, turning around, and stopping short of the driveway. There were about ten people in the yard. Kenny jumped out, and Travis got out too yelling at Kenny not to go up there. Lori then attacked Holly, and Travis tried to break it up. Lori was decidedly winning the fight when Travis pushed her back, and then he heard a gunshot from the yard. The group – with the exception of Kenny – piled in the car, and they heard more gunshots as the back glass of the car shattered. The gunfire came from directly behind Travis. He realized he was hit, and tapped Bobby on the shoulder, only to see Bobby's half closed eyes. {Tr. 563-72}.

Notably, Travis stated he never went any further than the trunk of the car and did not go in the yard, and stated Kenny only went about 10-15 feet in the yard. No one approached the house. {Tr. 568; 576}.

E. The people at the party

A number of people at the party testified for the State as well, although in some respects their story differed somewhat.

Robert Beverly did not really know many of the people at the party except Rocky Breakfield, who invited him. Robert and his girlfriend went, and everyone was drinking some red alcoholic beverage made in a cooler. Robert bought some Xanax from Brad Deal and took it. As the evening went on, Robert heard Rick Deal "fussing" with Travis on cell phones. {Tr. 738-41}.

When the car pulled up, people in the house – including Brad – went outside like they were ready to fight. The next thing Robert knew, Lee *Walden* (not Lee Owens) was

screaming they had knocked Lori down and Walden went out to pick her up. Robert turned around to go get his girlfriend when Lee Owens said "who are you" and fired two shots and Robert. Robert held out his hands and passed by them, but when he looked back he saw Appellant and Lee Owens firing at the car. Appellant was about a car length up the driveway, and the car was in the road. Robert got his girlfriend and left. Robert said in his statement to police that someone shot from the cars, but he admitted at trial he did not see any such thing and the only shooters he saw were Appellant and Lee Owens. {Tr. 741-51; 757-66}.

Tayna Humphries was the girlfriend of Brad Moore and went over to the party that night to see her friend Demi who had just gotten out of prison. Brad Deal spent a lot of time on the phone and at one point played a voice mail for everyone. Tanya was standing in the driveway arguing with Moore when the victims' car came past. Someone yelled "that's your ass", and the car turned around. Moore "beeped" the others inside the house and told them the people were coming back. {Tr. 768-73}.

The car was parked in the road, but Kenny got out, threw a beer bottle at Tanya, and approached Moore. Lee Owens and Appellant came to the end of the driveway, and Lori and Holly engaged in what Tanya said was a "mutual" fight. However, Travis punched Lori, and Lee Walden ran out to pick her up. Tanya stated that Lee Owens and Appellant were standing on either side of her at the end of the driveway and she heard them open fire. When the shooting started, everyone scattered as the car kept going up the road. {Tr. 773-81}. Tanya stated there was also a second car and she thought she saw a flash of light from it. However, she noted that as Appellant was firing, Moore put his hand on the

gun and pushed it down, telling Appellant to stop shooting. {Tr. 781-87}.

Brad Moore testified next. He knew Appellant, Lee Owens, and Brad Deal, but also went to the party to see Demi. Everyone was standing around drinking beers and mixed drinks. On a few occasions Moore saw Brad Deal on the cell phone. {Tr. 795-99}. Moore stated he was outside arguing with Tanya for not answering his phone call when a car came by slowly. Someone in the car yelled "that's your ass", and then it turned around, came back and stopped where it was blocking the driveway. Moore then beeped his cousin Lee Walden and told him there was a car load of people there cussing him. {Tr. 800-802}.

Kenny then came out of the car and ran towards Moore, cussing him. They just "talked junk" to one another but never threw punches. Travis was standing on the other side of the car and never came to whether Moore was. Moore then heard someone say Lori had been hit by Travis, and Lee went to get her. At that point gunshots went off. {Tr. 802-04}.

Lee Owens fired the first shot in the air, and everyone scattered. Shots continued to ring out as the car drove away. Moore did not recall any shots coming from the car, and stated the only people he saw with guns were Appellant and Lee Owens. Moore saw another car parked out there but it left before the victims' car. Moore noted that he reached over and pushed Appellant's gun down after the shooting. Brad admitted that he was not scared of Kenny. {Tr. 804-13; 825}.

Caroline Lee Killian was the next witness. She and her younger sisters Lori and Kristin Moss rode over after receiving a phone call for Rick Deal inviting them. Jeff Buck

was there briefly, but was telling Brad Deal that he "was going to call so-and-so you know about something that Bradley had got jumped on". Everyone was drinking Alabama Slammers, a powerful mixed drink, and Caroline bought some Xanax from Buck. {Tr. 825-31}. Later, Caroline stated Jeff Buck was trying to "get something going" between the two camps. However, she also stated Brad Deal did not want any part of it. {Tr. 840-42}.

Eventually, she heard some yelling "they are here", so she ran outside, and saw Lori fall to the ground in the road. She heard shots before Lori was hit, and someone went and picked Lori out of the road. She heard 20 to 30 shots and dropped to the ground, but was not looking and could not tell from where any of it was coming. {Tr. 825-34}. Caroline also stated Kenny threw a beer bottle at Tanya, but then Kenny realized who they were and apologized to Caroline, saying he did not mean it before running off the other way. {Tr. 835-36}.

On cross, Carolina admitted in her statement to police after the incident saying that the people in the car shot out the window at them. {Tr. 845}.

Rocky Breakfield is Appellant cousin and invited him to the party, after Rocky had been invited by Lee Walden. When Rocky, Appellant, and Appellant's girlfriend arrived, a bunch of people came running out of the house as if they were expecting someone else. When he went inside, Caroline played Rocky a tape of someone threatening to come over and fight. {Tr. 849-54}.

Eventually, people went running out of the house, saying "they're here". Rocky eventually went out there, in time to see Lee Owens, standing in front of Appellant's truck, fire two shots in the air. Rocky could not see what was going on down by the car until he

saw Lee Owens fire three more shots at the car as it was pulling away. However, Rocky claimed he did not see Berry shoot a gun. Rocky also saw another car leaving when he first came out the door but thought that was just someone from the party. {Tr. 854-60}.

Lee Lowder is a friend of the Deals who came to the party. He also testified as to everyone drinking Alabama slammers in the kitchen, and stated he was told about the phone calls between the two camps. {Tr. 863-68}.

Lowder was in the kitchen with Rick Deal when he heard gunshots. He waited until they stopped and then looked outside to see a car pulling away. Brad Deal then called police and they arrived shortly. {Tr. 868-70}.

Lee Walden was someone who knew people on both sides of this incident but had come over at the invitation of the Deals. He also described everyone drinking beer and Alabama Slammers. Jeff Buck arrived and was saying Travis had called saying he wanted to fight. {Tr. 873-78}.

Walden was in the house when the car arrived, and he ran outside where he saw the car parked on the side of the road and in the ditch a little bit. He ran to Lori, who was "laid out" in the street, and drug her in a ditch. As he did that he heard gunshots. Walden saw Travis running to get in the car and Kenny running down the street, but did not see anyone with a gun in his hand or shooting – other than the fact that Lee Owens had shown him a pistol earlier that night. Walden said the car was pulling off as the shots were fired. Other people left in their cars, but Walden went inside, opened a beer, and waited for the police {Tr. 878-91}.

Lori Moss testified next. She is Appellant's ex-girlfriend, and of course knew Lee

Owens and the Deals. As her sister had testified, the three young women went over to the party, where people were drinking. She heard about a phone call in which Travis and Bobby had stated they were on the way to jump on Brad Deal "and everybody". {Tr. 894-899}.

Lori went outside when she heard the car was there, and saw it parked in the road. She saw Holly and the two of them willingly fought each other. Lori admitted she was winning the fight when Travis hit her. {Tr. 900-02}.

Lori heard the first gunshot when Lee Owens fired in the air, so she shut her eyes as she had been knocked down and could hardly see. Demi and Lee Walden picked her up and took her to Caroline's car, and as they did so, Lori heard a number of shots. She did see Appellant holding a gun down by his side. She thought the victims' car had already left. Lori went home and did not need medical treatment. {Tr. 902-12}.

On cross, Lori stated she told police in her statement she saw a second vehicle – a SUV – pull by and saw shots fired from that vehicle. {Tr. 914}. On redirect, she admitted she was not sure if there was such a vehicle, and admitted she could not recall seeing a second vehicle. {Tr. 916-17}.

Bradley Deal was the next to testify. He noted that at the time he was helping to renovate the house, and there was nothing in there but a piano. No one was living there. He also admitted there was beer and Alabama Slammers, but said he only had one beer. He stated they decided to have a get-together but then a number of people showed up that they normally did not see. About 11:00 p.m., Jeff Buck called and said Travis and Bobby heard Brad was having a party and they were going to come over and kill everyone and put

them in the hospital. However, Brad also admitted earlier that afternoon hollering "F you" into Bobby's voice mail, and stated he and Bobby had problems since high school. He noted that he had been jumped by Travis Falls and some others during a previous incident. **{Tr. 917-30}.**

Brad said he was inside and heard yelling so he went out to see. He saw two guys exiting a car that was blocking the driveway, and one of them had his arms in the air saying "let's do this". The guy had nothing in his hands. The other guy went over and hit a girl who was in the roadway, and after she fell down, yet another guy went and picked her up. **{Tr. 930-34}.**

Brad claimed that the guy who hit the car got back in the car and it started to move, and then an arm stuck out of the window and Brad saw three muzzle flashes. They seemed to be pointing up in the air. Brad then went inside to call 911, and he heard other gunshots. **{Tr. 934-41; 943-44}.**

Brad admitted in his statement he said that as the car drove away, he heard four to six more shots, and also that he never said in his statement anything about three muzzle flashes emanating from the car. **{Tr. 948-49}.** On cross, Brad stated that Appellant was at the house with his permission, and his family owns the property. **{Tr. 949-52}.**

Kristin Moss testified about going to the party, about people drinking, and about riding to the store for cigarettes with Tanya. She also heard the conversation about people coming to the house to fight. When she and Tanya arrived back at the house, Tanya and Moore got into an argument, so Kristin walked inside. **{Tr. 953-61}.**

As she was doing so, Lee Walden was on the phone and pointing at the road saying

"here they come", and everyone ran outside. Kristin said four or five people jumped out of the car and everyone was fighting at the road. She saw Travis hit her sister and as she yelled for someone to get Lori gunshots went off. Kristin climbed underneath her car. Kristin admitted seeing Lee Owens and Appellant out there with guns, and she saw Lee shoot his gun. She saw Appellant with his gun after it was over, just holding it by his side. {Tr. 961-69}.

ARGUMENT

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN REFUSING REQUESTED INSTRUCTIONS BASED IN THE PROTECTION OF PERSONS AND PROPERTY ACT, WHERE THE ACT IS PROSPECTIVE ONLY; THE CHARGES AS REQUESTED WERE INCOMPLETE AND INCORRECT; AND THE ACT WAS INAPPLICABLE UNDER THE UNDISPUTED FACTS OF THIS CASE.

Appellant first contends that the trial court erred in refusing to charge two presumptions he asserts are necessary after the passage of the Protection of Person and Property Act ("the Act"), S.C. Code Ann. § 16-11-410, *et. seq.* However, the Act is prospective only and inapplicable to Appellant's case. Even if the Act was retroactive, there was no reversible error in refusing the requested instructions since they were incorrect or incomplete expressions of the law. Further, the Act was inapplicable to the facts of this case, and even if it was, any error was harmless.

A. The Act

Aside from some intent and definitional provisions, the substance of the Act is in S.C. Code Ann. § 16-11-440 and -450 (Supp. 2007). Subsection 16-11-440(A) first provides for presumptions that one has a reasonable fear of imminent peril if: (1) another person is unlawfully and forcefully entering "a dwelling, residence, or occupied vehicle", or is attempting to remove someone against his will from "a dwelling, residence, or occupied vehicle"; or (2) if the person using deadly force knows or has reason to believe an unlawful and forcible entry or act is occurring or has occurred.

Subsection -440(B) has exclusions for the presumption in subsection (A), including where the person who uses deadly force is engaged in an unlawful activity or is using the dwelling, residence, or occupied vehicle for an unlawful activity.

Subsection -440(C) seems to have a significant effect on the duty to retreat in South Carolina. It provides that one not engaged in unlawful activity "who is attacked in a place where he has a right to be, including, but not limited to, his place of business", has no duty to retreat. Such a person may use deadly force if he reasonably believes it to be necessary to prevent death or great bodily injury to himself "or another person", or to prevent the commission of a violent crime.

Subsection -440(D) provides that a person who unlawfully and forcefully attempts to enter another's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or a violent crime.

Subsection -440(E) provides that a person who forcefully enters or attempts to enter a dwelling, residence, or occupied vehicle in violation of an order of protection, restraining order, or bond condition is presumed to be doing so with the intent to commit an unlawful act.

Subsection (A) of S.C. Code Ann. § 16-11-450 provides that someone who uses deadly force pursuant to the article is immune from prosecution and civil action, with one exclusion relating to law enforcement officers.

Subsection (B) of -450 precludes a law enforcement agency from arresting a person who used deadly force unless probable cause exists that the deadly force used was unlawful.

Finally, subsection (C) of -450 provides for the awarding of fees, costs, expenses, and losses if the court finds a civil defendant was immune from prosecution under subsection (A).

B. Events at trial

During a pre-trial hearing, Appellant moved to quash the indictments based on the Act, asserting that the statute provides immunity from prosecution and that a hearing should be held to determine if the prosecution should continue. He also asked for a restraining order against the State to prohibit the prosecution, based on the fact that Travis had a bond condition to stay away from Brad Deal and the expressed purpose of the victims was to go to the house to fight. The defense admitted the incident did not take place in the dwelling, but asserted that it was sufficient that it took place at the end of the driveway after the occupants came outside upon seeing the victims' car. {Tr. 161-63}.

The trial court expressed skepticism that the end of the driveway qualified as a "dwelling". The court ultimately denied the motion for the time being, noting that it would consider subsequent motions, but it did not believe the Legislature intended to provide immunity to someone firing at a car racing down the street. {Tr. 163-68}. After argument on the issue by Appellant's codefendant Lee Owens (who decided to plead before trial began), the court noted it would give the defense the opportunity to make its case outside the presence of the jury as to whether it fell within the immunity provision of the statute. {Tr. 168-75}. The State asserted the Act was prospective not retroactive and thus inapplicable since it was passed after the commission of the crime in this case. It also asserted the granting of immunity for criminal matters was unconstitutional since prosecutorial power resided in the hands of the Attorney General. Finally, the state argued the statute only applied to the dwelling itself and the people who live there. The court noted it would take up the issue later. {Tr. 176-79}.

At the conclusion of the State's evidence, and after making the "standard" directed

verdict motion, the defense contended that a directed verdict motion should be granted based on S.C. Code Ann. § 16-11-440(C) of the Act. The defense argued that there had been no evidence Appellant was acting unlawfully, and Appellant was where he had a right to be, so thus a directed verdict should be granted not only based on Appellant's right to defend himself but also on the defense of others. {Tr. 1042-44}.

The trial court denied the motion, finding first that the Act was prospective not retroactive. The court also reasoned the Act was to protect habitation and Appellant was not in the house, in a vehicle, or in his business. Finally, the court noted that the facts of the case did not fall within the purview of the Act, and while he was not deciding the burden of proof, "the facts as presented including [Appellant's] statement . . . do not place him under the protection of the Act". {Tr. 1044-45}.

After the defense rested, there were no further motions. An in-chambers charge conference was had, after which the defense objected to the court's refusal to charge its requests regarding presumptions in the Act. {Tr. 1054-56; Defendant's Request to Charge 12}.

The judge gave a complete but "normal" self-defense and defense of others charge. {Tr. 1157-62}. The defense renewed its request for its proposed instructions under the Act. {Tr. 1168}.

C. The trial court committed no reversible error in refusing the charges proposed by Appellant under the Act since the Act's effective date was after the commission of the crime in this case.

As an initial matter, the trial court was correct that the Act is prospective only and does not apply to Appellant's case.

Generally, statutory enactments are presumed to be prospective rather than retroactive, unless the statute is remedial or procedural – such as a statute of limitations or a statute allowing change of venue. See Jenkins v. Meares, 302 S.C. 142, 394 S.E.2d 317 (1990) (mentioning the statute of limitations as such a procedural rule, and holding Tort Reform Act was not retroactive); State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992) (new statute allowing change of venue was procedural and retroactive), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). However, those are rules of statutory construction and the paramount consideration is the intent of the Legislature. Meares, supra (finding dispositive the act's express statement that it would only apply to actions arising or accruing after the effective date of the act).

Here, not only is this statute clearly substantive in its expressed intent to codify and expand the castle doctrine, but the General Assembly in the Act's savings clause clearly expressed the intent that it not be applied to criminal and civil actions, and rights, liabilities or duties, in existence prior to the Act's effective date. Section 4 of 2006 South Carolina Laws Act 379 reads as follows:

The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of the act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

(Emphasis added). The General Assembly could not have been clearer. And, indeed, this makes sense, as one is presumed to know the law when one acts. Appellant could not

have been relying on the Act when he opened fire as it did not exist yet. See generally Morehead v. Doe, 324 S.C. 559, 479 S.E.2d 817 (Ct. App. 1996) (person presumed to know the law).

Appellant's crimes were committed on February 18th, 2006. He was indicted in May of 2006. {R. *}. The Act took effect on June 9th, 2006. It was inapplicable to Appellant's then pending criminal prosecution for a crime that took place before the Act's effective date. Thus, Appellant's jury requests did not reflect the proper law of South Carolina and the judge was not in error for refusing them. Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 336 S.E.2d 502 (Ct. App. 1985) (where charge, if given in exact language of request, would be incorrect, it is not error to refuse it).

This analysis is sufficient to reject both of Appellant's issues on appeal.

D. Even if the Act was retroactive, the trial court did not commit reversible error in refusing the instructions as they were either incomplete or incorrect statements of the law.

Of course, this Court can affirm for any ground present in the record. Rule 220(c), SCACR. There was no reversible error from the denial of both of the requested instructions in Defense Request to Charge Number 12, as they were both incomplete or incorrect statements of the law.

Appellant's first requested instruction was as follows:

I charge you that if you can find that the one or more aggressors was under a bond restriction as referenced in Section 16-11-440 (E) of the Code of Laws of South Carolina, 1976, as amended, then you are to accept the legal presumption, as provided for in the noted statute, and concluded that the aggressor's intended to commit an unlawful act.

{Defense Request No. 12}.

This request is erroneous in several respects. It refers to "aggressors" – a clearly loaded term that in and of itself seems to be a charge on the facts – but nowhere in the subsection or indeed the statute is such a term mentioned. Instead, subsection (E) refers to a "a person who by force enters or attempts to enter a dwelling, residence, or occupied vehicle". Appellant's proposed charge makes no reference whatsoever to the express factual requirements of "by force", "entry or attempt to enter", or "dwelling, residence, or occupied vehicle". Since Appellant's first instruction is incomplete and incorrect, and uses a loaded term not found in or defined by the statute, it was not reversible error to refuse it. See Powers v. Temple, 250 S.C. 149, 156 S.E.2d 759 (1967) (request to charge that was incomplete statement of law should not have been given); Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 336 S.E.2d 502 (Ct. App. 1985) (where charge, if given in exact language of request, would be incorrect, it is not error to refuse it).

Petitioner's second requested instruction was equally as flawed. It reads as follows:

Further, if the aggressor is presumed to be committing an unlawful act, then, pursuant to Section 16-11-440(A), you are to presume the defendant was acting with a reasonable fear of imminent peril of death or great bodily injury as to himself or another.

{Defense Request No. 12}.

Again, this request uses the term "aggressor" which is impermissible for the reasons previously expressed. However, subsection (A) also requires something different than just the intent to commit an unlawful act for the presumption to apply– it requires that the person be in the process of or already having committed an unlawful *and forceful* entry. Appellant's instruction makes no mention of the forceful requirement. Moreover, the unlawful and forceful entry must be to a "dwelling, residence, or occupied vehicle".

Alternatively, the statutory subsection could be satisfied if the person was attempting to unlawfully and forcefully remove a person against his will from a dwelling, residence, or occupied vehicle. Finally, the subsection could be satisfied if the person who uses deadly force knew or had reason to believe an unlawful *and forceful* entry had occurred or was occurring.

The use of a loaded and undefined term "aggressor", the reference to "intent to commit an unlawful act" instead of "an unlawful *and forceful* entry", and the failure to mention "dwelling, residence, or occupied vehicle", all make the instruction an incomplete and incorrect statement of law. As such, there was no error in the refusal to charge it. Powers, supra; Floyd, supra.

E. Even if the Act were retroactive, the facts of this case do not trigger application of the Act.

Moreover, the facts of this case simply do not trigger the Act. As noted before, both S.C. Code Ann. §§ 16-11-440 (A) and (E) require an unlawful and forceful entry into a "dwelling, residence, or occupied vehicle". It is of course true that the common law of self defense includes the curtilage of a home when addressing where one has no duty to retreat. See, e.g. State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998). However, we are dealing here not with the common law and its judicial interpretation, but a specific and express statutory definition. "Dwelling" is defined by the Act as:

[A] building or conveyance or any kind, including an attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging there at night.

S.C. Code Ann. § 16-11-430(1) (Supp. 2007). Tellingly, this is distinguishable from the

statutory definition of "dwelling" for purposes of burglary, which includes appurtenant structures 200 yards from the main house. See S.C. Code Ann. § 16-11-10 (Rev. 2003).

In the present case, there was no evidence that the victims at any time forcibly entered or attempted to enter the dwelling. Indeed, as seen from the recitation in the Statement of Facts, all parties agreed none of the victims got any further than a few feet up the driveway. Perhaps had the people at the party remained inside and the victims had attempted to forcibly gain entry, a different issue would be presented, but the fact remains that the people inside all poured out to meet the victims, and the confrontation occurred at or near the roadway.

Indeed, there is no dispute that Appellant's bullets struck people from behind in a car as it was leaving – unquestionably there was no unlawful and forcible entry or attempt at entry at the moment Appellant used deadly force. Appellant himself stated that he shot at the car while it was leaving, because he had just "lost it" when Lori was hit. {Tr. 399-404}. While it is true that Brad Deal testified as to three muzzle flashes in the air from the car, and others mentioned a mysterious second car from which a flash was seen, there was no evidence whatsoever that *Appellant* saw those alleged flashes and that is what put him in a belief of imminent peril to himself or others. The only evidence on the subject came from Appellant's statement that he had just lost it and was shooting at people who were already trying to escape the scene. This is insufficient to trigger the statute and indeed, insufficient for self-defense in general. State v. Lee, 293 S.C. 536, 362 S.E.2d 24 (1987) (rejecting charge of self defense for defendant who fired warning shots at a victim sitting in his truck based solely on belief that victim carried a gun under his front seat,

where the victim was simply sitting in the truck with two innocent passengers and the door closed, and the only reasonable inference was that the victim was preparing to leave); Tate v. State, 308 S.C. 163, 417 S.E.2d 553 (1992) (noting that defendant clearly was not in imminent danger when she shot a man in back as he relieved himself). Cf. State v. Slater, 360 S.C. 487, 602 S.E.2d 90 (2004) (once defendant turned and ran away from attacker, he restored his right to self defense even if he was at fault in bringing on the difficulty).¹

The Act is inapplicable and the issue should be denied.²

II. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN REFUSING TO GRANT A DIRECTED VERDICT BASED ON THE ACT, WHERE THE ACT IS PROSPECTIVE ONLY; THE ISSUE AS ARGUED IS NOT PRESERVED; THE COURT APPLIED THE CORRECT STANDARD; AND THERE WAS AMPLE EVIDENCE TO SEND THE CASE TO THE JURY EVEN UNDER THE ACT.

Appellant next contends that the judge erred in refusing to grant a directed verdict based on the fact that the Act grants one immunity from prosecution if he falls under its provisions. However, as argued earlier, the Act is prospective only. Next, any contention that the judge should apply a different standard to enforce the immunity provision of the Act is not preserved. Finally, the judge applied the correct standard for a directed verdict, and there was ample evidence to send the case to the jury even if the Act is applied.

¹ For this reason, any difference between the charge as given and the requested charge were harmless.

² Indeed, Appellant is underage and admitted in his statement drinking earlier in the day and worrying about being caught as a minor in possession {Tr. 321; 399-400}. As shown in the Statement of Facts, there was drinking and drug use at the party. This arguably precluded application of the Act because the person using deadly force was engaged in an unlawful activity. See S.C. Code Ann. § 16-11-440(B)(3) (Supp. 2007). Moreover, while the trial court quashed the indictment for person under 21 in possession of a pistol, this decision is presently the subject of a pending State's appeal. Indisputably Appellant would fall under that statute if it were upheld. Were that statute upheld, it arguably would also trigger -440(B)(3).

A. Events at trial

The relevant events have already been set forth in the discussion for the preceding issue and are incorporated here.

B. The trial court committed no reversible error in refusing the charges proposed by Appellant under the Act since the Act's effective date was after the commission of the crime in this case.

As argued in the preceding issue and incorporated here, the trial court was correct that the Act is prospective only and does not apply to Appellant's case. Thus, the trial court could not have erred in failing to grant a directed verdict based on the Act.

C. The issue is not preserved, as it is not the one presented to the trial court.

The issue presently argued is not preserved as it was not the one presented to the trial court. It is true that prior to trial, Appellant moved to quash the indictment or for a "restraining order" against the prosecution based on his assertion that the Act applied. {Tr. 161-62}. During this discussion Appellant conceded that subsection (C) of S.C. Code Ann. § 16-11-440 (Supp. 2007) "looks like a version of self defense which would be for the jury". {Tr. 165}. Later, counsel for the co-defendant – NOT Appellant – argued that under the Act a defendant was entitled to two "shots" – one with the judge and one with the jury. {Tr. 175}. The trial court denied the motion, with the caveat that it would be glad to consider any further motions as trial progressed. {Tr. 167; 175; 179}.

However, the only further motion (other than the jury requests) was a motion for directed verdict based in subsection (C), with an argument that the state had not presented any evidence Appellant was behaving unlawfully, that Appellant had a right to be where he was, and thus he had a right to defend himself or others. {Tr. 1043-44}. There was no

argument made to the trial court, as Appellant makes now, that the Court should change the standard for review of a directed verdict and grant it "if there is credible evidence the Act applies, as in this case, notwithstanding any evidence the State may present that does not negate the applicability of the Act". {Brief of Appellant p. 17}.

Since Appellant did not make the same argument at trial that he makes now, the issue is not preserved. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal."); State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal.").³

D. A motion for directed verdict was properly denied even if the Act is considered.

Even taking the Act into consideration, the judge properly denied the motion for directed verdict. When reviewing the denial of a directed verdict, the evidence must be viewed in the light most favorable to the state. If there is any direct evidence or any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt can be fairly and logically deduced, then the case was properly submitted to the jury. State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000); State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999). The trial judge is concerned with the existence of evidence, not its weight. State v. Williams, 303 S.C. 274, 400 S.E.2d 131

³ Moreover, it does not appear Appellant renewed his motion for a directed verdict at the close of the defense case, which would also preclude the issue from being preserved. {Tr. 1054-56}. State v. Harry, 321 S.C. 273, 277, 468 S.E.2d 76, 79 (Ct.App.1996) ("A motion for a directed verdict made at the close of the [state's] case is not sufficient to preserve error unless renewed at the close of all the evidence, because once the defense has come forward with its proof, the propriety of a directed verdict can only be tested in terms of all the evidence.").

self-incrimination or the double jeopardy clause. See State v. Morriss, No. 26418 (S.C. Sup. Ct. January 14th, 2008); State v. Brewer, 351 S.C. 226, 569 S.E.2d 340 (2002) (noting that the purpose of immunity provisions is to aid the prosecution in investigating crimes and bringing charges); Thrift, *supra*. Thus, even if the Act were applicable to this case, the judge would have to assess its presumptions in the context of a normal directed verdict motion – which, of course, requires viewing the evidence in the light most favorable to the State. However, even if the judge were to make an independent determination, it is clear here that the trial court in this case did not believe the evidence required it to dismiss the charges pursuant to the Act. {Tr. 1044-45}.

The issue should be denied.

CONCLUSION

Respondent respectfully submits the convictions and sentences should be affirmed.

Respectfully submitted,

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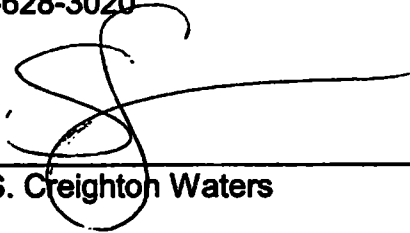
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February 4, 2008

**IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

v.

BERRY SCOTT BOLIN,

Appellant.

PROOF OF SERVICE

I, S. Creighton Waters, Counsel for Appellant, certify that I have this date served the *Initial Brief of Respondent and Designation of Matter*, dated February 4, 2008, on Respondent by depositing three copies of the same in the United States mail, first class postage prepaid, addressed to his attorney of record:

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I further certify that I have served all parties required by Rule to be served.

This 4th day of February, 2008.



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IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

Case No. 2006-GS-46-1595, 1596, 1598, 1599, 1600

State of South Carolina Respondent,

v.

Berry Scott Bolin Appellant.

BRIEF OF APPELLANT

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ISSUES ON APPEAL

1. Whether to trial Court erred in denying Defendant's request for the jury to be charged the legal presumptions contained in Section 16-10-440, South Carolina Code of Laws, 2006.
2. Whether the trial Court erred in denying Defendant's motion for a direct verdict on all charges based on Section 16-10-450.

STATEMENT OF THE CASE

On May 18, 2006 Berry Scott Bolin was indicted by the York County Grand Jury on charges of Murder; three counts of Assault and Battery With the Intent to Kill; Firing a Weapon into an Occupied Vehicle; Unlawful Possession of Pistol (Being Under the Age of 21 Years at the time); and Possession of a Weapon during the Commission of a Violent Offense. (R. App. pp. 2, 5, 8, 11, 14)

The case was called for a jury trial on August 28, 2006. Prior to the oath of the jury panel, Mr. Bolin made a motion to quash indictment 2006-GS-46-1601 alleging Unlawful Possession of a Pistol. The trial court granted Mr. Bolin's motion.¹

The trial proceeded on the remaining indictments. At the close of the State's case, Mr. Bolin moved the Court for a directed verdict on all indictments relying on Sections 16-11-410, et seq., of the South Carolina Code of Laws, 2006. The Court denied Mr. Bolin's motion and the case proceeded. (R. App. p. 462, ln 23 – p. 465, ln. 3) . At the close of Mr. Bolin's case, he renewed his motion for a directed verdict on the grounds previously stated to the Court. (R. App. p. 465, lns. 12-16). Following closing arguments by counsel for Mr. Bolin and the State, the Court instructed the jury panel as to the law of the case. Although requested of the Court by Mr. Bolin, the Court refused

¹ The Order of the Honorable John C. Hayes quashing the indictment is currently on appeal by the State before the South Carolina Supreme Court.

to charge the jury the presumptions presented in Section 16-11-440, South Carolina Code of Laws, 2006. To the Court's denial Mr. Bolin objected. (R. App. p. 468, ln 17-21, also R. App. p. 16).

The jury returned a verdict finding Mr. Bolin guilty of Voluntary Manslaughter (2006-GS-46-1595), three counts of Assault and Battery of a High and Aggravated Nature (2006-GS-46-1596, 1598, 1599); and Discharging a Weapon into an Occupied Vehicle (2006-GS-46-1600). The jury found Mr. Bolin not guilty of Possession of a Weapon during the Commission of a Violent Offense (2006-GS-46-1597). (R. App. pp. 3, 6, 9, 12). Following the verdicts, the Court imposed concurrent sentences totaling 30 years. (R. App. pp. 4, 7, 11, 15).

STATEMENT OF THE FACTS

Prior to midnight on February 18, 2006, Travis Falls, 26 years of age, accompanied by his confederates, which included girlfriend Holly McCarter, Bobby Hovis, Kenny Norris, and Michael Hubbard, decided to travel to a residence in Clover, South Carolina. (R. App. p. 199, ln. 1 – p. 204, ln.13). The residence was owned by the parents of Jonathon Bradley Deal. (R. App. p. 396, ln.25 – p.397, ln. 23) The purpose of the trip was to attack Mr. Deal, his brother and other people at the house.

At the time of making this plan, and attempting to carry it out, Mr. Falls was under the authority of a bond provision forbidding him from having any contact with Jonathon Bradley Deal or going around his property. Mr. Falls had been released on bond only a few days earlier after having been charged with committing an Assault and Battery of a High and Aggravated Nature on Mr. Deal. (R. App. p. 214, ln. 11 – p. 216

ln. 6). Mr. Falls was aware of this provision. Yet it would not prevent him from attempting to carry out the attack.

Also that evening Berry Scott Bolin was a guest at the house, having arrived with his girlfriend, Michelle Barfield, a friend of Jonathon Bradley Deal. There were many people at the house at the time Mr. Falls arrived with his pack. Upon their arrival, people began to rush outside of the house. Berry Scott Bolin exited the house. (R. App. pp. 17-23; p. 26-27)

The Falls car passed by the house, made a U-turn and returned, pulling up on the roadside just past the front of the driveway. The men exited the car. Mr. Norris proceeded up the driveway yelling to begin a fight, throwing a beer bottle he was carrying onto the driveway shattering it. (R. App. p. 182, ln. 21- p. 183, ln. 24).

As this occurred, a fight ensued near the car between Holly McCarter, of the Fall's pack, and Laurie Moss, a guest at the house. Mr. Falls then joined by attacking Ms. Moss, 17 years old at the time, resulting in Mr. Falls knocking out Ms. Moss. (R. App. p. 913, ln. 2 – ln. 8).

As Mr. Bolin was exiting the house, he heard someone yell to get a gun. Mr. Bolin proceeded to his truck which was parked in the front yard of the residence. Mr. Bolin retrieved his pistol which was stored in the glove box of his truck. (R. App. pp. 17-23; p. 26-27)

As Mr. Bolin moved away from his truck, he heard gunfire near the car. He also heard gunfire away from him, to his side. (R. App. pp. 17-23; p. 26-27).

Mr. Falls and 3 of his 4 confederates ran to their automobile, getting inside. Holly McCarter was the driver with Mr. Falls seated behind her, and Mr. Hovis seated in the

rear seat on the passenger side of the car. As the car began to move, muzzle fire was seen coming from the car by Jonathon Bradley Deal who was on the front porch of the residence. (R. App. p. 408, ln. 21 – ln. 25) At this time, Mr. Bolin fired several shots in the direction of the car. Mr. Falls was seated next to Mr. Hovis, with his right arm extended behind the head of Mr. Hovis, and his hand toward the rear side window. A bullet of the same caliber as Mr. Bolin's pistol shattered the rear window of the car, passed through the wrist of Mr. Falls, and into the rear right area of Mr. Hovis' head .

The car proceeded away from the scene on its way to the Clover Police Department a few miles away with the two wounded occupants. Prior to arriving at the Clover Police Department, the car pulled off the roadway into the parking lot of a closed auto parts store where it remained for a short period. After this short period, the car, continuing to be driven by Holly McCarter (p. 256, lns. 9 – 13), left the lot, and a short way down the road pulled into the rear parking lot of the Clover Police Department. An ambulance was dispatched and Mr. Hovis and Mr. Falls were taken to the hospital. Mr. Hovis was pronounced dead at the hospital and Mr. Falls received treatment and was released.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSABLE ERROR IN REFUSING TO CHARGE THE JURY THE LEGAL PRESUMPTIONS CONTAINED IN SECTION 16-10-440, SOUTH CAROLINA CODE OF LAWS, 2006.

Prior to the Court's charge to the jury, Mr. Bolin requested the Court include in its charge the presumption language contained in Section 16-10-440, South Carolina Code of Laws, 2006. The Court refused and Mr. Bolin preserved his objection to the omission.

In June of 2006, the Protection of Persons and Property Act was passed into law. The statute is an expansion of the common law castle doctrine which this State has historically recognized in a limited capacity, concentrating the application on the dwelling. In 1908 the Court ruled on the castle doctrine in two cases. In State v. Stockman, the Court found that indeed a man's house was his castle, and had the right to protect every member occupying it and make take life if necessary in carrying out the protection. However, the Court ruled that the danger must be imminent. That once the danger had ceased, the man did not have the right then to take life. 82 S.C. 388, 401 (1908). The Court ruled also that the castle doctrine would not apply in a situation where the man left his property and took the life of the other in the street where the other had a legal right to be. State v. Brooks, 79 S.C. 144, 148 (1908). The castle doctrine has primarily supported the law that a man has no duty to retreat from conflict on his own property.

Thus, in 2006 the South Carolina Legislature expanded this doctrine through codification with Sections 16-11-410 et seq. known as the Protection of Persons and Property Act. Section 16-11-410, South Carolina Code of Laws, 2006. The codification has expanded the applicability of the castle doctrine to houses, tents, mobile homes,

businesses, and automobiles by its general and expansive definitions, including that of "Dwelling" and "Residences". Sections 16-11-430 (1), (3), and (4), South Carolina Code of Laws, (2006). The definition of residence also expands the protection of the statute to an invited guest.

Additionally, the statute sets out two legal presumptions of fact addressing reasonable fear of bodily harm or serious injury. The first, Section 16-11-440 (A) states:

A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

(1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and

(2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

The second legal presumption of fact is provided in Section 16-11-440 (E) which states:

A person who by force enters or attempts to enter a dwelling, residence, or occupied vehicle in violation of an order of protection, restraining order, or condition of bond is presumed to be doing so with the intent to commit an unlawful act regardless of whether the person is a resident of the dwelling, residence, or occupied vehicle including, but not limited to, an owner, lessee, or titleholder.

It is submitted the legislative intent of this presumption is specific in Section 16-11-420 (E) that provides "The General Assembly finds that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack."

The Protection of Persons and Property Act is applicable to the facts of this case.

Berry Scott Bolin was an invited guest at the house of Jonathon Bradley Deal. Although the State may assert the house was not an active dwelling, it certainly fits squarely within the broad definition of residence afforded by the statute. Jonathon Bradley Deal was the victim of a crime committed against him by Travis Falls for which Travis Falls was out of jail on bond. Travis Falls admitted that he and his confederates were traveling to the residence for the purpose of attacking the Deal brothers and the others at the residence, and in fact did so. When confronted regarding the bond provision of staying away from Jonathon Bradley Deal, Travis Falls admitted knowing and understanding the provisions of the bond, but further admitted that he did not know what would stop him from doing such a thing. Additionally, at no time was there evidence presented by the State that would conclude that Mr. Bolin was involved in illegal activity. The activity of him possessing a firearm despite being the age of 19 years was never presented, for the indictment containing that allegation had be quashed by the Court during pretrial motions. Yet despite the existence of these facts, the Act was not allowed to be a part of this case when requested by Mr. Bolin.

A trial court is required to charge the current and correct law of South Carolina. State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006); Sheppard v. State, 357 S.C. 636, 665, 594 S.E.2d 462, 472-73 (2004); State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005); State v. Brown, 362 S.C. 258, 261-62, 607 S.E. 2d 93, 95 (Ct. App. 2004). At the time of this trial in August 2006, the Act was a current law of the State of South Carolina and was the correct law in these circumstances. The trial court has a duty to give a requested instruction that is supported by the evidence and correctly states the law applicable to the issues. State v. Peer, 320 S.C. 546, 553, 466

S.E.2d 375, 380 (Ct. App. 1996); see also State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989) (acknowledging that a defendant is generally entitled to a requested jury instruction if it is a correct statement of the law on an issue raised by the indictment); State v. West, 138 S.C. 421, 136 S.E. 736, 737 (1927) (finding the court has a duty to charge jury as to law applicable to facts brought out in testimony). Prior to the Court's jury charge, Mr. Bolin requested that the presumptions supplied in the Act be instructed to the jury. This was denied. The evidence presented raised the issue of the presumption of intent to commit a crime, to have the intent to bring about death or serious bodily injury due to the violation of the bond provision. The refusal by the court to charge the requested charge was an abuse of discretion in that the Court's decision was an error of law. The error was omitting the applicable statutory law for the circumstances raised by the evidence. Fontaine v. Peitz, 291 S. C. 536, 538, 354 S.E.2d 565, 566 (1987); State v. Peay, 321 S.C. 405, 410, 468 S.E.2d 669, 672 (Ct. App. 1996) (concluding that the trial court commits reversible error when it fails to give requested charge on issue raised by indictment and evidence presented).

The State may argue that if the omission of the charge was error, it was harmless error. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. State v. Pagan, 369 S.C. 212, 212, 631 S.E.2d 262, 267 (2006) (citing Arnold, 309 S.C. at 172, 420 S.E.2d at 842 (1992)). "An error is not reversible unless it is material and prejudicial to the substantial rights of the appellant." Visual Graphics Leasing Corp., Inc. v Lucia, 311 S.C. 383, 489, 429 S.E.2d 839, 841 (Ct. App. 1993).

If he was actually in imminent danger it must be shown that circumstances would have warranted a person of ordinary firmness and courage to strike a fatal blow to prevent their own death or serious bodily injury. If Mr. Bolin believed he was in imminent danger of death or seriously bodily injury, it must be shown that if a reasonable prudent person of ordinary firmness and courage would have had the same belief in deciding whether Mr. Bolin actually was or believed he was in imminent danger or death or seriously bodily injury, you should consider all the facts and circumstances surrounding the crime including the physical condition and characteristics of Mr. Bolin and the victims.

A defendant does not have to show that he was actually in danger. It is enough if he believed he was in imminent danger and a reasonable prudent person of ordinary firmness and courage would have also believed they were in imminent danger. A defendant has a right to act on appearances even though those beliefs may have been mistaken. *It is for you to decide whether Mr. Bolin's fear of imminent danger of death or seriously bodily injury was reasonable and would have been felt by an ordinary person of the same situation. Words accompanied by hostile acts may depending on the circumstances establish self defense.* (R. App. p. 470, ln. 7 – p. 471, ln. 12).

Thus, Mr. Bolin's right to have the jury hear that the statutory law had determined that there was a factual presumption of imminent danger or death or seriously bodily injury was denied. The Court required the jury alone to determine the reasonableness of Mr. Bolin's actions. The statutory condition of the violation of the bond provision by Travis Falls was omitted and therefore ignored by the Court. This is in direct contravention to the intent of the legislature for there not to be a need for a factual determination of "reasonableness" when the necessary pre-existing condition for the presumption was present. This is an essential element of self defense that could very well have changed the determination of the jury had it been instructed the current and correct law of these presumptions.

It is essential that a jury in cases such as this, where there is evidence of the applicability of this law, know about the law and what the position of the legislature is, and the presumptions provided by the legislature. The same type of instruction is given

daily across this State in cases of alleged Driving Under the Influence, or Driving with an Unlawful Alcohol Content when the juries are instructed as to the statutory inferences provided by the State Legislature regarding the alcohol content of a person's breath. As it is done in those cases, likewise, the presumptions should be instructed in cases falling under the Protection of Persons and Property Act.

To warrant reversal based on the trial court's failure to give a requested jury instruction, the failure must be both erroneous and prejudicial. State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003); State v. Patterson, 367 S.C. 219, 232, 625 S.E.2d 245, 239 (Ct. App. 2006) cert pending; State v. Harrison, 343 S.C. 165, 172, 539 S.E.2d 71, 74 (Ct. App. 2000) (citing State v. Hughey, 339 S.C. 439, 450, 529 S.E.2d 721, 727 (2000)). In this case, it is clear that the Court's failure to instruct the jury as requested by Mr. Bolin was not only error, but was also prejudicial due to the effect the omitted charge surely had on the jury's analysis of the third element of self defense and defense of others. For this reason, the jury verdicts on all indictments for which he was found guilty should be reversed and the matter remanded to the trial court for a new trial.

II. THE TRIAL COURT COMMITTED REVERSABLE ERROR IN REFUSING TO GRANT DEFENDANT'S MOTION FOR A DIRECT VERDICT CONTAINED IN SECTION 16-10-450, SOUTH CAROLINA CODE OF LAWS, 2006.

At the close of the State's case, Mr. Bolin made a motion for a directed verdict on all indictments based on Section 16-11-450, South Carolina Code of Laws, 2006. The Court committed error in denying this motion, as well as when it denied the renewed motion at the close of all the evidence.

In almost all criminal cases, unless precluded by other law, that standard by which the Court is to rule on the motion is well settled. When a motion for a directed verdict of acquittal is made in a criminal case, the trial court is concerned with the existence or non-existence of evidence, not its weight. The accused is entitled to a directed verdict when the evidence merely raises a suspicion of guilt. The accused also is entitled to a directed verdict when the State fails to present evidence on a material element of the offense charged. However, if the State presents any evidence which reasonably tends to prove the defendant's guilt, or from which the defendant's guilt can be fairly and logically deduced, the case must go to the jury. On appeal, the Court must view the evidence in light most favorable to the State. State v. Pittman, Op. No. 26339 (2007); State v. Brown, 360 S.C. 581, 586-87, 602 S.E.2d 392, 395 (2004).

Section 16-11-450 however, provides a person whose actions come within the applicability of the statute with immunity from prosecution. Subsection (A) states:

(A) A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force, unless the person against whom deadly force was used is a law enforcement officer acting in the performance of his official duties and he identifies himself in accordance with applicable law or the person using deadly force knows or reasonably should have known that the person is a law enforcement officer.

In light of practicality and judicial efficiency, it must be determined when and how such immunity one is entitled to should be enforced. When a solicitor has the sole discretion in carrying forward a prosecution, he may do so until either a court or jury ends the prosecution with a favorable ruling to the Defendant. If the applicability of this provision is solely left up to the prosecutor in every case, then the affect of this provision passed by the legislature could become completely hollow, and merely be used as a tool

of the prosecutor in explaining away cases the prosecutor has no desire to continue. It is submitted it was not the intent of the legislature in passing this law for this to be controlled solely by the prosecutors, but was passed for the benefit of victims of crime, and for aiding their ability to protect themselves from unlawful activity in certain circumstances. Therefore, it is only logical for the Court to be empowered to enforce the immunity provision of the statute through rulings on motions of the defendant, such as the one made by Mr. Bolin at the time he made it.

The evidence presented in Court, as stated above, brings this case into the parameters of the statute and should be the basis for the Court enforcing the immunity granted in the law. For a Defendant to bring a pretrial motion seeking the enforcement of the immunity provision against the State, such motion would require an extensive evidentiary hearing. Therefore, in the interests of judicial economy, if the State refuses to abide by the immunity provisions of the statute, the Court should grant the immunity if the evidence of the case shows the elements needed for the granting of the immunity have been met, as was done in this case.

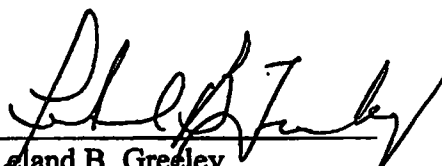
When this Act is applicable in a case, it is submitted that the standard for a directed verdict consistent with the purpose of the act should be if there is credible evidence that the Act applies, as in this case, notwithstanding any evidence the State may present that does not negate the applicability of the Act.

In applying this standard, it is submitted the Court plainly erred in not granting a directed verdict in favor of Mr. Bolin on all charges before the jury.

CONCLUSION

The Court erred in not granting a directed verdict on all indictments against Mr. Bolin in this matter under the Protection of Persons and Property Act. Due to the error of the Court, Mr. Bolin respectfully requests this Court to reverse the verdicts of the jury.

IN the alternative, it was harmful error for the court to refuse to instruct the jury on the statutory presumptions provided by the Protection of Persons and Property Act. Due to the error of the Court, Mr. Bolin respectfully requests this Court to set aside the jury verdicts on all indictments and remand all matters to the trial court for a new trial.



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March 13, 2008

**IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

v.

BERRY SCOTT BOLIN,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN REFUSING REQUESTED INSTRUCTIONS BASED IN THE PROTECTION OF PERSONS AND PROPERTY ACT, WHERE THE ACT IS PROSPECTIVE ONLY; THE CHARGES AS REQUESTED WERE INCOMPLETE AND INCORRECT; AND THE ACT WAS INAPPLICABLE UNDER THE UNDISPUTED FACTS OF THIS CASE?

II. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN REFUSING TO GRANT A DIRECTED VERDICT BASED ON THE ACT, WHERE THE ACT IS PROSPECTIVE ONLY; THE ISSUE AS ARGUED IS NOT PRESERVED; THE COURT APPLIED THE CORRECT STANDARD; AND THERE WAS AMPLE EVIDENCE TO SEND THE CASE TO THE JURY EVEN UNDER THE ACT?

STATEMENT OF THE CASE

At the May 2006 term, the Grand Jury of York County indicted Appellant, Berry Scott Bolin, for murder (2006-GS-46-1595), assault and battery with intent to kill (ABIK) (2006-GS-46-1596), possession of a firearm during commission of a violent crime (2006-GS-46-1597); two charges of assault with intent to kill (AIK) (2006-GS-46-1598 & -1599), discharging a firearm into an occupied vehicle (2006-GS-46-1600), and possession of a pistol under the age of 21. The indictment for the latter charge was quashed by the trial court, which is the subject of a now-pending state's appeal.

Appellant was represented at the trial level by Leland Greeley, Esquire. Petitioner was tried from August 28th to September 6th, 2006 before the Honorable John C. Hayes and a jury. The jury convicted Appellant of the lesser included offense of voluntary manslaughter on -1595; the lesser included offense of assault and battery of a high and aggravated nature on -1596; the the lesser included offense of assault of a high and aggravated nature on -1598; the lesser included offense of assault of a high and aggravated nature on -1599; and as indicted on -1600. The jury acquitted Appellant of -1597. {R. 476-477}. Judge Hayes then sentenced Petitioner to concurrent sentences of thirty (30) years for voluntary manslaughter on -1595, and ten (10) years each on the remaining convictions. {R. 478}.

This appeal follows.

STATEMENT OF FACTS

It is undisputed that Appellant, Berry Scott Bolin, fired his pistol and killed the victim. The issues on appeal concern the application of the recent Protection of Persons and Property Act to Appellant's claim of defense of others.

A. The Incident

Just past midnight on Sunday, February 19th, 2006, a car pulled into the Clover police station where Officer Michael Trabue was unloading a prisoner. A man who proved to be Travis Falls ran up with a gunshot wound to his wrist. Falls told Trabue that his friend was shot, and Trabue observed a bloody scene in which the victim, Bobby Hovis, was slouched in the back seat with a gunshot wound to his head – barely breathing. Also in the car was Holly McCarter and Michael Hubbard. {R. 47-54}.

Bobby never regained consciousness. {R. 60-65; 165-166; 195-196; 212; 446}. He had a single gunshot wound to the back of his head. The bullet struck the front of his skull and ricocheted back through his brain. A projectile was recovered from Bobby's head, which appeared to be a .45 caliber bullet. {R. 447-448}.

Meanwhile, 911 calls were coming in reporting shots fired at a home on Lawrence Road, including one from Bradley Deal, whose family owned the house. Officers responded to the home, where they found four young men still there. Nine millimeter and .45 caliber casings were found in the yard, and near the culvert where the driveway met the road. A stain and broken shards of brown glass were in the driveway where it appeared a beer bottle has been busted. {R. 74-85; 236-239; 240; 251; 253}. The victims' car has been clearly struck by bullets, but no casings were found within the car.

{R. 230-231; 241-250}. A hair scrunchie was found in the roadway that McCarter later identified as hers. **{R. 254; 255}**. Although they searched, officers found no other bullet holes in the surrounding areas. **{R. 235-236; 252-253}**.

All of the 9mm casings found in the yard were fired by one weapon, and all of the .45 casings recovered were fired by Appellant's gun. **{R. 460}**.

B. Appellant's various accounts of the events

Based on information the officers received, Deputy Mike Ferrell was asked to go to Appellant's house to see if he was at the party. Appellant and his girlfriend Michelle arrived just as Ferrell was about to leave, and Appellant denied having been at Lawrence Road. Appellant agreed to go to the station and voluntarily drove himself there. **{R. 66-77; 86-89}**.

While there, Petitioner consented to a gunshot residue ("GSR") test as well as a search of his truck. After advising Appellant of his rights and securing a waiver, Sgt. Phillip Jamison of the York County Sheriff's Office took Appellant's first statement, which was completed at 2:37 a.m. **{R. 90-100}**. In it, Appellant handwritten:

Woke up at 11:30 p.m. at my house watch movies until 2:00 or 3:00 pm with my girlfriend took shower then went to aunt house, girlfriend went home to take shower I hung out in the back yard and biliding [sic] and shot at bird at around 4:30 to five o' clock then hung out a little longer drank alcohol till 8:30 or 9:00 o'clock then quit and at like 9:30 went to Bradley Deal's house, large commotion went outside to see if was serious or not saw it was serious, did not want to get minor in possession or anything like that left and drive to girlfriend's house then to my house.

{R. 17; 101}. As the night proceeded on, Detective Doug Patterson and other officers asked Appellant upstairs to further discuss the matter. **{R. 102-108; 114-120}**. Petitioner ultimately gave a second statement at about 4:30 a.m., which read as follows:

I was inside Brad's house and heard some yelling going on outside.

I was going outside and I heard someone yell to give me a gun. I went to my truck and got my gun. Someone ran up to me and said give me your fucking gun. All of a sudden someone shot a gun two times very near me. I don't know who fired those shots.

I looked toward the car that was at the end of the driveway. I saw a girl fall and someone said she had been shot. Then someone said no, they hit her. I then saw six or seven people run toward the car. I think it was all the people that had been in the house. I then heard two or three shots being fired near the car. At that time there were people fighting and hanging onto the car. After the shots were fired, the car started pulling away. That is when I started shooting at the car. I think that I shot about four times; all I know is that I shot all my bullets. At the same time I was shooting, there was someone else beside me shooting to [sic]. I am not sure if it was the same person who shot near me right after I got my gun.

After it was over, I was running around and upset. I got rid of my gun but I don't remember what I did with it. I think that I gave it to someone.

I lied about who I gave my gun to so that he would not get into trouble. I went to a party and gave it to my cousin, Michael Wallace. I told him what happened and told him to get rid of the gun.

{R. 18; 120-124}. The last paragraph was added because Appellant finally admitted – after being confronted with the knowledge of the police – that he had given his .45 Llama pistol to his cousin Mike Wallace and told him to get rid of it. Wallace ultimately brought to the pistol to the station and turned it over to police. **{R. 238-234; 109-120; 217-229; 270-271}**.

After the statement police took Appellant to the Lawrence Road location where he showed them he position when he fired the shots. Appellant said he was in the yard and not quite halfway from the road to the house. **{R. 121-122}**.

After Appellant admitted firing at the car he was arrested. Detective Russ Yeager was the case agent for this incident and he interviewed Appellant about 6 p.m. that afternoon, after Appellant again waived his rights. **{R. 125-133}**. Yeager's notes of that interview were as follows:

Berry Bolin states that he and his girlfriend Michelle, there is supposed to be Barfield, went to a party at Bradley Deal's house on Lawrence Road.

Berry Bolin states that he had been drinking that day and he had fired his .45 caliber pistol at a bird around three o' clock that afternoon.

Berry states when they got to the party there were several people there. While at the party a car pulled up and white male subject with long hair got out of the vehicle. This person walked down the driveway saying, I quote: " I heard y'all carry guns. If you've got a gun, shoot me. Get your gun." Berry Bolin states that as this person was saying this, he saw two girls fighting in the road. The guy with the long hair was fighting with someone in the driveway.

When Berry heard the person say get your gun, he got his gun out of his truck console. He stuck the gun in the front of his pants. Somebody ran up to him and said give me your God dam gun. Berry states he told this person no.

Berry states as people were fighting in the road and in the yard, he saw a person shoot a gun up in the air. Berry states he then saw a male subject hit Lori Miss with his feet. Lori got knocked back and fell to the ground. Berry stated that people were getting back in their car. After seeing Lori get knocked out he pulled his gun out and aimed at the side of the car and fired rounds at the vehicle.

As the car was pulling off, he ran toward the vehicle and aimed toward the trunk and fired more rounds at the car as it was pulling off. He states he fired all the rounds he had in his gun. He states he was about 30 feet from the vehicle when he was firing a weapon. He also states while he was firing his weapon he saw a person to his left firing a gun also. He states he could see a horizontal flash coming from the other person's gun. He states the other person was close to the corner of the driveway near the road. The car left.

And Berry got his girlfriend and they drove to meet his cousin Michael Wallace who was at the party near the Clover Police Department. Berry stated he told his cousin what had happened and gave the gun to his cousin. Berry and Michelle then drove up, Berry and Michelle then drove to Michelle's house and she changed clothes then they drove to Berry's Aunt's house on Flatstone Drive. A sheriff's deputy pulled up and asked them to come to Clover Police which they did. Barry states he told officers he gave his gun to his cousin. His cousin was contacted and brought the gun to the Clover Police Department and turned over to police.

{R. 26-27; 134-138}. Yeager then asked Appellant some specific questions, to which Appellant responded as follows:

Berry Bolin was asked by detectives if he saw anyone shooting at him. He replied no. Berry Bolin was asked if saw any other cars in the roadway other than the victim's car. He replied no.

Berry Bolin was asked if anyone from the victim's car approached him in a threatening manner or tried to fight with him. He replied no.

Berry Bolin was asked if he saw anyone from victim's vehicle get out of the car with a gun. He replied no.

Berry Bolin asked if saw anyone in the yard with a gun. He replied the only other person he saw with a gun was the person he saw with a gun was the person that was standing beside him and that person was shooting up in the air.

Berry Bolin was asked why he shot at the car if the car was leaving. He replied I just lost it when Lori got hit.

Berry Bolin replied he used to date Lori and he doesn't even really like her now. He didn't know why he shot at the car.

Berry Bolin was asked if he knew the people in the car. He replied he did not know who was in the car.

Berry Bolin was asked if he was aiming at the car and he was trying to hit the car. He replied yes.

Berry Bolin was asked if he saw the other people standing beside them shoot at the car as the car was leaving. He replied yes.

{R. 26-27; 138-139}.

C. Appellant's codefendant Lee Owens

Meanwhile, based on information received Deputy Jerry Hoffman made contact with Appellant's codefendant Lee Owens, who was going to be tried with Appellant but pled guilty to various charges right before trial. Owens also went with Hoffman to the Lawrence

Road location and showed where he fired his gun, and officers found a grouping of two 9mm casings and another grouping of three 9mm casings in the yard. Owens told officers he threw his gun off a boat landing, but officers were unsuccessful in finding the gun in the lake. {R. 141-151}.

D. The people in the car

Officers set about interviewing the people in the victim's car and at the party. Not surprisingly, there were discrepancies in the various versions as to what happened.

Michael Hubbard was a friend of Bobby's who had just met Holly McCarter and Travis Falls. Michael was hanging with the group when Bobby and Travis returned from a beer run, stating that they had been talking to the now-deceased Jeff Buck who told them there were some guys who were going to come by and shoot the house up. Apparently, an arrangement was made with Buck whereby Bobby and his group would drive by the house on Lawrence Road, blow the horn, and people from Lawrence Road who wanted to fight would follow them to the "spot" – a field where young people liked to hang out. {R. 152-155}.

Michael, Holly, Bobby, and Travis got in the car and went out looking for reinforcements. They were turned down a couple of times, but eventually they picked up Travis's drunken cousin Kenny Norris at a bar. The group had no guns, but did have a stick. {R. 155-160}.

Once arriving at Lawrence Road, they blew the horn, drove by, turned around, and parked prior to the driveway. Bobby said "let's do it". Holly got out and was fighting Lori Moss in the street; Travis, Bobby, and Kenny got out and were proceeding up the driveway.

Michael did not get out of the car and saw someone in the yard had a gun. He screamed "they got guns; let's go", and heard a shot. Michael ducked down. {R. 160-163}.

Michael then heard as if several people were banging on or hitting the car. He saw Travis push Lori off of Holly, and Holly jumped in the driver's seat while Bobby came running. The group took off down the road in the car and Michael heard shots and bullets ricocheting off the car. The back window of the car shattered. Travis said he was hit and Michael turned around to see Bobby "crouched" over in the back seat. Holly became hysterical when she saw Bobby was mortally wounded and eventually they had to pull over so Michael could drive to the police station. {R. 163-169}.

Kenny Norris admitted he had been at a bar drinking since 2 p.m. when Travis arrived and asked him if he needed a ride home. Kenny stated he did not know fully what was going to happen but Travis did say they were going to a party where there might be trouble. {R. 170-173}.

Kenny also testified as to the group blowing the horn, driving past the residence, turning around, and parking at the driveway. He admitted walking up the driveway, when the five to eight people in the yard ran down towards him. He saw Lee Owens fire a gun two times in the air, and a girl shoved him and hit him with an umbrella, so Kenny threw the beer bottle. Brad Moore came up to Kenny and the two shoved and punched each other, but then Kenny saw a girl lying in the street. He did not know if she was shot and ran down to see – at which point he heard more shots. Travis jumped in their car and it took off, leaving Kenny behind. Kenny saw someone grab the girl and jump in the ditch, and Kenny jumped the fence and ran. He testified someone ran after the car shooting, but said no

gunshots were coming from the car. Kenny ran back to the bar. {R. 174-181}.

Holly McCarter, the girlfriend of Travis Falls, was the next to testify. She also stated Jeff Buck had called inviting them to Lawrence to fight, and that the group was then supposed to go to the "spot" where the fight would happen. Buck gave them directions to get to the house on Lawrence, and along the way the group picked up Kenny. {R. 184-187}.

Like the others, she stated they blew the horn, drove past the house, turned around, came back, and stopped. Ten or so people were in the yard. Kenny – apparently not knowing the arrangement about going to the "spot" – jumped out and Travis went after him. The next thing Holly knew Lori was in her face and they were fighting. Travis broke it apart, and Holly got in the car. Lori then came at Travis and he pushed her down. {R. 187-191}.

Holly then heard shots and Bobby tried to drive away. He could not get the car in drive so he got out and ran to the back seat while Holly climbed over in the driver's seat. Travis yelled "wait on me" and jumped in the car, and they took off. As she drove away Holly heard gunfire. Holly was clear none of her group had guns and no gunfire was coming from her car. When she realized Bobby had been mortally wounded, she panicked, and Mike Hubbard had to drive to the Clover police station. {R. 191-198}.

Travis also testified similarly about the incident, recounting the traded phone calls with Jeff Buck and the invitation from Buck to come fight him and Brad and Rick Deal. Travis admitted he had as a condition of bond a prohibition against contact with Brad Deal from an earlier fight, but stated he was not thinking about that order when the invitation to rumble was extended. Travis also described their unsuccessful attempts to recruit some

help until they picked up Kenny. The group had no guns, but did have a stick. {R. 199-203}.

Travis testified about blowing the horn, driving past, turning around, and stopping short of the driveway. There were about ten people in the yard. Kenny jumped out, and Travis got out too yelling at Kenny not to go up there. Lori then attacked Holly, and Travis tried to break it up. Lori was decidedly winning the fight when Travis pushed her back, and then he heard a gunshot from the yard. The group – with the exception of Kenny – piled in the car, and they heard more gunshots as the back glass of the car shattered. The gunfire came from directly behind Travis. He realized he was hit, and tapped Bobby on the shoulder, only to see Bobby's half closed eyes. {R. 203-212}.

Notably, Travis stated he never went any further than the trunk of the car and did not go in the yard, and stated Kenny only went about 10-15 feet in the yard. No one approached the house. {R. 208; 213}.

E. The people at the party

A number of people at the party testified for the State as well, although in some respects their story differed somewhat.

Robert Beverly did not really know many of the people at the party except Rocky Breakfield, who invited him. Robert and his girlfriend went, and everyone was drinking some red alcoholic beverage made in a cooler. Robert bought some Xanax from Brad Deal and took it. As the evening went on, Robert heard Rick Deal "fussing" with Travis on cell phones. {R. 256-259}.

When the car pulled up, people in the house – including Brad – went outside like

they were ready to fight. The next thing Robert knew, Lee *Walden* (not Lee *Owens*) was screaming they had knocked Lori down and Walden went out to pick her up. Robert turned around to go get his girlfriend when Lee *Owens* said "who are you" and fired two shots and Robert. Robert held out his hands and passed by them, but when he looked back he saw Appellant and Lee *Owens* firing at the car. Appellant was about a car length up the driveway, and the car was in the road. Robert got his girlfriend and left. Robert said in his statement to police that someone shot from the cars, but he admitted at trial he did not see any such thing and the only shooters he saw were Appellant and Lee *Owens*. {R. 259-269; 271-280}.

Tayna Humphries was the girlfriend of Brad Moore and went over to the party that night to see her friend Demi who had just gotten out of prison. Brad Deal spent a lot of time on the phone and at one point played a voice mail for everyone. Tanya was standing in the driveway arguing with Moore when the victims' car came past. Someone yelled "that's your ass", and the car turned around. Moore "beeped" the others inside the house and told them the people were coming back. {R. 282-287}.

The car was parked in the road, but Kenny got out, threw a beer bottle at Tanya, and approached Moore. Lee *Owens* and Appellant came to the end of the driveway, and Lori and Holly engaged in what Tanya said was a "mutual" fight. However, Travis punched Lori, and Lee *Walden* ran out to pick her up. Tanya stated that Lee *Owens* and Appellant were standing on either side of her at the end of the driveway and she heard them open fire. When the shooting started, everyone scattered as the car kept going up the road. {R. 287-295}. Tanya stated there was also a second car and she thought she saw a flash of

light from it. However, she noted that as Appellant was firing, Moore put his hand on the gun and pushed it down, telling Appellant to stop shooting. {R. 295-301}.

Brad Moore testified next. He knew Appellant, Lee Owens, and Brad Deal, but also went to the party to see Demi. Everyone was standing around drinking beers and mixed drinks. On a few occasions Moore saw Brad Deal on the cell phone. {R. 302-306}. Moore stated he was outside arguing with Tanya for not answering his phone call when a car came by slowly. Someone in the car yelled "that's your ass", and then it turned around, came back and stopped where it was blocking the driveway. Moore then beeped his cousin Lee Walden and told him there was a car load of people there cussing him. {R. 307-309}.

Kenny then came out of the car and ran towards Moore, cussing him. They just "talked junk" to one another but never threw punches. Travis was standing on the other side of the car and never came to whether Moore was. Moore then heard someone say Lori had been hit by Travis, and Lee went to get her. At that point gunshots went off. {R. 309-311}.

Lee Owens fired the first shot in the air, and everyone scattered. Shots continued to ring out as the car drove away. Moore did not recall any shots coming from the car, and stated the only people he saw with guns were Appellant and Lee Owens. Moore saw another car parked out there but it left before the victims' car. Moore noted that he reached over and pushed Appellant's gun down after the shooting. Brad admitted that he was not scared of Kenny. {R. 311-320; 321}.

Caroline Lee Killian was the next witness. She and her younger sisters Lori and

Kristin Moss rode over after receiving a phone call for Rick Deal inviting them. Jeff Buck was there briefly, but was telling Brad Deal that he "was going to call so-and-so you know about something that Bradley had got jumped on". Everyone was drinking "Alabama Slammers", a powerful mixed drink, and Caroline bought some Xanax from Buck. {R. 321-327}. Later, Caroline stated Jeff Buck was trying to "get something going" between the two camps. However, she also stated Brad Deal did not want any part of it. {R. 332-334}.

Eventually, she heard some yelling "they are here", so she ran outside, and saw Lori fall to the ground in the road. She heard shots before Lori was hit, and someone went and picked Lori out of the road. She heard 20 to 30 shots and dropped to the ground, but was not looking and could not tell from where any of it was coming. {R. 321-330}. Caroline also stated Kenny threw a beer bottle at Tanya, but then Kenny realized who they were and apologized to Caroline, saying he did not mean it before running off the other way. {R. 321-330}.

On cross, Carolina admitted in her statement to police after the incident saying that the people in the car shot out the window at them.

Rocky Breakfield is Appellant's cousin and invited him to the party, after Rocky had been invited by Lee Walden. When Rocky, Appellant, and Appellant's girlfriend arrived, a bunch of people came running out of the house as if they were expecting someone else. When he went inside, Caroline played Rocky a tape of someone threatening to come over and fight. {R. 335-340}.

Eventually, people went running out of the house, saying "they're here". Rocky eventually went out there, in time to see Lee Owens, standing in front of Appellant's truck,

fire two shots in the air. Rocky could not see what was going on down by the car until he saw Lee Owens fire three more shots at the car as it was pulling away. However, Rocky claimed he did not see Berry shoot a gun. Rocky also saw another car leaving when he first came out the door but thought that was just someone from the party. {Tr. 854-60}.

Lee Lowder is a friend of the Deals who came to the party. He also testified as to everyone drinking "Alabama Slammers" in the kitchen, and stated he was told about the phone calls between the two camps. {R. 347-352}.

Lowder was in the kitchen with Rick Deal when he heard gunshots. He waited until they stopped and then looked outside to see a car pulling away. Brad Deal then called police and they arrived shortly. {R. 352-354}.

Lee Walden was someone who knew people on both sides of this incident but had come over at the invitation of the Deals. He also described everyone drinking beer and Alabama Slammers. Jeff Buck arrived and was saying Travis had called saying he wanted to fight. {R. 352-354}.

Walden was in the house when the car arrived, and he ran outside where he saw the car parked on the side of the road and in the ditch a little bit. He ran to Lori, who was "laid out" in the street, and drug her in a ditch. As he did that he heard gunshots. Walden saw Travis running to get in the car and Kenny running down the street, but did not see anyone with a gun in his hand or shooting – other than the fact that Lee Owens had shown him a pistol earlier that night. Walden said the car was pulling off as the shots were fired. Other people left in their cars, but Walden went inside, opened a beer, and waited for the police. {R. 355-360}.

Lori Moss testified next. She is Appellant's ex-girlfriend, and of course knew Lee Owens and the Deals. As her sister had testified, the three young women went over to the party, where people were drinking. She heard about a phone call in which Travis and Bobby had stated they were on the way to jump on Brad Deal "and everybody". {R. 374-379}.

Lori went outside when she heard the car was there, and saw it parked in the road. She saw Holly and the two of them willingly fought each other. Lori admitted she was winning the fight when Travis hit her. {R. 380-382}.

Lori heard the first gunshot when Lee Owens fired in the air, so she shut her eyes as she had been knocked down and could hardly see. Demi and Lee Walden picked her up and took her to Caroline's car, and as they did so, Lori heard a number of shots. She did see Appellant holding a gun down by his side. She thought the victims' car had already left. Lori went home and did not need medical treatment. {R. 382-392}.

On cross, Lori admitted she told police in her statement that she saw a second vehicle—a SUV—pull by and saw shots fired from that vehicle. {R. 394}. On redirect, she admitted she was not sure if there was such a vehicle, and admitted she could not recall seeing a second vehicle. {R. 395-396}.

Bradley Deal was the next to testify. He noted that at the time he was helping to renovate the house, and there was nothing in there but a piano. No one was living there. He also admitted there was beer and "Alabama Slammers", but said he only had one beer. He stated they decided to have a get-together but then a number of people showed up that they normally did not see. About 11:00 p.m., Jeff Buck called and said Travis and Bobby

heard Brad was having a party and they were going to come over and kill everyone and put them in the hospital. However, Brad also admitted earlier that afternoon hollering "F you" into Bobby's voice mail, and stated he and Bobby had problems since high school. He noted that he had been jumped by Travis Falls and some others during a previous incident. **{R. 396-409}.**

Brad said he was inside and heard yelling so he went out to see. He saw two guys exiting a car that was blocking the driveway, and one of them had his arms in the air saying "let's do this". The guy had nothing in his hands. The other guy went over and hit a girl who was in the roadway, and after she fell down, yet another guy went and picked her up. **{R. 409-413}.**

Brad claimed that the guy who hit the car got back in the car and it started to move, and then an arm stuck out of the window and Brad saw three muzzle flashes. They seemed to be pointing up in the air. Brad then went inside to call 911, and he heard other gunshots. **{R. 413-420; 422-423}.**

Brad admitted in his statement he said that as the car drove away, he heard four to six more shots, and also that he never said in his statement anything about three muzzle flashes emanating from the car. **{R. 424-425}.** On cross, Brad stated that Appellant was at the house with his permission, and his family owns the property. **{R. 425-428}.**

Kristin Moss testified about going to the party, about people drinking, and about riding to the store for cigarettes with Tanya. She also heard the conversation about people coming to the house to fight. When she and Tanya arrived back at the house, Tanya and Moore got into an argument, so Kristin walked inside. **{R. 429-437}.**

As she was doing so, Lee Walden was on the phone and pointing at the road saying "here they come", and everyone ran outside. Kristin said four or five people jumped out of the car and everyone was fighting at the road. She saw Travis hit her sister and as she yelled for someone to get Lori gunshots went off. Kristin climbed underneath her car. Kristin admitted seeing Lee Owens and Appellant out there with guns, and she saw Lee shoot his gun. She saw Appellant with his gun after it was over, just holding it by his side. {R. 437-445}.

ARGUMENT

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN REFUSING REQUESTED INSTRUCTIONS BASED IN THE PROTECTION OF PERSONS AND PROPERTY ACT, WHERE THE ACT IS PROSPECTIVE ONLY; THE CHARGES AS REQUESTED WERE INCOMPLETE AND INCORRECT; AND THE ACT WAS INAPPLICABLE UNDER THE UNDISPUTED FACTS OF THIS CASE.

Appellant first contends that the trial court erred in refusing to charge two presumptions he asserts are necessary after the passage of the Protection of Person and Property Act ("the Act"), S.C. Code Ann. § 16-11-410, *et. seq.* However, the Act is prospective only and inapplicable to Appellant's case. Even if the Act was retroactive, there was no reversible error in refusing the requested instructions since they were incorrect or incomplete expressions of the law. Further, the Act was inapplicable to the facts of this case, and even if it was, any error was harmless.

A. The Act

Aside from some intent and definitional provisions, the substance of the Act is in S.C. Code Ann. § 16-11-440 and -450 (Supp. 2007). Subsection 16-11-440(A) first provides for presumptions that one has a reasonable fear of imminent peril if: (1) another person is unlawfully and forcefully entering "a dwelling, residence, or occupied vehicle", or is attempting to remove someone against his will from "a dwelling, residence, or occupied vehicle"; or (2) if the person using deadly force knows or has reason to believe an unlawful and forcible entry or act is occurring or has occurred.

Subsection -440(B) has exclusions for the presumption in subsection (A), including where the person who uses deadly force is engaged in an unlawful activity or is using the dwelling, residence, or occupied vehicle for an unlawful activity.

Subsection -440(C) seems to have a significant effect on the duty to retreat in South Carolina. It provides that one not engaged in unlawful activity "who is attacked in a place where he has a right to be, including, but not limited to, his place of business", has no duty to retreat. Such a person may use deadly force if he reasonably believes it to be necessary to prevent death or great bodily injury to himself "or another person", or to prevent the commission of a violent crime.

Subsection -440(D) provides that a person who unlawfully and forcefully attempts to enter another's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or a violent crime.

Subsection -440(E) provides that a person who forcefully enters or attempts to enter a dwelling, residence, or occupied vehicle in violation of an order of protection, restraining order, or bond condition is presumed to be doing so with the intent to commit an unlawful act.

Subsection (A) of S.C. Code Ann. § 16-11-450 provides that someone who uses deadly force pursuant to the article is immune from prosecution and civil action, with one exclusion relating to law enforcement officers.

Subsection (B) of -450 precludes a law enforcement agency from arresting a person who used deadly force unless probable cause exists that the deadly force used was unlawful.

Finally, subsection (C) of -450 provides for the awarding of fees, costs, expenses, and losses if the court finds a civil defendant was immune from prosecution under subsection (A).

B. Events at trial

During a pre-trial hearing, Appellant moved to quash the indictments based on the Act, asserting that the statute provides immunity from prosecution and that a hearing should be held to determine if the prosecution should continue. He also asked for a restraining order against the State to prohibit the prosecution, based on the fact that Travis had a bond condition to stay away from Brad Deal and the expressed purpose of the victims was to go to the house to fight. The defense admitted the incident did not take place in the dwelling, but asserted that it was sufficient that it took place at the end of the driveway after the occupants came outside upon seeing the victims' car. {R. 28-30}.

The trial court expressed skepticism that the end of the driveway qualified as a "dwelling". The court ultimately denied the motion for the time being, noting that it would consider subsequent motions, but it did not believe the Legislature intended to provide immunity to someone firing at a car racing down the street. {R. 30-35}. After argument on the issue by Appellant's codefendant Lee Owens (who decided to plead before trial began), the court noted it would give the defense the opportunity to make its case outside the presence of the jury as to whether it fell within the immunity provision of the statute. {R. 35-42}. The State asserted the Act was prospective not retroactive and thus inapplicable since it was passed after the commission of the crime in this case. It also asserted the granting of immunity for criminal matters was unconstitutional since prosecutorial power resided in the hands of the Attorney General. Finally, the state argued the statute only applied to the dwelling itself and the people who live there. The court noted it would take up the issue later. {R. 43-46}.

At the conclusion of the State's evidence, and after making the "standard" directed verdict motion, the defense contended that a directed verdict motion should be granted based on S.C. Code Ann. § 16-11-440(C) of the Act. The defense argued that there had been no evidence Appellant was acting unlawfully, and since Appellant was where he had a right to be, a directed verdict should be granted not only based on Appellant's right to defend himself but also on the defense of others. {R. 462-464}.

The trial court denied the motion, finding first that the Act was prospective not retroactive. The court also reasoned the Act was to protect habitation and Appellant was not in the house, in a vehicle, or in his business. Finally, the court noted that the facts of the case did not fall within the purview of the Act, and while he was not deciding the burden of proof, "the facts as presented including [Appellant's] statement . . . do not place him under the protection of the Act". {R. 464-465}.

After the defense rested, there were no further motions. An in-chambers charge conference was had, after which the defense objected to the court's refusal to charge its requests regarding presumptions in the Act. {R. 16; 466-468}.

The judge gave a complete but "normal" self-defense and defense of others charge. {R. 469-474}. The defense renewed its request for its proposed instructions under the Act. {R. 475}.

C. The trial court committed no reversible error in refusing the charges proposed by Appellant under the Act since the Act's effective date was after the commission of the crime in this case.

As an initial matter, the trial court was correct that the Act is prospective only and does not apply to Appellant's case.

Generally, statutory enactments are presumed to be prospective rather than retroactive, unless the statute is remedial or procedural – such as a statute of limitations or a statute allowing change of venue. See Jenkins v. Meares, 302 S.C. 142, 394 S.E.2d 317 (1990) (mentioning the statute of limitations as such a procedural rule, and holding Tort Reform Act was not retroactive); State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992) (new statute allowing change of venue was procedural and retroactive), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). However, those are rules of statutory construction and the paramount consideration is the intent of the Legislature. Meares, *supra* (finding dispositive the act's express statement that it would only apply to actions arising or accruing after the effective date of the act).

Here, not only is this statute clearly substantive in its expressed intent to codify and expand the castle doctrine, but the General Assembly in the Act's savings clause clearly expressed the intent that it not be applied to criminal and civil actions, and rights, liabilities or duties, in existence prior to the Act's effective date. Section 4 of 2006 South Carolina Laws Act 379 reads as follows:

The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of the act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

(Emphasis added). The General Assembly could not have been clearer. And, indeed, this makes sense, as one is presumed to know the law when one acts. Appellant could not

have been relying on the Act when he opened fire as it did not exist yet. See generally Morehead v. Doe, 324 S.C. 559, 479 S.E.2d 817 (Ct. App. 1996) (person presumed to know the law).

Appellant's crimes were committed on February 18th, 2006. He was indicted in May of 2006. {R. 5}. The Act took effect on June 9th, 2006. It was inapplicable to Appellant's then pending criminal prosecution for a crime that took place before the Act's effective date. Thus, Appellant's jury requests did not reflect the proper law of South Carolina and the judge was not in error for refusing them. Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 336 S.E.2d 502 (Ct. App. 1985) (where charge, if given in exact language of request, would be incorrect, it is not error to refuse it).

This analysis is sufficient to reject both of Appellant's issues on appeal.

D. Even if the Act was retroactive, the trial court did not commit reversible error in refusing the instructions as they were either incomplete or incorrect statements of the law.

Of course, this Court can affirm for any ground present in the record. Rule 220(c), SCACR. There was no reversible error from the denial of both of the requested instructions in Defense Request to Charge Number 12, as they were both incomplete or incorrect statements of the law.

Appellant's first requested instruction was as follows:

I charge you that if you can find that the one or more aggressors was under a bond restriction as referenced in Section 16-11-440 (E) of the Code of Laws of South Carolina, 1976, as amended, then you are to accept the legal presumption, as provided for in the noted statute, and concluded that the aggressor's intended to commit an unlawful act.

{R. 16}.

This request is erroneous in several respects. It refers to "aggressors" – a clearly loaded term that in and of itself seems to be a charge on the facts – but nowhere in the subsection or indeed the statute is such a term mentioned. Instead, subsection (E) refers to a "a person who by force enters or attempts to enter a dwelling, residence, or occupied vehicle". Appellant's proposed charge makes no reference whatsoever to the express factual requirements of "by force", "entry or attempt to enter", or "dwelling, residence, or occupied vehicle". Since Appellant's first instruction is incomplete and incorrect, and uses a loaded term not found in or defined by the statute, it was not reversible error to refuse it. See Powers v. Temple, 250 S.C. 149, 156 S.E.2d 759 (1967) (request to charge that was incomplete statement of law should not have been given); Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 336 S.E.2d 502 (Ct. App. 1985) (where charge, if given in exact language of request, would be incorrect, it is not error to refuse it).

Petitioner's second requested instruction was equally as flawed. It reads as follows:

Further, if the aggressor is presumed to be committing an unlawful act, then, pursuant to Section 16-11-440(A), you are to presume the defendant was acting with a reasonable fear of imminent peril of death or great bodily injury as to himself or another.

{R. 16}.

Again, this request uses the term "aggressor" which is impermissible for the reasons previously expressed. However, subsection (A) also requires something different than just the intent to commit an unlawful act for the presumption to apply– it requires that the person be in the process of or already having committed an unlawful *and forceful* entry. Appellant's instruction makes no mention of the forceful requirement. Moreover, the unlawful and forceful entry must be to a "dwelling, residence, or occupied vehicle".

Alternatively, the statutory subsection could be satisfied if the person was attempting to unlawfully and forcefully remove a person against his will from a dwelling, residence, or occupied vehicle. Finally, the subsection could be satisfied if the person who uses deadly force knew or had reason to believe an unlawful *and forceful* entry had occurred or was occurring.

The use of a loaded and undefined term "aggressor", the reference to "intent to commit an unlawful act" instead of "an unlawful *and forceful* entry", and the failure to mention "dwelling, residence, or occupied vehicle", all make the instruction an incomplete and incorrect statement of law. As such, there was no error in the refusal to charge it. Powers, supra; Floyd, supra.

E. Even if the Act were retroactive, the facts of this case do not trigger application of the Act.

Moreover, the facts of this case simply do not trigger the Act. As noted before, both S.C. Code Ann. §§ 16-11-440 (A) and (E) require an unlawful and forceful entry into a "dwelling, residence, or occupied vehicle". It is of course true that the common law of self defense includes the curtilage of a home when addressing where one has no duty to retreat. See, e.g. State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998). However, we are dealing here not with the common law and its judicial interpretation, but a specific and express statutory definition. "Dwelling" is defined by the Act as:

[A] building or conveyance or any kind, including an attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging there at night.

S.C. Code Ann. § 16-11-430(1) (Supp. 2007). Tellingly, this is distinguishable from the

statutory definition of "dwelling" for purposes of burglary, which includes appurtenant structures 200 yards from the main house. See S.C. Code Ann. § 16-11-10 (Rev. 2003).

In the present case, there was no evidence that the victims at any time forcibly entered or attempted to enter the dwelling. Indeed, as seen from the recitation in the Statement of Facts, all parties agreed none of the victims got any further than a few feet up the driveway. Perhaps had the people at the party remained inside and the victims had attempted to forcibly gain entry, a different issue would be presented, but the fact remains that the people inside all poured out to meet the victims, and the confrontation occurred at or near the roadway.

Indeed, there is no dispute that Appellant's bullets struck people from behind in a car as it was leaving – unquestionably there was no unlawful and forcible entry or attempt at entry at the moment Appellant used deadly force. Appellant himself stated that he shot at the car while it was leaving, because he had just "lost it" when Lori was hit. {R.134-139}. While it is true that Brad Deal testified as to three muzzle flashes in the air from the car, and others mentioned a mysterious second car from which a flash was seen, there was no evidence whatsoever that Appellant saw those alleged flashes and that is what put him in a belief of imminent peril to himself or others. The only evidence on the subject came from Appellant's statement that he had just lost it and was shooting at people who were already trying to escape the scene. This is insufficient to trigger the statute and indeed, insufficient for self-defense in general. State v. Lee, 293 S.C. 536, 362 S.E.2d 24 (1987) (rejecting charge of self defense for defendant who fired warning shots at a victim sitting in his truck based solely on belief that victim carried a gun under his front seat, where the victim was

simply sitting in the truck with two innocent passengers and the door closed, and the only reasonable inference was that the victim was preparing to leave); Tate v. State, 308 S.C. 163, 417 S.E.2d 553 (1992) (noting that defendant clearly was not in imminent danger when she shot a man in back as he relieved himself). Cf. State v. Slater, 360 S.C. 487, 602 S.E.2d 90 (2004) (once defendant turned and ran away from attacker, he restored his right to self defense even if he was at fault in bringing on the difficulty).¹

The Act is inapplicable and the issue should be denied.²

II. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN REFUSING TO GRANT A DIRECTED VERDICT BASED ON THE ACT, WHERE THE ACT IS PROSPECTIVE ONLY; THE ISSUE AS ARGUED IS NOT PRESERVED; THE COURT APPLIED THE CORRECT STANDARD; AND THERE WAS AMPLE EVIDENCE TO SEND THE CASE TO THE JURY EVEN UNDER THE ACT.

Appellant next contends that the judge erred in refusing to grant a directed verdict based on the fact that the Act grants one immunity from prosecution if he falls under its provisions. However, as argued earlier, the Act is prospective only. Next, any contention that the judge should apply a different standard to enforce the immunity provision of the Act is not preserved. Finally, the judge applied the correct standard for a directed verdict, and there was ample evidence to send the case to the jury even if the Act is applied.

¹ For this reason, any difference between the charge as given and the requested charge were harmless.

² Indeed, Appellant is underage and admitted in his statement drinking earlier in the day and worrying about being caught as a minor in possession {R. 101; 135}. As shown in the Statement of Facts, there was drinking and drug use at the party. This arguably precluded application of the Act because the person using deadly force was engaged in an unlawful activity. See S.C. Code Ann. § 16-11-440(B)(3) (Supp. 2007). Moreover, while the trial court quashed the indictment for person under 21 in possession of a pistol, this decision is presently the subject of a pending State's appeal. Indisputably Appellant would fall under that statute if it were upheld. Were that statute upheld, it arguably would also trigger -440(B)(3).

A. Events at trial

The relevant events have already been set forth in the discussion for the preceding issue and are incorporated here.

B. The trial court committed no reversible error in refusing the charges proposed by Appellant under the Act since the Act's effective date was after the commission of the crime in this case.

As argued in the preceding issue and incorporated here, the trial court was correct that the Act is prospective only and does not apply to Appellant's case. Thus, the trial court could not have erred in failing to grant a directed verdict based on the Act.

C. The issue is not preserved, as it is not the one presented to the trial court.

The issue presently argued is not preserved as it was not the one presented to the trial court. It is true that prior to trial, Appellant moved to quash the indictment or for a "restraining order" against the prosecution based on his assertion that the Act applied. {R. 28-29}. During this discussion Appellant conceded that subsection (C) of S.C. Code Ann. § 16-11-440 (Supp. 2007) "looks like a version of self defense which would be for the jury". {R. 32}. Later, counsel for the co-defendant – NOT Appellant – argued that under the Act a defendant was entitled to two "shots" – one with the judge and one with the jury. {R. 42}. The trial court denied the motion, with the caveat that it would be glad to consider any further motions as trial progressed. {R. 34; 42; 46}.

However, the only further motion (other than the jury requests) was a motion for directed verdict based in subsection (C), with an argument that the state had not presented any evidence Appellant was behaving unlawfully, that Appellant had a right to be where he was, and thus he had a right to defend himself or others. {R. 463-464}. There was no

argument made to the trial court, as Appellant makes now, that the Court should change the standard for review of a directed verdict and grant it "if there is credible evidence the Act applies, as in this case, notwithstanding any evidence the State may present that does not negate the applicability of the Act". {Brief of Appellant p. 17}.

Since Appellant did not make the same argument at trial that he makes now, the issue is not preserved. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal."); State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal.").³

D. A motion for directed verdict was properly denied even if the Act is considered.

Even taking the Act into consideration, the judge properly denied the motion for directed verdict. When reviewing the denial of a directed verdict, the evidence must be viewed in the light most favorable to the state. If there is any direct evidence or any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt can be fairly and logically deduced, then the case was properly submitted to the jury. State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000); State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999). The trial judge is concerned with the existence of evidence, not its weight. State v. Williams, 303 S.C. 274, 400 S.E.2d 131

³ Moreover, it does not appear Appellant renewed his motion for a directed verdict at the close of the defense case, which would also preclude the issue from being preserved. {R. 466-468}. State v. Harry, 321 S.C. 273, 277, 468 S.E.2d 76, 79 (Ct.App.1996) ("A motion for a directed verdict made at the close of the [state's] case is not sufficient to preserve error unless renewed at the close of all the evidence, because once the defense has come forward with its proof, the propriety of a directed verdict can only be tested in terms of all the evidence.").

(1991).

Here, subsection (C) of S.C. Code Ann. § 16-11-440 (Supp. 2007) seems wholly directed at modifying but one of the four elements of self defense – the duty to retreat. Even accepting no duty to retreat, there was still evidence in play as to whether Appellant was at fault in bringing on the difficulty by being the first to use a firearm, and whether he had an actual and reasonable belief of imminent harm (since, as argued in subsection I(E), *supra*, subsections (A) and (E) did not apply to the facts of this case). Given that Appellant himself described shooting at a car as it fled the scene, and admitted he saw none of the victims with a gun or firing a gun, coupled with the testimony of the victims outlined in the Statement of Facts that they had no weapon and attempted to leave the scene the moment Lee Owens fired his gun in the air, there was certainly evidence from which a jury could conclude that self-defense or defense of others had been disproven.

With regard to Appellant's contention that the judge should make an independent determination under the Act whether it preclude prosecution – complete, obviously, with necessary factual findings and credibility determinations – this arguably would be unconstitutional under the South Carolina Constitution's grant to the Executive Branch of the "power to decide when and how to prosecute a case". State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994) (discussing S.C. Const. Art. V § 24, and noting the "unfettered discretion to prosecute solely in the prosecutor's hands"). It is true that pre-trial motions are often heard when someone claims immunity based on some sort of contract with or action of the prosecutor; however, this is consistent with the constitutional power to prosecute as it is based in actions taken by the prosecutor to aid investigation and prosecution, or it is to enforce *constitutional* limits on prosecution such as the right against

self-incrimination or the double jeopardy clause. See State v. Morriss, No. 26418 (S.C. Sup. Ct. January 14th, 2008); State v. Brewer, 351 S.C. 226, 569 S.E.2d 340 (2002) (noting that the purpose of immunity provisions is to aid the prosecution in investigating crimes and bringing charges); Thrift, *supra*. Thus, even if the Act were applicable to this case, the judge would have to assess its presumptions in the context of a normal directed verdict motion – which, of course, requires viewing the evidence in the light most favorable to the State. Moreover, even if the judge were to make an independent determination, it is clear here that the trial court in this case did not believe the evidence required it to dismiss the charges pursuant to the Act. {R. 464-465}.

The issue should be denied.

CONCLUSION

For the foregoing reasons, the convictions and sentences should be affirmed.

Respectfully submitted,

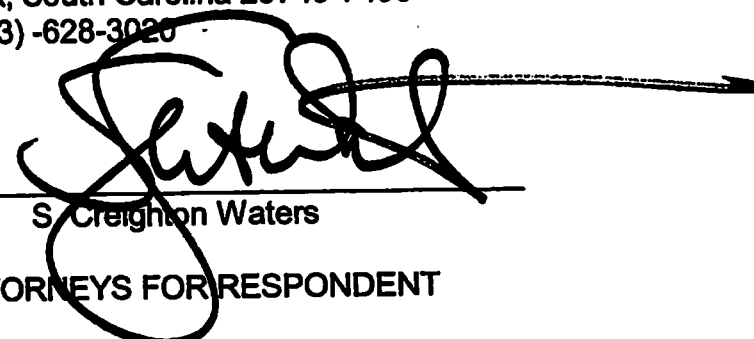
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April 16, 2008

**IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

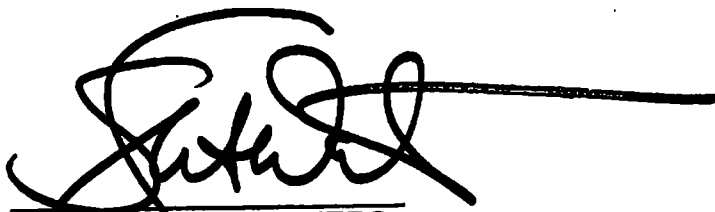
v.

BERRY SCOTT BOLIN,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.



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STATE OF SOUTH CAROLINA,

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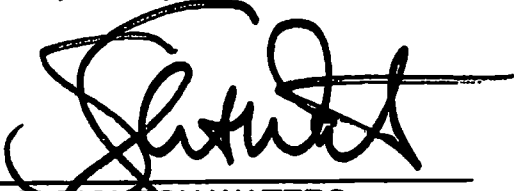
PROOF OF SERVICE

I, S. Creighton Waters, Counsel for Appellant, certify that I have this date served the *Final Brief of Respondent*, dated April 16, 2008, on Respondent by depositing three copies of the same in the United States mail, first class postage prepaid, addressed to his attorney of record:

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I further certify that I have served all parties required by Rule to be served.

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IN THE SUPREME COURT**

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge

THE STATE,

Appellant,

v.

BERRY SCOTT BOLIN,

Respondent.

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STATEMENT OF THE ISSUE ON APPEAL

DID THE TRIAL COURT ERR IN QUASHING THE INDICTMENT FOR POSSESSION OF A HANDGUN WHILE UNDER THE AGE OF 21, BASED ON THE STATE CONSTITUTIONAL PROVISION SETTING THE AGE OF MAJORITY AT 18, WHERE THE CONSTITUTIONAL PROVISION ITSELF EXPRESSLY CONTEMPLATES FURTHER REGULATION OF YOUNG ADULTS, AND WHERE IN ANY EVENT NO LEGAL RIGHT AS TO POSSESSION OF HANDGUNS WAS INFRINGED BY THIS REASONABLE EXERCISE OF THE STATE'S POLICE POWER?

STATEMENT OF THE CASE

Respondent, Berry Scott Bolin, was indicted in May 2006 by the York County Grand Jury for Murder, Assault and Battery with Intent to Kill, Possession of a Firearm During Commission of a Violent Offense, Assault with Intent to Kill, Discharging a Firearm into an Occupied Vehicle, and Possession of a Pistol by Person under 21 Years of Age (2006-GS-46-1595 to -1601).

Petitioner was represented at the trial level by Leland Greeley, Esquire. On August 17th, 2006, Greeley filed a Motion to Quash Indictments and Cease Prosecution Pursuant to the "Protection of Persons and Property Act", as well as a Motion to Quash Indictment Due to "Unconstitutionality of Statute".

A hearing on the motions was held before the Honorable John C. Hayes, III, on August 28th, 2006. The next day, Judge Hayes quashed the Indictment for Possession of a Pistol by Person under 21 Years of Age (06-GS-46-1601).

This State's appeal follows.

STATEMENT OF FACTS

Of course, South Carolina Code § 16-23-30 (Supp. 2006) provides criminalizes the sale or transfer of a handgun to, or the possession of a handgun by, drunkards, addicts, mental incompetents, subversives, and those adjudicated unfit, as well as:

(3) a person under the age of twenty-one, but this shall not apply to the issue of handguns to members of the Armed Forces of the United States, active or reserve, National Guard, State Militia, or R. O. T. C., when on duty or training or the temporary loan of handguns for instructions under the immediate supervision of a parent or adult instructor.

(Emphasis added). Bolin was 19 years of age at the time of the incident, during which he is accused of using a pistol to open fire on occupants of a car. Thus, he was charged for possession under this statute.

In his Motion to Quash, Bolin argued that this statutory crime violates two provisions of the South Carolina Constitution. First, he noted the reference to the right to bear arms in Article I, section 20 of the South Carolina Constitution:

A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner nor in time of war but in the manner prescribed by law.

Bolin noted that the General Assembly had also referred to the right of the people to bear arms as supporting its recent passage of the Protection of Persons and Property Act. See S.C. Code Ann. § 16-11-420(C) (Supp. 2006).

Second, Bolin pointed to Article XVII, section 14 of our state constitution:

Every citizen who is eighteen years of age or older, not laboring under disabilities prescribed in this Constitution or otherwise established by law,

shall be deemed sui juris and endowed with full legal rights and responsibilities, *provided*, that the General Assembly may restrict the sale of alcoholic beverages to persons until age twenty-one.

Thus, Bolin concluded that since he was old enough to be sui juris and our state constitution guarantees him the right to bear arms, then he could not be charged with a crime for possession. Bolin pointed out that despite the provision in Article XVII, Section 14 allowing a higher minimum age for alcohol, no such provision exists in the constitution for firearms. {R p. *}.

The State responded with a Memorandum dated August 28th, 2006. In it, the State argued that the state constitutional right to bear arms was subject to reasonable regulation through the State's police power, and noted that the right itself was expressly linked with the societal goal of a well-regulated militia – rather than being a purely individual right. Next, the State argued that further legislative restriction based on age was expressly authorized by the provision in Article XVII section 14 excluding those "not laboring under disabilities prescribed in this Constitution or otherwise established by law". Finally, the State argued that the right to self-defense did not give one unlimited choice as to the weapon used. {R p. *}.

The day after argument, the court orally granted Bolin's motion to quash, finding section 16-3-30(B) unconstitutional. The court reasoned that the other disabilities set forth in the "otherwise established by law" clause of the constitutional provision referred to something other than age. {Tr. 17}.

ARGUMENT

THE TRIAL COURT ERRED IN QUASHING THE INDICTMENT FOR POSSESSION OF A HANDGUN WHILE UNDER THE AGE OF 21, BASED ON THE STATE CONSTITUTIONAL PROVISION SETTING THE AGE OF MAJORITY AT 18, SINCE THE CONSTITUTIONAL PROVISION ITSELF EXPRESSLY CONTEMPLATES FURTHER REGULATION OF YOUNG ADULTS, AND IN ANY EVENT NO LEGAL RIGHT AS TO POSSESSION OF HANDGUNS WAS INFRINGED BY THIS REASONABLE EXERCISE OF THE STATE'S POLICE POWER.

There is no question that any possession or use of firearms is subject to legislative restriction pursuant to the State's police power. Since the constitutional provision as to age expressly contemplates and allows further restriction of young adults, Petitioner's indictment for possession of a handgun under the age of 21 is constitutional. In any event, Petitioner has no claim under the constitutional provision as to age that he was denied a legal right, because any right to bear arms he may have was not infringed by reasonable restriction that still allowed him to possess other types of firearms.

A. General Rules

When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution. State v. Bouye, 325 S.C. 260, 484 S.E.2d 461 (1997). The party challenging the statute has the burden of proving it unconstitutional. Id. See State v. Jones, 344 S.C. 48, 543 S.E.2d 541 (2001) (setting forth the above discussion) See also State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004) (setting forth the above).

B. Putting aside for the moment the state constitutional provision as to age, there can be no dispute that any right to bear arms would be subject to regulation pursuant to the State's police power.

Of course, as noted before, Article I, section 20 of the South Carolina Constitution sets forth a right of the people to keep and bear arms. Indeed, the General Assembly stated in its recent enactment of the Protection of Persons and Property Act that it "found" Section 20 of Article I guaranteed the right of people to bear arms – a right which should not be infringed. S.C. Code Ann. § 16-11-420 (Supp. 2006). Indeed, in the Nineteenth Century, Justice Story wrote that the right to bear arms "has justly been considered as the palladium of the liberties of the republic." 3 J. Story, Commentaries, 1890, p. 746 (1833). And, North Carolina, which possesses virtually an identical constitutional provision guaranteeing the right to bear arms to that of South Carolina's Art. I, § 20, has construed its amendment as bestowing the right to bear arms not just collectively but as insuring individual rights. State v. Dawson, 159 S.E.2d 1, 9 (N.C. 1968). Such a construction by the North Carolina Supreme Court possesses strong historical support in this State as well.

However, there seems to be no dispute that any right to bear arms is subject to reasonable regulation pursuant to the State's police power. In State v. Johnson, 16 S.C. 187, 1881 W.L. 5959 (S.C. 1881) ("Johnson I"), this Court noted that the purpose of a statute prohibiting the possession of a concealed weapon "was, as far as may be consistent with the right of the citizen to bear arms, absolutely to prohibit the carrying of deadly weapons, with a view to prevent acts of violence and bloodshed, which are too apt to be committed by persons under excitement when they have at hand such effectual means of perpetrating such acts." Moreover, in a different State v. Johnson, 56 S.E. 544 (1907) ("Johnson II"), this Court specifically held that a statute prohibiting the discharge of a firearm within the city limits of Charleston did not violate the constitutional right to bear arms, but clearly was within the police power granted to the city government by statute.

Moreover, the caselaw of the nation is full of decisions also upholding regulation on firearms despite various state constitutional provisions. Some jurisdictions expressly set forth an individual right to bear arms in the language of their state constitutions; some have "militia-based" provisions on the right to bear arms; and some have found an individual right to bear arms as necessarily implicit in a "militia-based" constitutional provision. See Robertson v. City and County of Denver, 874 P.2d 325, 328 n.6 (Colo. 1994) (generally categorizing the constitutional provisions of various states); North Carolina v. Dawson, 159 S.E.2d 1 (N.C. 1968) (noting that while the right to bear arms was formulated when the weapons of the militia were the private arms of the members – a condition that no longer exists, the individual's right to use his weapon for self-defense was assumed). Regardless, all of these jurisdictions have found the right however defined as subject to reasonable state regulation. Robertson, supra; Dawson, 159 S.E.2d at 10 (the right to bear arms is not absolute, but is subject to regulation by the General Assembly so long as such regulation bears "a reasonable relation to the preservation of public peace and safety"); Quilici v. Village of Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982) (upholding ban on handguns against Illinois' constitutional right to bear arms).¹

And, there also is no doubt that for policy reasons our State regards young adults between the ages of 18 and 20 as inexperienced and more susceptible to lapses of

¹ In passing, it should be noted the United States Supreme Court rejected a Second Amendment challenge to a firearms restriction by noting that the defendant's individual claim had no merit because it had no relationship with the common goal preservation or efficiency of a regulated militia. United States v. Miller, 307 U.S. 174 (1939). See Silveira v. Lockyer, 312 F.3d 1052, 1061 (9th Cir.2003) (referring to Miller's implicit rejection of traditional individual rights position). But see United States v. Emerson, 270 F.3d 203, 226 (5th Cir.2001) (reading Miller as indecisive and, at best, supporting an individual's right to bear arms).

judgment. Marcum v. Bowden, No. 26259, 2007 W.L. 415672 (S.C. filed February 5th, 2007) (although drinkers 18, 19, and 20 have full legal rights, "the public policy of this State treats these individuals as lacking full adult capacity to make informed decisions concerning the ingestion of alcoholic beverages"). Norton v. Opening Break of Aiken, 313 S.C. 508, 443 S.E.2d 406 (Ct. App. 1994) (although adults, individuals from 18-20 who drink pose a high risk of danger to themselves and others). Similarly, there is no doubt that valid policy concerns support limitations on handguns not also placed on long guns, as handguns are more typically used in crime due to their concealability, ready availability, and lower cost. See, e.g. Johnson v. State, 839 A.2d 769 (Md. Ct. App. 2003) (noting the Maryland General Assembly's determination that current laws were insufficient to curb the "more frequent use of handguns" in crime); Zawitz, Marianne, "Guns Used in Crime", U.S. Department of Justice, Office of Justice Programs, July 1995 NJ-148201 (finding that 75% of gun crime is committed with handguns, that inmates say they prefer concealable weapons, and that juvenile offenders are more likely to have handguns than adult offenders). Indeed, it is common knowledge that the combination of young people, handguns, and gangs creates a particularly toxic mix. Tellingly, the General Assembly, in enacting the Concealable Weapons Act, reiterated that persons under the age of 21 are ineligible for a concealable weapons permit. See, § 23-31-215 (F)(1) (applicant must certify "he is not a person prohibited under state law from possessing a weapon ...").

Accordingly, a prohibition against possession of a handgun prior to the age of 21 has never been thought to be and is not now arbitrary or irrational, and is reasonably related to legitimate government interests. See generally Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) (age is not a suspect class under the Equal

Protection Clause); In the Interest of Ronnie A., 355 S.C. 407, 585 S.E.2d 311 (2003) (substantive due process guarantee requires a rational basis for legislation depriving a person of life, liberty, or property); Arnold v. Ass'n of Citadel Men, 337 S.C. 265, 523 S.E.2d 757 (1999) (unless a fundamental right or suspect class is involved, equal protection is satisfied if the classification bears a reasonable relation to the legislative purpose, members of the class are treated alike, and the classification rests on some reasonable basis). Certainly if it is appropriate for the Legislature to stop a nineteen year old from having a Heineken, it is also appropriate under the same power to prohibit that same nineteen year old from having a Glock 9mm semiautomatic pistol.

C. Not only does the constitutional provision as to age authorize further reasonable regulation of young adults, but any enforceable right of Respondent to bear arms was not infringed by this reasonable exercise of the State's police power.

The previous conclusion is not the real rub of this case, however, as the question is whether any age-based restriction from 18-20 on handguns runs afoul of our state constitutional provision that lowered the age of majority from twenty-one to eighteen. Of course, the state constitution is a limitation upon and not a grant of power to the General Assembly. Duncan v. York County, 267 S.C. 327, 228 S.E.2d 92 (1976).

At common law, the age of majority was twenty-one. South Carolina Jurisprudence Vol. 21, Children and Families § 171 (1993). Accordingly, the Constitution of 1868 granted all males of age twenty-one or older the right to vote; the Constitution of 1895 retained this age minimum and added poll taxes and literacy tests. South Carolina Constitution of 1895 Art. II, §§ 3-4.

This common law age of majority was also often applied to the right to bear arms.

As St. George Tucker wrote, "children under the age of discretion," or those under the common law age of majority at 21, as well as others such as criminals, could not bear arms. Cornell, "St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings," 47 William and Mary Law Review 1123, 1144 (Feb. 2006). Indeed, the choice of twenty one years of age as the universally accepted age of majority in this country for over two hundred years was "based upon that being the age at which a young man attained sufficient strength and ability to bear arms." Castle, "Early Emancipation Statutes: Should They Protect Parents As Well as Children?" 20 Family Law Quarterly, 343, n. 36 (Fall, 1986).

Thus, the age of 21 has strong historical roots as that age at which one possessed as a citizen of the republic the right to bear arms. Historically, persons below such age possessed the very same disability from bearing arms as others in society who were considered unable to possess firearms in a responsible manner.

However, in 1970 Congress lowered the voting age to eighteen when extending the Voting Rights Act of 1965, but the United States Supreme Court ruled the Act's voting age could not apply to the States. Oregon v. Mitchell, 400 U.S. 112 (1970). The States then ratified the lower voting age in the Twenty-Sixth Amendment to avoid having two sets of voting rules. Consequently, in 1975 the General Assembly approved Act No. 42 which lowered the voting age from twenty-one to eighteen in Article II, section 4 of our state constitution. Consistently, by 1975 Act No. 15, the General Assembly also approved Article XVII, section 14 of our state constitution, which lowered the age of majority to eighteen:

Every citizen who is eighteen years of age or older, not laboring under

disabilities prescribed in this Constitution or otherwise established by law, shall be deemed sui juris and endowed with full legal rights and responsibilities, *provided*, that the General Assembly may restrict the sale of alcoholic beverages to persons until age twenty-one.

The General Assembly also passed in 1976 South Carolina Code section 15-1-320, which provided that all references to minors in the law of South Carolina would mean persons under the age of eighteen. South Carolina Jurisprudence Vol. 21, Children and Families § 171 (1993).

With the way this constitutional provision developed in mind – as a mechanism for to equalize voting ages – it is clear that our state constitutional provision as to the right to bear arms does not invalidate criminalization of possession of a pistol under 21 based on the constitutional provision lowering the age of majority. As noted before, such a right to bear arms would still be subject to reasonable state regulation. See Johnson II, supra.

The constitutional provision as to age expressly contemplates further regulation by the General Assembly, by providing that to have “full legal rights and responsibilities”, a person over eighteen years old must also not be “laboring under disabilities prescribed in this Constitution or otherwise established by law” (emphasis added). While the trial court believed this clause referred to disabilities other than age, this conflicts with the plain meaning of the provision. The term “established by law” for purposes of a constitutional provision means “provided by legislation.” St. Mary’s Anesthesia Associates, Inc. v. Hospital Service Dist, 836 So.2d 379 (La. 2003). See generally Fraternal Order of Police v. South Carolina Department of Revenue, 352 S.C. 420, 574 S.E.2d 717 (2002) (determining and applying the plain meaning of a state constitutional provision). The provision does not speak to “other” disabilities than age; it merely says “disabilities . . .

otherwise established by law". Unquestionably, being under a certain age is a classic legal disability. Black's Law Dictionary p.461 (6th ed. 1990) (disability includes "persons under age"). Moreover, age has always been deemed a disability for purposes of firearms regulations.

In addition, the mere fact that the constitutional provision specifically mentions subsequent prohibition of drinking by those under twenty-one does not necessarily exclude any other regulation of the conduct of young adults. It is true that the canon of construction *expressio unius est exclusio alterius* holds that "to express or include one thing implies the exclusion of another." South Carolina Dep't of Consumer Affairs v. Rent-A-Center, Inc., 345 S.C. 251, 547 S.E.2d 881 (S.C. Ct. App. 2001). However, the rule is a rule of construction, not substantive law, and it should not be used to defeat legislative intent, but rather should be used "with care". Id.

Here, nothing in the plain meaning of the age provision specifically limits further regulation *only* to drinking age, just as nothing in that provision expressly limits the earlier "otherwise established by law" provision. Indeed, even though the statute criminalizing the possession of a handgun under the age of twenty-one was in existence prior to the constitutional amendment setting the age of majority at eighteen, the General Assembly did not include it among other statutes that it amended to delete references to the age of twenty-one to replace them with eighteen. 1976 Act No. 695. Moreover, the General Assembly has since twice amended the statute containing the prohibition against those under twenty-one possessing handguns, S.C. Code Ann. § 16-23-30 (Supp. 2005), but never reduced the age limit in that statute. 2006 Act No. 336; 2004 Act No. 294. And, as indicated, the Concealable Weapons Act – legislation which expresses the very essence

of the right to bear arms – recognizes that persons under 21 are ineligible for a Concealable Weapons Permit. This certainly indicates the intent of the General Assembly in passing and ratifying the constitutional provision as to age that reasonable regulation of firearms and young adults was not considered abridged by the provision. See generally Berkebile v. Outen, 311 S.C. 50, 426 S.E.2d 760 (1993) (basic presumption that General Assembly has knowledge of previous legislation when later statutes are passed on a related subject). The obvious intent of the constitutional provision was set the age of majority at eighteen as a *general matter* – consistent with the lowering of the voting age after the federal impetus – not to preclude all other reasonable State regulation of young adults and inherently dangerous activities. Thus, in this case, merely specifying one does not exclude the possibility of others.²

Further, the concerns raised by the trial court {Tr. 12-14; 15-16} do not preclude this interpretation of the constitutional provision as to age. Obviously, restriction of any sort of fundamental right would be subjected to strict scrutiny review, and a statute, for example, prohibiting 18-20 year olds from marrying or engaging in First Amendment freedoms would

² Indeed, the state constitution itself still imposes a minimum age of 21 for Representatives, State Librarian, and Departmental Clerks. See S.C. Const. Art. III § 7; S.C. Const. Art. XVII § 1. And, our state statutes still retain in various contexts the age of 21 as a minimum. See, e.g. S.C. Code Ann. § 14-23-1040 (must be 21 to be probate judge); S.C. Code Ann. § 15-3-555 (statute of limitations as to sexual abuse begins, in part, at age 21); S.C. Code Ann. § 17-5-130 (must be 21 to be a coroner); S.C. Code Ann. § 20-7-7810(E) (person convicted as juvenile for violent offense and given indeterminate sentence until age of 21 must be transferred to SCDC upon turning 17); S.C. Code Ann. § 24-19-50 (allowing indeterminate sentences without consent of youthful offenders under the age of 21); S.C. Code Ann. § 40-18-100 (no person can be granted a Security Weapons Permit without being at least 21); S.C. Code Ann. § 40-47-30 (minimum age for practicing medicine is 21); S.C. Code Ann. § 44-34 100 (unlawful to tattoo a person under 21; those 18 or older need parental consent); S.C. Code Ann. § 56-5-3670 (goggles and face shields to be worn by all motorcyclists under 21).

not survive this heightened review. Similarly, a law that 18-20 year olds did not have a right to a speedy trial would not be enforceable in a criminal proceeding, as it would inherently raise criminal procedure concerns on its own right – indeed, it is hard to conceive of a rational basis for such a statute anyway.

These examples show that in analyzing rights under the constitutional age provision, it is the nature of the right itself in issue that should be analyzed for the reasonableness of restriction and regulation – in other words, any claim under the constitutional provision as to age necessarily depends on the rules surrounding the specific right a person claims was infringed due to age. While Bolin as a 19 year old has legal rights, the specific right he claims was violated by indictment for possession of a pistol – the right to bear arms – is a “right” in and of itself that unquestionably subject to reasonable State regulation. Indeed, throughout history perhaps no other constitutional right has been more subject to legislative restriction than the right to bear arms.

Here, any right of Bolin to bear arms is not infringed in the constitutional sense, but merely limited by a reasonable exercise of the State's police power. Bolin is still free to possess long guns, and also can temporarily possess handguns under supervision of an parent or instructor. Moreover, nothing prohibits him from possessing a handgun when on military duty. S.C. Code Ann. § 16-23-30(A)(3) (Supp. 2006). Mere restriction of one sort of particularly troublesome firearm does not amount to infringement in the constitutional sense. See generally Benjamin v. Bailey, 662 A.2d 1226, 1235 (Conn. 1995) (ban on assault weapons did not infringe the right to bear arms, as the law continued to permit a “wide array of weapons”); Mosby v. Devine, 851 A.2d 1031 (R.I. 2004) (restriction on handguns does not infringe the state constitutional right to bear arms, as it is a reasonable

regulation and does not create a total ban on the right to bear arms); State v. Cline, 488 S.E.2d 376 (W. Va. 1997) (state constitutional provision setting forth right to bear arms for lawful hunting and recreation not infringed by statute prohibiting transport of loaded weapons in vehicle); State v. Warden, 901 P.2d 900 (Or. Ct. App. 1995) (statute prohibiting person from casting artificial light from a motor vehicle while in possession of a firearm did not unreasonably infringe a person's right to bear arms, but was a reasonable exercise of police power). Cf. Robertson v. City and County of Denver, 874 P.2d 325 (Colo. 1994) (precluding assault weapons was a reasonable exercise of police power despite right to bear arms).

Since the constitutional provision as to age expressly contemplates further regulation, and since the reasonable restriction of one specific type of firearm did not infringe on his constitutional right to bear arms anyway, then Bolin was denied no legal right based on his age. The quashing of the indictment was improper.

CONCLUSION

For the foregoing reasons, the State respectfully submits that the trial judge's ruling that the statutory provision was unconstitutional should be reversed, and the quashed indictment should be reinstated.

Respectfully submitted,

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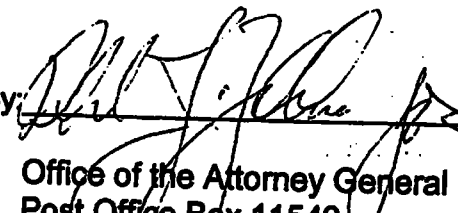
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March 7, 2007

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge

THE STATE,

Appellant,

v.

BERRY SCOTT BOLIN,

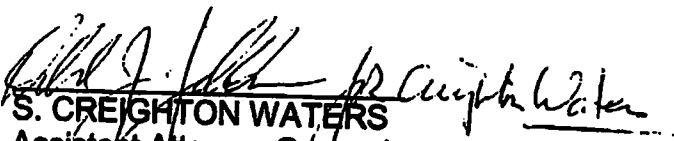
Respondent.

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

Appellant hereby designates the following for inclusion in the Record on Appeal:

- (1) Indictment,
- (2) Transcript of hearing, August 28 and 29, 2006;
- (3) Motion to Quash Indictments and Cease Prosecution Pursuant to the "Protection of Persons and Property Act";
- (4) Motion to Quash Indictment Due to "Unconstitutionality of Statute";
- (5) Memorandum of Law in Opposition to Motion to Quash Indictment.

Counsel for Appellant certifies this designation contains no matter irrelevant to this appeal.


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March 7, 2007

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge

THE STATE,

Appellant,

v.

BERRY SCOTT BOLIN,

Respondent.

PROOF OF SERVICE

I, S. Creighton Waters, Counsel for Appellant, certify that I have this date served the *Initial Brief of Appellant and Designation of Matter*, dated March 7, 2007, on Respondent by depositing two copies of the same in the United States mail, first class postage prepaid, addressed to his attorney of record:

Leland B. Greeley, Esquire
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I further certify that I have served all parties required by Rule to be served.

This 7th day of March, 2007.


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ATTORNEY FOR APPELLANT

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

Case No. 2006-GS-46-1601

RECEIVED

MAY - 9 2007

S.C. SUPREME COURT

State of South Carolina, ... Appellant,

v.

Berry Scott Bolin. Respondent.

INITIAL BRIEF OF RESPONDENT

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ISSUE ON APPEAL

Whether the trial court erred in quashing the indictment for Possession of a Handgun While Under the Age of 21 on the ground that the criminal statute making such possession illegal is unconstitutional.

STATEMENT OF THE CASE

Respondent agrees with the statement of the case provided in Appellant's Initial Brief.

STATEMENT OF THE FACTS

Respondent agrees with the statement of the facts provided in Appellant's Initial Brief.

ARGUMENT

Section 16-23-30, Code of Laws of South Carolina, subsection (B) creates a statutory criminal offense for anyone under the age of 21 to possess of pistol. That section of the statute is unconstitutional. The trial court did not err in finding this part of the statute unconstitutional and was correct in its quashing of indictment 2006-GS-46-1601 which alleged Mr. Bolin, 19 years of age at the time of the incident, guilty of the provision.

Statutes are to be construed in favor of constitutionality, and a legislative act is to be presumed constitutionally valid unless a clear showing to the contrary is made. State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1994). A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution. Westvaco Corp. v. South Carolina Dep't of Revenue, 321 S.C. 59, 467 S.E.2d 739 (1995). See, State v. Kenneth Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004).

In this particular case, there is no room for reasonable doubt that the statute in question is constitutionally invalid.

The Constitution for the State of South Carolina provides in Article I, Section 20:

A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner nor in time of war but in the manner prescribed by law.

This right is one that is cherished in this State. Most recently the right is referenced as one of the basis for the *Protection of Persons and Property Act* which took

affect in South Carolina in June of 2006. See Section 16-11-410, et seq., Code of Laws of South Carolina, (1976), as amended. The law states: "The General Assembly finds that Section 10, Article I of the South Carolina Constitution guarantees the right of the people to bear arms, and this right shall not be infringed." Section 16-11-420(C).

Further, Article XVII, Section 14 of the Constitution for the State of South Carolina provides:

Every citizen who is eighteen years of age or older, not laboring under disabilities prescribed in this Constitution or otherwise established by law, shall be deemed sui juris and endowed with full legal rights and responsibilities, provided, that the General Assembly may restrict the sale of alcoholic beverages to persons under age twenty-one.

Passage of Section 16-23-30 (B) referencing (A)(3) was a mere statutory stripping of a constitutional right to bear arms by all citizens who are between the initial age of sui juris (18 years of age) and 21 years of age. At the time of the allegation, the Defendant was 19 years of age, thus of age to constitutionally bear arms.

To further support the unconstitutionality of the statute, the State of South Carolina in the past decided to put another age restriction on the legality of alcohol sales to persons under twenty-one years of age. In so doing, the State recognized the impact of Section 14 of Article XVII and thus amended that particular section to allow the General Assembly to statutorily address the sale of alcohol. No such amendment dealing with the bearing of arms has ever been passed.

The State presents two primary arguments for the constitutionality of the statute. First, "putting aside for the moment the state constitutional provision as to age", the State makes an argument based on the State's police power. Respondent agrees that there are times when activities may be restricted by legislation with the use of the State's police power. Respondent submits when such is lawfully done, the emphasis is on the activity,

and the restrictions apply to all citizens alike. In the two Johnson cases cited by the State, this is what was involved. In State v. Johnson, 16 S.C. 187, 1881 W.L. 5959 (S.C. 1881), the restriction in issue involved guns and dealt with the carrying of those guns in a concealed fashion by the citizenry. Thus, it was the act of concealing a weapon that was addressed. Likewise, in State v. Johnson, 56 S.E. 544, (1907), the activity was discharging a gun in within the city limits of Charleston, and was applicable in general to the citizenry.

The fact the State set aside the aspect of "age" in this argument is telling. When age is set aside, the emphasis is on the activity. However, the statute in issue in this matter is not a restriction on actions regarding guns and the general citizenry, but a limitation placed on a singled out group of citizenry, the only common characteristic being age. It is the emphasis on this single defining characteristic which makes this statute unconstitutional.

The second argument made by the State is one of the historical origin of the constitutional provision granting sui juris to all person 18 years of age and older. The State comes close to making an apology for the passing of this provision. It also implies that although the provision is one which reads of overall application to legal rights and abilities of person 18 years of age or older, it was only passed for the purpose of voting, and thus, this Court should not be concerned regulating and limiting other activities because of age.

The State contends that the prohibition against possession of a pistol by one who is younger than 21 is reasonably related to legitimate government interests. It may very well be. But that is not sufficient to strike down a constitutional right. Although the State

concedes that "the state constitution is a limitation upon, and not a grant of power General Assembly", Duncan v. York County, 267 S.C. 327, 228 S.E. 2d 92 (1976), the bottom line of its argument is that all constitutional rights become subject to whatever is determined to be reasonably related to legitimate government interests. In this particular case, the provision in question does not restrict actual activity or behavior with a gun. It restricts a group of people.

Finally, the State makes a third argument that the "disability" provision in the Constitutional provision allows for the statute to be passed with age being the disability. There is absolutely no logic whatsoever in such an argument for it leaves the State contending that the disability under which the statute may be passed, that being "age", is the same substantive provision that grants that sui juris status in the first place, "age."

This Court can find the single provision unconstitutional without doing harm to the remainder of the statute. It is not necessary for the entire statute to be found unconstitutional. The Court addressed severability in Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 528 S.E.2d 647, 654 (1999), stating:

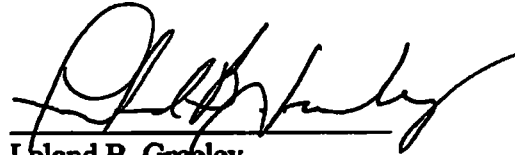
The test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed that the legislature would have passed it independent of that which conflicts with the constitution. "When the residue of an Act, sans that portion found to be unconstitutional, is capable of being executed in accordance with the Legislative intent, independent of the rejected portion, the Act as a whole should not be stricken as being in violation of a Constitutional Provision."

Thus, only the specific provision of this statute is unconstitutional.

CONCLUSION

Based on the foregoing, because the statute restricts not an activity of the general citizenry, but merely restricts a group of people with the common characteristic of age, it

does not survive the strict scrutiny analysis this Court is to use. The statute intrudes on the constitutional right of that group to "bear arms" in a consistent manner as the remainder of the citizenry. Therefore, the ruling of the trial court quashing the indictment is a correct ruling and should be affirmed by this Court.



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May 6, 2007

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

Case No. 2006-GS-46-1601

State of South Carolina, ...Appellant,

v.

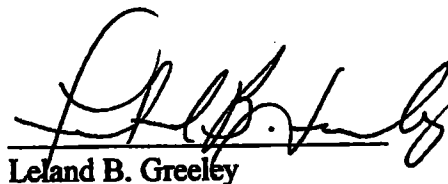
Berry Scott Bolin. Respondent.

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Respondent here designates the following for inclusion in the Record on Appeal:

All matters listed and designated in Appellant's Designation without additions or deletions.

Counsel for Respondent certifies this designation contains no matter irrelevant to this appeal.



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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
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APPEAL FROM YORK COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

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State of South Carolina, ... Appellant,

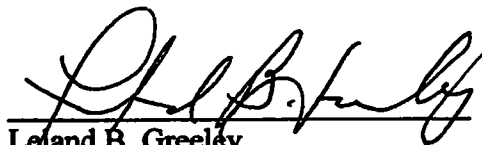
v.

Berry Scott Bolin. Respondent.

PROOF OF SERVICE

I certify that I have served a copy of the Respondent's Initial Brief of Respondent and Designation of Matter on the attorney for Petitioner/Appellant by depositing them in the United States Mail, postage prepaid, on May 7, 2007, addressed as follows:

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**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge

THE STATE,

Appellant,

v.

BERRY SCOTT BOLIN,

Respondent.

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STATEMENT OF THE ISSUE ON APPEAL

DID THE TRIAL COURT ERR IN QUASHING THE INDICTMENT FOR POSSESSION OF A HANDGUN WHILE UNDER THE AGE OF 21, BASED ON THE STATE CONSTITUTIONAL PROVISION SETTING THE AGE OF MAJORITY AT 18, WHERE THE CONSTITUTIONAL PROVISION ITSELF EXPRESSLY CONTEMPLATES FURTHER REGULATION OF YOUNG ADULTS, AND WHERE IN ANY EVENT NO LEGAL RIGHT AS TO POSSESSION OF HANDGUNS WAS INFRINGED BY THIS REASONABLE EXERCISE OF THE STATE'S POLICE POWER?

STATEMENT OF THE CASE

Respondent, Berry Scott Bolin, was indicted in May 2006 by the York County Grand Jury for Murder, Assault and Battery with Intent to Kill, Possession of a Firearm During Commission of a Violent Offense, Assault with Intent to Kill, Discharging a Firearm into an Occupied Vehicle, and Possession of a Pistol by Person under 21 Years of Age (2006-GS-46-1595 to -1601).

Petitioner was represented at the trial level by Leland Greeley, Esquire. On August 17th, 2006, Greeley filed a Motion to Quash Indictments and Cease Prosecution Pursuant to the "Protection of Persons and Property Act", as well as a Motion to Quash Indictment Due to "Unconstitutionality of Statute".

A hearing on the motions was held before the Honorable John C. Hayes, III, on August 28th, 2006. The next day, Judge Hayes quashed the Indictment for Possession of a Pistol by Person under 21 Years of Age (06-GS-46-1601).

This State's appeal follows.

STATEMENT OF FACTS

Of course, South Carolina Code § 16-23-30 (Supp. 2006) provides criminalizes the sale or transfer of a handgun to, or the possession of a handgun by, drunkards, addicts, mental incompetents, subversives, and those adjudicated unfit, as well as:

(3) a person under the age of twenty-one, but this shall not apply to the issue of handguns to members of the Armed Forces of the United States, active or reserve, National Guard, State Militia, or R. O. T. C., when on duty or training or the temporary loan of handguns for instructions under the immediate supervision of a parent or adult instructor.

(Emphasis added). Bolin was 19 years of age at the time of the incident, during which he is accused of using a pistol to open fire on occupants of a car. Thus, he was charged for possession under this statute.

In his Motion to Quash, Bolin argued that this statutory crime violates two provisions of the South Carolina Constitution. First, he noted the reference to the right to bear arms in Article I, section 20 of the South Carolina Constitution:

A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner nor in time of war but in the manner prescribed by law.

Bolin noted that the General Assembly had also referred to the right of the people to bear arms as supporting its recent passage of the Protection of Persons and Property Act. See S.C. Code Ann. § 16-11-420(C) (Supp. 2006).

Second, Bolin pointed to Article XVII, section 14 of our state constitution:

Every citizen who is eighteen years of age or older, not laboring under disabilities prescribed in this Constitution or otherwise established by law,

shall be deemed sui juris and endowed with full legal rights and responsibilities, *provided*, that the General Assembly may restrict the sale of alcoholic beverages to persons until age twenty-one.

Thus, Bolin concluded that since he was old enough to be sui juris and our state constitution guarantees him the right to bear arms, then he could not be charged with a crime for possession. Bolin pointed out that despite the provision in Article XVII, Section 14 allowing a higher minimum age for alcohol, no such provision exists in the constitution for firearms. {R pp.12-13}.

The State responded with a Memorandum dated August 28th, 2006. In it, the State argued that the state constitutional right to bear arms was subject to reasonable regulation through the State's police power, and noted that the right itself was expressly linked with the societal goal of a well-regulated militia – rather than being a purely individual right. Next, the State argued that further legislative restriction based on age was expressly authorized by the provision in Article XVII section 14 excluding those “not laboring under disabilities prescribed in this Constitution or otherwise established by law”. Finally, the State argued that the right to self-defense did not give one unlimited choice as to the weapon used. {R. pp.15-24}.

The day after argument, the court orally granted Bolin's motion to quash, finding section 16-3-30(B) unconstitutional. The court reasoned that the other disabilities set forth in the “otherwise established by law” clause of the constitutional provision referred to something other than age. {R. p. 41}.

ARGUMENT

THE TRIAL COURT ERRED IN QUASHING THE INDICTMENT FOR POSSESSION OF A HANDGUN WHILE UNDER THE AGE OF 21, BASED ON THE STATE CONSTITUTIONAL PROVISION SETTING THE AGE OF MAJORITY AT 18, SINCE THE CONSTITUTIONAL PROVISION ITSELF EXPRESSLY CONTEMPLATES FURTHER REGULATION OF YOUNG ADULTS, AND IN ANY EVENT NO LEGAL RIGHT AS TO POSSESSION OF HANDGUNS WAS INFRINGED BY THIS REASONABLE EXERCISE OF THE STATE'S POLICE POWER.

There is no question that any possession or use of firearms is subject to legislative restriction pursuant to the State's police power. Since the constitutional provision as to age expressly contemplates and allows further restriction of young adults, Petitioner's indictment for possession of a handgun under the age of 21 is constitutional. In any event, Petitioner has no claim under the constitutional provision as to age that he was denied a legal right, because any right to bear arms he may have was not infringed by reasonable restriction that still allowed him to possess other types of firearms.

A. General Rules

When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution. State v. Bouye, 325 S.C. 260, 484 S.E.2d 461 (1997). The party challenging the statute has the burden of proving it unconstitutional. Id. See State v. Jones, 344 S.C. 48, 543 S.E.2d 541 (2001) (setting forth the above discussion) See also State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004) (setting forth the above).

B. Putting aside for the moment the state constitutional provision as to age, there can be no dispute that any right to bear arms would be subject to regulation pursuant to the State's police power.

Of course, as noted before, Article I, section 20 of the South Carolina Constitution sets forth a right of the people to keep and bear arms. Indeed, the General Assembly stated in its recent enactment of the Protection of Persons and Property Act that it "found" Section 20 of Article I guaranteed the right of people to bear arms – a right which should not be infringed. S.C. Code Ann. § 16-11-420 (Supp. 2006). In the Nineteenth Century Justice Story wrote that the right to bear arms "has justly been considered as the palladium of the liberties of the republic." 3 J. Story, Commentaries, 1890, p. 746 (1833). And, North Carolina, which possesses virtually an identical constitutional provision guaranteeing the right to bear arms to that of South Carolina's Art. I, § 20, has construed its amendment as bestowing the right to bear arms not just collectively but as ensuring individual rights. State v. Dawson, 159 S.E.2d 1, 9 (N.C. 1968). Such a construction by the North Carolina Supreme Court possesses strong historical support in this State as well.

However, there seems to be no dispute that any right to bear arms is subject to reasonable regulation pursuant to the State's police power. In State v. Johnson, 16 S.C. 187, 1881 W.L. 5959 (S.C. 1881) ("Johnson I"), this Court noted that the purpose of a statute prohibiting the possession of a concealed weapon "was, as far as may be consistent with the right of the citizen to bear arms, absolutely to prohibit the carrying of deadly weapons, with a view to prevent acts of violence and bloodshed, which are too apt to be committed by persons under excitement when they have at hand such effectual means of perpetrating such acts." Moreover, in a different State v. Johnson, 56 S.E. 544 (1907) ("Johnson II"), this Court specifically held that a statute prohibiting the discharge of a firearm

within the city limits of Charleston did not violate the constitutional right to bear arms, but clearly was within the police power granted to the city government by statute.

Moreover, the caselaw of the nation is full of decisions also upholding regulation on firearms despite various state constitutional provisions. Some jurisdictions expressly set forth an individual right to bear arms in the language of their state constitutions; some have "militia-based" provisions on the right to bear arms; and some have found an individual right to bear arms as necessarily implicit in a "militia-based" constitutional provision. See Robertson v. City and County of Denver, 874 P.2d 325, 328 n.6 (Colo. 1994) (generally categorizing the constitutional provisions of various states); North Carolina v. Dawson, 159 S.E.2d 1 (N.C. 1968) (noting that while the right to bear arms was formulated when the weapons of the militia were the private arms of the members – a condition that no longer exists, the individual's right to use his weapon for self-defense was assumed). Regardless, all of these jurisdictions have found the right however defined as subject to reasonable state regulation. Robertson, supra; Dawson, 159 S.E.2d at 10 (the right to bear arms is not absolute, but is subject to regulation by the General Assembly so long as such regulation bears "a reasonable relation to the preservation of public peace and safety"); Quilici v. Village of Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982) (upholding ban on handguns against Illinois' constitutional right to bear arms).¹

¹ In passing, it should be noted the United States Supreme Court rejected a Second Amendment challenge to a firearms restriction by noting that the defendant's individual claim had no merit because it had no relationship with the preservation of the common good or efficiency of a regulated militia. United States v. Miller, 307 U.S. 174 (1939). See Silveira v. Lockyer, 312 F.3d 1052, 1061 (9th Cir.2003) (referring to Miller's implicit rejection of traditional individual rights position). But see United States v. Emerson, 270 F.3d 203, 226 (5th Cir.2001) (reading Miller as indecisive and, at best, supporting an individual's right to bear arms).

And, there also is no doubt that for policy reasons our State regards young adults between the ages of 18 and 20 as inexperienced and more susceptible to lapses of judgment. Marcum v. Bowden, No. 26259, 2007 W.L. 415672 (S.C. filed February 5th, 2007) (although drinkers 18, 19, and 20 have full legal rights, "the public policy of this State treats these individuals as lacking full adult capacity to make informed decisions concerning the ingestion of alcoholic beverages"). Norton v. Opening Break of Aiken, 313 S.C. 508, 443 S.E.2d 406 (Ct. App. 1994) (although adults, individuals from 18-20 who drink pose a high risk of danger to themselves and others). Similarly, there is no doubt that valid policy concerns support limitations on handguns not also placed on long guns, as handguns are more typically used in crime due to their concealability, ready availability, and lower cost. See, e.g. Johnson v. State, 839 A.2d 769 (Md. Ct. App. 2003) (noting the Maryland General Assembly's determination that current laws were insufficient to curb the "more frequent use of handguns" in crime); Zawitz, Marianne, "Guns Used in Crime", U.S. Department of Justice, Office of Justice Programs, July 1995 NJ-148201 (finding that 75% of gun crime is committed with handguns, that inmates say they prefer concealable weapons, and that juvenile offenders are more likely to have handguns than adult offenders). Indeed, it is common knowledge that the combination of young people, handguns, and gangs creates a particularly toxic mix. Tellingly, the General Assembly, in enacting the Concealable Weapons Act, reiterated that persons under the age of 21 are ineligible for a concealable weapons permit. See, § 23-31-215 (F)(1) (applicant must certify "he is not a person prohibited under state law from possessing a weapon ...").

Accordingly, a prohibition against possession of a handgun prior to the age of 21 has never been thought to be and is not now arbitrary or irrational, and is reasonably related to

legitimate government interests. See generally Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) (age is not a suspect class under the Equal Protection Clause); In the Interest of Ronnie A., 355 S.C. 407, 585 S.E.2d 311 (2003) (substantive due process guarantee requires a rational basis for legislation depriving a person of life, liberty, or property); Arnold v. Ass'n of Citadel Men, 337 S.C. 265, 523 S.E.2d 757 (1999) (unless a fundamental right or suspect class is involved, equal protection is satisfied if the classification bears a reasonable relation to the legislative purpose, members of the class are treated alike, and the classification rests on some reasonable basis). Certainly if it is appropriate for the Legislature to stop a nineteen year old from having a Heineken, it is also appropriate under the same power to prohibit that same nineteen year old from having a Glock 9mm semiautomatic pistol.

C. Not only does the constitutional provision as to age authorize further reasonable regulation of young adults, but any enforceable right of Respondent to bear arms was not infringed by this reasonable exercise of the State's police power.

The previous conclusion is not the real rub of this case, however, as the question is whether any age-based restriction from 18-20 on handguns runs afoul of our state constitutional provision that lowered the age of majority from twenty-one to eighteen. Of course, the state constitution is a limitation upon and not a grant of power to the General Assembly. Duncan v. York County, 267 S.C. 327, 228 S.E.2d 92 (1976).

At common law, the age of majority was twenty-one. South Carolina Jurisprudence Vol. 21, Children and Families § 171 (1993). Accordingly, the Constitution of 1868 granted all males of age twenty-one or older the right to vote; the Constitution of 1895 retained this age minimum and added poll taxes and literacy tests. South Carolina Constitution of 1895

Art. II, §§ 3-4.

This common law age of majority was also often applied to the right to bear arms. As St. George Tucker wrote, "children under the age of discretion," or those under the common law age of majority at 21, as well as others such as criminals, could not bear arms. Cornell, "St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings," 47 William and Mary Law Review 1123, 1144 (Feb. 2006). Indeed, the choice of twenty one years of age as the universally accepted age of majority in this country for over two hundred years was "based upon that being the age at which a young man attained sufficient strength and ability to bear arms." Castle, "Early Emancipation Statutes: Should They Protect Parents As Well as Children?" 20 Family Law Quarterly, 343, n. 36 (Fall, 1986).

Thus, the age of 21 has strong historical roots as that age at which one possessed as a citizen of the republic the right to bear arms. Historically, persons below such age possessed the very same disability from bearing arms as others in society who were considered unable to possess firearms in a responsible manner.

~~However, in 1970 Congress lowered the voting age to eighteen when extending the~~ Voting Rights Act of 1965, but the United States Supreme Court ruled the Act's voting age could not apply to the States. Oregon v. Mitchell, 400 U.S. 112 (1970). The States then ratified the lower voting age in the Twenty-Sixth Amendment to avoid having two sets of voting rules. Consequently, in 1975 the General Assembly approved Act No. 42 which lowered the voting age from twenty-one to eighteen in Article II, section 4 of our state constitution. Consistently, by 1975 Act No. 15, the General Assembly also approved Article XVII, section 14 of our state constitution, which lowered the age of majority to eighteen:

Every citizen who is eighteen years of age or older, not laboring under disabilities prescribed in this Constitution or otherwise established by law, shall be deemed sui juris and endowed with full legal rights and responsibilities, *provided*, that the General Assembly may restrict the sale of alcoholic beverages to persons until age twenty-one.

The General Assembly also passed in 1976 South Carolina Code section 15-1-320, which provided that all references to minors in the law of South Carolina would mean persons under the age of eighteen. South Carolina Jurisprudence Vol. 21, Children and Families § 171 (1993).

With the way this constitutional provision developed in mind – as a mechanism for to equalize voting ages – it is clear that our state constitutional provision as to the right to bear arms does not invalidate criminalization of possession of a pistol under 21 based on the constitutional provision lowering the age of majority. As noted before, such a right to bear arms would still be subject to reasonable state regulation. See Johnson II, supra.

The constitutional provision as to age expressly contemplates further regulation by the General Assembly, by providing that to have “full legal rights and responsibilities”, a person over eighteen years old must also not be “laboring under disabilities prescribed in this Constitution *or otherwise established by law*” (emphasis added). While the trial court believed this clause referred to disabilities other than age, this conflicts with the plain meaning of the provision. The term “established by law” for purposes of a constitutional provision means “provided by legislation.” St. Mary’s Anesthesia Associates, Inc. v. Hospital Service Dist, 836 So.2d 379 (La. 2003). See generally Fraternal Order of Police v. South Carolina Department of Revenue, 352 S.C. 420, 574 S.E.2d 717 (2002) (determining and applying the plain meaning of a state constitutional provision). The

provision does not speak to "other" disabilities than age; it merely says "disabilities . . . otherwise established by law". Unquestionably, being under a certain age is a classic legal disability. Black's Law Dictionary p.461 (6th ed. 1990) (disability includes "persons under age"). Moreover, age has always been deemed a disability for purposes of firearms regulations.

In addition, the mere fact that the constitutional provision specifically mentions subsequent prohibition of drinking by those under twenty-one does not necessarily exclude any other regulation of the conduct of young adults. It is true that the canon of construction *expressio unius est exclusio alterius* holds that "to express or include one thing implies the exclusion of another." South Carolina Dep't of Consumer Affairs v. Rent-A-Center, Inc., 345 S.C. 251, 547 S.E.2d 881 (S.C. Ct. App. 2001). However, the rule is a rule of construction, not substantive law, and it should not be used to defeat legislative intent, but rather should be used "with care". Id.

Here, nothing in the plain meaning of the age provision specifically limits further regulation *only* to drinking age, just as nothing in that provision expressly limits the earlier ~~"otherwise established by law"~~ provision. ~~Indeed, even though the statute criminalizing the~~ possession of a handgun under the age of twenty-one was in existence prior to the constitutional amendment setting the age of majority at eighteen, the General Assembly did not include it among other statutes that it amended to delete references to the age of twenty-one to replace them with eighteen. 1976 Act No. 695. Moreover, the General Assembly has since twice amended the statute containing the prohibition against those under twenty-one possessing handguns, S.C. Code Ann. § 16-23-30 (Supp. 2005), but never reduced the age limit in that statute. 2006 Act No. 336; 2004 Act No. 294. And, as

indicated, the Concealable Weapons Act – legislation which expresses the very essence of the right to bear arms – recognizes that persons under 21 are ineligible for a Concealable Weapons Permit.

This certainly indicates the intent of the General Assembly in passing and ratifying the constitutional provision as to age that reasonable regulation of firearms and young adults was not considered abridged by the provision. See generally Berkebile v. Outen, 311 S.C. 50, 426 S.E.2d 760 (1993) (basic presumption that General Assembly has knowledge of previous legislation when later statutes are passed on a related subject). The obvious intent of the constitutional provision was set the age of majority at eighteen as a *general matter* – consistent with the lowering of the voting age after the federal impetus – not to preclude all other reasonable State regulation of young adults and inherently dangerous activities. Thus, in this case, merely specifying one does not exclude the possibility of others.²

Further, the concerns raised by the trial court {R. pp. 36-38; 39-40} do not preclude this interpretation of the constitutional provision as to age. Obviously, restriction of any sort

² Indeed, the state constitution itself still imposes a minimum age of 21 for Representatives, State Librarian, and Departmental Clerks. See S.C. Const. Art. III § 7; S.C. Const. Art. XVII § 1. And, our state statutes still retain in various contexts the age of 21 as a minimum. See, e.g. S.C. Code Ann. § 14-23-1040 (must be 21 to be probate judge); S.C. Code Ann. § 15-3-555 (statute of limitations as to sexual abuse begins, in part, at age 21); S.C. Code Ann. § 17-5-130 (must be 21 to be a coroner); S.C. Code Ann. § 20-7-7810(E) (person convicted as juvenile for violent offense and given indeterminate sentence until age of 21 must be transferred to SCDC upon turning 17); S.C. Code Ann. § 24-19-50 (allowing indeterminate sentences without consent of youthful offenders under the age of 21); S.C. Code Ann. § 40-18-100 (no person can be granted a Security Weapons Permit without being at least 21); S.C. Code Ann. § 40-47-30 (minimum age for practicing medicine is 21); S.C. Code Ann. § 44-34-100 (unlawful to tattoo a person under 21; those 18 or older need parental consent); S.C. Code Ann. § 56-5-3670 (goggles and face shields to be worn by all motorcyclists under 21).

of fundamental right would be subjected to strict scrutiny review, and a statute, for example, prohibiting 18-20 year olds from marrying or engaging in First Amendment freedoms would not survive this heightened review. Similarly, a law that 18-20 year olds did not have a right to a speedy trial would not be enforceable in a criminal proceeding, as it would inherently raise criminal procedure concerns on its own right – indeed, it is hard to conceive of a rational basis for such a statute anyway.

These examples show that in analyzing rights under the constitutional age provision, it is the nature of the right itself in issue that should be analyzed for the reasonableness of restriction and regulation – in other words, any claim under the constitutional provision as to age necessarily depends on the rules surrounding the specific right a person claims was infringed due to age. While Bolin as a 19 year old has legal rights, the specific right he claims was violated by indictment for possession of a pistol – the right to bear arms – is a “right” in and of itself that unquestionably subject to reasonable State regulation. Indeed, throughout history perhaps no other constitutional right has been more subject to legislative restriction than the right to bear arms.

Here, any right of Bolin to bear arms is not infringed in the constitutional sense, but merely limited by a reasonable exercise of the State’s police power. Bolin is still free to possess long guns, and also can temporarily possess handguns under supervision of an parent or instructor. Moreover, nothing prohibits him from possessing a handgun when on military duty. S.C. Code Ann. § 16-23-30(A)(3) (Supp. 2006). Mere restriction of one sort of particularly troublesome firearm does not amount to infringement in the constitutional sense. See generally Benjamin v. Bailey, 662 A.2d 1226, 1235 (Conn. 1995) (ban on assault weapons did not infringe the right to bear arms, as the law continued to permit a

"wide array of weapons"); Mosby v. Devine, 851 A.2d 1031 (R.I. 2004) (restriction on handguns does not infringe the state constitutional right to bear arms, as it is a reasonable regulation and does not create a total ban on the right to bear arms); State v. Cline, 488 S.E.2d 376 (W. Va. 1997) (state constitutional provision setting forth right to bear arms for lawful hunting and recreation not infringed by statute prohibiting transport of loaded weapons in vehicle); State v. Warden, 901 P.2d 900 (Or. Ct. App. 1995) (statute prohibiting person from casting artificial light from a motor vehicle while in possession of a firearm did not unreasonably infringe a person's right to bear arms, but was a reasonable exercise of police power). Cf. Robertson v. City and County of Denver, 874 P.2d 325 (Colo. 1994) (precluding assault weapons was a reasonable exercise of police power despite right to bear arms).

Since the constitutional provision as to age expressly contemplates further regulation, and since the reasonable restriction of one specific type of firearm did not infringe on his constitutional right to bear arms anyway, then Bolin was denied no legal right based on his age. The quashing of the indictment was improper.

CONCLUSION

For the foregoing reasons, the State respectfully submits that the trial judge's ruling that the statutory provision was unconstitutional should be reversed, and the quashed indictment should be reinstated.

Respectfully submitted,

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June 28, 2007

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge

THE STATE,

Appellant,

v.

BERRY SCOTT BOLIN,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule
211(b), SCACR.



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**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from York County
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Appellant,

v.

BERRY SCOTT BOLIN,

Respondent.

PROOF OF SERVICE

I, S. Creighton Waters, Counsel for Appellant, certify that I have this date served the *Final Brief of Appellant* dated June 28, 2007, on Respondent by depositing three copies of the same in the United States mail, first class postage prepaid, addressed to his attorney of record:

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I further certify that I have served all parties required by Rule to be served.

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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

Case No. 2006-GS-46-1601

State of South Carolina, ...Appellant,

v.

Berry Scott Bolin. Respondent.

BRIEF OF RESPONDENT

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ISSUE ON APPEAL

Whether the trial court erred in quashing the indictment for Possession of a Handgun While Under the Age of 21 on the ground that the criminal statute making such possession illegal is unconstitutional.

STATEMENT OF THE CASE

Respondent agrees with the statement of the case provided in Appellant's Initial Brief.

STATEMENT OF THE FACTS

Respondent agrees with the statement of the facts provided in Appellant's Initial Brief.

ARGUMENT

Section 16-23-30, Code of Laws of South Carolina, subsection (B) creates a statutory criminal offense for anyone under the age of 21 to possess of pistol. That section of the statute is unconstitutional. The trial court did not err in finding this part of the statute unconstitutional and was correct in its quashing of indictment 2006-GS-46-1601 which alleged Mr. Bolin, 19 years of age at the time of the incident, guilty of the provision.

Statutes are to be construed in favor of constitutionality, and a legislative act is to be presumed constitutionally valid unless a clear showing to the contrary is made. State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1994). A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution. Westvaco Corp. v. South Carolina Dep't of Revenue, 321 S.C. 59, 467 S.E.2d 739 (1995). See, State v. Kenneth Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004).

In this particular case, there is no room for reasonable doubt that the statute in question is constitutionally invalid.

The Constitution for the State of South Carolina provides in Article I, Section 20:

A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner nor in time of war but in the manner prescribed by law.

This right is one that is cherished in this State. Most recently the right is referenced as one of the basis for the *Protection of Persons and Property Act* which took

affect in South Carolina in June of 2006. See Section 16-11-410, et seq., Code of Laws of South Carolina, (1976), as amended. The law states: "The General Assembly finds that Section 10, Article I of the South Carolina Constitution guarantees the right of the people to bear arms, and this right shall not be infringed." Section 16-11-420(C).

Further, Article XVII, Section 14 of the Constitution for the State of South Carolina provides:

Every citizen who is eighteen years of age or older, not laboring under disabilities prescribed in this Constitution or otherwise established by law, shall be deemed sui juris and endowed with full legal rights and responsibilities, provided, that the General Assembly may restrict the sale of alcoholic beverages to persons under age twenty-one.

Passage of Section 16-23-30 (B) referencing (A)(3) was a mere statutory stripping of a constitutional right to bear arms by all citizens who are between the initial age of sui juris (18 years of age) and 21 years of age. At the time of the allegation, the Defendant was 19 years of age, thus of age to constitutionally bear arms.

To further support the unconstitutionality of the statute, the State of South Carolina in the past decided to put another age restriction on the legality of alcohol sales to persons under twenty-one years of age. In so doing, the State recognized the impact of Section 14 of Article XVII and thus amended that particular section to allow the General Assembly to statutorily address the sale of alcohol. No such amendment dealing with the bearing of arms has ever been passed.

The State presents two primary arguments for the constitutionality of the statute. First, "putting aside for the moment the state constitutional provision as to age", the State makes an argument based on the State's police power. Respondent agrees that there are times when activities may be restricted by legislation with the use of the State's police power. Respondent submits when such is lawfully done, the emphasis is on the activity,

and the restrictions apply to all citizens alike. In the two Johnson cases cited by the State, this is what was involved. In State v. Johnson, 16 S.C. 187, 1881 W.L. 5959 (S.C. 1881), the restriction in issue involved guns and dealt with the carrying of those guns in a concealed fashion by the citizenry. Thus, it was the act of concealing a weapon that was addressed. Likewise, in State v. Johnson, 56 S.E. 544, (1907), the activity was discharging a gun in within the city limits of Charleston, and was applicable in general to the citizenry.

The fact the State set aside the aspect of "age" in this argument is telling. When age is set aside, the emphasis is on the activity. However, the statute in issue in this matter is not a restriction on actions regarding guns and the general citizenry, but a limitation placed on a singled out group of citizenry, the only common characteristic being age. It is the emphasis on this single defining characteristic which makes this statute unconstitutional.

The second argument made by the State is one of the historical origin of the constitutional provision granting sui juris to all person 18 years of age and older. The State comes close to making an apology for the passing of this provision. It also implies that although the provision is one which reads of overall application to legal rights and abilities of person 18 years of age or older, it was only passed for the purpose of voting, and thus, this Court should not be concerned regulating and limiting other activities because of age.

The State contends that the prohibition against possession of a pistol by one who is younger than 21 is reasonably related to legitimate government interests. It may very well be. But that is not sufficient to strike down a constitutional right. Although the State

concedes that "the state constitution is a limitation upon, and not a grant of power General Assembly", Duncan v. York County, 267 S.C. 327, 228 S.E. 2d 92 (1976), the bottom line of its argument is that all constitutional rights become subject to whatever is determined to be reasonably related to legitimate government interests. In this particular case, the provision in question does not restrict actual activity or behavior with a gun. It restricts a group of people.

Finally, the State makes a third argument that the "disability" provision in the Constitutional provision allows for the statute to be past with age being the disability. There is absolutely no logic whatsoever in such an argument for it leaves the State contending that the disability under which the statute may be passed, that being "age", is the same substantive provision that grants that sui juris status in the first place, "age."

This Court can find the single provision unconstitutional without doing harm to the remainder of the statute. It is not necessary for the entire statute to be found unconstitutional. The Court addressed severability in Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 528 S.E.2d 647, 654 (1999), stating:

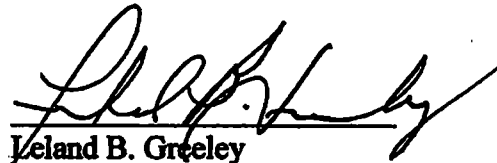
The test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed that the legislature would have passed it independent of that which conflicts with the constitution. "When the residue of an Act, sans that portion found to be unconstitutional, is capable of being executed in accordance with the Legislative intent, independent of the rejected portion, the Act as a whole should not be stricken as being in violation of a Constitutional Provision."

Thus, only the specific provision of this statute is unconstitutional.

CONCLUSION

Based on the foregoing, because the statute restricts not an activity of the general citizenry, but merely restricts a group of people with the common characteristic of age, it

does not survive the strict scrutiny analysis this Court is to use. The statute intrudes on the constitutional right of that group to "bear arms" in a consistent manner as the remainder of the citizenry. Therefore, the ruling of the trial court quashing the indictment is a correct ruling and should be affirmed by this Court.



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June 29, 2007

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

Case No. 2006-GS-46-1601

State of South Carolina, ... Appellant,

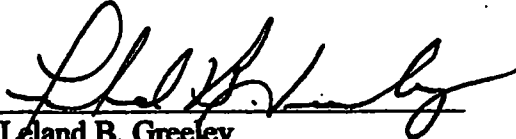
v.

Berry Scott Bolin. Respondent.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

June 29, 2007



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**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge

THE STATE,

Appellant,

vs.

BERRY SCOTT BOLIN,

Respondent.

RECORD ON APPEAL

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WITNESSES

YCSD/Straft

asg

ARREST WARRANT NUMBER

Direct Indictment

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: 5-18-06

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2008-GS-46-01601

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

May 18, Term 2006

THE STATE

vs.

BERRY SCOTT BOLIN

Indictment for

**POSSESSION OF A PISTOL BY
PERSON UNDER TWENTY-ONE**

SC Code: 16-23-30(e)
CDR Code: 2364

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

INDICTMENT

At a Court of General Sessions, convened on May 18, 2006, the Grand Jurors of York County present upon their oath:

POSSESSION OF A PISTOL BY PERSON UNDER TWENTY-ONE

Berry Scott Bolin did in York County, South Carolina, on or about February 18, 2006, unlawfully and knowingly have in his possession a pistol while being under Twenty-One (21) years of age, all in violation of Section 16-23-30, Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT DEPUTY SOLICITOR

STATE OF SOUTH CAROLINA)
) IN THE COURT OF GENERAL SESSIONS
COUNTY OF YORK)

State of South Carolina,)
)
vs.) **MOTION TO QUASH INDICTMENTS**
) **AND CEASE PROSECUTION PURSUANT**
Berry Scott Bolin,) **TO THE "PROTECTION OF PERSONS**
) **AND PROPERTY ACT"**
Defendant.)
_____)

NOW COMES the Defendant, Berry Scott Bolin, by and through undersigned counsel of record, and moves the Court for an Order quashing indictments 2006-GS-46-1595 (Murder), 2006-GS-46-1596 (Assault and Battery with Intent to Kill) , 2006-GS-46-1597 (Possession of a Firearm During the Commission of a Violent Offense), 2006-GS-46-1598 (Assault with Intent to Kill), 2006-GS-46-1599 (Assault with Intent to Kill), 2006-GS-46-1600 (Discharging a Firearm into an Occupied Vehicle) , and 2006-GS-46-1601 (Possession of Pistol by Person Under 21 Years of Age) and requiring the State to cease and desist in its criminal prosecution of the Defendant.

Pertinent Facts

On February 18, 2006, Berry Scott Bolin, age 19, was an invited guest at the residence of Jonathan and Ricky Deal, located at 1123 Lawrence Road, Clover, South Carolina. A party was occurring at the residence attended by many people from the age of 16

and older.

At or about midnight, one or more cars came to the site of the party. In one of the cars were Travis Falls, Michael Hubbard, Bobby R. Hovis, III, Kenneth Norris, and Holly McCarter. Four days prior to this incident, Travis Falls had been released on bond from the York County Detention Center after being arrested for Assault and Battery of a High and Aggravated Nature arising from his, and others, beating of Jonathan Deal. The purpose of their arrival at the property was to fight. After initially performing a drive by, they turned around and returned to the property, and exited the vehicle, making threats, and moved onto the property. Confrontations and assaults occurred during this time. Gunfire erupted. The passengers from the car, returned to the car, and muzzled flashes from the car were seen.

The car was struck by two different types of bullets: 45 caliber, and 9mm. Travis Falls was struck in the wrist and Bobby R. Hovis, III was struck in the back of the head. Mr. Hovis subsequently died from the wound. The State believes the same bullet, a 45 caliber, struck Falls first, and then Hovis.

It is alleged that Mr. Bolin was in possession of a 45 caliber pistol and fired the gun.

On May 18, 2006, the York County Grand Jury returned an indictment (2006-GS-46-1600) against Mr. Bolin for a violation of 16-23-30(e), alleging that "Berry Scott Bolin did in York County, South Carolina, on or about February 18, 2006, unlawfully and knowingly have in his possession a pistol while being under Twenty-one (21) years of age, all in violation of Section 16-23-30, Code of Laws of South Carolina, (1976), as amended."

Discussion

Section 16-11-410, et seq., Code of Laws of South Carolina, was recently passed into

law by the South Carolina General Assembly in June of this year. The law is entitled the Protection of Persons and Property Act. The intent of the act is to provide to citizens of this State assurance that they will be allowed to protect both property and/or persons through the use of force, up to and including deadly force, without having to suffer either criminal prosecution by the State nor a civil lawsuit arising from the facts of the case.

This purpose is first emphasized in subsections (B) and (C) of Section 16-11-420 wherein each state:

The General Assembly finds that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others. See Section 16-11-420 (B) and,

The General Assembly finds that Section 20, Article I of the South Carolina Constitution guarantees the right of the people to bear arms, and this right shall not be infringed. See Section 16-11-420.

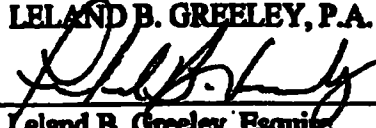
Section 16-11-450 (A) provides, "A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution..."

In the current case, Berry Scott Bolin has been suffering criminal prosecution from February 18, 2006 until the present. This act was effective June 9, 2006, during the pendency of this prosecution. Given the facts of this case, the Defendant is entitled to protection under this act.

Therefore, Defendant requests the Court quash the above-referenced indictments and order the State to cease and desist in the prosecution of criminal charges arising from this incident, or in the alternative, have a full evidentiary hearing before the Court for such determination to be made.

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August 17 2006

Section 16-11-410. This article may be cited as the 'Protection of Persons and Property Act'.

Section 16-11-420. (A) It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business.

(B) The General Assembly finds that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others.

(C) The General Assembly finds that Section 20, Article I of the South Carolina Constitution guarantees the right of the people to bear arms, and this right shall not be infringed.

(D) The General Assembly finds that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles.

(E) The General Assembly finds that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack.

Section 16-11-430. As used in this article, the term:

(1) 'Dwelling' means a building or conveyance of any kind, including an attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging there at night.

(2) 'Great bodily injury' means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of a bodily member or organ.

(3) 'Residence' means a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest.

(4) 'Vehicle' means a conveyance of any kind, whether or not motorized, which is designed to transport people or property.

Section 16-11-440. (A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

(1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and

(2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

(B) The presumption provided in subsection (A) does not apply if the person:

(1) against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling, residence, or occupied vehicle including, but not limited to, an owner, lessee, or titleholder; or

(2) sought to be removed is a child or grandchild, or is otherwise in the lawful custody or under the lawful guardianship, of the person against whom the deadly force is used; or

(3) who uses deadly force is engaged in an unlawful activity or is using the dwelling, residence, or occupied vehicle to further an unlawful activity; or

(4) against whom the deadly force is used is a law enforcement officer who enters or attempts to enter a dwelling, residence, or occupied vehicle in the performance of his official duties, and he identifies himself in accordance with applicable law or the person using force knows or reasonably should have known that the person entering or attempting to enter is a law enforcement officer.

(C) A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or

great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

(D) A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or a violent crime as defined in Section 16-1-60.

(E) A person who by force enters or attempts to enter a dwelling, residence, or occupied vehicle in violation of an order of protection, restraining order, or condition of bond is presumed to be doing so with the intent to commit an unlawful act regardless of whether the person is a resident of the dwelling, residence, or occupied vehicle including, but not limited to, an owner, lessee, or titleholder.

Section 16-11-450. (A) A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force, unless the person against whom deadly force was used is a law enforcement officer acting in the performance of his official duties and he identifies himself in accordance with applicable law or the person using deadly force knows or reasonably should have known that the person is a law enforcement officer.

(B) A law enforcement agency may use standard procedures for investigating the use of deadly force as described in subsection (A), but the agency may not arrest the person for using deadly force unless probable cause exists that the deadly force used was unlawful.

(C) The court shall award reasonable attorneys' fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of a civil action brought by a plaintiff if the court finds that the defendant is immune from prosecution as provided in subsection (A).

STATE OF SOUTH CAROLINA)
) IN THE COURT OF GENERAL SESSIONS
COUNTY OF YORK)

State of South Carolina,)

vs.)

Berry Scott Bolin,)

Defendant.)

**MOTION TO QUASH INDICTMENT
DUE TO UNCONSTITUTIONALITY
OF STATUTE**

2006-GS-14-1600

CLERK OF COURT
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SOUTH CAROLINA

NOW COMES the Defendant, Berry Scott Bolin, by and through undersigned counsel of record, and moves the Court for an Order quashing indictment 2006-GS-46-1600, which charges Mr. Bolin with Possession of a Pistol by a Person under the age of Twenty-one. The ground upon which this motion is based is that subsection (B), as it refers to subsection (A)(3) of Section 16-23-30, Code of Laws of South Carolina, 1976, as amended is unconstitutional under the Constitution of the State of South Carolina.

Pertinent Facts

On February 18, 2006, Berry Scott Bolin, age 19, was an invited guest at the residence of Jonathan and Ricky Deal, located at 1123 Lawrence Road, Clover, South Carolina. A party was occurring at the residence attended by many people from the age of 16 and older.

At or about midnight, one or more cars came to the site of the party. In one of the cars were Travis Falls, Michael Hubbard, Bobby R. Hovis, III, Kenneth Norris, and Holly

McCarter. Four days prior to this incident, Travis Falls had been released on bond from the York County Detention after being arrested for Assault and Battery of a High and Aggravated Nature arising from his, and others, beating of Jonathan Bradley Deal. The purpose of their arrival at the property was to fight. After initially performing a drive by, they turned around and returned to the property, and exited the vehicle, making threats, and moved onto the property. Confrontations and assaults occurred during this time. Gunfire erupted. The passengers from the car, returned to the car, and muzzled flashes from the car were seen.

The car was struck by two different types of bullets: 45 caliber, and 9mm. Travis Falls was struck in the wrist and Bobby R. Hovis, III was struck in the back of the head. Mr. Hovis subsequently died from the wound. The State believes the same bullet, a 45 caliber, struck Falls first, and then Hovis.

It is alleged that Mr. Bolin was in possession of a 45 caliber pistol and fired the gun.

On May 18, 2006, the York County Grand Jury returned an indictment (2006-GS-46-1600) against Mr. Bolin for a violation of 16-23-30(e), alleging that "Berry Scott Bolin did in York County, South Carolina, on or about February 18, 2006, unlawfully and knowingly have in his possession a pistol while being under the Twenty-one (21) years of age, all in violation of Section 16-23-30, Code of Laws of South Carolina, (1976), as amend."

Discussion

Section 16-23-30, Code of Laws of South Carolina, in subsection (B) creates a statutory criminal offense for anyone under the age of 21 to possess of pistol. That section of the statute is unconstitutional and therefore, indictment 2006-GS-46-1600 should be quashed by this Court.

Statutes are to be construed in favor of constitutionality, and a legislative act is to be presumed constitutionally valid unless a clear showing to the contrary is made. State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1994). A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution. Westvac Corp. v. South Carolina Dep't of Revenue, 321 S.C. 59, 467 S.E.2d 739 (1995). See, State v. Kenneth Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004).

In this particular case, there is no room for reasonable doubt that the statute in question is constitutionally invalid.

The Constitution for the State of South Carolina provides in Article I, Section 20:

A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner nor in time of war but in the manner prescribed by law.

This right is one that is cherished in this State. Most recently the right is referenced as one of the basis for the *Protection of Persons and Property Act* which took affect in South Carolina in June of this year. See Section 16-11-410, et seq., Code of Laws of South Carolina, (1976), as amended. The law states: "The General Assembly finds that Section 10, Article I of the South Carolina Constitution guarantees the right of the people to bear arms, and this right shall not be infringed." Section 16-11-420(C).

Further, Article XVII, Section 14 of the Constitution for the State of South Carolina provides:

Every citizen who is eighteen years of age or older, not laboring under disabilities prescribed in this Constitution or otherwise established by law, shall be deem sui juris and

endowed with full legal rights and responsibilities, provided, that the General Assembly may restrict the sale of alcoholic beverages to persons under age twenty-one.

That passage of Section 16-23-30 (B) referencing (A)(3) was a mere statutory stripping of a constitutional right to bear arms by all citizens who are between the initial age of sui juris (18 years of age) and 21 years of age. At the time of the allegation, the Defendant was 19 years of age, thus of age to constitutionally bear arms.

To further support the unconstitutionality of the statute, the State of South Carolina in the past decided to put another age restriction on the legality of alcohol sales to persons under twenty-one years of age. In so doing, the State recognized the impact of Section 14 of Article XVII and thus amended that particular section to allow the General Assembly to statutorily address the sale of alcohol. No such amendment dealing with the bearing of arms has ever been passed.

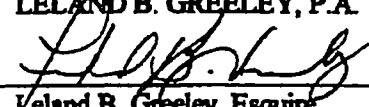
It is not necessary for the entire statute to be found unconstitutional. The Court addressed severability in Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 528 S.E.2d 647, 654 (1999), stating:

The test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed that the legislature would have passed it independent of that which conflicts with the constitution. "When the residue of an Act, sans that portion found to be unconstitutional, is capable of being executed in accordance with the Legislative intent, independent of the rejected portion, the Act as a whole should not be stricken as being in violation of a Constitutional Provision."

Thus, only that portion of the statute with which the Defendant is charged need be proclaimed unconstitutional. Due to the unconstitutional nature of the charged statute, indictment 2006-GS-46-1600 should be quashed.

Respectfully submitted,

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August 17, 2006

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA)
v.) MEMORANDUM OF LAW
IN OPPOSITION TO MOTION
TO QUASH INDICTMENT

Berry Scott Bolin (a/k/a Barry),

Defendant.

Indi # 2006-GS46-01600

ATTORNEY GENERAL'S OFFICE

ADMINISTRATIVE INSTRUCTIONS

FILE OPEN END

DATE COMPLETED

TRANSMIT

FILE RECORDS CLEAR RECORDS

The State of South Carolina, through the Solicitor for the Sixteenth Judicial Circuit, does hereby offer this memorandum of law in opposition to the Defense motion to quash Indictment 2006-GS-46-1600 (Possession of a Pistol under the Age of Twenty-One).

The Defense contends that S.C. Code Ann. 16-23-30 (A)(3) is unconstitutional in that it denies people aged eighteen to twenty the right to bear arms provided by S.C. Const. Art. I, § 20.

It is the State's position that the Defense has failed to show that the statute is clearly unconstitutional and, therefore, has failed to overcome the presumption of constitutionality. Further, it is the State's position that S.C. Code Ann. 16-23-30(A)(3) is a constitutional exercise of the legislature's police power.

STATEMENT OF THE LAW

I. The right to bear arms is not an absolute right.

Contrary to the Defense's assertion, S.C. Const. Art. I, § 20,¹ does not provide the absolute right to possess any and all weapons, but is instead a

¹ Art. I, § 20 of South Carolina Constitution provides:

limited right subject to regulation by the legislature through exercise of its police power.

In State v. Johnson, 76 S.C. 39; 56 S.E. 544 (S.C. 1907), the only South Carolina appellate decision addressing a constitutional challenge to gun regulation, the South Carolina Supreme Court upheld a city ordinance prohibiting the firing of guns in city limits as a reasonable exercise of police power. A review of other States' treatment of constitutional challenges to gun regulations shows a consensus among States that the right to bear arms is not absolute, but subject to regulation under the State's police powers.

The limited right to bear arms, subject to reasonable regulation, is indicated in the language of the provision itself. South Carolina's constitutional right to bear arms expressly refers to the bearing of arms in the context of "a well regulated militia"—in other words, the defense of the state. South Carolina courts have never ruled on the scope of this right. However, this language seems to place South Carolina's right to bear arms in the category of the most limited right in the spectrum running from the right as a collective right of society for purposes of the militia to the right as an individual right. All of the provisions fall into roughly three categories: the right to bear arms as a collective right, the

A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner nor in time of war but in the manner prescribed by law.

right to bear arms as both a collective right and an individual right, and the right to bear arms as an individual right.²

States whose provisions refer to the right to bear arms solely as a collective right tend to use language referencing the maintenance of a militia for the protection of the state. The possession of individual arms by citizens of the state is therefore geared toward the accomplishment of this purpose, and the value of gun ownership lies in its contribution to protection of the state. This category offers the most limited right to bear arms, with no express constitutional guarantee of a right to bear arms beyond those conducive of the maintenance of a militia or for any other purpose.³ South Carolina's constitutional provision falls within this category.⁴ Slightly broader is Alaska's constitution provision, which is

² A number of other jurisdictions have addressed the question as to whether a right to bear arms is a collective right held by the people of a state as a whole or an individual right held by the separate citizens of the state; despite the frequency of which this question has been addressed, there is no clear consensus as to the answer. The different conclusions reached by various and sundry states may be due to the variety of right to bear arms provisions enacted by the states. For a convenient summary of how states' provisions fall along this spectrum, see Robertson v. City and County of Denver, 874 P.2d. 325, 328, n.6 (Colo. 1994).

³ The more restrictive "militia" language of some states provisions have led some State courts to analysis regulation with reference to whether the type of weapon restricted is one which the framers would have understood a militia member to use. See e.g., State v. Kerner, 181 N.C. 574, 107 SE 222 (N.C. 1921); Guida v. Dier, 84 Misc. 2d 110 (NY 1975).

⁴ Haw. Const. art. I, § 17 and N.C. Const. art. I, § 30 both refer specifically to a militia. Massachusetts, Tennessee, and Arkansas have provisions worded differently, but with the same essential concept. N.C. Const. art. I, § 30 provides:

A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice.

See North Carolina v. Dawson, 272 N.C. 535; 159 S.E.2d 1 (N.C. 1968) ("At the time constitutional provisions guaranteeing to the people the right to bear arms were formulated, the weapons of the militia were largely the private arms of the individual members; so the right of the people to keep and bear arms was the right to maintain an effective militia. If a citizen could be disarmed, he could not function as a militiaman in the organized militia. Today, of course, the

a blend of the collective right of maintaining a militia and an individual right.⁵ The third category is that of provisions where an individual's right to bear arms is expressly stated, frequently couched in terms of self-defense or defense of property.⁶

Despite the three different categories of constitutional provisions and the varying language of the individual provisions, state appellate courts typically side on the constitutionality of reasonable gun regulations regardless of the

State militia (of which the National Guard is the backbone) is armed by the State government and privately owned weapons do not contribute to its effectiveness. While the purpose of the constitutional guaranty of the right to bear arms was to secure a well regulated militia and not an individual's right to have a weapon in order to exercise his common-law right of self-defense, this latter right was assumed. In any event, the guaranty made the militiaman's arms available to him for that purpose. North Carolina decisions have interpreted our Constitution as guaranteeing the right to bear arms to the people in a collective sense – similar to the concept of a militia – and also to individuals. These decisions have, however, consistently pointed out that the right of individuals to bear arms is not absolute, but is subject to regulation.”)

⁵ Alaska Const. art. I, § 19 provides: “A well-regulated militia being necessary to the security of a free state, the right of a people to keep and bear arms shall not be infringed. The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State.” The first sentence is identical to S.C. Const. art. I, § 20. The second sentence was added by amendment in 1994. Gibson v. Alaska, 930 P.2d 1300 (Alaska Ct. App. 1997).

See also Oh. Const. Art. I, § 4 (The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power); Arnold v. City of Cleveland, 616 N.E.2d 163 (Ohio 1993) (“This provision is divided by two semicolons, coordinating three independent clauses. Rather than focusing merely on the preservation of a militia, as provided by the Second Amendment, the people of Ohio chose to go even further. Section 4, Article I not only suggests a preference for a militia over a standing army, and the deterrence of governmental oppression, it adds a third protection and secures to every person a fundamental individual right to bear arms for ‘their defense and security.’”); Vt. Const. Ch. I, Art. 16 (That the people have a right to bear arms for the defence of themselves and the State—and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power); Vermont v. Duranleau, 260 A.2d 383 (Vt. 1969) (“But the language of the constitutional provision does not suggest that the right to bear arms is unlimited and undefinable. To require that two particular kinds of weapons, at certain specific places and under limited circumstances, be carried unloaded rather than loaded, is not such an infringement on the constitutional right to bear arms as to make the statute invalid.”).

⁶ The majority of states’ provisions fall under this category, including Connecticut (Conn. Const. art. I, § 15), Colorado (Colo. Const. art. II, § 13), and Wisconsin (Wis. Const. Art. I, § 25: The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose). Six states (California, Iowa, Maryland, Minnesota, New Jersey, and Wisconsin) have no constitutional provisions dealing with the right to bear arms. Robertson, 874 P.2d at 328, n. 6.

narrowness or breadth of the associated constitutional provision. Even states whose constitutional provisions fall within the broadest category—broader than that of South Carolina—conclude that restrictions on this right do not violate the constitutional guarantee of an individual right to bear arms.⁷

II. The State may regulate firearms in the constitutional exercise of its police power.

The South Carolina legislature, in the exercise of its police powers, may pass laws to promote the public health, safety, morals, welfare or convenience of the people, subject to the provisions of the South Carolina constitution. Ford v. Atlantic Coast Line R. Co., 169 S.C. 41, 168 S.E. 143 (S.C. 1932); Sturgiss v. Atlantic Coast Line R.R. Co., 80 S.C. 167; 60 S.E. 939 (S.C. 1908); Aetna Fire Ins. Co. v. Jones, 78 S.C. 445; 59 S.E. 148 (S.C. 1907). The exercise of this police power includes the regulation of guns. See State v. Johnson, supra.

In order to establish the validity of a law enacted under the State's police power, it must appear to the Court, first, that the end in view is the promotion of some or all of these objects; and, second, that the means are reasonably necessary for the accomplishment of the purpose. Sturgiss v. Atlantic Coast Line R.R. Co., 80 S.C. 167; 60 S.E. 939 (S.C. 1908).

A legislative act is presumed constitutionally valid unless a clear showing to the contrary is made. State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (S.C.

⁷ See, e.g., Gibson v. Alaska, 930 P.2d 1300 (Alaska Ct. App. 1997) (possession of firearm while intoxicated); Benjamin v. Bailey, 862 A.2d 1226 (Conn. 1995) (assault weapons ban); Dozier v. Indiana, 709 N.E.2d 27 (Ct. app. 2nd Dist. Ind. 1999) (possession of handgun under the age of 18); Nebraska v. Comeau, 448 N.W.2d 595 (Neb. 1989) (the State may prohibit possession by certain people to eliminate possibility of use by those people); Klein v. Leis, 795 N.E.2d 633 (Ohio 2003) (concealed weapons ban); Arnold v. City of Cleveland, 616 N.E.2d 163 (Ohio 1993) (assault weapons ban); Pennsylvania v. Ray, 272 A.2d 275 (Penn. 1970) (carrying gun in public place); Wisconsin v. Cole, 665 N.W.2d 328 (Wis. 2003) (concealed weapons law); Wisconsin v. Thomas, 683 N.W.2d 497 (Wis. Ct. App. 2004) (felon in possession law).

2004). The exercise of police power is subject to judicial correction only if the action is arbitrary and has no reasonable relation to a lawful purpose. Denene v. City of Charleston, 359 S.C. 85, 596 S.E.2d 917 (S.C. 2004).

ARGUMENT

S.C. Code Ann. 16-23-30 (A)(3)'s restriction against persons under twenty-one years of age from possessing a pistol is a constitutional exercise of the legislature's police power.

The Defense contends, without reference to any supporting case law, that S.C. Code Ann. 16-23-30(A)(3) unconstitutionally deprives people under twenty-one from bearing arms.

It is the State's position that S.C. Code Ann. 16-23-30 is a valid exercise of the State's police power. The law's purpose is clearly to promote the public health, safety, and welfare of the people, and the law employs means used are reasonably necessary to meet those goals without running afoul of the defendant's constitutional rights.

As discussed in State v. Johnson, the regulation of guns falls within the State's police power to regulate for the public health, safety, and welfare. Although State v. Johnson did not discuss the public health, safety, and welfare concerns implicated by gun use in great detail, the possession and use of gun by an individual clearly implicates the health, safety and welfare of all other members of the community. This reasoning is found in State Court decision from across the country. For example, the Court of Appeals of Alaska has held that "the government retains the authority to enact and enforce laws prohibiting people from possessing firearms when there is a significant risk that they will use

those firearms in a criminal or dangerous manner."⁸ Indiana has held that "the regulation of the possession of firearms is closely relate to the public safety and welfare"⁹ and pointed to decisions of a number of states finding that state legislatures have the power to enact reasonable regulations for the use of firearms, in particular, pistols.¹⁰ The Court of Appeals of Indiana, Second District, in ruling on the constitutionality of laws prohibiting the possession of a handgun by a person under eighteen years of age and the carrying of an unlicensed handgun on school property, found that both statutes were constitutional, as they "are in the interest of public safety and provide reasonable regulation for the use of handguns."¹¹ And the Connecticut Supreme Court has found that states are uniform in an approach that a state's police power allows it to regulate, and even restrict, the right to bear arms (regardless of how that right is enunciated in that state's constitution), offering a lengthy list of state court decisions that "overwhelmingly have recognized that the right is not infringed by reasonable regulation by the state in exercise of its police power to protect the health, safety, and morals of the citizenry."¹²

Further, the means employed by the legislature in S.C. Code Ann. 16-23-30(A) (3) are reasonably necessary to meet those goals without running afoul of the defendant's constitutional rights. As discussed above, the right to bear arms is not an absolute right. State Courts have consistently upheld statutes which prohibit ownership of certain types of guns, ownership by certain groups of

⁸ Gibson, 930 P.2d at 1301.

⁹ Matthews v. Indiana, 148 N.E.2d 334, 336 (Ind. 1958).

¹⁰ Id. at 338, citing decisions from Idaho, Georgia, Kansas, Arkansas, and Washington.

¹¹ Dozier v. Indiana, 709 N.E.2d 27, 31 (Ind. Ct. App. 1999).

¹² Benjamin, 682 A.2d at 1233.

people, and regulations regarding carrying of guns.¹³ S.C. Code Ann. 16-23-30 (A) (3) does not constitute an absolute ban on eighteen to twenty year olds from bearing arms as the defense contends. The statute bans only the possession of pistols by persons under twenty-one, and does not prohibit possession of rifles and shotguns. Further, S.C. Code Ann. 16-23-30 (A)(3) provides an exception for "members of the Armed Forces of the United States, active or reserve, National Guard, State Militia, or R. O. T. C., when on duty or training or the temporary loan of handguns for instructions under the immediate supervision of a parent or adult instructor." This statutory exception is completely consistent with S.C. Const. Ann. Art. XIII, § 1 (2005),¹⁴ which sets the minimum age for militia service at eighteen years old.

Defense contends that, pursuant to Article XVII, § 14, the legislature can impose no other restriction on people under twenty one except the purchase and use of alcohol. This argument ignores that plain meaning of S.C. Const. Article XVII, § 14, which provides:

Every citizen who is eighteen years of age or older, not laboring under disabilities prescribed in this Constitution or otherwise established by law, shall be deemed sui juris and endowed with full legal rights and responsibilities, provided, that the General Assembly may restrict the sale of alcoholic beverages to persons until age twenty-one.

¹³ See Fn. 8.

¹⁴ The militia of this State shall consist of all able-bodied male citizens of the State between the ages of eighteen and forty-five years, except such persons as are now or may be exempted by the laws of the United States or this State, or who from religious scruples may be adverse to bearing arms, and shall be organized, officered, armed, equipped and disciplined as the General Assembly may by law direct.

(Emphasis added). Clearly, the framers understood that the legislature may, in its police power, pass laws creating age restrictions. To interpret this provision otherwise would render "not laboring under disabilities ... established by law" meaningless.¹⁵ Ravenel v. Dekle, 265 S.C. 364; 218 S.E.2d 521 (S.C. 1975) (in construing a constitutional provision, the court should avoid a construction which renders any constitutional provision meaningless or inoperative).

The Defense further contends that the age restriction is unconstitutional in that it interferes with the right of self-defense. Although a person has the right to act in self-defense in appropriate circumstances and the right to bear arms for purposes of self-defense may be fairly inferred from the constitution even in the absence of an express provision,¹⁶ a person does not have the right to the weapon of his own choosing. As explained by the Connecticut Supreme Court in Benjamin v. Bailey, 662 A.2d at 1232:

[T]he constitution protects each citizen's right to possess a weapon of reasonably sufficient firepower to be effective for self-defense. The constitution does not guarantee the right to possess any weapon of the individual's choosing for use in self-defense. We conclude, therefore, that as long as our citizens have available to them some types of weapons that are adequate reasonably to vindicate the right to bear arms in self-defense, the state may

¹⁵ Although the defense does not couch its argument in terms of equal protection, to the extent that the Defense argument could be so construed, age is not a suspect class. See Gary v. City of Warner Robins, 311 F.3d 133(11th Cir. 2002), cited with approval in Denene v. City of Charleston, 359 S.C. 85, 596 S.E.2d 917 (S.C. 2004). Further, although the right to bear arms is frequently spoken of as a fundamental right, there is no South Carolina case declaring it a fundamental right, the regulation of which would be subject to a strict scrutiny analysis. See Robertson, 874 P.2d at 330 "(It is significant to note that while plaintiff argue that the right to bear arms in fundamental, any restriction on that right must be subject to strict scrutiny, they fail to point to even one published opinion where the strict scrutiny standard of review has been applied to a firearms regulation, and we are aware of none."

¹⁶ See North Carolina v. Dawson, 272 N.C. 535; 159 S.E.2d 1 (N.C. 1968) (While the purpose of the constitutional guaranty of the right to bear arms was to secure a well regulated militia and not an individual's right to have a

proscribe the possession of other weapons without infringing on (the right to bear arms).

CONCLUSION

In conclusion, it is the State's position that the Defense has failed to show that the statute is clearly unconstitutional and, therefore, has failed to overcome the presumption of constitutionality. Further, it is the State's position that S.C. Code Ann. 16-23-30(A)(3) is a constitutional exercise of the legislature's police power. The means are reasonably related to a lawful purpose, the promotion of the health, safety, and welfare of the people. The law does not impermissibly infringe on the defendant's right to bear arms as the law acts as an age restriction on the right to own pistols only. Finally, although each person has the right to act in self-defense, that right does not extend to the right to a particular type of weapon as long as the law allows him access to other types of weapons which can be used for self-defense.

For the foregoing reasons, the State respectfully asks the Court to deny the defense motion.

Respectfully submitted,



Willy Thompson
Assistant Deputy Solicitor

York, South Carolina

Aug 28, 2006

1 IN THE COURT OF GENERAL SESSIONS
2 YORK COUNTY, SOUTH CAROLINA

3 SOUTH CAROLINA

4 VERSUS

5 BERRY SCOTT BOLIN, DEFENDANT

6 CASE NUMBER: 2006-GS-46-1595-1601
7

8 HEARD ON MONDAY & TUESDAY AUGUST 28 & 29, 2006.
9 BEFORE THE HONORABLE JOHN C. HAYES, III AND A JURY.

10 APPEARANCES:

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REPORTED BY: JANET M. RICH
CIRCUIT COURT REPORTER
1992 DOWNEY STREET
ROCK HILL, SC 29732

1 (THE START OF THE REQUESTED PROCEEDINGS
2 THAT HAPPENED ON MONDAY, AUGUST 28, 2006.)

3 THE COURT: NOW WE GOT SOME OTHER MATTERS.
4 WE GOT THE MOTION TO QUASH. ONE IS MOTION TO QUASH
5 ALL INDICTMENTS BASED ON THE PROTECTION OF PERSONS
6 AND PROPERTY ACT AND THE SECOND TO, AT LEAST BY
7 MR. BOLIN AND MR. OWENS, AND THEN MR. BOLIN HAS A
8 SEPARATE MOTION TO QUASH THE INDICTMENT FOR CARRYING
9 A PISTOL BEING UNDER 21, SO I'LL BE GLAD TO HEAR FROM
10 MR. BOLIN.

11 WE'VE ACTUALLY HAD AN IN CHAMBERS
12 CONFERENCE ON THESE AND I HAVE READ OVER THE ACT AND
13 LET ME START BY THIS. LET'S LOOK FIRST, IT KIND OF
14 MAY BE IN REVERSE ORDER, AT THE POSSESSION OF PISTOL
15 UNDER THE AGE OF 21. I'M GOING TO TURN TO THE STATE
16 FIRST. I'VE LOOKED AT YOUR BRIEF AND I'LL BE VERY
17 CANDID, I'M HAVING A LOT OF TROUBLE WITH THE ACT.
18 ARTICLE 17 SECTION 14 OF THE SOUTH CAROLINA
19 CONSTITUTION SAYS THAT EVERY CITIZEN WHO IS 18 YEARS
20 OF AGE OR OLDER NOT LABORING UNDER DISABILITIES
21 DESCRIBED IN THIS CONSTITUTION OR OTHERWISE STATED BY
22 LAW SHALL BE DEEMED SUI JURIS AND ENDOWED WITH FULL
23 LEGAL RIGHTS AND RESPONSIBILITY. THEN IT DOES ALLOW
24 RESTRICTIONS REGARDING ALCOHOLIC BEVERAGES.
25 MR. THOMPSON, IT'S IN YOUR MEMORANDUM SO I PRESUME

1 YOU ARE GOING TO ARGUE IT, HOW YOU CAN SUPPORT THE
2 STATUTE IN LIGHT OF THAT?

3 MR. THOMPSON: WELL, YOUR HONOR, THE
4 STATUTE IS ALMOST IDENTICAL TO THE OTHER STATUTES
5 WITHIN OTHER STATES. WHILE OUR STATE HAS NOT MADE A
6 SPECIFIC DECISION THAT WOULD FULLY FACE THIS HEAD ON,
7 OTHER STATES HAVE, AND THEY'VE FOUND ON THOSE COURSE
8 ALONG THOSE LINES THAT BASICALLY THIS IS WITHIN THE
9 POLICE POWER OF THE STATE AND IN DOING SO THEY LOOKED
10 AT THE FACT THAT THE RIGHT TO BEAR ARMS IS NOT
11 NECESSARILY AN ABSOLUTE RIGHT.

12 THE COURT: I AGREE WITH THAT. WE START
13 OFF FELONS CAN'T CARRY, YOU CAN'T CARRY THEM ON
14 SCHOOLS, YOU CAN'T CARRY THEM CONCEALED, THERE IS A
15 ABUNDANCE OF THINGS, BUT WHAT HE'S SAYING IS, YES,
16 YOU CAN RESTRICT ALL OF THAT BUT NOT BECAUSE OF AGE
17 BECAUSE OUR CONSTITUTION SAYS THAT YOU CAN'T, ONCE
18 YOU ARE 18 YOU GOT ALL THE RIGHTS OF AN ADULT, YOU
19 ARE CONSIDERED SUI JURIS, SO DO YOU HAVE ANY STATUTE
20 THAT SPECIFICALLY DEALS WITH THE AGE?

21 MR. THOMPSON: WELL, THE OTHER STATUTES I
22 BELIEVE DID SPECIFICALLY DEAL WITH THE AGE. I THINK
23 IF I'M NOT MISTAKEN SOME OF THE OTHER STATES.

24 THE COURT: ALL RIGHT. WHICH ONES?
25 BECAUSE I AGREE, IT'S NOT AN ABSOLUTE RIGHT AND THERE

1 ARE, I WENT THROUGH A LIST OF THEM EARLIER. IF I CAN
2 FIND MY NOTES. FUGITIVES CAN'T HAVE THEM, CAN'T HAVE
3 A PISTOL IF YOU'VE BEEN CONVICTED OF A CRIME OF
4 VIOLENCE, IF YOU ARE A HABITUAL DRUNKARD, DRUG
5 ADDICT, MENTALLY INCOMPETENT, MEMBER OF A SUBVERSIVE
6 ORGANIZATION, DECLARED BY A COURT TO BE UNFIT.

7 MR. THOMPSON: RIGHT, AND WHAT THEY BASE
8 THAT ON IS THAT IT PROMOTES THE PUBLIC HEALTH,
9 SAFETY, AND WELFARE --

10 THE COURT: I AGREE WITH THAT. I'M WITH
11 YOU ON THAT. THAT'S NO PROBLEM. THEN WE, WE DON'T
12 HAVE A STATUTE THAT SAYS DRUNKARDS CAN CARRY GUNS.
13 WE HAVE SOMEBODY OR DRUNKARDS CAN ALL HAVE THE RIGHTS
14 OF ANYONE OVER THE AGE OF 18. WE GOT A STATUTE THAT
15 SAYS ONCE YOU ARE 18 YOU ARE AN ADULT FOR ALL
16 PURPOSES.

17 MR. THOMPSON: RIGHT. AND YOU CAN BEAR
18 ARMS. YOU CAN HAVE A RIFLE, YOU CAN HAVE A SHOTGUN,
19 YOU CAN HAVE OTHER LEGAL WEAPONS OF PEOPLE OF THAT
20 AGE; HOWEVER, THE STATE HAS LOOKED AT THE WELFARE AND
21 SAFETY OF OTHER PEOPLE AND DETERMINED THAT PEOPLE
22 UNDER 21 SHOULD NOT POSSESS A PISTOL. AS A MATTER OF
23 FACT, THE STATE'S POSITION IS THAT HAD THAT BEEN
24 SOMETHING THE DEFENDANT FOLLOWED IN THIS CASE WE
25 WOULDN'T HAVE A DEAD PERSON TODAY.

1 THE COURT: WELL, I AGREE. I AGREE WITH
2 THE RESULTS MIGHT NOT HAVE OCCURRED.

3 MR. THOMPSON: I BELIEVE THE COURT OF
4 APPEALS IN INDIANA IS ONE THAT FOUND THAT BY THE
5 RESTRICTION AS WELL AND SAID THAT IT WAS IN THE
6 INTEREST OF PUBLIC SAFETY AND PROVIDED REASONABLE
7 REGULATIONS FOR THE USE OF A HANDGUN. AS WELL AS I
8 BELIEVE CONNECTICUT'S SUPREME COURT HAS FOUND THAT
9 STATES ARE UNIFORM IN THEIR APPROACH THAT THE STATES
10 HAVE THE POLICE POWER TO ALLOW US TO REGULATE EVEN TO
11 RESTRICT THE RIGHTS TO BEAR ARMS.

12 THE COURT: WHERE ARE YOU IN YOUR BRIEF?

13 MR. THOMPSON: I'M ON WHAT WOULD BE THE,
14 UNDER THE SECTION IN THE ARGUMENTS SECTION, THE
15 SECOND PAGE OF THE ARGUMENT SECTION.

16 THE COURT: MAY I MAKE A SUGGESTION IN THE
17 FUTURE.

18 MR. THOMPSON: NUMBER THE PAGES OF THE
19 BRIEF, YES.

20 THE COURT: ALL RIGHT. ARGUMENT, OKAY.

21 MR. THOMPSON: THE SECOND PAGE OF THAT,
22 IT'S ABOUT FIVE LINES DOWN, STARTS OUT THE COURT OF
23 APPEALS IN INDIANA SECOND DISTRICT AND ITS RULING.

24 THE COURT: LOOK AT WHAT IT SAYS.
25 PROHIBITING POSSESSION OF A HANDGUN BY A PERSON UNDER

1 18.

2 MR. THOMPSON: RIGHT, BUT THAT'S ALSO AN
3 AGE RESTRICTION.

4 THE COURT: I KNOW BUT WE HAVE A
5 CONSTITUTION THAT SAYS, YEAH, WE CAN GO ALONG WITH
6 THAT. THE COURT OF INDIANA THE SECOND DISTRICT ITS
7 RULING SLAM DUNK FOR THE STATE.

8 MR. THOMPSON: RIGHT. BUT WE ALSO LOOK AT
9 THE FACT THAT IT IS A PRESUMED CONSTITUTIONAL AT THE
10 BEGINNING, THAT THERE HAS TO BE SOME OTHER SHOWING
11 THAT SHOWED THEY ARE NOT CONSTITUTIONAL WOULD CAUSE
12 THAT TO BE IN THAT FORM. AND I BELIEVE, YOUR HONOR,
13 YOU HAVE MENTIONED THAT YOU ARE ALLOWING FOR,
14 UNDERSTAND THAT YOU ARE ALLOWING FOR DISABILITIES AS
15 BEING SOMETHING THAT YOU CAN'T POSSESS A FIREARM FOR
16 OR A PISTOL FOR OR JUST AS THE ACT, OUR ACT SAYS OR
17 AS OUR CONSTITUTION SAYS OR THIS PARTICULAR ACT SAYS,
18 IT DESCRIBES EXCEPT FOR DISABILITY IT DESCRIBES THAT
19 AS BEING ONE OF THE REASONS YOU WOULDN'T ALLOW
20 SOMEONE TO POSSESS A FIREARM. IN THE STATEMENT THAT
21 I BELIEVE YOU READ EARLIER FROM THE ACT ITSELF.

22 THE COURT: IT SAYS IN THE ACT YOU ARE 18
23 REMOVES ALL YOUR DISABILITIES AND UNLESS THERE IS
24 SOME DISABILITY OTHERWISE ESTABLISHED BY LAW.

25 MR. THOMPSON: I BELIEVE SO, YOUR HONOR.

1 THE COURT: WELL, THEN THIS STATUTE
2 DOESN'T MEAN ANYTHING THEN.

3 MR. THOMPSON: WELL, IT CERTAINLY DOES.

4 THE COURT: BECAUSE YOU WILL --

5 MR. THOMPSON: IT MEANS YOU CANNOT
6 RESTRICT THEM IN SOME FORM BEARING ARMS. I THINK ALL
7 THE STATES KIND OF FALL UNDER SOME KIND OF AGREEMENT
8 THAT WHILE WE'RE DOING THIS AS A POLICE POWER FOR
9 PISTOLS OTHER ARMS ARE ALLOWED AND SO WE'RE NOT
10 RESTRICTING THEM FROM BEING ABLE TO BEAR ARMS. THEY
11 ARE STILL HAVING THAT RIGHT AND THEY ARE STILL
12 FEELING THAT RIGHT AS A CONSTITUTIONAL RIGHT, AND
13 ONCE AGAIN OUR STATE, ONCE AGAIN, LOOKS AT THAT RIGHT
14 NOT AS AN INDIVIDUAL RIGHT NECESSARILY BUT AS A MORE
15 COLLECTIVE RIGHT, ONE THAT DEALS MORE AND HAS BEEN
16 DETERMINED BY MOST COURTS TO BE ONE THE RIGHT TO ARM
17 A MILITIA, NOT NECESSARILY INDIVIDUAL. IT IS
18 ACTUALLY VERY FEW STATES THAT SPREAD IT OUT TO THE
19 INDIVIDUAL. THIS PARTICULAR STATUTE SEEMS TO SPREAD
20 IT OUT TO AN INDIVIDUAL UNDER STATUTE BUT NOT UNDER
21 THE CONSTITUTION ITSELF.

22 THE COURT: WELL, A PERSON OF ANY AGE
23 CAN'T POSSESS A PISTOL.

24 MR. THOMPSON: CORRECT.

25 THE COURT: BUT THE PENALTY FOR THIS

1 PARTICULAR STATUTE IS FIVE YEARS IF I REMEMBER
2 CORRECT AS OPPOSED TO ONE YEAR IF YOU OR I POSSESS A
3 PISTOL, RIGHT?

4 MR. THOMPSON: RIGHT. WE HAVE TO UNLAWFUL
5 CARRY IT.

6 THE COURT: YEAH. OBVIOUSLY IF YOU HAD IT
7 LOCKED IN YOUR TRUNK OR GLOVE BOX OR AT HOME.

8 MR. THOMPSON: RIGHT.

9 THE COURT: OR IN THE PROCESS OF FISHING
10 OR WHATEVER ALL.

11 MR. THOMPSON: THOSE RESTRICTIONS ARE ON
12 EVERYBODY, SO WHILE YOU ARE ALLOWED TO POSSESS A
13 FIREARM, OBVIOUSLY THESE PEOPLE AREN'T AT THEIR HOME.

14 THE COURT: THAT'S NOT WHAT THEY ARE
15 CHARGED WITH.

16 MR. THOMPSON: THAT'S CORRECT.

17 THE COURT: HE'S CHARGED WITH POSSESSING
18 IT BECAUSE OF HIS AGE.

19 MR. THOMPSON: THAT'S CORRECT BUT THAT IS
20 ALSO AN ARBITRARY LIMITATION. THAT'S ONE THAT THE
21 LEGISLATURE LOOKED AT AND SAID, HERE IS SOMETHING
22 THAT WOULD PROTECT SOCIETY THAT WOULD BE BETTER AS A
23 POLICE POWER, WE'RE GOING TO DECIDE A PERSON CAN'T
24 JUST WALK AROUND AT ANY POINT WITHOUT A GUN UNLESS
25 THERE ARE CERTAIN PROVISIONS MADE THAT THEY HAVE TO

1 FOLLOW TO DO THAT. SOMEONE WOULD HAVE TO BE LICENSED
2 TO BE ABLE TO CARRY A CONCEALED WEAPON OR SOMETHING
3 OF THAT NATURE OR IT'S AGAINST THE LAW SO THAT ALSO
4 IS ONE THAT CAN BE RESTRICTED AS A RESTRICTION THAT
5 FOLLOWS EVERYBODY THAT THE STATE HAS ONCE AGAIN MADE
6 UNDER ITS POLICE POWER.

7 THE COURT: BUT HOW CAN YOU RESTRICT
8 SOMEONE 18 TO 21, PUT A GREATER DEGREE OF CULPABILITY
9 ON THEM, THAN YOU CAN ON SOMEONE OVER 21.

10 MR. THOMPSON: WELL, I THINK THE SAME WAY
11 YOU CAN SAY SOMEONE WITH A DISABILITY COULDN'T HAVE
12 IT. IT HAS TO DO, ONCE AGAIN AS YOU SAID WITH A, THE
13 SAME WAY YOU CAN SAY SOMEONE UNDER THE AGE OF 18
14 CAN'T HAVE ONE. IT IS A MATTER OF THAT SAME AS THEY
15 RESTRICT, SAME AS LIKE DRIVER'S LICENSE AND SUCH AS
16 THAT, THIS IS KIND OF A RESTRICTION UNDER THE POLICE
17 POWER THAT THEY CAN LOOK TO AND DETERMINE --

18 THE COURT: WELL, SHOW ME ANY OTHER AGE,
19 ANY OTHER PLACE THAT AGE IS A, ANYONE OVER 18 IS
20 PENALIZED, OTHER THAN LIQUOR LAWS, AND THERE IS ONE
21 IN THERE THAT SAYS BETWEEN 18 AND 25 BEFORE YOU CAN
22 GET MARRIAGE LICENSE YOU HAVE TO SHOW PROBATE JUDGE
23 PROOF OF AGE, IT DOESN'T SAY YOU CAN'T GET MARRIED;
24 WHAT OTHER ACT IS THERE THAT DIFFERENTIATES BETWEEN
25 ANYBODY WHO SIMPLY BASED ON AGE. NOT SIMPLY ON AGE,

1 BEING OVER 18.

2 MY POINT IS, AT LEAST WHAT I THINK THE
3 CONSTITUTION SAYS IS, YOU CAN TREAT PEOPLE, PEOPLE
4 OVER 18 ARE SUPPOSED TO BE TREATED LIKE EVERYBODY
5 ELSE BECAUSE THEY ARE AN ADULT UNLESS THERE IS SOME
6 PARTICULAR DISABILITY AND WHAT DISABILITY IS THERE
7 BETWEEN AGE 18 AND 25 AS OPPOSED TO 18 AND 21 AND 21
8 AND ABOVE OTHER THAN AGE?

9 MR. THOMPSON: I HAVE TO SAY THE AGE AND AS
10 THE LEGISLATURE LOOKED AT IT AND AS WE'VE SEEN IN OUR
11 EVERY DAY ACTIVITY WITHIN THE COURT HOUSE THAT IS A
12 GROUP OF PEOPLE WHO ARE VERY DANGEROUS WITH HANDGUNS.

13 THE COURT: ANYBODY IS DANGEROUS WITH A
14 HANDGUN.

15 MR. THOMPSON: NOT NECESSARILY. THERE IS A
16 LOT OF PEOPLE WHO OWN THEM WHO DON'T USE THEM TO KILL
17 ANYBODY, SO I THINK THAT --

18 THE COURT: WELL, PROBABLY A LOT OF PEOPLE
19 WHO ARE BETWEEN 18 AND 21 WHO DON'T USE THEM TO KILL
20 ANYBODY.

21 MR. THOMPSON: AND THAT MAY BE TRUE AS
22 WELL, BUT I THINK AS WE LOOK AT IT THROUGH THE COURT
23 SYSTEM AND OUR EXPERIENCES AND LOOKING AT WHY THE
24 STATE WOULD HAVE DONE SUCH A THING IT IS CERTAINLY
25 WITHIN THE POLICE POWER TO DO SO. THERE IS NOTHING

1 THAT WOULD PREVENT THEM FROM PICKING CERTAIN AGES TO
2 DO THAT AND FOR OUR SOCIETY TO DO THAT, PICK CERTAIN
3 AGES THAT SEEM TO BE A VIOLENT AGE FOR THIS TYPE OF
4 WEAPON, FOR THIS TYPE OF THING, AND SO ONCE AGAIN AGE
5 RESTRICTIONS IF YOU WANT TO LOOK AT SOMETHING WOULD
6 HAVE AGE RESTRICTION, YOU COULD INCLUDE TAKING GUN TO
7 A HIGH SCHOOL.

8 THE COURT: YOU CAN'T DO THAT AT ANY AGE.

9 MR. THOMPSON: CORRECT, BUT --

10 THE COURT: THE STATUTE SAYS THAT. YOU
11 CAN'T HAVE A MACHINE GUN. YOU CAN'T HAVE A SAWED OFF
12 SHOTGUN. YOU CAN'T HAVE A SAWED OFF RIFLE. YOU
13 CAN'T HAVE MILITARY WEAPONS BUT THAT'S.

14 MR. THOMPSON: AND THAT'S TRUE, BUT SEE,
15 THERE IS NOTHING UNCONSTITUTIONAL ABOUT THEM MAKING
16 THAT DELINEATION BETWEEN 18 AND 21.

17 THE COURT: WELL, THIS CONSTITUTIONAL
18 PROVISION DOESN'T MEAN ANYTHING?

19 MR. THOMPSON: I BELIEVE IT DOES, BUT I
20 THINK IT'S NOT AIMING AT THIS I DON'T BELIEVE. IT
21 STILL DERIVES POLICE POWERS. IT DOESN'T MEAN THAT
22 JUST BECAUSE THERE IS SOME GROUP THAT THEY CLAIM TO
23 BE A GROUP THAT CAN'T POSSESS SOME THEM AT SOME
24 PERIOD OF TIME IT GOES ALONG WITH ANYONE ELSE. NOT
25 EVERYBODY IS A DRUNKARD AND CAN'T POSSESS A GUN.

1 THE COURT: IT SAYS YOU CAN'T BUT I DON'T
2 KNOW IF ANYBODY HAVE EVER BEEN PROSECUTED.

3 MR. THOMPSON: I'VE SEEN A COUPLE, BUT, YOU
4 KNOW, THOSE THINGS APPLY AND THOSE ARE CIRCUMSTANCES
5 THAT THE LEGISLATURE --

6 THE COURT: BUT THEY ARE NOT TIED TO AGE.
7 THAT'S THE KEY. THEY ARE NOT TIED TO AGE. YOU CAN'T
8 BE A DRUG ADDICT, YOU CAN'T, NOTHING ELSE IS TIED TO
9 AGE OTHER THAN THAT ONE PROVISION.

10 MR. THOMPSON: BUT THERE IS NOTHING THAT
11 WOULD PROHIBIT IT REALLY TO BEING TIED TO AGE.

12 THE COURT: THE CONSTITUTION. YOU DON'T
13 THINK OUR CONSTITUTION MEANS ANYTHING?

14 MR. THOMPSON: WELL, SEE, THEY STILL HAVE
15 THE RIGHT TO BEAR ARMS THOUGH BECAUSE THEY HAVE SOME
16 RESTRICTION ON THE RIGHT DOESN'T MEAN THEY STILL HAVE
17 THAT RIGHT.

18 THE COURT: I'M NOT TALKING ABOUT THE
19 RIGHT TO BEAR ARMS. I'M TALKING ABOUT THE AGE. WHAT
20 I'M GOING TO DO IS TAKE THIS UNDER ADVISEMENT AND I'M
21 GOING TO HEARING FROM MR. GREELEY SINCE I'VE BEEN
22 DOING ALL THE ARGUING AND GIVE YOU OVERNIGHT TO DO
23 SOME FURTHER RESEARCH BECAUSE THE INDIANA CASE IT
24 SAYS YOU CAN'T, THEY HAVE A STATUTE THAT SAYS YOU
25 CAN'T DO IT WHEN YOU ARE UNDER AGE 18, WE SAY THAT,

1 SO THAT'S NOT A WHOLE LOT OF PRECEDENT.

2 MR. THOMPSON: BUT I WILL POINT OUT RIGHT
3 AFTER IT SAYS NOT LABORING UNDER DISABILITIES
4 DESCRIBED IN THIS CONSTITUTION, IT SAYS OR OTHERWISE
5 ESTABLISHED BY LAW, SO THERE IS, OBVIOUSLY THEY ARE
6 MAKING ROOM FOR LAWS TO BE ESTABLISHED THAT WOULD
7 OTHERWISE SOMEWHAT RESTRICT OR BE ABLE TO PUT LIMITS
8 ON POSSESSING OF A FIREARM.

9 THE COURT: OR DOING ANYTHING UNTIL YOU
10 ARE 21. UNDER THIS YOU ARE SAYING THAT THE
11 LEGISLATURE COULD NOW SAY THAT YOU CAN'T GET MARRIED
12 UNTIL YOU ARE 21 AND THAT WOULD BE A DISABILITY
13 IMPOSED BY -- GO AHEAD AND GET YOUR COUNSEL FROM.

14 MR. THOMPSON: YES, SIR. WELL, AS
15 MS. JOYNER POINTED OUT, MARRIAGE IS A FUNDAMENTAL
16 RIGHT WHERE THE RIGHT TO BEARS RIGHT ARM IS NOT.

17 THE COURT: WHAT ABOUT DRIVING? YOU CAN'T
18 DRIVE UNTIL YOU ARE 21.

19 MR. THOMPSON: DRIVING IS NOT A
20 FUNDAMENTAL RIGHT.

21 THE COURT: YOU DON'T HAVE A RIGHT TO
22 DRIVE, THAT'S TRUE. BUT THEY CAN CREATE A DISABILITY
23 BASED ON AGE?

24 MR. THOMPSON: I BELIEVE THE STATE CAN
25 UNDER ITS POLICE POWER.

1 THE COURT: HOW ABOUT FREEDOM OF SPEECH?

2 MR. THOMPSON: IS DEFINITELY A FUNDAMENTAL
3 RIGHT.

4 THE COURT: CAN YOU RESTRICT IT AND SAY
5 THAT IF YOU ARE UNDER 21 THAT YOU CANNOT, SOMEHOW
6 YOUR FREEDOM OF SPEECH IS RESTRICTED?

7 MR. THOMPSON: I DON'T BELIEVE SO, BUT
8 ONCE AGAIN, FREEDOM OF SPEECH IS A FUNDAMENTAL RIGHT,
9 BUT FREEDOM OF SPEECH IS NOT GOING TO HARM THE
10 COMMUNITY EITHER. YOU ARE NOT GOING TO HAVE SOMEONE
11 COME OUT AND SAY I HATE YOU AND THAT'S GOING TO KILL
12 SOMEBODY. THAT'S NOT SOMETHING THAT UNDER THE POLICE
13 POWER WOULD EVER HAVE TO LOOK AT.

14 THE COURT: MR. GREELEY.

15 MR. GREELEY: YOUR HONOR, I'M GOING TO BE
16 VERY BRIEF. I BELIEVE THAT THE IMPORTANT THING IS
17 THAT WE'RE DEALING WITH A PROVISION THAT IS A
18 CONSTITUTIONAL RIGHT. BASICALLY WHAT IT DOES IS IT
19 COMES DOWN TO THE STATUTE CRIMINALIZED 18 TO 21 YEAR
20 OLDS FOR POSSESSING A GUN IS MERELY A STATUTE AND
21 WHAT THE LEGISLATURE DID BACK THEN IS THEY PASSED
22 THIS STATUTE. WELL, THE STATUTE CAN'T TRUMP A
23 CONSTITUTIONAL PROVISION. IT JUST CAN'T DO IT. AND
24 IT'S JUST LIKE, YOU WERE SAYING AS FAR AS FREEDOM OF
25 SPEECH, IF THE LEGISLATURE IN SOUTH CAROLINA SAID

1 THAT PEOPLE BETWEEN THE AGE OF 18 AND 21 CAN'T
2 PRACTICE RELIGION BECAUSE THEY ARE NOT OLD ENOUGH TO
3 MAKE A DECISION ABOUT THAT IMPORTANT THING YET, THEN
4 IT'S THE SAME AS THE BEARING ARMS. I DON'T KNOW
5 THAT, I JUST DON'T SEE HOW IT IS A CONSTITUTIONAL
6 STATUTE BECAUSE OF THE TRUMPING. IT'S A DIFFERENCE
7 BETWEEN PROHIBITION AND RESTRICTION. THE POLICE
8 POWERS CAN COME IN AND CAN RESTRICT CERTAIN THINGS
9 AND IN CERTAIN CIRCUMSTANCES. HERE WE HAVE A
10 COMPLETE PROHIBITION OF A CONSTITUTIONAL RIGHT THAT
11 SHOULD BE GOING TO PEOPLE UNDER THE CONSTITUTION
12 THROUGH THE SUI JURIS AND IT'S THIS COMPLETE
13 PROHIBITION OF THAT GROUP THAT I WOULD SUBMIT MAKES
14 THIS STATUTE UNCONSTITUTIONAL AND DOESN'T TRUMP THE
15 SUI JURIS CONSTITUTIONAL PROVISION.

16 THE COURT: THERE ARE AN AWFUL LOT OF
17 RIGHTS ENUMERATED IN THE CONSTITUTION AND I JUST,
18 SEARCH AND SEIZURE, JURY TRIALS, EMINENT DOMAIN,
19 SPEEDY TRIAL, COULD THE LEGISLATURE ENACT A PROVISION
20 THAT SAYS, A STATUTE THAT SAYS THAT ANYONE UNDER 21
21 IS NOT ENTITLED TO A SPEEDY TRIAL? THAT'S A
22 CONSTITUTIONAL RIGHT LIKE THE RIGHT TO BEAR ARMS NOT
23 A FUNDAMENTAL RIGHT.

24 MR. THOMPSON: I DON'T BELIEVE THAT THAT
25 IS SOMETHING THAT THEY CAN DO OBVIOUSLY.

1 THE COURT: WHY NOT?

2 MR. THOMPSON: WELL, I DON'T THINK THAT,
3 THEY CAN'T EVEN DO THAT FOR SOMEONE UNDER THE AGE OF
4 18, SO THERE IS NO, THERE IS NO WAY THAT THEY COULD
5 RESTRICT THAT. THERE IS NO, AS WELL THERE IS NO
6 DANGER IN SOMEONE, THERE IS NO DANGER TO THE PUBLIC.
7 ONCE AGAIN, SOMEONE IS NOT GOING TO BE KILLED BY
8 GIVING PEOPLE SPEEDY TRIALS. WHEREAS SOMEONE CAN BE
9 BY GIVING SOMEONE WHO SHOULDN'T HAVE A GUN A GUN.

10 AND AS TO MR. GREELEY'S REFERENCE TO
11 RELIGION, RELIGION CAN BE RESTRICTED AS WELL TO
12 CERTAIN EXTENTS. YOU CAN HAVE RELIGION THAT WOULD
13 SAY AS PART OF OUR WORSHIP WE NEED TO SACRIFICE 15
14 GOATS DOWNTOWN ROCK HILL IN THE MIDDLE OF THE SQUARE.
15 YOU KNOW, YOU CAN PROHIBIT THEM FROM DOING THAT.
16 THAT'S NOT NECESSARILY JUST CARTE BLANCHE YOU CAN DO
17 WHATEVER YOU WANT TO. THIS IS NOT PROHIBITING THEM
18 FROM POSSESSING FIREARMS. IT IS SIMPLY PISTOLS.
19 THEY CAN HAVE OTHER FIREARMS.

20 THE COURT: MR. GREELEY, I'M FLIP
21 FLOPPING, BUT YOU HAVE A RIGHT TO VOTE AT AGE 18 AND
22 THAT CAN BE RESTRICTED, CAN'T BE RESTRICTED ON THE
23 BASIS OF AGE BUT IT CAN BE RESTRICTED FOR OTHER
24 REASONS.

25 MR. GREELEY: IT CAN BE RESTRICTED AND A

1 LOT OF TIMES THOSE RESTRICTIONS COME FROM ACTIONS OR
2 ACTIVITIES THAT HAVE BEEN PERFORMED BY THAT
3 INDIVIDUAL WHICH CAUSES THEM TO LOSE THAT RIGHT OR TO
4 BECAME RESTRICTED AS OPPOSED TO THIS STATUTE HERE TO
5 WHERE THERE HASN'T BEEN ANYTHING THAT THEY HAVE DONE
6 TO BRING THIS ABOUT OR TO LOSE THAT RIGHT OR TO HAVE
7 THAT RIGHT RESTRICTED EXCEPT EXIST BETWEEN AGES.

8 THE COURT: ALL RIGHT. WELL, I'M GOING TO
9 TAKE IT UNDER ADVISEMENT AND I'LL HEAR SOME FURTHER
10 ARGUMENT ON IT IN THE MORNING.

11 (END OF REQUESTED PROCEEDINGS.)

12 (START OF REQUESTED TESTIMONY THAT
13 HAPPENED ON TUESDAY, AUGUST 29, 2006.)

14 THE COURT: AT THIS POINT I'M GOING TO
15 RULE ON THE QUASHING, THE MOTION TO QUASH THE
16 INDICTMENT FOR POSSESSION OF A PISTOL BY SOMEONE
17 UNDER THE AGE OF 21. I'M GOING TO GRANT THAT MOTION.
18 BASED ON THE ARGUMENT THAT WE HAVE HAD YESTERDAY, I
19 DON'T BELIEVE, I BELIEVE WE USED THE WORD DISABILITY
20 THEY ARE TALKING ABOUT SOME DISABILITY OTHER THAN AGE
21 FROM THE STATUTE. ANYWAY, I'M GOING TO QUASH THE
22 INDICTMENT. I FIND THAT IT'S UNCONSTITUTIONAL. SO
23 WE HADN'T THE SWORN THE JURY. IF THE STATE WANTS TO
24 POSTPHONE THE TRIAL AND APPEAL THAT ISSUE, WE HAVE TO
25 DO IT NOW OR NEVER.

1 MR. POPE: THAT WAS OUR DISCUSSION.

2 THE COURT: ALL RIGHT. TAKE A MINUTE.
3 YOU HAVE GOT TO HAVE ANTICIPATED THAT I MIGHT HAVE
4 DONE THIS.

5 MR. POPE: SIR?

6 THE COURT: SURELY YOU ANTICIPATED THAT I
7 COULD HAVE DONE THIS WHEN I GOT TWO CHOICES.

8 MR. POPE: WE ALWAYS ANTICIPATE ANYTHING
9 IS POSSIBLE, YOUR HONOR. YOUR HONOR, NOT BEING A
10 APPELLATE LAWYERS WE'RE JUST TRYING, WE CLEARLY WANT
11 TO GO FORWARD WITH THE TRIAL. WE PRESERVE WHATEVER
12 RIGHTS WE MAY OR MAY NOT HAVE TO APPEAL ON THIS ISSUE
13 SINCE IT WILL NEVER GO TO THE JURY AND THE JURY HAS
14 NEVER BEEN SWORN, WE WON'T HAVE AN OPPORTUNITY TO
15 ADDRESS THAT, THERE IS NOTHING TO AFFECT WITH GOING
16 FORWARD WITH THE TRIAL. IN OTHER WORDS, IF YOU
17 DISMISS IT WE --

18 THE COURT: I UNDERSTAND WHAT YOU ARE
19 SAYING AND I'M NOT APPELLATE JUDGE EITHER.

20 MR. POPE: I JUST WANTED TO PUT THAT ON
21 THE RECORD THAT WE MAY INTEND TO APPEAL BUT WE WOULD
22 NOT WITHHOLD GOING FORWARD AT THIS TIME.

23 (END OF REQUESTED PROCEEDINGS.)

24

25

1 I, JANET RICH, OFFICIAL COURT REPORTER FOR
2 THE SIXTEENTH CIRCUIT OF THE STATE OF SOUTH CAROLINA,
3 DO HEREBY CERTIFY THAT THE FORGOING IS A TRUE,
4 ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL
5 THE REQUESTED PROCEEDINGS HAD IN THE TRIAL OF THE
6 CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CIRCUIT
7 COURT FOR YORK COUNTY, SOUTH CAROLINA, ON THE 28TH &
8 29TH DAY OF AUGUST 2006.

9 I DO FURTHER CERTIFY THAT I AM NEITHER KIN,
10 COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

11
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JANET M. RICH

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge

THE STATE,

Appellant,

vs.

BERRY SCOTT BOLIN,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains only those materials agreed upon by counsel for both parties.



S. CREIGHTON WATERS

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEYS FOR APPELLANT

June 6, 2007

STATE OF SOUTH CAROLINA

COUNTY OF YORK

BERRY BOLIN

Plaintiff(s)

vs.

STATE OF SOUTH CAROLINA

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2010-CP - 46- 0436

(Please Print)

Submitted By: T. MICAH LEDDY

Address: 2008 LINCOLN STREET

COLUMBIA, SC 29201

SC Bar #: 75213

Telephone #: 803-771-9066

Fax #: 803-753-0837

Other:

E-mail: MICAH@LEDDEY.LAW.FIRM

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☐ Breach of Contract (140) ☐ Other (199)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20 -CP- ☐ Notice/ File Med Mal (230) ☐ Other (299)	Torts - Personal Injury ☐ Assault/Slander/Libel (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Other (399)	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
Inmate Petitions ☒ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Other (799)	Administrative Law/Relief ☐ Reinstate Driver's License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899)	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Commission (990) ☐ Employment Security Comm (991) ☐ Other (999)
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Sexual Predator (510)		

Submitting Party Signature: TML

Date: 12/29/11

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA)
County of York)
Berry S. Bolin)
Applicant,)
vs.)
State of South Carolina)
Respondent.)

IN THE COURT OF COMMON PLEAS

CA No. 2010-CP-46-0436

FIRST AMENDED APPLICATION
FOR POST CONVICTION REVIEW

FILED-RECEIVED
2011 DEC 30 PM 1:42
DAVID H. HORTON
C.C. CLERK
YORK COUNTY, SC

{Note: This Application follows SCRPC Appendix of Forms, Form 5, as required by Rule 71.1(b), SCRPC.}

1. Applicant is detained at Lee Correctional Institution, 990 Wisacky Hwy, Bishopville, SC.
2. Name and location of Court which imposed sentence: York County Court of General Sessions, The Honorable John Hayes, presiding.
3. Name of Co-Defendant: Ronald Lee Owens (pled guilty following jury selection).
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
 - a. 2006-GS-46-01595: Lesser included offense of Voluntary Manslaughter
 - b. 2006-GS-46-01596: Lesser included offense of ABHAN
 - c. 2006-GS-46-01598: Lesser included offense of ABHAN
 - d. 2006-GS-46-01599: Lesser included of AHAN
 - e. 2006-GS-46-01600: Discharging a firearm into an occupied vehicle
5. The date upon which sentence was imposed and the terms of the sentence: September 6, 2006, all sentences concurrent:

- a. Voluntary Manslaughter: 30 years
 - b. ABHAN: 10 years
 - c. ABHAN: 10 years
 - d. AHAN: 10 years
 - e. Discharging firearm: 10 years
6. A finding of guilty on lesser included offenses was made after a plea of not guilty.
7. The applicant did appeal from judgment of conviction and sentence.
8. (a) Applicant appealed to
- i. The South Carolina Court of Appeals
- (b) The result in each such Court:
- i. Affirmed;
- (c) The date of the result was:
- i. February 5, 2009
- (d) Citation of the opinion of each court:
- i. *State v. Berry Bolin*, 674 S.E.2d 885, 381 S.C. 557 (Ct.App. 2009)
9. N/A
10. and
11. Grounds for Relief and Concise Statement of Supporting Facts.¹

10(A). GROUND A

Petitioner was denied effective assistance of counsel at the trial stage of his case in violation of Petitioner's rights under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution.

¹ Applicant reserves his right to amend this application after further discovery and to amend the application to conform to the proof adduced at the evidentiary hearing.

11 (A) FACTS IN SUPPORT OF GROUND A

Counsel was deficient in not calling several witnesses who were present at the scene who would testify that they saw gunfire coming from the alleged victims' automobile, which would have bolstered Applicant's claim of self-defense immensely. Counsel did put up a case in chief, which gave the State the last closing argument as well as opened the door to the State being able to argue that the Defense had no witnesses who could corroborate this theory of the defense.

10 (B) GROUND B

Petitioner was denied effective assistance of counsel at the trial stage of his case in violation of Petitioner's rights under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution.

11 (B) FACTS IN SUPPORT OF GROUND B

Counsel was deficient in failing to subpoena or otherwise obtain the videotape surveillance from the location where the alleged victims stopped their vehicle on the way to the police station, even though it was Counsel's contention at trial that they had disposed of weapons at the stop. The evidence is now forever lost.

10 (C) GROUND C

Petitioner was denied effective assistance of counsel at the trial stage of his case in violation of Petitioner's rights under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution.

11 (C) FACTS IN SUPPORT OF GROUND C

Counsel was deficient in his efforts to get Petitioner to accept the guilty plea offer of 15 years to manslaughter. Counsel was likewise deficient in failing to attempt to get the plea offer

reinstated after the trial judge ruled that the "Castle Doctrine" statute did not apply to this case because the statute was prospective in its application only.

10 (D) GROUND D

Petitioner was denied effective assistance of counsel at the appellate stage of his case in violation of Petitioner's rights under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution.

11 (D) FACTS IN SUPPORT OF GROUND D

Counsel was ineffective in not filing a writ of certiorari to the South Carolina Supreme Court.

12. Applicant has appealed directly to the Supreme Court of South Carolina and to the United States Supreme Court. Applicant has not previously filed for either an application for post-conviction relief or a petition for a writ of habeas corpus in state or federal court.

13. Prior to this application have you filed with respect to this conviction:

- a. Any petition in a State Court under South Carolina law? No
- b. Any petition in State or Federal Courts for habeas corpus or post-convictions relief? No.
- c. Any petition in the United States Supreme Court for certiorari other than petitioners, if any already specified in (8)? No.
- d. Any other petitions, motions or applications in this or any other Court? No.

14. N/A

15. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion, or application which you have filed? No.

16. N/A

17. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented. N/A.

18. Were you represented by an attorney at any time during the course of:

- a. Your arraignment and plea? Yes.
- b. Your trial? Yes
- c. Your sentencing? Yes.
- d. Your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes.
- e. Preparation, presentation, or consideration of any petitions, motions, or applications with respect to this conviction, which you filed? Yes.

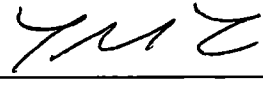
19. Applicant was represented at trial and on direct appeal by Leland B. Greeley, Esquire,
P.O. Box 2981, Rock Hill, SC 29732.

20. Applicant seeks to have his convictions and sentences vacated.

21. Applicant is under no other sentence from any other court.

Respectfully submitted,

T. Micah Leddy
Leddy Law Firm, LLC
2008 Lincoln Street
Columbia, SC 29201
(803) 779-9966

By: 

T. Micah Leddy, Esquire
Counsel for Applicant

STATE OF SOUTH CAROLINA

COUNTY OF YORK

BERRY BOLIN

Plaintiff,

vs.

STATE OF SOUTH CAROLINA

Defendant.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

CASE NO.: 2010-CP-46-0436

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

FILED-RECEIVED
2012 FEB 16 AM 11:56
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

Plaintiff's Attorney:

T. MICAH LEDDY, Bar No. 75213

Address:

2008 LINCOLN STREET

COLUMBIA, SC 29201

Phone: 803-779-9966 Fax 803-753-0837

E-mail: MICAH@LEDDYLAW.COM Other: _____

Defendant's Attorney:

SALLEY ELLIOTT, Bar No. _____

Address:

S.C. ATTORNEY GENERAL

P.O. BOX 11549

COLUMBIA, SC 29201

Phone: 803-734-3727 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: Motion to Open Limited Discovery

Estimated Time Needed: 15 Minutes

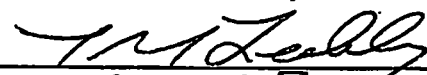
Court Reporter Needed: ☒ YES / ☐ NO

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

2/8/12
Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT: \$ _____

☒ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ 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, SCRPC)

☐ 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: \$ _____

STATE OF SOUTH CAROLINA)
 County of York)
 Berry S. Bolin)
 Applicant,)
 vs.)
 State of South Carolina)
 Respondent.)

IN THE COURT OF COMMON PLEAS

CA No. 2010-CP-46-0436

MOTION FOR LEAVE
 TO CONDUCT LIMITED DISCOVERY

FILED-RECEIVED
 2012 FEB 16 AM 11:56
 DAVID HAMILTON
 C.C.P. & GS
 YORK COUNTY, SC

Applicant, Berry S. Bolin, by and through undersigned counsel, hereby moves, pursuant to S.C. Code Ann. §17-27-150, for leave to conduct discovery in this post-conviction relief action. In support of this motion, applicant apprises the Court of the following facts and legal principles:

1. Applicant is presently serving a thirty-year sentence for manslaughter, imposed on September 6, 2006 by the York County Court of General Sessions following his trial. A direct appeal was taken and the South Carolina Court of Appeals affirmed the convictions and sentences on February 5, 2009. *State v. Bolin*, 673 S.E.2d 885 (Ct. App. 2009). Applicant's initial application for post-conviction relief was filed on February 1, 2010.
2. Section 17-27-150 specifically authorizes discovery in noncapital post-conviction relief proceedings upon a showing of good cause. §17-27-150(A) ("A party in a noncapital post-conviction relief proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.").

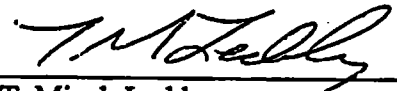
3. Applicant submits that good cause exists for the authorization of limited discovery for the following reasons:

- a. Use of discovery procedures will expedite applicant's preparation for the evidentiary hearing, thus saving time and state resources;
- b. Information obtained through discovery will likely eliminate the need for a number of witnesses to be called to testify at the post conviction relief hearing;
- c. Permitting discovery will substantially reduce the likelihood that a last-minute continuance of the post-conviction relief proceedings will be necessary;
- d. Discovery will permit applicant to obtain necessary information through means other than in-court proceedings, such as depositions, interrogatories, affidavits, and documents produced by the prosecuting agencies; therefore, valuable court time can be used to present only relevant material and witnesses obtained through these sources;
- e. If discovery is not authorized, applicant will have no option but to pursue the information and materials he seeks to discovery by subpoenaing individuals and files to the PCR hearing. If forced to rely on this method, applicant will almost certainly require additional time for investigation after gaining access to the information and materials he seeks, which will in turn require a continuance of the post-conviction relief proceedings. On the other hand, allowing pre-hearing discovery will facilitate full preparation by applicant and clear the way for a presentation of all facts supporting his claims for relief to be presented at a single evidentiary hearing.

f. Applicant has sought to review the Seventh Circuit Solicitor's files related to Travis Falls and Berry Bolin, including materials that have been withheld under an asserted attorney work-product privilege. Applicant has been denied access, and Applicant therefore seeks for the Court to open limited discovery so that those materials can be reviewed, a privilege log provided, and discovery of appropriate materials can be made in advance of the PCR evidentiary hearing.

WHEREFORE, for all the foregoing reasons, applicant submits that he has presented good cause for the invocation of discovery, and requests a hearing be conducted to address any issues the Court may have.

Respectfully submitted,



T. Micah Leddy
Attorney for Applicant

February 8, 2012

STATE OF SOUTH CAROLINA)

County of York)

Berry S. Bolin)

Applicant,)

vs.)

State of South Carolina)

Respondent.)

IN THE COURT OF COMMON PLEAS

CA No. 2010-CP-46-0436

CERTIFICATE OF SERVICE

I, T. Micah Leddy, Counsel for Berry Bolin, hereby certify that I have served upon the attorney for the respondent one (1) copy of applicant's Motion to Invoke Limited Discovery in the above-captioned case by depositing a copy of same in the United States Mail, first class, postage pre-paid, addressed as follows:

Salley Elliot, Esquire
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29201

This the 8th day of February, 2012, in Columbia, South Carolina.



T. Micah Leddy
Attorney for Applicant

FILED-RECEIVED
2012 FEB 16 AM 11:56
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC



ALAN WILSON
ATTORNEY GENERAL

March 9, 2012

The Honorable David Hamilton
York County Clerk of Court
P.O. Box 649
York, South Carolina 29745

Re: Berry Bolin v. State of South Carolina
2010-CP-46-0436

Dear Mr. Hamilton:

Enclosed please find the original **Return to Applicant's Motion for Leave to Conduct Limited Discovery** of the Respondent in the above-captioned case for filing in your office.

Sincerely,

Salley W. Elliott
Senior Assistant Deputy Attorney General

SWE/ab

Enclosure

cc: Assistant Solicitor Walter Williams Thompson
T. Micah Leddy, Esquire

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)
Berry Bolin,)
Applicant,)
State of South Carolina,)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS

2010-CP-46-0436

RETURN TO APPLICANT'S MOTION
FOR LEAVE TO CONDUCT LIMITED DISCOVERY

This matter comes before the Court by way of the Applicant's Motion for Leave to Conduct Limited Discovery. The Respondent (the State) would submit the following:

I.

The Uniform Post-Conviction Procedure Act comprehends and takes the place of the statutory writ of habeas corpus found in S.C. Code Ann. §§ 17-17-10 (2003), *et seq.*, under which this action has been filed. *See* S.C. Code Ann. § 17-27-20(b). The Uniform Post-Conviction Procedure Act does not allow for discovery in a non-capital post-conviction relief case without good cause. S.C. Code Ann. § 17-27-150(A) states:

A party in a noncapital post-conviction relief proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for the effective utilization of discovery procedures, counsel may be appointed by the judge for an applicant who qualifies for appointment pursuant to Section 17-27-60 or similar applicable provisions of law.

The Applicant seeks to review the files respecting Travis Falls and Berry Bolin in the possession, custody and control of the 16th Circuit Solicitor's Office, including materials that have been withheld under an asserted attorney work-product privilege. He contends he has been denied

access to these materials and asks this Court to open limited discovery so that the materials can be reviewed, a privilege log provided, and discovery made in advance of the evidentiary hearing. The Sixteenth Circuit Solicitor's file for Travis Falls and Berry Bolin is not in the possession, custody, or control of counsel for the Respondent in this post-conviction relief action. It will be necessary for the Solicitor's Office to appear and make its arguments as to propriety of Applicant's access to the materials sought and whether any documents are available that might be relevant to Applicant's post-conviction relief action.

II.

As to access to files relating to Travis Falls or Berry Bolin in the possession, custody, and control of the 16th Circuit Solicitor's Office, the undersigned submits that a hearing should be convened with counsel for the parties and participation by the prosecuting agency with custody and control of the information sought.

III.

WHEREFORE, having made its Return to the motion, the State requests that a hearing be held as to access to files and information that might be in the possession, custody, and control of the 16th Circuit Solicitor's Office.

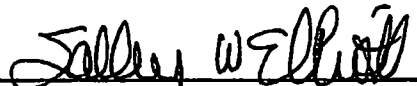
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

BY:


(ATTORNEYS FOR RESPONDENT)
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3727

March 9, 2012

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

2010-CP-46-0436

BERRY BOLIN,

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

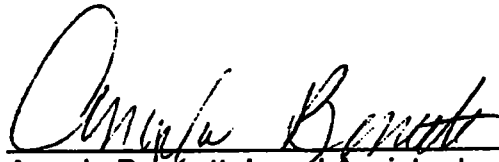
STATE OF SOUTH CAROLINA,

Respondent.

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return to Applicant's Motion for Leave to Conduct Limited Discovery** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

T. Micah Leddy, Esquire
2008 Lincoln Street
Columbia, South Carolina 29201

DATED this 9th day of March, 2012


Angela Bennett, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Berry Bolin,

Applicant,

v.

State of South Carolina,

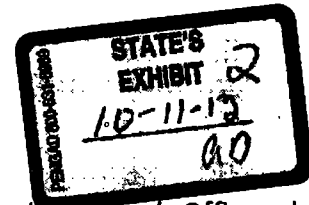
Respondent.

IN THE COURT OF COMMON PLEAS

2010-CP-46-0436

PRIVILEGE LOG

SIXTEENTH CIRCUIT SOLICITOR'S OFFICE



Applicant, Berry Bolin, requests the files of the Sixteenth Circuit Solicitor's Office related to Travis Falls and Berry Bolin in a motion for leave to conduct limited discovery in Applicant's Post Conviction Relief action. The Sixteenth Circuit Solicitor's Office fully complied with the discovery requests from Berry Bolin during the original trial of his case. Any further discovery is unnecessary, irrelevant and improper. Any items not provided in the original discovery are not subject to discovery for various reasons including the work product exception. The following files/documents are in the possession of the Sixteenth Circuit Solicitor's Office:

BOX LABELLED "Hovis-Falls Discovery Box"

1. A folder containing discovery pages 1 to 512 and signed paperwork acknowledging receipt of the discovery by representatives of the defendants Barry Scott Bolin and Ronald Lee Owens.
2. A smaller box containing numerous photo, audio and video disks, two audio cassette tapes and various photographs. All of these items were handed over in discovery to Barry Scott Bolin and Ronald Lee Owens.
3. Handwritten note by Investigator Merry Collins indicating Attorney Michah Leddy viewed the contents of this discovery box on September 22, 2011.

BOX LABELLED "Box 1 of 3, Hovis-Falls, St v Bolin & Owens, Murder"

4. The contents of Solicitor Tommy Pope's trial notebook. This contains documents handed out in discovery and the handwritten and typed notes of Solicitor Pope.

5. A folder containing the notes taken during trial for the State by Solicitor's Office Investigator Merry Collins. This folder contains various email correspondences and miscellaneous work product information.
6. A transcript of the arraignment of Berry Scott Bolin dated May 22, 2006.
7. A file containing various papers regarding Berry Scott Bolin's representation, discovery motions, warrants and tracking sheets.
8. An expanding folder containing many handwritten notes by Solicitor's Office Investigator Martha Parrish. These notes were taken at the request of Deputy Solicitor Willy Thompson during interviews of potential witnesses by both Martha Parrish and Willy Thompson in preparation for trial. This folder also contains subpoenas, witness rap sheets and other miscellaneous paperwork.
9. An expanding folder containing the following: legal motions, handwritten and typed notes regarding potential witness information made by the Solicitor's Office in preparation for trial, subpoenas, and jury lists with Solicitor's Office notes and comments.

BOX LABELLED "Hovis-Falls, Box 2 of 3"

8

10. A notebook containing the York County Detention Center records of Berry Bolin and Lee Owens.
11. A folder containing legal motions and correspondences.
12. A folder containing witness rap sheets.
13. A folder containing victim notification information, copies of mugshots of potential witnesses, copies of DMV photographs/driving records of potential witnesses, and various other miscellaneous papers/notes.
14. Several extra copies of various computer disks containing photographs, video and audio related to the case. (These disks are extra copies of some of the disks in the discovery box).

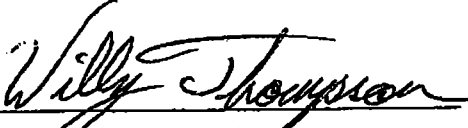
BOX LABELLED "Hovis-Falls, Berry Bolin, Box 3 of 3"

9

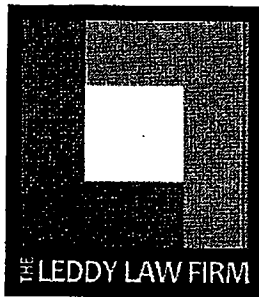
15. The contents of Deputy Solicitor Willy Thompson's trial notebook. This contains documents handed out in discovery and the handwritten and typed notes of Deputy Solicitor Thompson.
16. An expandable folder containing legal research and legal motions.
17. An expandable folder containing summaries and statements of various witnesses taken by law enforcement and previously turned over in discovery. This folder also contains the rap sheets of the witnesses.

18. A folder containing legal correspondences between the State and the Defense (Bolin and Owens).
19. A folder containing a copy of the paperwork on warrant J-160582 for ABHAN against Travis Falls including copies of the letters conflicting this charge to the Attorney General's Office.
20. A folder containing a copy of the paperwork on warrant J-210472 for Common Law Robbery against Travis Falls. This charge occurred after the trial of the defendant Berry Bolin.
21. A folder containing the handwritten notes of Deputy Solicitor Willy Thompson and some handwritten notes of Solicitor's Office Investigator Martha Parrish.
22. A folder containing miscellaneous court paperwork regarding Ronald Lee Owens.
23. A folder containing the polygraph report on Eric Brown.
24. A folder containing various charge requests by the State and the Defense.
25. A folder containing various potential witness lists.
26. A folder containing various witness rap sheets.
27. Several extra copies of various computer disks containing photographs, video and audio related to the case. It also contains two extra copies of audio cassettes related to the case. (These disks and cassettes are extra copies of some of the disks and cassettes in the discovery box).
28. Several audio disks of some of Berry Bolin's "jail" telephone calls.
29. The prosecution file on Travis Falls for Possession of Codeine with the arrest date of November 23, 2002. This case was prosecuted in 2003 some 3 years prior to Berry Bolin's arrest and is not related to Bolin's case.

The Sixteenth Circuit Solicitor's Office reserves the right to add other items to this list and the absence of a document from this list does not constitute a waiver of any privilege applicable to that document.

By: 
Deputy Solicitor Willy Thompson
Sixteenth Circuit Solicitor's Office

July 13, 2012



THE LEDDY LAW FIRM, LLC.

2008 LINCOLN STREET
COLUMBIA, SC 29201
(803) 779 - 9966
(803) 753 - 0837 (fax)

October 24, 2012

The Honorable Edgar W. Dickson
Circuit Court Judge
P.O. Box 1949
Orangeburg, SC 29116

Re: *State v. Berry Bolin*

Dear Judge Dickson:

At the request of The Court, I am tendering this letter in support of my motion to admit three (3) subpoenaed boxes of documents withheld by Deputy Solicitor Willy Thompson pursuant to an asserted work-product privilege.

As Your Honor may recall, the materials requested in this motion were originally requested pursuant to a Freedom of Information Act request that I sent to Deputy Solicitor Thompson. That request was denied, citing the work product privilege. I then filed a motion to open discovery, limited to the materials sought in the FOIA request. This motion was heard before The Honorable Lee S. Alford on July 13, 2012 in the York County Court of Common Pleas. The issue before Judge Alford was whether to grant the Applicant's request to open discovery based on a showing of good cause. That motion was denied, but the issue of whether the documents are being properly withheld pursuant to an asserted work-product privilege was never before Judge Alford. Therefore, the issue of whether the documents should be admitted into the record is properly before Your Honor.

Deputy Solicitor Thompson was properly served a subpoena and commanded to produce "[a]ny and all documents in the possession of the York County Solicitor's Office related to Travis Falls (DOB: 7/30/79) AND Berry Bolin (DOB: 4/18/86)." Mr. Thompson appeared at the hearing on October 11, 2012 and was called as a witness. Mr. Thompson produced four (4) boxes of materials, but testified that three of the four were not subject to disclosure because they were attorney work-product. Mr. Thompson was asked to produce a privilege log as required by Rule 45 (d)(2), and provided a three page document to the Court. The Applicant objected to the sufficiency of the Privilege Log on the basis that it did not conform to the rule's requirement that the log be "sufficient to enable the demanding party to contest the claim," and the Applicant reasserts this objection as well as all objections made in the hearing.

Based on the representations made in the Privilege Log, however, the Applicant now moves only to have the Court review the contents of a few of the twenty-nine withheld files. The

vast majority of the enumerated files are either things that are public record or copies of documents that have been produced in the past.

Applicant moves to have the Court inspect the contents of Applicant's Exhibit 7 ("Box Labeled 'Box 1 of 3, Hovis-Falls, St v. Bolin & Owens, Murder'", #8, which is identified as "[a]n expanding folder containing many handwritten notes by Solicitor's Office Investigator Martha Parrish..." because these notes are related to interviews of material witnesses and are therefore subject to Rule 5 and *Brady*. See *State v. Gibson*, 334 S.C. 515, 514 S.E.2d 320 (1999) (holding that statements made to Solicitor and law enforcement subject to disclosure and failure to disclose constituted a *Brady* violation).

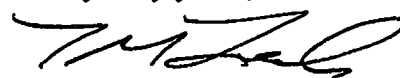
Applicant moves to have the Court inspect the contents of Applicant's Exhibit 9 ("Box Labeled 'Hovis-Falls, Berry Bolin, Box 3 of 3,'" #21, which is identified as "[a] folder containing the handwritten notes of Deputy Solicitor Willy Thompson and some handwritten notes of Solicitor's Office Investigator Martha Parish." This entry does not sufficiently identify the materials as required by the rules. Furthermore, the entry does not indicate when these notes were made or to what subject matter they pertain. However, Mr. Thompson testified in the hearing on July 13, 2012 that he and Ms. Parish interviewed potential witnesses together, indicating that these notes may be discoverable pursuant to *Gibson* and *Brady*.

Applicant moves to have the Court order the disclosure of Applicant's Exhibit 9 ("Box Labeled 'Hovis-Falls, Berry Bolin, Box 3 of 3,'" #23, which is identified as "[a] folder containing the polygraph report of Eric Brown." The State used this document as a basis for cross examining witnesses in the October 11, 2012 hearing, therefore waiving any privilege that could possibly apply. Moreover, because the results of a polygraph are not admissible in trial, the polygraph and subsequent report could not possibly have been produced in preparation for trial. Furthermore, the report is discoverable pursuant to Rule 5, SCRCrimP. The document would also be material and relevant to the impeachment of the assertions of Mr. Greeley and Mr. Thompson that Eric Brown was not a credible witness, therefore making it discoverable pursuant to *Brady*.

Finally, the Applicant moves to have an exact copy of the remaining materials made and filed with the record of the Court so that additional examination can be done, should this Court or another deem it necessary and proper.

If I can be of any further assistance in this matter, please do not hesitate to contact me.

Very truly yours,



T. Micah Leddy

VIA U.S. MAIL & EMAIL ATTACHMENT

Cc: Salley Elliott, Esquire
York County Clerk of Court



ALAN WILSON
ATTORNEY GENERAL

November 21, 2012

The Honorable Edgar W. Dickson
Circuit Court Judge
P.O. Box 1949
Orangeburg, South Carolina 29116

RE: Berry Bolin v. State
2010-CP-46-0436

Dear Judge Dickson:

By letter response to the privilege log submitted by Deputy Solicitor Willy Thompson respecting the pending post-conviction relief case listed above, Applicant moves this Court to admit three boxes of documents from the solicitor's prosecution file. Applicant also moves this Court to conduct an *in camera* review of three items identified by Deputy Solicitor Willy Thompson in his Privilege Log as not subject to disclosure. I write on behalf of Respondent in the post-conviction relief case listed above opposing the wholesale admission of the solicitor's entire file respecting the underlying prosecution as well as Applicant's request that this Court conduct an *in camera* review of the contents of Item #8 in Applicant's Exhibit 7 and Item # 21 in Applicant's Exhibit 9 based purely upon Applicant's speculation the items may contain Rule 5, SCRCrimP, and Brady material. Respondent objects on the grounds the prosecution file is not relevant to issues litigated at the hearing in this case, access to the material in the file was previously denied to Applicant, Applicant makes an insufficient showing allowing for an *in camera* review and wholesale admission of boxes of the prosecution file is improper. Respondent has no objection to admission into evidence of the polygraph report of Eric Brown in Item # 23 of Applicant's Exhibit 9. Deputy Solicitor Willy Thompson will respond separately as to challenges to his Privilege Log.

As stated at the evidentiary hearing, Respondent opposes admission of the contents of the entire prosecution file on the ground the file and matters within the file have not been shown to be relevant to any of the allegations identified by Applicant in his application for post-conviction relief or identified by Applicant's counsel in the amended application for post-conviction relief. The allegations presented and litigated at the evidentiary hearing held on October 11, 2012, concern trial counsel's failure to properly advise Applicant to accept the guilty plea offer, failure to revisit the guilty plea offer after the trial court ruled on the Protection of Persons and Property Act, failure to challenge the trial court's order of restitution, failure to call witnesses for trial, failure to obtain a surveillance videotape and failure to file a Petition for Writ of Certiorari to the South

Carolina Supreme Court. Applicant has not shown how the entire prosecution file is relevant to the issues litigated. Applicant did not allege as a ground for relief that the prosecution withheld material exculpatory or impeaching evidence and does not offer the file as evidence for a purpose related to any of the grounds he identified in his application and amended application.

Respondent also objects to wholesale admission of the entire prosecution file as evidence and to the request for an *in camera* review of the items requested by Applicant even if Applicant had advanced a claim that the prosecution failed to provide Brady or Rule 5 information. He certainly has not made the requisite showing when he has not alleged the prosecution failed to disclose Brady or Rule 5 information. Before the State must produce purported undisclosed Brady evidence for the Court's inspection, a defendant must first establish a basis for his claim that the document in question contains material exculpatory or impeachment evidence. It is only after Applicant has identified specific items or information that might constitute Brady material that the trial court should rule on the materiality of the evidence and determine whether the State should have produced it for the defendant's use. See State v. Nance, 320 S.C. 501, 466 S.E.2d 349 (1996). Applicant does not identify any specific material that he alleges should have been provided before trial. He simply wants this Court to survey what appears to be trial preparation notes made by the prosecutors and their investigators for a determination whether anything contained in the notes might be subject to Brady or Rule 5. The showing is not sufficient and a similar argument has already been rejected in this case by Judge Alford. See State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999) (stating that Rule 5 exempts internal prosecution documents made in connection with an investigation and Brady only requires disclosure of impeachment or exculpatory evidence); State v. Myers, 359 S.C. 40, 596 S.E. 2d 488 (2004) (stating Rule 5 exempts work product and internal prosecution documents made by an attorney for prosecution.). Applicant merely speculates that notes taken during pre-trial interviews with witnesses might contain exculpatory or impeaching information. Contrary to Applicant's contention, Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006) and Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999), do not require the prosecution to provide any and all notes of witness interviews taken for or during trial preparation. Disclosure is only required as to facts and information learned that are exculpatory or impeaching. Deputy Solicitor Thompson testified at the evidentiary hearing that anything of that nature was provided to trial counsel and that the notes in question pertain to internal prosecution documents made in preparation for trial, including personal recollections, mental impressions, and matters respecting case theory and strategy, much of which may be difficult now for Deputy Solicitor Thompson to reconstruct. See Hickman v. Taylor, 329 U.S. 495 (1947).

Respondent further objects because wholesale admission of the entire Solicitor's file is improper. The relevance of all of the documents in the prosecution file and admission of the documents must be reviewed on an individual basis rather than by way of wholesale admission of the entire file which precludes this Court from being able to adequately consider and rule upon the propriety of admitting each document or category of document in the file into evidence.

Page 3
November 21, 2012
Berry Bolin v. The State

Lastly, Respondent objects to Applicant's requests to admit the entire solicitor's file as evidence and for this Court's *in camera* review of the two items listed above on the ground the requests were heard and denied by Judge Alford unless and until Applicant could identify specific information or material that was exculpatory or impeaching in the file that had not been previously provided to Applicant. Applicant does not offer specific material. Applicant merely uses a trial subpoena to ask this Court to revisit a matter already ruled upon by Judge Alford and to admit the evidence wholesale in circumvention of Judge Alford's earlier ruling. Applicant had the opportunity to revisit the issue of access and production of the solicitor's file in the manner suggested by Judge Alford but failed to do so. Because discovery has not been permitted, the privilege log and objections thereto are not applicable. Applicant failed to make the requisite showing and regardless whether a privilege exists or not, admission of the entire file, including the items he wishes this Court to review *in camera* comes too late. The issues were identified and litigated at the hearing in October and do not concern Brady or Rule 5.

I also write to advise that Deputy Solicitor Thompson scanned and prepared CD's containing the entire prosecution file in question as well as a separate CD containing the material subject to the request for an *in camera* review. While noting my previous objections to this Court's receipt and review of these materials, please provide instructions as to what the Court would like done with the CD's. I request that anything filed or admitted either as evidence or proffer be presented and maintained under seal. I also note that the undersigned has not reviewed any of the material, documents or notes in the prosecution file except that which was voluntarily provided by Deputy Solicitor Thompson to Applicant in preparation for the post-conviction relief case.

Sincerely,

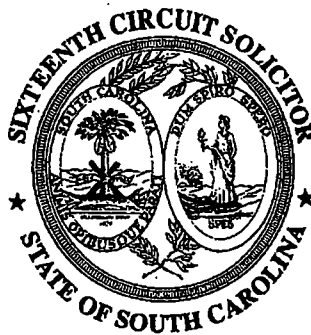


Salley W. Elliott
Assistant Deputy Attorney General

SWE/ab

cc: The Honorable David Hamilton
Deputy Solicitor Willie Thompson
Micah Leddy, Esquire
Victim Services

KEVIN S. BRACKETT
SOLICITOR



WILLY THOMPSON
DEPUTY SOLICITOR

December 11, 2012

The Honorable Edgar W. Dickson
Circuit Court Judge
P.O. Box 1949
Orangeburg, South Carolina 29116

RE: Berry Bolin v. State, 2010-CP-46-0436, Privilege Log

Dear Judge Dickson:

As requested by the Court, I am hereby responding to Mr. Leddy's request for the Court to review three specific folders listed in the Privilege Log as part of Mr. Bolin's Post Conviction Relief action. Mr. Leddy has requested the portion of the Prosecution's file labeled folder #8, folder #21 and folder #23.

The State consents to the release of the contents of folder #23 (Polygraph report of Eric Brown). The content of this folder was made known to the defense during the original trial.

Among other documents, folder #8 and folder #21 contain handwritten notes by Solicitor's Office Investigator Martha Parrish and my personal notes. These include numerous notes of interviews conducted with witnesses by the prosecution in preparation for trial. The notes of Investigator Parrish were taken at my direction in preparation for trial. I was present and conducted almost all of the interviews with Investigator Parrish. These notes are clear work product and are not subject to discovery. Mr. Leddy now asks that these privileged notes from the prosecution file be reviewed by the Court for possible Rule 5 and *Brady* violations. Those concerns were thoroughly addressed during my testimony at our last hearing. Prior to the trial, I provided any impeachable or exculpatory material that arose during witness interviews.

The Honorable Edgar W. Dickson
December 11, 2012
Page Two

This was evidenced in emails to the defense and my memory of conversations with the defendant's attorney, Leland Greeley, prior to and during trial. As Assistant Deputy Attorney General Elliott pointed out, this request by Mr. Leddy has no relevance to the Applicant's specific requests for relief in his Post Conviction Relief motion and has already been denied by Judge Alford.

In every case that goes to trial, the prosecution interviews potential witnesses and often takes notes either during or after the interview as the prosecution did in this case. This has long been considered work product and privileged material. It is not discovery. There is no evidence that the State withheld any discoverable material in this case. If the prosecution notes are released in this case simply because the defense asks for them, then the prosecution notes should be released in every case. The defendant would only need to claim that there may be some impeachment or *Brady* material in the prosecution notes. The law does not allow this type of "fishing" through the prosecution file.

I also respectfully join with Assistant Deputy Attorney General Elliott in objecting to the Courts receipt and review of the State's file. The law is clear that in non-capital cases, the defense is not entitled to discovery without good cause shown. Judge Alford already determined that Mr. Leddy has not shown good cause and is not entitled to discovery in this case. Since the defense is not entitled to discovery in this case, the Court should not receive or review any portion of the State's file.

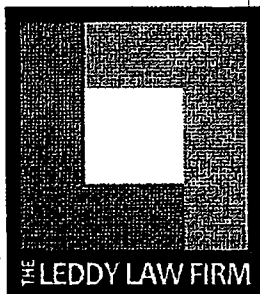
Sincerely,

A handwritten signature in black ink that reads "Willy Thompson". The signature is fluid and cursive, with the first name "Willy" and last name "Thompson" clearly distinguishable.

Willy Thompson
Deputy Solicitor
Sixteenth Judicial Circuit

WWT / mac

cc: Micah Leddy, Esq.
Salley W. Elliott, Assistant Deputy Attorney General



THE LEDDY LAW FIRM, LLC.

2008 LINCOLN STREET
COLUMBIA, SC 29201
(803) 779 - 9966
(803) 753 - 0837 (fax)

January 8, 2013

The Honorable Edgar W. Dickson
Circuit Court Judge
P.O. Box 1949
Orangeburg, SC 29116

Re: *State v. Berry Bolin*

Dear Judge Dickson:

I am writing in response to an email I just received from your law clerk, Mr. Evans. I am very surprised that The Court has ruled on the merits in this case at this point. It was my understanding based on the instructions from Your Honor that the only issue pending at this moment was whether The Court would review the materials for which Deputy Solicitor Thompson had asserted a work-product privilege.

It was my intention, and my understanding based on what occurred at the PCR Hearing on October 11, 2012, that I would be permitted to file an amended PCR application to conform my pleadings to the proof adduced at the hearing and the materials that may have been subsequently disclosed. I request that Your Honor permit me to file an amended PCR application at this time based on the testimony received at the hearing. I believe that, based on testimony I did not have until the hearing, there are claims to raise that are not included in the original PCR application.

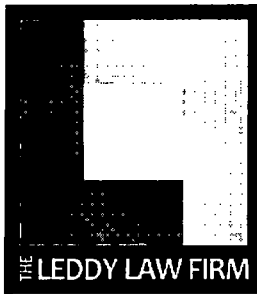
I have not discussed this matter with Ms. Elliott, but I anticipate that the State will object to this request because in our previous discussions Ms. Elliott indicated that she would object to me filing an amended PCR application.

Very truly yours,

T. Micah Leddy

VIA U.S. MAIL & EMAIL ATTACHMENT

Cc: Salley Elliott, Esquire
York County Clerk of Court



THE LEDDY LAW FIRM, LLC.

2008 LINCOLN STREET
COLUMBIA, SC 29201
(803) 779 – 9966
(803) 753 – 0837 (fax)

January 25, 2013

The Honorable Edgar W. Dickson
Circuit Court Judge
P.O. Box 1949
Orangeburg, SC 29116

Re: *State v. Berry Bolin*

Dear Judge Dickson:

I am writing in support of my motion to file a Second Amended Application for Post-Conviction Relief, which is attached hereto.

The first two claims added to the Second Amended Application is Ground E and Ground F. Ground E is a claim of prosecutorial misconduct and Ground F is a claim of ineffective assistance of counsel, but both claims arise out of false testimony given by Holly McCarter at trial. These amendments are based on the motion to amend the pleadings to conform to the evidence adduced at the hearing, which Applicant made during the evidentiary hearing on October 11, 2012. See Transcript of October 11, 2012 hearing, p. 22 lines 23-25. The State, being on notice that claims of prosecutorial misconduct were being pursued, vigorously challenged several points of contention, including the discovery and admission of documents withheld by Deputy Solicitor Willy Thompson under an asserted work product privilege.

The basis of Ground E, eliciting false testimony from Holly McCarter, was tried vigorously by both sides at the PCR hearing on October 11, 2012. The State was able to elicit testimony from both Mr. Thompson and Mr. Greeley on these issues. The State did not object to testimony related to this claim on the basis that it was irrelevant to claims in the First Amended Application for Post Conviction Relief. Moreover, no new evidence would be required for the State to meet this claim now, so the State cannot be prejudiced according to the definition in Lee v. Bunch, 373 S.C. 654, 661 (2007). Therefore, under SCRCR Rule 15(b), the pleadings must be amended to include Ground E and Ground F.

The next claim is Ground G, which was likewise thoroughly tried at the PCR hearing by both sides. The State did not object to the testimony elicited from Mr. Greeley about his research into the applicability of the Castle Doctrine statute. The State was in no way limited in cross examining Mr. Greeley on these issues, or otherwise challenging the evidence adduced.

Ground H is a claim based on ineffective assistance of counsel. Mr. Lee Owens was Applicant's co-defendant and was introduced to the jury panel as such. After the jury was selected, Mr. Owens entered a plea of no contest. Trial counsel testified at the PCR hearing that he did not move to strike a new jury or move for a curative instruction to cure the prejudice caused by this. Counsel for the State objected to trial counsel being questioned on this on the basis that it was not a claim in the First Amended Application for Post Conviction Relief. Your Honor overruled this objection on the basis that it was relevant to a claim of ineffective assistance of counsel. See PCR Hearing transcript pp. 91-96. Because the Court has already overruled the objection to this testimony and allowed the issue to be tried, the pleadings must be amended to include this claim. See SCRCP Rule 15(b).

Contrary to the State's assertion in its letter dated January 18, 2013, the State was able to ask questions and develop a record on these issues. There is absolutely no new evidence or testimony required for these issues to be litigated by way of an amended pleading, which is precisely the type of amendment mandated by SCRCP Rule 15(b) ("[W]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."). Furthermore, "[t]he circuit court is to freely grant leave to amend when justice requires, and there is no prejudice to any other party." Lee v. Bunch 373, S.C. 654, 660 (2007). "A motion to amend is addressed to the sound discretion of the trial judge, and the party opposing the motion has the burden of establishing prejudiced." Id. "Amendments to conform to the proof should be liberally allowed when no prejudice to the opposing party will result." Id.

Based on the foregoing reasons and the plain reading of Rule 15(b), the Applicant respectfully moves that the Court grant his motion to file the Second Amended Application for Post Conviction Relief.

Very truly yours,



T. Micah Leddy

VIA U.S. MAIL & EMAIL ATTACHMENT

Cc: Salley Elliott, Esquire
York County Clerk of Court

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
County of York	)	
	)	
Berry S. Bolin	)	CA No. 2010-CP-46-0436
	)	
	)	
Applicant,	)	
vs.	)	
	)	SECOND AMENDED APPLICATION
	)	FOR POST CONVICTION RELIEF
State of South Carolina	)	
	)	
Respondent.	)	

{Note: This Application follows SCRCF Appendix of Forms, Form 5, as required by Rule 71.1(b), SCRCF.}

1. Applicant is detained at Lee Correctional Institution, 990 Wisacky Hwy, Bishopville, SC.
2. Name and location of Court which imposed sentence: York County Court of General Sessions, The Honorable John Hayes, presiding.
3. Name of Co-Defendant: Ronald Lee Owens (pled guilty following jury selection).
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
 - a. 2006-GS-46-01595: Lesser included offense of Voluntary Manslaughter
 - b. 2006-GS-46-01596: Lesser included offense of ABHAN
 - c. 2006-GS-46-01598: Lesser included offense of ABHAN
 - d. 2006-GS-46-01599: Lesser included of AHAN
 - e. 2006-GS-46-01600: Discharging a firearm into an occupied vehicle
5. The date upon which sentence was imposed and the terms of the sentence: September 6, 2006, all sentences concurrent:

- a. Voluntary Manslaughter: 30 years
 - b. ABHAN: 10 years
 - c. ABHAN: 10 years
 - d. AHAN: 10 years
 - e. Discharging firearm: 10 years
6. A finding of guilty on lesser included offenses was made after a plea of not guilty.
7. The applicant did appeal from judgment of conviction and sentence.
8. (a) Applicant appealed to
- i. The South Carolina Court of Appeals
- (b) The result in each such Court:
- i. Affirmed;
- (c) The date of the result was:
- i. February 5, 2009
- (d) Citation of the opinion of each court:
- i. *State v. Berry Bolin*, 674 S.E.2d 885, 381 S.C. 557 (Ct.App. 2009)
9. N/A
10. and
11. Grounds for Relief and Concise Statement of Supporting Facts.¹

10(A). GROUND A

Petitioner was denied effective assistance of counsel at the trial stage of his case in violation of Petitioner's rights under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution.

¹ Applicant reserves his right to amend this application after further discovery and to amend the application to conform to the proof adduced at the evidentiary hearing.

11 (A) FACTS IN SUPPORT OF GROUND A

Counsel was deficient in not calling several witnesses who were present at the scene who would testify that they saw gunfire coming from the alleged victims' automobile, which would have bolstered Applicant's claim of self-defense immensely. Counsel did put up a case in chief, which gave the State the last closing argument as well as opened the door to the State being able to argue that the Defense had no witnesses who could corroborate this theory of the defense.

10 (B) GROUND B

Petitioner was denied effective assistance of counsel at the trial stage of his case in violation of Petitioner's rights under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution.

11 (B) FACTS IN SUPPORT OF GROUND B

Counsel was deficient in failing to subpoena or otherwise obtain the videotape surveillance from the location where the alleged victims stopped their vehicle on the way to the police station, even though it was Counsel's contention at trial that they had disposed of weapons at the stop. The evidence is now forever lost.

10 (C) GROUND C

Petitioner was denied effective assistance of counsel at the trial stage of his case in violation of Petitioner's rights under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution.

11 (C) FACTS IN SUPPORT OF GROUND C

Counsel was deficient in his efforts to get Petitioner to accept the guilty plea offer of 15 years to manslaughter. Counsel was likewise deficient in failing to attempt to get the plea offer

reinstated after the trial judge ruled that the "Castle Doctrine" statute did not apply to this case because the statute was prospective in its application only.

10 (D) GROUND D

Petitioner was denied effective assistance of counsel at the appellate stage of his case in violation of Petitioner's rights under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution.

11 (D) FACTS IN SUPPORT OF GROUND D

Counsel was ineffective in not filing a writ of certiorari to the South Carolina Supreme Court.

10 (E) GROUND E

Petitioner was denied his right to a fair trial, a right guaranteed by the Fourteenth Amendment to the United States Constitution as well as the South Carolina Constitution because the state elicited false testimony, failed to correct it, and argued it to the jury.

11 (E) FACTS IN SUPPORT OF GROUND E

The State elicited testimony from Holly McCarter that she was too hysterical to drive her vehicle to the police station upon learning that Bobby Hovis had been shot. The testimony of Ms. McCarter was that she was not driving the vehicle when it arrived at the Clover Police Department. This testimony is refuted by a video showing that she was in fact driving the car when it arrived at the station. Not only did the State elicit this testimony and fail to correct it, the State argued this point to the jury.

This point is critical because the defense argued that there had been a gun in the victims' car, and that they had stopped at American Auto Sales on the 1.7 mile trip to the Clover Police in order to dispose of the gun. The State successfully rebutted this with the rationalizing story

provided to them by Holly McCarter, the irrefutable video evidence of its falsity notwithstanding. This video was in the possession of the State at the time that the testimony was elicited and the arguments were made. If the jury had known that Holly McCarter had lied about the vehicle stop at American Auto Sales, they would have been much more likely to conclude that the Defense was correct.

10 (F) GROUND F

Petitioner was denied effective assistance of counsel at the trial state of his case in violation of Petitioner's rights under the Sixth, Eight, and Fourteenth Amendments of the U.S. Constitution.

11 (F) FACTS IN SUPPORT OF GROUND F

At the PCR evidentiary hearing held on October 11, 2012, trial counsel for the Applicant testified that there was a video tape that showed that Holly McCarter was in fact driving the vehicle that arrived at the Clover Police Department. See Transcript of PCR Hearing pg. 88. However, at trial, this point was never raised by trial counsel on cross examination of Holly McCarter. See Trial Transcript pp 543-556. Trial counsel was also deficient in failing to argue this point in closing, relying instead only on the eyewitness testimony of an Officer who testified that a female was driving when the car arrived at the police station. See Trial Transcript p.1089. Trial counsel failed to even mention the video or object to the State eliciting this testimony.

Trial counsel's failure to utilize the irrefutable evidence that Ms. McCarter had lied critically prejudiced the theory of the defense, and constitutes ineffective assistance of counsel in violation of Applicant's Constitutional guarantees. If the jury had been aware beyond the shadow of a doubt that Holly McCarter was lying about the vehicle stop, they would have been

much more likely to conclude that the Defense's theory about the stop was correct. Additionally, the jury would know that the State's theory of the case was based on false testimony.

10 (G) GROUND G

Petitioner was denied effective assistance of counsel at the trial state of his case in violation of Petitioner's rights under the Sixth, Eight, and Fourteenth Amendments of the U.S. Constitution.

11 (G) FACTS IN SUPPORT OF GROUND G

Trial counsel failed to correctly ascertain that the "Castle Doctrine" statute did not apply to the Applicant's case. The statute was enacted a few months after Applicant's trial, and the legislation included a savings clause that indisputably states that the statute was intended to be only applied prospectively. The savings clause was not published within the language of the statute itself, but it was readily available on the legislature's website. At the PCR hearing, trial counsel confirmed that he filed a written motion to quash Applicant's indictments based on the "Castle Doctrine" statute. Trial counsel testified that he could not remember whether he had consulted the savings clause prior to the motion to quash. See PCR hearing transcript p. 65 line 9. Trial counsel did concede that his written motion, which contained his copy of the law, did not include the savings clause. See PCR hearing transcript p.65 lines 1-3. Trial counsel's failure to correctly ascertain the applicability of this statute unquestionably affected trial counsel's ability to correctly advise Applicant on his chances for success at trial because the statute, had it been retroactive, would have greatly increased Applicant's chances of being acquitted.

10 (H) GROUND H

Petitioner was denied effective assistance of counsel at the trial state of his case in violation of Petitioner's rights under the Sixth, Eight, and Fourteenth Amendments of the U.S. Constitution.

11 (H) FACTS IN SUPPORT OF GROUND H

Lee Owens was originally a co-defendant in this case because Mr. Owens also fired a gun during the incident. Trial counsel testified at the PCR hearing that Mr. Owens was introduced to the jury panel as a co-defendant. After the jury was selected, Mr. Owens entered a no contest plea. The trial court pointed out Mr. Owens' absence to the jury and told them that the case was concluded as to Mr. Owens. Trial counsel admitted at the PCR hearing that he did not ask for a new jury. Trial counsel also admitted that he did not request that the trial court give a curative instruction to the jury to ensure that they would not consider Mr. Owens' absence in their consideration of the case.

12. Applicant has appealed directly to the Supreme Court of South Carolina and to the United States Supreme Court. Applicant has not previously filed for either an application for post-conviction relief or a petition for a writ of habeas corpus in state or federal court.

13. Prior to this application have you filed with respect to this conviction:

- a. Any petition in a State Court under South Carolina law? No
- b. Any petition in State or Federal Courts for habeas corpus or post-convictions relief? No.
- c. Any petition in the United States Supreme Court for certiorari other than petitioners, if any already specified in (8)? No.
- d. Any other petitions, motions or applications in this or any other Court? No.

14. N/A

15. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion, or application which you have filed? No.

16. N/A

17. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented. N/A.

18. Were you represented by an attorney at any time during the course of:

- a. Your arraignment and plea? Yes.
- b. Your trial? Yes
- c. Your sentencing? Yes.
- d. Your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes.
- e. Preparation, presentation, or consideration of any petitions, motions, or applications with respect to this conviction, which you filed? Yes.

19. Applicant was represented at trial and on direct appeal by Leland B. Greeley, Esquire, P.O. Box 2981, Rock Hill, SC 29732.

20. Applicant seeks to have his convictions and sentences vacated.

21. Applicant is under no other sentence from any other court.

Respectfully submitted,

T. Micah Leddy
Leddy Law Firm, LLC
2008 Lincoln Street
Columbia, SC 29201
(803) 779-9966

By: T. Micah Leddy
T. Micah Leddy, Esquire
Counsel for Applicant

January 25, 2013



ALAN WILSON
ATTORNEY GENERAL

February 1, 2013

The Honorable Edgar W. Dickson
Circuit Court Judge
P.O. Box 1949
Orangeburg, South Carolina 29116

RE: Berry Bolin v. State
2010-CP-46-0436

Dear Judge Dickson:

Please accept this letter as Respondent's reply to Applicant's request to file a second amended application and to the proposed Second Amended Application for Post-Conviction Relief in the matter listed above.

The State reiterates its strenuous objection to Applicant's request to amend the Application for Post-Conviction Relief after the hearing on the merits has been held. The amendments introducing totally new claims at this point in the litigation should be denied as untimely. The amendments constitute impermissible, successive claims. See Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992) (Supreme Court affirmed PCR court's refusal to permit amendments after the ruling as untimely and as improper vehicle to assert new claims). The issues Applicant now attempts to raise were matters he could have included in the application or amended application through the exercise of due diligence but simply failed to do so. The case does not present a situation where an applicant filed a pro se application that was later expanded during the evidentiary hearing with notice to Respondent. This action was initiated by an application filed by Diana Holt, Esquire. Thereafter, Applicant's current attorney was retained and amended the application to include only the grounds litigated at the evidentiary hearing after counsel confirmed the claims he intended to pursue on the record. Applicant failed to show why the grounds were not and could not have been presented in the application and amended application.

Moreover Respondent will be greatly prejudiced by the amendments at this late stage of the litigation. The Second Amended Application for Post-Conviction Relief submitted by Applicant adds four new allegations of which Respondent had no notice or opportunity to investigate and to present evidence and defenses. To the extent Applicant contends Respondent is not prejudiced because it was able to develop a record at the hearing or has no need to present evidence or otherwise respond to the new allegations, Respondent disagrees. The amendments will leave

Page 2

February 1, 2013

Berry Bolin v. The State

Respondent without an avenue for response, particularly when there is no valid reason why the new claims could not have been alleged and litigated during the hearing. The amendments from Applicant at this late date will provide an unfair advantage to Applicant at Respondent's expense. Respondent did not agree to litigate these new claims at the evidentiary hearing, tacitly or otherwise.

Contrary to Applicant's assertion and with the exception of matters objected to, Respondent was unaware the new claims were being explored at the evidentiary hearing. Respondent did not present evidence in response to these allegations. Also, contrary to Applicant's assertion, Respondent will be required to conduct an investigation into the matters if Applicant is permitted to amend the application as requested and thereafter move to reopen the record to conduct cross-examination of Applicant's witnesses or present defense witnesses depending upon the results of its investigation. For example, Respondent would need to explore whether a videotape of the Clover Police Department parking lot existed and thereafter present testimony or other evidence, if available, respecting the newly proposed claim that the State elicited false testimony or failed to correct testimony from Holly McCarter. However, Respondent should not be required to do so when the claims were available to Applicant but simply not included in the pleadings. Finality must be realized.

To the extent Applicant suggests that Respondent's position respecting his discovery request or its objection to introduction of the prosecutor's entire file during the hearing can be considered its litigation of the newly alleged claim of prosecutorial misconduct, Respondent submits the position is simply incorrect and not supported by the record in this case. Respondent's position concerning Applicant's request for production of the prosecutor's file was merely recitation of the governing statute requiring Applicant to make a showing of good cause. Counsel for Respondent did not otherwise take a position regarding Applicant's access to or production of the prosecution file. The file is not in the possession, custody or control of counsel for Respondent. The prosecutor's office appeared at the discovery hearing and argued its position on production of the documents Applicant sought from the prosecutor's office as a non-party entity. At the hearing on the merits of the case, counsel for Respondent objected to admission of the prosecutor's entire file as evidence because the file was not relevant to any allegation raised by Applicant and being litigated during the hearing. Now, after the hearing, Applicant attempts to allege matters of prosecutorial misconduct which could have been asserted prior to the hearing and of which Respondent could have been provided notice in order to fully and fairly litigate the issue. Respondent was precluded from doing so because Applicant did not timely raise this or any of the other new allegations he attempts to inject into this case at this late stage.

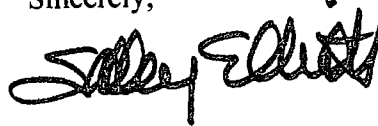
Also, contrary to Applicant suggestion that the State agreed to litigate his new Castle Doctrine allegation, Respondent submits that the testimony elicited by Applicant respecting the Castle.

Page 3
February 1, 2013
Berry Bolin v. Sate

Doctrine appeared to pertain to the ineffective assistance of appellate counsel claim and Respondent limited its examination to the issue as alleged.

All of the proposed amendments should have been alleged in the pleadings and properly addressed at the hearing already held on the merits. Respondent asks this Court to deny the request to amend the application. An end to litigation must be realized. The delay in finality will serve only to undermine the process for all involved.

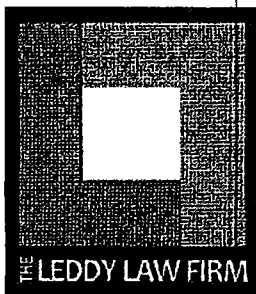
Sincerely,

A handwritten signature in black ink, appearing to read "Salley W. Elliott", written in a cursive style.

Salley W. Elliott
Senior Assistant Deputy Attorney General

SWE/ab

cc: Micah Leddy, Esquire
Victim Services
The Honorable David Hamilton, York County Clerk of Court



THE LEDDY LAW FIRM, LLC.

2008 LINCOLN STREET
COLUMBIA, SC 29201
(803) 779 - 9966
(803) 753 - 0837 (fax)

February 5, 2013

The Honorable Edgar W. Dickson
Circuit Court Judge
P.O. Box 1949
Orangeburg, SC 29116

Re: *State v. Berry Bolin*

Dear Judge Dickson:

The State, in a letter dated February 1, 2013, has objected to Applicant's Second Amended Application for PCR and cites Arnold v. State, 309 S.C. 157 (1992) in support of its position.

Arnold could not be more inapposite to the issue at hand. Arnold, a South Carolina state court case, was reversed and remanded from the United States Supreme Court on multiple occasions, ruled upon at PCR after years of litigation, and then a new PCR application was filed raising new claims that had never been litigated. The Supreme Court held that this was a "successive" application as that term is defined under the PCR statute.

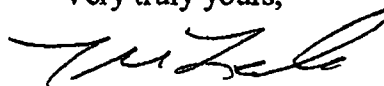
A "successive" application is one filed after a final ruling on a Post Conviction Relief action. In this case, Applicant's Second Amended Application for PCR is not a "successive" application because this action is still pending. Therefore, the State's reliance on Arnold is completely without merit.

The First Amended Application for Post Conviction relief filed explicitly reserved Applicant's right to amend the pleadings to conform to the evidence adduced at the evidentiary hearing. See Applicant's First Amended Application p. 2 fn. 1 ("Applicant reserves his right to amend this application after further discovery and to amend the application to conform to the proof adduced at the evidentiary hearing."). Furthermore, Counsel for Applicant explicitly informed the Court at the evidentiary hearing of his intention to amend the pleadings to conform to the proof adduced after the evidentiary hearing. See Transcript of October 11, 2012 hearing, p. 22 lines 23-25. This is not an unusual mode of procedure in a Post Conviction Relief case, and the law is tailored to allow for it in an effort to ensure that justice prevails over the pursuit of finality for its own sake.

Applicant could not have anticipated that trial counsel would assert at the evidentiary hearing that Holly McCarter had perjured herself in a most critical portion of her testimony at trial. Applicant could not have anticipated that trial counsel would assert that the State knew that

her testimony was false. Trial counsel never brought this point up on cross, and never objected to it at trial. This is precisely the type of claim for which Rule 15(b) provides. Therefore, the Second Amended Application for Post Conviction Relief should be allowed and considered by this Court.

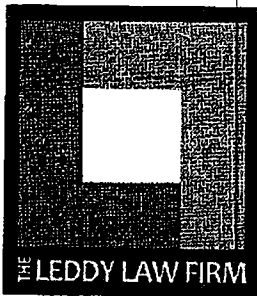
Very truly yours,

A handwritten signature in black ink, appearing to read 'T. Micah Leddy', with a stylized, cursive script.

T. Micah Leddy

VIA U.S. MAIL & EMAIL ATTACHMENT

Cc: Salley Elliott, Esquire
York County Clerk of Court



THE LEDDY LAW FIRM, LLC.

2008 LINCOLN STREET
COLUMBIA, SC 29201
(803) 779 - 9966
(803) 753 - 0837 (fax)

February 12, 2013

The Honorable Edgar W. Dickson
Circuit Court Judge
P.O. Box 1949
Orangeburg, SC 29116

Re: *State v. Berry Bolin*

Dear Judge Dickson:

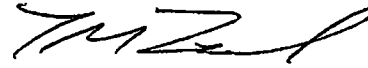
I am writing in reference to the above-referenced case, which you may recall is a pending PCR action out of York County. On January 25, 2013, I filed a Second Amended Application for Post Conviction Relief, which included claims of prosecutorial misconduct and ineffective assistance of counsel that were based on testimony provided to the Court by Leland Greeley, Esquire.

Mr. Greeley testified very emphatically at the evidentiary hearing that one witness, Holly McCarter, had perjured herself, and that there was video evidence that proved this to be true. Ms. McCarter testified that she was driving the vehicle when it left the party where the shooting occurred. She testified at trial that she switched places with another driver on the way to the Clover Police because she was too hysterical to continue driving after discovering that her friend Bobby Hovis had been shot. Mr. Greeley testified that there was a video from a camera at the Clover Police that clearly showed Ms. McCarter was still driving when the car arrived at the Clover Police Station. See testimony of Mr. Greeley at PCR hearing, attached hereto. This information had never been mentioned by either side in the Applicant's original trial, so Mr. Greeley's testimony was surprising. Based on this testimony, I filed the claims in the Second Amended Application for Post Conviction Relief.

In an effort to corroborate Mr. Greeley's testimony, I went back through materials that I have obtained during the course of representing the Applicant to see if I had a copy of the video described by Mr. Greeley. After an extensive search, I have been unable to locate a video that matches Mr. Greeley's testimony. However, I stand by the claims made in the Second Amended Application. Mr. Greeley's unwavering testimony about this video was a statement against his legal interest in this PCR action. Furthermore, Deputy Solicitor Thompson, who was present for Mr. Greeley's testimony, never disavowed the existence of this video or Mr. Greeley's assertion that Ms. McCarter had perjured herself. See testimony of Mr. Thompson at PCR hearing, attached hereto. I can come to no conclusion except that Mr. Greeley did see this video at some point.

I am also attaching a news story from WSOC TV that was placed on their website shortly after these events. I have contacted the news station and I am attempting to get any video that they have from their interview of Ms. McCarter. In any event, based on the testimony presented at the PCR evidentiary hearing, the claims in the Second Amended Application for Post Conviction Relief are well-founded and constitute a basis for his convictions to be vacated.

Very truly yours,



T. Micah Leddy

VIA U.S. MAIL & EMAIL ATTACHMENT

Cc: Salley Elliott, Esquire
York County Clerk of Court

1 his house and he saw three muzzle flashes that were going off
2 his house. So that is some of the things there. Another thing
3 that we got in regards to the existence of a gun is that Holly
4 McCarter purger herself. She lied on the stand. And the State
5 put her up. And the State knew what she was going to testify
6 to. I knew what she was going to testify to. And that's why it
7 struck me greatly when we saw the video of the car pulling in
8 behind the police station. Because Holly McCarter said and she
9 testified, that they had stopped at the American Auto because
10 they wanted to change drivers because she was so upset. And she
11 gave that in a statement at the beginning of the investigation.
12 We got it. And the State stayed with that testimony. That they
13 had stopped there so that they could trade drivers. And that's
14 what she testified at trial. Under oath.

15 Now, she was the only female in the car. Everybody else
16 was male and she testified they stopped at the American Auto
17 Sales and then they went directly to the Clover Police
18 Department.

19 Well, the next time that we see the car when the car pulls
20 up behind the Clover Police Department who is driving the car,
21 Holly. They didn't trade drivers. So, they must have stopped
22 for some other reason.

23 Q And your theory?

24 A And that indicates the possibility of a gun.

25 Q Okay. And in fact you said to the jury, I will tell

1 he ever really worked with his own video stuff. I think the
2 other fella did and from what I understand he nervous. I don't
3 blame him. He lives in the community. A lot of the folks from
4 the defendant live in the community. They posted any number of
5 very mean things on line that I have seen, comparing us to any
6 case that comes up that we get bad press on, oh, they shafted
7 our son. And they did this and that.

8 No, I don't blame him. He wants to sell cars to anybody
9 who wants to but them.

10 Q Now, you testified that you believed that you knew
11 where that car stopped on that property?

12 A Well, we had an idea.

13 Q How in the world would you possibly know that?

14 A When Lori Moss -- the people who testified said they
15 pulled up just on the side of the property. The victims in the
16 car they said where they parked.

17 Q The lady who was driving?

18 A Right.

19 Q Okay. The one who lied to you about switching seats?

20 A That is all we had. But if you think about it does it
21 make sense they would pull up into a parking spot in a place.
22 No. It makes sense they would pull up just enough to get out,
23 change and get going. But that's all I had.

24 Q I am sorry.

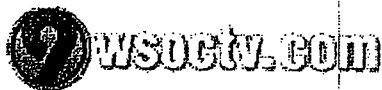
25 A But that's all I have. Whether that is true or not as

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Tuesday, Feb. 12, 2013 | 10:56 a.m.

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Charlotte 53° Cloudy

11 a.m. 51°

2 p.m. 59°

- 5-Day Forecast
- Personal Forecast
- Interactive Radar

Updated: 6:30 p.m. Monday, Feb. 20, 2006 | Posted: 4:14 p.m. Monday, Feb. 20, 2006

Police: Feud Between Teens Leads To Shooting Death

CLOVER, S.C. — Police said a long-time running feud between two teenagers erupted in gunfire and resulted in the death of one of the teens Sunday night in Clover. Officials said Bobby Hovis III, 19, was in a car when he was shot and killed.

The woman driving that car said when the shooting started, she just wanted to get everyone out of there alive.

Holly McCarter can't stop thinking that she should've done more.

"I just feel like it's my fault for some reason. I know it's not. I don't know. I feel like I could've helped him," she said.

According to police, late Saturday, a car pulled in front of a house on Lawrence Road. Investigators said a party was going on at a house that had just sold. The parents had moved, but the children hadn't yet. A fight started and shots were fired, police said.

McCarter raced off down the street. That's when she realized something had happened.

"Travis was in the back seat with Bobby, and he looked down at his arm and said, 'My gosh, I've been hit.' He looked up, and looked over and was hollering for Bobby and he didn't ever answer. Then I looked back, and seen the window was busted out," she said.

In a panic, she drove to the Clover Police Department for help. Hovis had been shot once in the back of the head, and friend Travis Falls was shot in the wrist.

Detective Tim Hager said the motive looks like a long-running feud.

"Typical teenager things — fighting over possibly something that's very minor, and it's escalated to the point that it's been back and forth a couple years, and it led up to this," said Hager.

Investigators said 19-year-old Berry Bolin brought the gun to the party and they expect to charge him with murder.

More News

We Recommend

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From Around the Web

- Don't Touch that Ketchup: Keep Healthy by

(wsocv.com)

- Police: Cellphones taken from student who allegedly had sex... (wsocv.com)
- NC drivers will soon pay registration, vehicle tax together (wsocv.com)
- Crash on Ardrey Kell Road Tuesday turns fatal (wsocv.com)
- Ex-wife of deputy accused of sexual harassment to help case... (wsocv.com)
- CMPD warn of sneaker robberies that are being set up online (wsocv.com)

Avoiding these 8 Germ Havens (AARP.org)

- 5 Tips to Help Keep Your Car on the Road for 10 Years (Allstate Blog)
- 7 Signs and Symptoms of Lung Cancer (HealthCentral.com)
- 10 Things You Should Never Buy at Garage Sales (Reader's Digest)
- What Happens If You Are Caught With a Gun With No License? (eHow)
- Six Sexy Hairstyles Men Are Attracted To (You Beauty)

[?]

Comments

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ALAN WILSON
ATTORNEY GENERAL

February 13, 2013

The Honorable Edgar W. Dickson
Circuit Court Judge
P.O. Box 1949
Orangeburg, South Carolina 29116

RE: Berry Bolin v. State
2010-CP-46-0436

Dear Judge Dickson:

I am in receipt of a copy of the February 12, 2013, letter to you from counsel for Berry Bolin respecting his request to amend the post-conviction relief application. Respondent reiterates its previous responses opposing the amendments and objects to consideration of the news article attached to his most recent letter because it has not been admitted as evidence and was certainly available before the hearing. I will await your instructions whether I should proceed with preparing the proposed order of dismissal pursuant to your earlier directions.

With kind regards, I am

Sincerely,

Salley W. Elliott
Senior Assistant Deputy Attorney General

SWE/

VIA U.S. MAIL AND EMAIL ATTACHMENT

cc: Micah Leddy, Esquire
Victim Services
The Honorable David Hamilton, York County Clerk of Court

From: Dickson, Edgar W. Law Clerk (Andrew C. Evans) edicksonlc@sccourts.org
Subject: Bolin v. State, 2010-CP-46-0436, Motion to File Second Amended PCR Application
Date: June 18, 2013 at 10:57 AM
To: micah@leddylaw.com, Salley Elliott Selliot@scag.gov
Cc: Dickson, Edgar W. Secretary (Peggy Smith) edicksonsc@sccourts.org

Good morning:

This letter is in reference to the Applicant's request to file an Amended PCR Application following the conclusion of his PCR hearing and the Court's ruling therein.

The Court is hereby denying the Applicant's request to file a Second Amended PCR Application.

Rules 71.1(a) of the South Carolina Rules of Civil Procedure, as counsel have noted, states that the Civil Rules govern Post-Conviction Relief Actions. Inasmuch as it is formally before the Court, it is treating the Applicant's request to file a Second Amended PCR Application as a Motion under Rule 15(b) of the Rules. That Rule states that "[s]uch amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment."

The Court convened on October 11, 2012 in York County and devoted an entire day of its Post-Conviction Relief Term to take testimony and receive evidence on this case. During the Hearing Mr. Leddy moved to conform the pleadings to the evidence. The Court is of the opinion that the matters raised herein were *thoroughly* litigated. Any and all evidence that was brought out at the Hearing was considered by the Court in its deliberation on this action and in its decision to deny the Applicant's PCR Action.

Applicant's Motion to File a Second Amended PCR Application appears to deal almost entirely with a purported surveillance video alluded to, and allegedly raised for the first time by Applicant's trial counsel in his testimony. Certainly if Applicant's Counsel's sole source for the purported existence of this video is Applicant's trial counsel's testimony, Applicant cannot contend its existence was unknown or is the source of any prosecutorial misconduct.

The SC Court of Appeals has held that "[p]rejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action." Ball v. Canadian American Express, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994) (internal citations omitted). As Respondent contends, leave to file a Second Amended PCR Application would require it to undertake not only a thorough, unanticipated investigation of evidence it had no prior notice would be at issue, but also likely reopen the record and reconvene to elicit further testimony from, not only Applicant's witnesses on the matter, but any additional witnesses Respondent deems necessary to defend the Applicant's additional allegations. Applicant's Second Amended PCR Application raises claims of prosecutorial misconduct and the potential existence of a video alluded to in Applicant's trial Counsel's testimony. Undoubtedly, these additional claims would require the Respondent to "introduce additional or different evidence" in any hearing on the Amended Application and the Court therefore finds prejudice herein.

The Court is of the opinion that Applicant's allegations of prosecutorial misconduct, whether raised in his Amended Application, were more than thoroughly litigated at the Hearing in October. The Court is satisfied that the Applicant was unable to show any evidence of misconduct on the part of the

Sixteenth Circuit Solicitors Office and so determined in its deliberation on the merits of this action.

The Court hereby finds that granting the Applicant leave to file a Second Amended PCR Application would be prejudicial to the Respondent and unnecessary to the litigation on the Applicant's claims because they were all addressed in the Hearing on October 11, 2012. The Court is therefore denying the Applicant's Motion to Amend the Pleadings.

Ms. Elliott, Judge Dickson asks that you prepare the Order encompassing the Court's ruling herein as well as on the merits of the Application heard in October. When it has been prepared, please send a copy to opposing counsel and mail or hand deliver the Order to this office with a self-addressed, stamped envelope for its prompt return.

If you have any questions or concerns, please contact this office by email or by phone at (803) 535-2187.

Thank you. Kind regards,

Drew Evans

Andrew C. Evans
Law Clerk, Hon. Edgar Warren Dickson
First Judicial Circuit
P. O. Box 1949
Orangeburg, S. C. 29116
803-535-2187 (phone)
803-535-2188 (fax)

STATE OF SOUTH CAROLINA

COUNTY OF YORK

BERRY BOLIN

vs.

STATE OF SOUTH CAROLINA

Defendant.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

CASE NO.: 2010-CP-46-0436

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:

T. MICAH LEDDY, Bar No. 75312

Address:

2008 LINCOLN STREET

COLUMBIA, SC 29201

Phone: 803-779-9966 Fax 803-753-0837

E-mail: MICAH@LEDDYLAW.COM Other: _____

Defendant's Attorney:

SALLEY ELLIOTT, Bar No. _____

Address:

S.C. ATTORNEY GENERAL

P.O. BOX 11549

COLUMBIA, SC 29201

Phone: 803-734-3727 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: Rule 59(e) Motion to Alter or Amend

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

Date submitted 1/20/14

SECTION III: Motion Fee

☐ PAID - AMOUNT: \$ _____

☒ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ 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, SCRPC)

☐ 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: \$ _____

FILED-RECEIVED
2014 JAN 21 PM 4:05
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA)
 County of York)
 Berry S. Bolin)
 Applicant,)
 vs.)
 State of South Carolina)
 Respondent.)

IN THE COURT OF COMMON PLEAS

CA No. 2010-CP-46-0436

APPLICANT'S RULE 59(e) MOTION
 TO ALTER OR AMEND THE JUDGMENT

FILED-RECEIVED
 2014 JAN 31 PM 4:05
 CLERK OF COURT
 YORK COUNTY, SC

NOW COMES Applicant, Berry Bolin, by and through undersigned counsel, and pursuant to SCRCP Rule 59(e), respectfully requests that this Court reconsider its judgment of January 7, 2014, denying Mr. Bolin's Application for Post Conviction Relief. Applicant moves that this Court reconsider its rulings on the following issues and for the following reasons.

1. Ineffective Assistance of Trial Counsel

Applicant renews his previous claims for ineffective assistance of counsel on the grounds raised in his Amended PCR Application, Second Amended PCR Application, and argument made in open court and adopts them as if restated verbatim here.

In regard to Eric Brown, Applicant respectfully disagrees with this Court's assessment of the probable impact of his testimony if he had been called at the trial. At the outset, it is important to keep in mind that trial counsel did call a witness and put up a case in chief, which resulted in giving the final closing argument to the State. Therefore, the question of whether to put up a case in chief is not at issue, which changes the landscape from a strategy point of view. Mr. Brown's testimony would have provided more credible information that the Applicant was himself being fired at than the physically impossible and illogical account relied upon from

Bradley Deal by trial counsel. Applicant therefore reiterates his argument that failing to call Mr. Brown constituted constitutionally ineffective assistance of counsel.

Regarding the failure of trial counsel to call Samantha Eason as a witness, the Applicant submits that the statements accepted into evidence would have made Applicant's claim of self-defense more likely to prevail, and the failure to call her as a witness constituted constitutionally ineffective assistance of counsel.

2. Admission of the Prosecutor's File

Prior to the evidentiary hearing in this action, Counsel for Applicant sought to review the prosecution's file, and his request to do so under FOIA was denied. Thereafter, Counsel sought to open discovery, limited only to a review of the prosecutor's file.

Judge Alford held a hearing to decide the issue of whether to open discovery, which is left to the discretion of the Court in a non-capital PCR action. Judge Alford was not asked to decide whether the materials were discoverable in the PCR hearing itself, and Applicant therefore objects to any argument or holding that the subpoena for the prosecutor's file was an attempt to circumvent Judge Alford's previous ruling on whether to open pre-hearing discovery.

Applicant further moves that this Court's reconsider its holding holding that no *in camera* review of the requested materials will be done. First, a cursory review of Mr. Thompson's privilege log shows that he has an incredibly broad interpretation of what is subject to the attorney work-product privilege. For instance, Mr. Thompson claimed a work-product privilege for documents that were public record or had already been produced in his twenty-nine item privilege log. After reviewing the privilege log, Applicant narrowed his request to only three items. Two of these items were notes related to witness interviews conducted by Mr. Thompson or his investigator. The Applicant has tried to minimize the burden on the Court and Mr.

Thompson by narrowing the request to include only the items that possibly include *Brady* materials. Applicant moves that this Court reconsider its judgment that no *in camera* review of the requested items will be held. By allowing the prosecutor to avoid any review of the materials by the applicant or the Court by simply stating that they have no *Brady* information contained within them would be to set up a system where the prosecutor, and not the Court, is performing the gate-keeping function of what evidence is adduced. Whether or not Mr. Thompson would exploit such a system in order to suppress constitutionally discoverable evidence is not the point, it is that any prosecutor *could* use such a system to undermine the guarantees to due process afforded by the Constitution. Riddle and Gibson would have never reached the results that they did if the Court's ruling was a correct statement of the law on this issue.

Applicant furthermore renews his request that the entirety of the withheld materials be copied and kept as a court exhibit for purposes of further review, should the Court of Appeals determine that such a review is necessary.

3. Request to File Second Amended PCR Application

Applicant renews his motion to amend the PCR application for the reasons and rationales articulated in the letter from his counsel dated January 24, 2013. Applicant further moves that the Court consider the claims made in his Second Amended Application for Post Conviction Relief on the merits of those claims, which the Court has not addressed in its judgment.

In the second amended application, Applicant raised claims of ineffective assistance and prosecutorial misconduct based on a video alleged to irrefutably show that Holly McCarter was still driving the victims' vehicle when it arrived at the Clover Police Dept. Following the hearing, Counsel performed an exhaustive search of his file and there is no such video in the materials provided by trial counsel and the prosecution. The testimony on the record, however,

indicates that trial counsel was in possession of this video before Applicant's trial, yet he never cross-examined Holly McCarter with it to expose her testimony to be, as he put it, perjury.

Because the video is not in the Applicant's file and because no mention of it was made by trial counsel during the trial, it was not possible for Applicant's counsel to anticipate this matter prior to the evidentiary hearing.

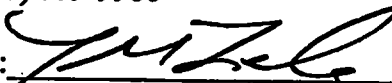
Because the prosecutor never corrected the testimony of Ms. McCarter to point out that there was irrefutable video evidence that she never switched seats on the way to the police department, and because the video was never in possession of current counsel for the Applicant, it was likewise impossible for Applicant to anticipate and raise the claim that failing to correct the testimony of Ms. McCarter constituted prosecutorial misconduct for eliciting and not correcting false testimony.

Because there was no way for the Applicant to know about this video at the police station – as it was never produced to his current counsel or mentioned in the course of the trial transcript – it was proper for the Applicant to raise the claims in an amended application pursuant to Rule 15(b). Applicant therefore moves that the Court reconsider for the foregoing reasons as well as the reasons stated in the letters from his counsel dated January 25, 2013 and February 12, 2013, which are incorporated as if restated verbatim here.

Based on the foregoing, the Applicant respectfully requests that the Court reconsider its judgment in this case and that the Court grant the Applicant's petition for post-conviction relief.

Respectfully submitted,

T. Micah Leddy
Leddy Law Firm, LLC
2008 Lincoln Street
Columbia, SC 29201
(803) 779-9966

By: 
T. Micah Leddy, Esquire
Counsel for Applicant

January 20, 2014

From: Dickson, Edgar W. Law Clerk (Joshua A. Edwards) edicksonlc@sccourts.org
Subject: RE: Bolin v. State, 2010-CP-46-0436, Motion to File Second Amended PCR Application
Date: January 31, 2014 at 12:04 PM
To: micah@leddy.com, Salley Elliott Selliot@scag.gov
Cc: Dickson, Edgar W. Secretary (Peggy Smith) edicksonsc@sccourts.org

Good morning:

This letter is in reference to the Applicant's motion to reconsider.

After due deliberation, review of memoranda, case law, and the Court's prior ruling, the Court is denying the Applicant's motion.

Applicant reiterates the arguments made in his application, at the evidentiary hearing, and in his motion to file a second amended application. The Court, having addressed these issues repeatedly, sees no reason to depart from its earlier rulings.

Mrs. Elliott, Judge Dickson asks that you prepare the Order. When it has been prepared, please send a copy to opposing counsel and mail or hand deliver the Order to this office with a self-addressed, stamped envelope for its prompt return.

If you have any questions or concerns, please contact this office by email or by phone at (803) 535-2187.

With Kind Regards,
Josh Edwards

Joshua A. Edwards
Law Clerk, Hon. Edgar W. Dickson
First Judicial Circuit
P.O. Box 1949
Orangeburg, SC 29116
803-535-2187 (phone)
803-535-2188 (fax)

COUNTY OF York
 STATE VS.
Berry Scott Bolin

INDICTMENT/CASE#

2006-GS46-01595

AKA:

Race: W Sex: M Age: 20
 DOB: 4/18/1986 SS#: 257-79-2005
 Address: 185 Cedar Grove Rd.
Clover, SC 29710

A/W#: J150348Date of Offense: 02-18-2006S.C. Code §: 16-03-0010.0020CDR Code #: 0116DL#: 100310243 SID#: SC01679598☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
 TO: **VOLUNTARY MANSLAUGHTER**

in violation of § 16-03-0050 of the S.C. Code of Laws, bearing CDR Code # 0217

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The charge is: ☐ As Indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST

Willy Thompson
 Solicitor

Berry Bolin
 Defendant

Philip P. Smith
 Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____
 months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135

SPECIAL CONDITIONS:

☒ RESTITUTION: ☒ Heard, ☐ Waived, ☒ OrderedTotal: \$ 34.00 plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)		\$	
§ 14-1-211(A)(1) (Conv Surcharge)	\$100	\$	<u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$	
§ 56-5-2995 (DUI Assessment)	\$12	\$	
§ 35.13 (Public Def/Prob)	\$500	\$	
§ 73.3, 1B TP (Law Enforce. Funding)	\$25	\$	<u>25.00</u>
§ 33.7, 1B TP (Drug Court Surcharge)	\$100	\$	
§ 50-21-114(BUI Breath Test Fee)	\$50	\$	
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$	
3% to County (if paid in installments)		\$	
TOTAL		\$	<u>125.00</u>

David Hamilton
 Clerk of Court/ Deputy Clerk

Court Reporter: Janet Rich

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §35.13 TP

Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE John C. HagerJudge Code: 2101419Sentence Date: 9-6-06

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

May 18, Term 2006

THE STATE

VS.

BERRY SCOTT BOLIN

Indictment for

MURDER

SC Code: 16-3-10

CDR Code: 0116

WITNESSES

YCSU/Strait

asg

ARREST WARRANT NUMBER

J150348

ACTION OF GRAND JURY

TRUE BILL

Dora Zeleny
Foreperson of Grand Jury

5-18-06

VERDICT

Vol ms - Guilty

Andrew R. Ruffolo
Foreperson of Petit Jury

Date: 9-6-06

CERTIFIED TRUE COPY
2610 FEB -8 PM 1:37
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

INDICTMENT

At a Court of General Sessions, convened on May 18, 2006 the Grand Jurors of York County present upon their oath:

MURDER

Berry Scott Bolin did willfully and unlawfully in York County on or about February 18, 2006, with malice aforethought, kill one Bobby R. Hovis, III by means of shooting the victim and said victim died as a result thereof. The murder occurred at 1123 Lawrence Road in Clover, South Carolina, all in violation of Section 16-3-10, South Carolina Code of Laws, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT DEPUTY SOLICITOR

ARREST WARRANT

J-150348

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

York

THE STATE
against

Case # 2006-00065517

Berry Scott Bolin

Address: 185 Cedar Grove Rd

Clover, SC 29710--979

Phone: SSN: 251-79-2505

Sex: M Race: W Height: 5 10 Weight: 165

DL State: SC DL #: 100310243

DOB: 4/18/1986 Agency ORI #: SC0460000

Prosecuting Agency: York County Sheriff

Prosecuting Officer: Eddie Strait

Offense: Murder / Murder

Offense Code: 0116

Code/Ordinance Sec: 16-03-0010, 0020

This warrant is CERTIFIED FOR SERVICE in the

☒ County/ ☐ Municipality of

The accused

is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to

defendant

on

Berry Scott Bolin

2-22-06

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

York County General Sessions
1675 York Hwy
York, SC 29745

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

York

Personally appeared before me the affiant Eddie Strait

being duly sworn deposes and says that defendant Berry Scott Bolin

did within this county and state on or about 02/18/2006

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of York

in the following particulars:

DESCRIPTION OF OFFENSE Murder / Murder

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

That the defendant did willfully and unlawfully violate the laws of this state by on February 18th, 2006, shoot the victim, Bobby Hovis, causing his death. This occurred at 1123 Lawrence Road, located inside of York County. This all against the peace and dignity of this state and all such laws made and provided for. Probable cause based on police investigation and defendant statement.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

York

Affiant's Address Moss Justice Center

York, SC 29745-

Affiant's Telephone (803)628-3059

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 2/18/2006 defendant Berry Scott Bolin

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of York) as set forth below:

DESCRIPTION OF OFFENSE: Murder / Murder

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable
Sworn to and subscribed before me

on 02/20/2006

Signature of Issuing Judge
Lynne Horton Benfield

Judge Code: 5806

Judge's Address Moss Justice Center

York, SC 29745-7423

Judge's Telephone (803)628-3029

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

COUNTY OF
STATE

York

VS.

Berry Scott Bolin

INDICTMENT/CASE#

2006-GS46-01596

A/W#: J160712

Date of Offense: 02-18-2006

S.C. Code § : 16-03-0620

Code #: 0014

AKA:

Race: W

Sex: M

Age: 20

DOB: 4/18/1986

SS#: 251-79-2814

Address: 185 Cedar Grove Rd.

Clover, SC 29710

DL#: 100310243

SID#: SC01679598

DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIAL #2In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE

in violation of § C/L, 17-25-0030 of the S.C. Code of Laws, bearing CDR Code # 0013

☒ NON-VIOLENT☐ VIOLENT☐ SERIOUS☐ MOST SERIOUS☐ 17-25-45The charge is: ☐ As Indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Willy Thompson
Solicitor:Bury Bu
DefendantShelby
Attorney for DefendantWHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 10 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: 9/6/06☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 35.13 (Public Def/Prob)	\$500	\$
§ 73.3, 1B TP (Law Enforce. Funding)	\$25	\$ 25.00
§ 33.7, 1B TP (Drug Court Surcharge)	\$100	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)		\$
TOTAL		\$ 125.00

David Hamilton
Clerk of Court/ Deputy Clerk

Court Reporter: Janet Rich

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE: John C. Hanger

Judge Code: 21049

Sentence Date: 9-6-06

WITNESSES

YCSD/Strait

ARREST WARRANT NUMBER

J160712

360

ACTION OF GRAND JURY

VERDICT

ARSHNA - Guilty

Andriji Rzepka
Foreperson of Petit Jury

Date: 9-6-06

DOCKET NO. 2006-GS-46-01596

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

May 18, Term 2006

THE STATE

vs.

BERRY SCOTT BOLIN

Indictment for

**ASSAULT & BATTERY
WITH INTENT TO KILL**

SC Code: § 16-03-0620
CDR Code: 0014

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY
2010 FEB - 8 11:38
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

INDICTMENT

At a Court of General Sessions, convened on May 18, 2006, the Grand Jurors of York County present upon their oath:

ASSAULT & BATTERY WITH INTENT TO KILL

Berry Scott Bolin did willfully and unlawfully in York County on or about February 18, 2006, with malice aforethought, commit an assault and battery upon Travis Falls by shooting him with a handgun. The Assault and Battery with Intent to Kill occurred at 1123 Lawrence Road in Clover, South Carolina, all in violation of Section 16-3-620, *Code of Laws of South Carolina*, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



ASSISTANT DEPUTY SOLICITOR

ARREST WARRANT

J-160712

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

York

THE STATE

2006/5517

against

Berry Scott Bolin

Address: 185 Cedar Grove Rd
Clover, SC 29710--979Phone: _____ SSN: 251-79-2505
Sex: M Race: W Height: 5 10 Weight: 165

DL State: SC DL #: 100310243

DOB: 4/18/1986 Agency ORI #: SC0460000

Prosecuting Agency: York County Sheriff

Prosecuting Officer: Eddie Strait

Offense: Assault / Assault and battery with Intent to Kill
(ABWIK)

Offense Code: 0014

Code/Ordinance Sec: 16-03-0620

This warrant is CERTIFIED FOR SERVICE in the

☒ County/ ☐ Municipality ofThe accused
s to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant Berry Scott Bolin
on 2/16/06

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

York County General Sessions
1675 York Hwy
York, SC 29745

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

York

AFFIDAVIT

ORIGINAL

Form Approved by
S.C. Attorney General
April 21, 2003
SCCA 518Personally appeared before me the affiant Eddie Strait who
being duly sworn deposes and says that defendant Berry Scott Bolin
did within this county and state on or about 02/18/2006 violate the criminal laws of the
State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of York)
in the following particulars:

DESCRIPTION OF OFFENSE Assault / Assault and battery with Intent to Kill (ABWIK)

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:Defendant did wilfully and unlawfully violate the laws of this State on February 18, 2006 by assaulting the victim, Travis Falls, by
shooting him with a handgun. Victim sustained injury requiring emergency medical attention. This occurring 1123 Lawrence Road,
Clover, York County, SC. All against the peace and dignity of this State and all laws made and provided. Probable cause based
upon police investigation and witness statement.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

York

Affiant's Address Moss Justice Center

Rock Hill, SC 29730-

Affiant's Telephone (803)327-2021

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 2/18/2006 defendant Berry Scott Bolin

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of York) as set forth below:

DESCRIPTION OF OFFENSE: Assault / Assault and battery with Intent to Kill (ABWIK)

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable

Sworn to and subscribed before me

on 02/18/2006Signature of Issuing Judge
Lewis Daniel Malphrus Jr.

Judge Code: 5071

Judge's Address Moss Justice Center

York, SC 29745-7423

Judge's Telephone (803)628-3095

Issuing Court: ☒ Magistrate ☐ Municipal ☐ CircuitCERTIFIED TRUE COPY
2006 FEB 21 PM 1:38
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF York
STATE VS.
Berry Scott Bolin

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#
2006-GS46-01598
A/W#: J150382
Date of Offense: 02-18-2006
S.C. Code §: C/L 17-25-0030
CDR Code #: 0768

AKA:
Race: W Sex: M Age: 20
DOB: 4/18/1986 SS#: 251-79-2500 FEB -8 PM 1:38
Address: 185 Cedar Grove Rd
Clover, SC 29710
DL#: 100310243 SID#: SC01679598

☐ CASE RESTORED SENTENCE
☐ PLEA ☒ TRIAL
☒ CONVICTED OF or ☐ PLEADS

In disposition of the said indictment comes now the Defendant who was
TO: ASSAULT OF A HIGH AND AGGRAVATED NATURE

in violation of § C/L 17-25-0030 of the S.C. Code of Laws, bearing CDR Code # 0009
☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

The charge is: ☐ As Indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:
Willy Thompson Solicitor
Berry Bolin Defendant
[Signature] Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 10 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 9/6/06
☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135

SPECIAL CONDITIONS:
☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: \$ _____ plus 20% fee: \$ _____
Payment Terms: _____
☐ set by SCDPPPS

Recipient: _____
*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 35.13 (Public Def/Prob)	\$500	\$
§ 73.3, 1B TP (Law Enforce. Funding)	\$25	\$ 25.00
§ 33.7, 1B TP (Drug Court Surcharge)	\$100	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)	\$	\$
TOTAL	\$	125.00

David Hamilton
Clerk of Court/ Deputy Clerk
Court Reporter: Janet Rich

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc. Rehab. or Job Corp. _____
May serve W/E beginning _____
Substance Abuse Counseling _____
Random Drug/Alcohol testing _____
Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____
\$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel, §35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE [Signature]
Judge Code: 21049
Sentence Date: 9-6-06

WITNESSES

YCSD/Yeager

asg

ARREST WARRANT NUMBER

J150382

364

ACTION OF GRAND JURY

TRUE BILL

Dora Fack
Foreperson of Grand Jury

Date: 5-18-06

VERDICT

A HAN - Guilty

Andrei Prodan
Foreperson of Petit Jury

Date: 9-6-06

DOCKET NO. 2006-GS-4601598

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

May 18, Term 2006

THE STATE

vs.

BERRY SCOTT BOLIN

Indictment for

ASSAULT WITH INTENT TO KILL

SC Code: 17-25-30, C/L

CDR Code: 768

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

CERTIFIED TRUE COPY
2010 FEB - 8 PM 1:38

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

INDICTMENT

At a Court of General Sessions, convened on May 18, 2006 the Grand Jurors of York County present upon their oath:

ASSAULT WITH INTENT TO KILL

Berry Scott Bolin did willfully and unlawfully in York County on or about February 18, 2006 with malice aforethought commit an assault upon Holly McCarter by shooting a firearm at her while she was driving away from the defendant in a vehicle. The Assault With Intent to Kill occurred at 1123 Lawrence Road in Clover, South Carolina, all in violation of Section 17-25-30 C/L, Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT DEPUTY SOLICITOR

ARREST WARRANT

J-150382

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

York

THE STATE
against

Barry Scott Bolin

Address: 185 Cedar Grove Road
Clover, SC 29710-Phone: _____ SSN: _____
Sex: M Race: W Height: 5 10 Weight: 165

DL State: _____ DL #: _____

DOB: 4/18/1986 Agency ORI #: SC0460000Prosecuting Agency: York County SheriffProsecuting Officer: J. R. YeagerOffense: Assault / Assault with intent to kill (AWIK)Offense Code: 0768Code/Ordinance Sec: C/L, 16-03-0620,This warrant is **CERTIFIED FOR SERVICE** in the
306 County/ ☐ Municipality of
The accused
is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date: _____

RETURN

A copy of this arrest warrant was delivered to
defendant 2-22-06 Barry S Bolin
on 2-22-06

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

York County General Sessions
1675 York Hwy
York, SC 29745

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

York

Personally appeared before me the affiant J. R. Yeager whobeing duly sworn deposes and says that defendant Barry Scott Bolindid within this county and state on or about 02/18/2006 violate the criminal laws of theState of South Carolina (or ordinance of ☒ County/ ☐ Municipality of York)

in the following particulars:

DESCRIPTION OF OFFENSE Assault / Assault with intent to kill (AWIK)I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:That the defendant did willfully and unlawfully violate the South Carolina Code of Laws by on February 18, 2006 discharge a
firearm in the direction of a vehicle and striking the vehicle that was occupied. This occurred at 1123 Lawrencer Road, in Clover,
SC. This all against the peace and dignity of this state and all such laws made and provided for. Probable cause based on police
investigation and witness statements.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

York

Affiant's Address 529 South Cherry Road
Rock Hill, SC 29730-Affiant's Telephone (803)327-2021

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 2/18/2006 defendant Barry Scott Bolin

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of York) as set forth below:DESCRIPTION OF OFFENSE: Assault / Assault with intent to kill (AWIK)Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable
Sworn to and subscribed before meon 02/22/2006Signature of Issuing Judge Lynne Horton Benfield (L.S.)Judge's Address Moss Justice CenterJudge's Telephone (803)628-3029Issuing Court: ☒ Magistrate ☐ Municipal ☐ CircuitJudge Code: 5806

ORIGINAL

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S.C. Attorney General
April 21, 2003
SCCA 518

AFFIDAVIT

RECEIVED
2006 FEB 27 PM 3:00CERTIFIED TRUE COPY
2006 FEB -8 PM 1:38
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

0768

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

York

VS.

Berry Scott Bolin

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#

2006-GS46-01599

A/W#: J150383

Date of Offense: 02-18-2006

S.C. Code §: C/L 17-25-0030

CDR Code #: 0768

AKA:

Race: W

Sex: M

Age: 20

DOB: 4/18/1986

SS#: 251-79-2505

Address: 195 Cedar Grove Rd

Clover, SC 29710

DL#: 100310243

SID#: SC01679598

YORK COUNTY, SC

☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: **ASSAULT OF A HIGH AND AGGRAVATED NATURE**

in violation of § C/L, 17-25-0030 of the S.C. Code of Laws, bearing CDR Code # 0009

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45The charge is: ☐ As Indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor:

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 10 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 9/6/06☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 35.13 (Public Def/Prob)	\$500	\$
§ 73.3, 1B TP (Law Enforce. Funding)	\$25	\$ 25.00
§ 33.7, 1B TP (Drug Court Surcharge)	\$100	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)	\$	\$
TOTAL		\$ 125.00

Clerk of Court/ Deputy Clerk

Court Reporter: Janet Rich

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §35.13 TP

Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code: 201409Sentence Date: 9-6-06

WITNESSES

YCSD/Yeager

asg

ARREST WARRANT NUMBER

J150383

ACTION OF GRAND JURY

TRUE BILL

Dora Feltz
Foreperson of Grand Jury

Date: 5-18-06

VERDICT

AMAN - guilty

Andree Bradley
Foreperson of Petit Jury

Date: 9-06-06

DOCKET NO. 2006-GS-46-01599

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

May 18, Term 2006

THE STATE

vs.

BERRY SCOTT BOLIN

Indictment for

ASSAULT WITH INTENT TO KILL

SC Code: 17-25-30, C/L
CDR Code: 768

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

2010 FEB -8 PM 1:38
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC
CERTIFIED TRUE COPY

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

INDICTMENT

At a Court of General Sessions, convened on May 18, 2006 the Grand Jurors of York County present upon their oath:

ASSAULT WITH INTENT TO KILL

Berry Scott Bolin did willfully and unlawfully in York County on or about February 18, 2006 with malice aforethought commit an assault upon Michael Hubbard by shooting a firearm at him while he was riding in a vehicle being driven away from the defendant. The Assault With Intent to Kill occurred at 1123 Lawrence Road in Clover, South Carolina, all in violation of Section 17-25-30 C/L, Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT DEPUTY SOLICITOR

ARREST WARRANT

J-150383

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

York

THE STATE
against2006 FEB 27 PM 3:00
200605517

Barry Scott Bolin

Address: 185 Cedar Grove Road
Clover, SC 29710-Phone: _____ SSN: _____
Sex: M Race: W Height: 5 10 Weight: 165
DL State: _____ DL #: _____
DOB: 4/18/1986 Agency ORI #: SC0460000
Prosecuting Agency: York County Sheriff
Prosecuting Officer: J. R. Yeager
Offense: Assault / Assault with intent to kill (AWIK)Offense Code: 0768
Code/Ordinance Sec: C/L, 16-03-0620,370 This warrant is CERTIFIED FOR SERVICE in the
☒ County/ ☐ Municipality of
The accused
is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date: _____

RETURN

A copy of this arrest warrant was delivered to
defendant Barry S. Bolin
on 2-22-06

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

York County General Sessions
1675 York Hwy
York, SC 29745

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA)

☒ County/ ☐ Municipality of)

York)

Personally appeared before me the affiant J. R. Yeager whobeing duly sworn deposes and says that defendant Barry Scott Bolindid within this county and state on or about 02/18/2006

violate the criminal laws of the

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of York)
in the following particulars:DESCRIPTION OF OFFENSE Assault / Assault with intent to kill (AWIK)I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:That the defendant did willfully and unlawfully violate the South Carolina Code of Laws by on February 18, 2006 discharge a
firearm in the direction of a vehicle and striking the vehicle that was occupied. This occurred at 1123 Lawrencer Road, in Clover,
SC. This all against the peace and dignity of this state and all such laws made and provided for. Probable cause based on police
investigation and witness statements.

Signature of Affiant

STATE OF SOUTH CAROLINA)

☒ County/ ☐ Municipality of)

York)

Affiant's Address 529 South Cherry Road
Rock Hill, SC 29730-Affiant's Telephone (803)327-2021

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 2/18/2006 defendant Barry Scott Bolin

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of York) as set forth below:DESCRIPTION OF OFFENSE: Assault / Assault with intent to kill (AWIK)Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable
Sworn to and subscribed before me)on 02/22/2006)Signature of Issuing Judge Lynne Horton Benfield (L.S.)
Lynne Horton Benfield)
Judge Code: 5806)Judge's Address Moss Justice Center
York, SC 29745-7423Judge's Telephone (803)628-3029Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

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Form Approved by
S.C. Attorney General
April 21, 2003
SCCA 518

AFFIDAVIT

RECEIVED

DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC
FEB - 8 PM 1:37
X-100 COPY

0760

COUNTY OF
STATE

York
VS.

Berry Scott Bolin

INDICTMENT/CASE#

2006-GS46-01600

A/W#: DL2006GS4601600

Date of Offense: 02-18-2006

S.C. Code § : 16-23-0440(B)

CDR Code #: 2907

AKA:

Race: W Sex: M Age: 20

DOB: 4/18/1986 SS#: 251-79-2801 FEB -8 PM

Address: 185 Cedar Grove Rd. Clover, SC 29710

DL#: 100310243 SID#: SC01679598

DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

☐ CASE RESTORED
SENTENCE

☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: **DISCHARGING A FIREARM INTO AN OCCUPIED VEHICLE**

in violation of § 16-23-0440(B) of the S.C. Code of Laws, bearing CDR Code # 2907

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Willy Thompson
Solicitor

Berry Bolin
Defendant

Phil B. Smith
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 10 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine: \$ _____

§ 14-1-206 (Assessments 107.5 %) \$ _____

§ 14-1-211(A)(1) (Conv Surcharge) \$100 \$ 100.00

§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

§ 56-5-2995 (DUI Assessment) \$12 \$ _____

§ 35.13 (Public Def/Prob) \$500 \$ _____

§ 73.3, 1B TP (Law Enforce. Funding) \$25 \$ 25.00

§ 33.7, 1B TP (Drug Court Surcharge) \$100 \$ _____

§ 50-21-114(BUI Breath Test Fee) \$50 \$ _____

§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

3% to County (if paid in installments) \$ _____

TOTAL \$ 125.00

David Hamilton
Clerk of Court/ Deputy Clerk

Court Reporter: *Janet Rich*

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE *John Hays*

Judge Code: 2101419

Sentence Date: 9-6-06

WITNESSES

YCSD/Yeager

asg

ARREST WARRANT NUMBER

Direct Indictment

372

ACTION OF GRAND JURY

TRUE BILL

Dog Zeller
Foreperson of Grand Jury

Date: 5-18-06

VERDICT

Guilty

Amelia Ryder
Foreperson of Petit Jury

Date: 9-6-06

DOCKET NO. 2006-GS-46-01600

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

May 18, Term 2006

THE STATE

vs.

BERRY SCOTT BOLIN

Indictment for

**DISCHARGING A FIREARM
INTO AN OCCUPIED VEHICLE**

SC Code: 16-23-440 (B)
CDR Code: 2907

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

2010 FEB - 10 PM 1:38
DAVID H. HAMILTON
CLERK OF COURT
YORK COUNTY, SC

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

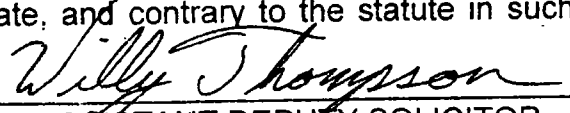
INDICTMENT

At a Court of General Sessions, convened on May 18, 2006, the Grand Jurors of York County present upon their oath:

DISCHARGING A FIREARM INTO AN OCCUPIED VEHICLE

Berry Scott Bolin did in York County, South Carolina, on or about February 18, 2006, willfully and unlawfully discharge a firearm at or into an occupied vehicle, while at 1123 Lawrence Road in Clover, South Carolina. All in violation of Section 16-23-440, Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT DEPUTY SOLICITOR

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF YORK) IN THE COURT OF COMMON PLEAS
3)

4 BERRY BOLIN)
5 APPLICANT,) TRANSCRIPT OF RECORD
6 -vs-) 2010-CP-46-00436
7 STATE OF SOUTH) JULY 13, 2012
8 CAROLINA,) YORK, SOUTH CAROLINA
9 RESPONDENT.)

10
11 B E F O R E:

12 THE HONORABLE LEE S. ALFORD, JUDGE.
13
14

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

16 T. MICAH LEDDY, ESQUIRE
17 ATTORNEY FOR THE APPLICANT

18 SALLEY ELLIOTT, ASSISTANT ATTORNEY GENERAL
19 ATTORNEY FOR THE RESPONDENT

20 ALSO PRESENT:
21 WILLY THOMPSON, DEPUTY ASSISTANT SOLICITOR

22 MICHAEL R. WATTS
23 CIRCUIT COURT REPORTER
24
25

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3	WITNESSES	PAGE
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EXHIBITS

1				
2	NO.	DESCRIPTION	ID.	EV.
3	(NO EXHIBITS MARKED)			
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1 (PROCEEDINGS, 2012)

2 MS. ELLIOTT: Good morning, Judge Alford.

3 THE COURT: Good morning.

4 MS. ELLIOTT: Good to see you.

5 THE COURT: Good to see you.

6 All right, Mr. Leddy, I think we are here on your
7 client's motion.

8 MR. LEDDY: Yes, Your Honor.

9 THE COURT: I'll be glad to hear from you.

10 MR. LEDDY: May it please the court, Your Honor, I
11 believe that Ms. Elliott has handed up the documents, the
12 motion that I filed a return.

13 What we are asking for, Your Honor, I submitted a
14 request to the solicitor's office for certain materials
15 related to a gentleman named Travis Falls, who is a key
16 witness in the trial of my client Berry Bolin.

17 Specifically it's the contention of the defense
18 and our contention now that Mr. Falls was firing a weapon
19 from a car that my client returned fire into, resulting in
20 him being hit and another gentleman being killed. So what I
21 asked for was, through the Freedom of Information Act, the
22 files that the solicitor's office has on Mr. Falls, and
23 Deputy Solicitor Thompson denied that request based on an
24 asserted work product privilege, and so I filed a motion to
25 open a very limited amount of discovery on this noncapital

1 PCR. It's limited only to having those materials provided
2 to the court so that the court can determine whether or not
3 the work product privilege applies to every single document;
4 and if not, whether they should be turned over pursuant to
5 the rules related to discovery. And that's -- that's the
6 only reason that I filed this request. And I think that the
7 good cause is based mostly on the fact that I won't have to
8 go through all of this at the actual PCR hearing that we are
9 going to have in October, because if they turn out to be
10 documents that are really important and not work product,
11 then it's just going to cause us to drag out and have
12 another hearing later after following additional
13 investigation, and I could go ahead and get all of that out
14 of the way. And --

15 THE COURT: What specifically are you seeking?
16 You would have to make a showing. You can't say "I want to
17 open a file to me because I may find something in there I
18 like."

19 MR. LEDDY: Yes, sir.

20 THE COURT: That's -- that's not -- that's not
21 good cause.

22 MR. LEDDY: Yes, sir.

23 THE COURT: What you have to do is say
24 specifically what you expect to find and what you are
25 looking for.

1 MR. LEDDY: Well --

2 THE COURT: So what is it that you are looking
3 for?

4 MR. LEDDY: Mr. Falls had been previously arrested
5 for an assault, which led to the incident that led to my
6 client being in prison, okay? So there was a person who was
7 assaulted. That was being prosecuted by this office.

8 When that person got out -- when Mr. Falls
9 assaulted this person -- he was released from jail. He went
10 to a party to fight this person again and then there was a
11 gunfight. And so the solicitor's office here sent their
12 file to the Attorney General on Mr. Falls prosecution,
13 conflicted him out, and so --

14 I have gotten the materials that they sent to the
15 Attorney General's office. What I'm interested in is any
16 interview notes from Mr. Falls, because I believe that there
17 could have been promises of leniency, or anything like that,
18 and there is no other way for me to determine that except to
19 see the actual interview notes and those wouldn't be
20 considered work product. I mean, those would go to
21 impeachment value. Those would go to exculpatory evidence
22 for my client.

23 THE COURT: All right. Let me hear from the
24 State.

25 MS. ELLIOTT: Your Honor, as counsel has

1 indicated, we have turned over our entire file, other than
2 communications between the victim's family and our victim
3 service coordinator. Everything has been turned over that
4 we had. And, again, I think the State was asserting that
5 there has not been a showing of good cause, other than just
6 speculation as to what might be available.

7 And as far as the work product information, I
8 believe Mr. Thompson would probably be better to address
9 that and the solicitor's position about whether or not they
10 feel the file should be disclosed.

11 If I may defer to Mr. Thompson?

12 THE COURT: Mr. Thompson?

13 MR. THOMPSON: Your Honor, I'll point out that he
14 basically asked for any files we have on Travis Falls,
15 whether they were related to this case or not.

16 Travis Falls had been charged in our circuit for a
17 drug possession of codeine in 2002, which is a couple years
18 before this happened. He was prosecuted before this
19 happened and he received a probationary sentence on this, so
20 I don't see the relevance in that file, for one thing, and
21 that was handled before this ever happened, so I don't know
22 how that becomes relevant.

23 Then there was be --

24 THE COURT: Let's take them specifically.

25 You don't -- you are not saying that would be

1 relevant, are you?

2 MR. LEDDY: No, Your Honor, and they didn't
3 even -- that would be fine.

4 MR. THOMPSON: As for the assault and battery of a
5 high and aggravated nature charge, Your Honor, the one that
6 we conflicted to the Attorney General's office when this
7 case occurred, that was against a Mr. Deal. The victim was
8 Mr. Deal, whose residence this incident occurred at where
9 Mr. Bolin ended up firing and killing the victim in this
10 case, as well as injuring Travis Falls. Travis Falls was
11 also shot in this case and was a victim, was in the vehicle
12 that was shot.

13 I would point out that at the time we -- we were
14 required, of course, to hand over any information that would
15 have been exculpatory to the attorney. We agreed and we
16 handed over any information that would have been, and there
17 really was none regarding this case.

18 We handed over the copy that the A.G.'s office had
19 of the file that Mr. Greeley was able to thoroughly
20 cross-examine Travis Falls during the time that he
21 testified. I mean, he was grilled on the stand about the
22 fact that he wasn't supposed to be around him and Mr. Deal,
23 that he shouldn't have gone to his house, that his bond
24 order said don't go to that house. He was charged with
25 assault and battery of a high and aggravated nature. All

1 those things were gone into at that time.

2 And, of course, there was no promises of leniency
3 or anything like that to Travis Falls. I never personally
4 spoke to him about that case that was pending, because it
5 wasn't my case. That case always was deferred over. It was
6 handed to the Attorney General's office, so there is nothing
7 to give, really, when it comes down to that particular case,
8 other than letters to the Attorney General's office of
9 conflict.

10 As far as I know, there was no interviews from
11 what I have reviewed in our system, done with Mr. Falls, at
12 least none that the attorney who would have had it at this
13 time would have noticed. And, of course, no promises or
14 other any sorts of things were given to him.

15 What I would point out as well, as far as the fact
16 that someone may have been firing back from the car, that
17 was something that Mr. Greeley also went into at length in
18 the trial.

19 And a number of witnesses, of course, testified, a
20 large number of lay witnesses for the parties. A lot of
21 people there. Most of them friends of the defendant and
22 sympathetic to him testified, and some of them had given
23 statements saying that they saw firing come from that car.
24 And those people -- a couple of those people at least
25 testified and changed their statements saying, "no, I really

1 didn't see anything coming from that car. I just thought
2 that was some of the gunshots that happened to come from
3 that car," or, "I had talked to someone else and I thought
4 maybe it came from that car."

5 And having been one of the prosecutor's on the
6 case, I can also tell the court, something that Mr. Leddy
7 would be certainly unaware of, the victim's vehicle and from
8 where the statements of the people who did say something
9 came from that car were from the back window on the
10 passenger's side -- the passenger's window on the
11 passenger's side. It would have been next to impossible for
12 someone to fire out of that window, because if you are in
13 the back seat of that car and you try to reach around, the
14 way that post came down, when you sit in the car there was a
15 solid piece of glass here that was not broken. There was a
16 post that came down. When you sat down, you would have had
17 to have tried to reach around like this to shoot a gun out
18 of that window, or you would have to get up and climb out
19 that window to shoot a gun, and that's an impossible way to
20 shoot a gun.

21 The investigation was done where there was no --
22 there was no shell casings or other things like that found
23 in the car or around the road where the car was shot into,
24 because the car was shot into the back. One of the victims
25 was shot -- Mr. Falls had his arm on the -- behind his

1 friend. It went through his arm. It went into the
2 victim's -- back of the victim's head and killed him. So
3 that came through the back windshield, and the windshield
4 wasn't totally knocked out. Nothing would have been shot
5 from inside and out the back windshield.

6 So I think it's really kind of a reaching claim at
7 this point, because that was thoroughly examined in the
8 trial, and so at this point we have nothing really that
9 would be of value to him to give.

10 Now, I will say there was -- after the trial was
11 over, Mr. Falls was charged with I think a common law
12 robbery and he pled to an ABHAN on that case and went to
13 prison. And at the same time he pled to those charges, the
14 Attorney General's office had and he did do some time on
15 both of those charges.

16 MR. LEDDY: Your Honor, I just -- if there is -- I
17 don't see any harm in just providing it to the court so the
18 court can determine if, indeed, they are all work product
19 privilege. If they are work product privilege, then they
20 are not subject to discovery. And if they are not, then
21 they are subject to just this limited discovery. If they
22 don't know help me, they don't help me, but I'm going to
23 have to --

24 THE COURT: Well, counsel, I'm just asking you --
25 are you saying throwing something out there and -- throwing

1 the net out there and hoping something jumps in it? I mean,
2 when you ask for discovery in these PRC cases --

3 MR. LEDDY: Yes, sir.

4 THE COURT: -- you have got to say what it is that
5 you are looking for. I mean, you can't just say "open your
6 file to me and let me see if I can find something that might
7 be helpful to me." You got to point out what it is that you
8 are looking for.

9 MR. LEDDY: Yes, sir. Specifically --

10 THE COURT: And you are saying you asked for it
11 and he says well, there was no deals made, nothing offered
12 to, I guess, Mr. Falls. He says he wasn't offered any
13 leniency.

14 No plea bargain deal was made with him, is that
15 right, for his testimony?

16 MR. THOMPSON: That's correct, Your Honor.

17 THE COURT: He said that there was nothing offered
18 to him.

19 He is saying the files -- everything they had with
20 that was turned over to the Attorney General's office to
21 prosecute him. He said there is none, but --

22 Is there anything that you all still have in your
23 files that was not turned over to the Attorney General's
24 office with regard to any statements taken from Mr. Falls,
25 interviews with Mr. Falls?

1 MR. THOMPSON: There is nothing in those files,
2 Your Honor, that I saw in reviewing them. The only -- the
3 only --

4 Of course, Mr. Falls was represented at that time,
5 too, if I'm not mistaken. There is nothing indicating
6 conversations with him regarding these charges of ABHAN and
7 the common law robbery, and this happened afterwards. There
8 is nothing that indicates that.

9 Now, of course, there are attorney's notes as far
10 as -- not specifically with the ABHAN, but with the strong
11 armed robbery, because the ABHAN was turned over to the
12 A.G.'s office and we really don't have anything on that.

13 But on the strong armed robbery, there would be
14 attorney notes from Jason Davis, who handled the case at
15 that time, about just the progress of the case and --

16 THE COURT: Was strong armed robbery in any way
17 involved in this case?

18 MR. THOMPSON: No, it wasn't. It actually
19 occurred after this case was tried.

20 MR. LEDDY: Your Honor, what I'm interested in his
21 interview notes about his testimony in Mr. Bolin's case.
22 It's just -- I'm sure that they interviewed him before they
23 put him on the stand. He was one of the most important
24 witnesses in the case.

25 MR. THOMPSON: And that would deal with Mr.

1 Bolin's file, which is something else that he's requested
2 full access to I believe in his motion, and certainly we
3 would object to. Really everything in that file is our work
4 product and it does include interviews with Travis Falls.
5 It includes interviews with all the people who testified in
6 that case and a lot of people who didn't, but it's interview
7 notes that I personally went out with Detective Parrish and
8 interviewed those people myself. They were hard to track
9 down because they tried to avoid us in every way they could.
10 There was many of them that would set up meetings one, two
11 and three times and didn't get them. We had to physically
12 go out and find them at their places of work, at other
13 people's houses trying to interview those folks, because
14 they were friends of the defendant, and it was difficult to
15 find them. So there are interview notes regarding some of
16 those people, but those people also testified. At least the
17 vast majority of them did.

18 And if there is someone specifically of the people
19 who testified, Mr. Greeley also interviewed those folks,
20 because many of them had already been interviewed by him or
21 his investigator by the time we ever found them.

22 They did a good job of trying to avoid us most of
23 the time, quite honestly. But our notes are our notes and
24 there is nothing that wasn't already, because they had
25 already given statements to law enforcement. There is

1 nothing in them that gives the defense any other benefit.

2 MR. LEDDY: Well, Your Honor, those aren't --
3 those notes would not be considered work product.

4 If you think of the case State v. Riddle, the
5 violation in that case was not telling the defense about the
6 interview that the solicitor had with the other witness in
7 the case, the main witness in the case.

8 Think about Gibson, State v. Gibson, the same
9 exact issue was that the -- there was a solicitor who was at
10 the scene of the incident with the main witness and says
11 "well, you couldn't have seen it from here." And she said
12 "well, yeah, it must have been over here." That wasn't
13 disclosed and that's considered to be a violation in that
14 case.

15 So these witness notes obviously are not work
16 product. If they were, then they would -- those things
17 would have been privileged and not subject to disclosure in
18 those cases. And that's exactly --

19 When he said that every single piece of paper in
20 there is their work product, and he's including witness
21 notes, that's incorrect. And I want the court to have that
22 file and see what things could be of impeachment or
23 exculpatory value. Whether or not Mr. Greeley's people
24 interviewed them, my people interviewed them, law
25 enforcement interviewed them, if there is inconsistent

1 statements in there, then he has a Constitutional Right to
2 at that.

3 And if those things weren't brought up in the
4 trial because they weren't disclosed under the idea that
5 they weren't subject to Brady because they were work
6 product, then that's something that now is the time, you
7 know, to get my hands on. It would be -- it could be
8 absolutely critical to this case, but I want the court to
9 have it and for it to be reviewed and made a part of the
10 record at the very minimum.

11 MR. THOMPSON: Once again, Your Honor, he's shown
12 no good cause. And if you look at what he's filed, as far
13 as the reasons for the PCR, they go down through just a few
14 things and --

15 THE COURT: Let me ask you this. Are you saying
16 they got an interview note in there that is exculpatory to
17 your client? Is that -- that's what you got to show. You
18 can't just say, "let me review your whole file and find out
19 if you got anything that would be exculpatory or helpful to
20 my client that you didn't reveal." You can't -- that's not
21 the way it works.

22 I want you to point it out, tell me what I'm
23 supposed to be looking for in there that you are looking
24 for. Don't tell me I shot a shotgun out there and that's,
25 you know, wherever it falls. You got to pinpoint it. What

1 are you looking for?

2 MR. LEDDY: Well, some of the witnesses in the
3 case, Your Honor, changed their stories over time.

4 THE COURT: He said that.

5 MR. LEDDY: Yeah. And so --

6 THE COURT: They all testified that -- they
7 testified, didn't they?

8 MR. LEDDY: No, they didn't all testify. A lot of
9 them weren't called as witnesses in the case. That's one of
10 the main claims that --

11 THE COURT: Have you looked at his counsel at
12 trial notes and file to see what's in there --

13 MR. LEDDY: Yes, sir.

14 THE COURT: -- with regard to these witnesses?

15 Mr. Thompson said he went out and interviewed
16 them. Most of them -- a lot of them he interviewed before
17 they ever found them. And he said that they -- a couple of
18 them changed their statement at trial and all that.

19 Have you checked with Mr. -- with his attorney at
20 trial to get that information out of -- and have you looked
21 at the transcript? If they changed their story based on
22 statements -- were they cross-examined at the trial, or did
23 they testify, or cross-examined at the trial, or did Mr.
24 Greeley have notes about what they are saying?

25 MR. LEDDY: A lot people weren't called by either

1 side. But what I would say is that -- I can't -- I had
2 requested them pursuant to the Freedom of Information and
3 that was denied, so I moved to open discovery, okay?

4 The reason it was not subject to disclosure is an
5 asserted work product privilege. There is no good cause
6 requirement under the Freedom of Information. That was just
7 an asserted work product privilege, so the remedy was to
8 come to court and ask the judge to review it and see if it
9 properly privileged under a work product privilege.

10 What I'm hearing is that we did have interview
11 notes, but they are cumulative in what you already head.

12 THE COURT: You got to go one more step. You are
13 seeking discovery in a PCR case.

14 MR. LEDDY: Yes, sir.

15 THE COURT: And we don't give discovery in a PCR
16 case, except upon good cause shown why you need that
17 information to conduct the discovery.

18 MR. LEDDY: Yes, sir.

19 THE COURT: And so it's incumbent on me and I'm
20 just asking, what is it that you are looking for?

21 MR. LEDDY: The interview notes.

22 THE COURT: Not that "I may find something there
23 and it might be helpful to me." I want to know what it is
24 you say is helpful to you that they have got that they
25 haven't turned over to you? What is it?

1 You are saying "maybe I can find something." Is
2 that what you are saying?

3 MR. LEDDY: Well, it's hard for me to tell you
4 what I will find, but --

5 THE COURT: Well, that's what you have got to do.

6 MR. LEDDY: Well --

7 THE COURT: You have got to show me what you
8 expect to find or what you think is going to be helpful to
9 you. What is it?

10 MR. LEDDY: Well, the interview notes from these
11 various witnesses.

12 And, Your Honor --

13 THE COURT: Why is that, counsel? What do you
14 expect to find in these interview notes with regard to these
15 various witnesses that are going to be helpful in your case
16 on a PCR?

17 MR. LEDDY: If Mr. Falls told them one thing and
18 then told them something else, then --

19 THE COURT: If.

20 MR. LEDDY: -- that would be very helpful.

21 THE COURT: Are you saying he did?

22 MR. LEDDY: I don't know what he told them,
23 because I wasn't there and they won't provide me with the
24 notes.

25 But here is what I'm saying, Your Honor --

1 THE COURT: You say he may have.

2 MR. LEDDY: I can -- I can just simply call this
3 at the hearing and ask these questions, and -- or we could
4 do it now. I'm -- the good cause is that it would save us
5 all a lot of time.

6 And, you know, I understand the reluctance to open
7 up discovery in noncapital PCR's, because there are so many
8 of them, but that's why I tried to tailor my request to be
9 very narrow. And my proposed order only allows --

10 THE COURT: It may be, but you haven't shown me
11 what it is that you expect that they are hiding from you --
12 that you think they are hiding from you that you need to
13 get. You are saying "they may be hiding something, so I
14 want to open the file on -- that's what you are saying to me
15 through discovery.

16 MR. LEDDY: There are --

17 THE COURT: Let me explain to you what I'm saying.

18 MR. LEDDY: Yes, sir.

19 THE COURT: Everybody comes in on one of these PCR
20 cases can say "open your file to me on every single note,
21 everything that you have got, because it may be helpful to
22 me." That's not going to help, okay, because we are not
23 going to open up every single file in every discovery in
24 every PCR case that comes in here and just unwielded.
25 That's just not going to happen.

1 If you say "there was a witness out there that
2 said so and so and they may have given you notes on that, we
3 want to see if they give you notes, an interview, or you
4 made notes on something that they told you and we think
5 that's helpful to my client, you are automatically entitled
6 to it." That's good cause.

7 But if you say "open your file to me," you can say
8 that in every single case, couldn't you? "I might find
9 something in there?"

10 MR. LEDDY: Yes, sir.

11 This particular gentleman --

12 The fact that he had a case here and was -- that
13 he got conflicted out, that creates a lot of leverage for
14 them. And I know they had multiple meetings with him, just
15 as interviewing other witnesses, and I would like to know
16 what they discussed in those meetings about his testimony
17 and how it would relate to Mr. Bolin's trial. And --

18 THE COURT: They had discussions with him about
19 his testifying at trial, wouldn't that be work product,
20 unless it was something exculpatory that he told them for
21 your client?

22 MR. LEDDY: No, sir.

23 THE COURT: Wouldn't that be work product, if they
24 are making notes for trial, or something like that, during
25 the trial; in preparing him for testimony at his trial?

1 MR. LEDDY: I don't think so, because the -- the
2 Fourth Circuit has taken the approach of, you know, fact
3 work product and opinion work product.

4 If he was drafting a memo about the law, a search
5 and seizure issue, that's work product.

6 If he was interviewing -- if the solicitor was
7 interviewing witnesses and taking notes, that's not work
8 product, because if it were, then no defendant would ever be
9 entitled to know what they were -- what the solicitor's
10 office talked to the witnesses about. We just would not
11 have the law enforcement do it. You would have the
12 solicitor do it and say that's work product.

13 Obviously the Constitution requires that that
14 would be turned over under the case of Brady if it's
15 impeachment or exculpatory, if the case of rule --

16 THE COURT: If, but you are not telling me
17 anything except "I'm throwing out a net. I hope to drag a
18 fish in there," you know, somewhere. That's what you are
19 telling me, basically.

20 MR. LEDDY: Well, Your Honor, if I told you "I
21 anticipate finding something very helpful," then that would
22 be a true statement that I do, but on the -- I don't have
23 any way of knowing what's in there, because I haven't seen
24 it, and so I don't want to say to the court --

25 THE COURT: All right. Listen to me.

1 MR. LEDDY: Yes, sir.

2 THE COURT: John Brown comes in here right behind
3 you and says "they got the some stuff in their file and I
4 haven't seen it, but I might find something helpful to me in
5 there. I might find it." Can they do it in every case?
6 Couldn't a lawyer do it in every single case, if that's
7 true; "I might find something in there that's helpful, so
8 open up everything and show it to me."

9 This is discovery in a PCR case.

10 MR. LEDDY: Yes, sir.

11 THE COURT: You got to show good cause. What do
12 you expect to find?

13 I'm not going to open it up, unless you can show
14 something to me that's going to be good cause for me to even
15 look at in there. Do you understand what I'm saying?

16 MR. LEDDY: Yes, sir.

17 THE COURT: If I do it for you, I got to do it for
18 everybody else. If you have nothing that you say you expect
19 to find in there and ask the court to look for it. Do you
20 understand what I'm saying?

21 MR. LEDDY: Yes, sir.

22 THE COURT: If I do it for you on a blanket,
23 throwing out a fishnet and hoping to catch in fish in there
24 somewhere and you have no good cause to show, you don't say
25 what you expect to find in there, what you think you will

1 find in there, or you have reason to believe you might find
2 in there, then you are -- that's just a shotgun approach.

3 But if I opened up their file with no specifics
4 with regard to what you expect to find or what you think is
5 in there that hadn't been turned over to you, then I -- then
6 I -- you would have to open it up in every single case,
7 wouldn't I, discovery in every single case, because every
8 lawyer could say the same thing, couldn't they?

9 MR. LEDDY: Well, I understand, Your Honor, what
10 your saying.

11 THE COURT: I'm saying if you say they are hiding
12 something from you or you would have reason to believe that
13 they have something in their file that they hadn't turned
14 over, or you think a witness may have said this and they
15 have got to -- if you can -- what's the -- if you can point
16 to something specific, you know --

17 MR. LEDDY: Well --

18 THE COURT: -- then you would be able to show some
19 good cause for requiring the court to allow some discovery
20 on that issue.

21 MR. LEDDY: Well, Mr. Thompson has told us this
22 morning that those interview notes would be work product in
23 his mind, and, therefore, weren't turned over to Mr. Greeley
24 at the trial. So what I'm saying is that's not work
25 product. It should have been turned over and I would like

1 the court now to review that.

2 THE COURT: Why -- why would that not -- why would
3 that be work product if you went out and interviewed
4 witnesses and took statements from them, or whatever, or
5 interviewed them and made notes about their testimony in the
6 interviews, not trial preparation, but interview them, why
7 would that be protected under work product, Mr. Thompson, or
8 Ms. Elliott, either one of you?

9 MR. THOMPSON: Your Honor, we didn't take any
10 statements from people. We simply went and interviewed them
11 in preparation for the trial. There were already statements
12 in existence that we knew would be people from, and then we
13 learned of some people who had never stuck around for the
14 police, that those people later told us about that we went
15 and interviewed. Once against, we didn't take statements.
16 We just took notes of what they told us, and that is work
17 product. That's in preparation for the trial.

18 That's not -- that's not in the arrest or the
19 other things. Those things are done way before this. We
20 are forced to do this in any case to talk to a witness. And
21 for us to have to hand over our notes seems a little
22 ridiculous. If it's not work product, I really don't know
23 what it is.

24 If you can separate and say "oh, yeah, your
25 research is work product," yeah, but, you know, pretty much

1 you bring the research out and argue it, so it's not -- it's
2 one of those odd things. If I bring the research out and
3 argue it, how much work product is that upon throwing it all
4 over the courtroom?

5 We don't bring out our notes and say "well, you
6 know, my notes say this or that." On occasion we might have
7 to cross-examine someone regarding those notes if they say
8 something different than what they said in front of our
9 investigator, or something like that, which happened in this
10 case I think at some point when they were on the stand, so
11 these things became quite evident at the time that they
12 occurred, because anything that was different that any one
13 of those witnesses told us was actually not beneficial to
14 the defendant.

15 For instance, if you look at the testimony of
16 Robert Beverly, particular, and Caroline Tillion, those two
17 people had given written statements to law enforcement
18 saying that there was gunfire from that vehicle. When they
19 testified they said that's not what happened. So obviously
20 they changed their stories, but not in favor of the
21 defendant. And that was obvious at the time of the trial,
22 because all those statements had been handed over to Mr.
23 Greeley. You know, all those things had been done.

24 And as well, when it came to various things in the
25 trial, as far as -- and I can tell you that I do have -- I

1 recall seeing in the files I was reviewing for this various
2 e-mails from Mr. Greeley where I do update him if I see
3 something different, where I did update him and say, oh, for
4 instance, like in regards to the defendant's statement.
5 There was some things that I said -- "I interviewed this
6 officer and he said this about the statement and that's not
7 recorded in the statement and that's not over here, but I
8 wanted to let you know this is the situation." So there are
9 things that I did specifically send to Mr. Greeley so that
10 he understood this is something that I haven't handed over
11 before and I just found out about it when I talked to this
12 witness. So I would have done that as well with these
13 things, had I seen something that would have been
14 exculpatory for the defendant, because I did it on
15 everything else.

16 I don't know what else work product could be,
17 other than my own notes or the notes that I asked my
18 investigator to take as I interviewed someone so that I
19 don't have to write the notes while I'm standing there
20 talking to them. The investigator wrote the notes. That's
21 our work product. I used that then to then go back to
22 review their statements, go back and review their statements
23 where it says, and use it determining what kind of questions
24 I'm going to ask them and how I'm going to direct those
25 questions, because I then write within the margins of the

1 notes myself. I write --

2 You know, I don't know how to separate these
3 things from anything else. I don't know what else to call
4 them but work product, because they are obviously not
5 produced to hand over to anybody at any point. It's for me
6 to understand the case, for me to remember what they said so
7 that I don't get it wrong.

8 And I would point out as well that as far as the
9 idea that somehow creating a deal with Mr. Falls or there is
10 likely to be something like that makes no sense. He was
11 shot. He was the victim. His friend Bobby Hovis was
12 killed. You can separate that easily in anyone's mind from,
13 you know, whether we would prosecute you on an ABHAN charge.
14 I don't see how that benefits him in any way to then say oh,
15 well, I won't -- I'll testify -- you know, what he's going
16 to testify differently to? He already gave a statement back
17 at the time that it happened as well. I mean, what -- what
18 benefit is there for him or what benefits us to try to give
19 him a deal to testify? You know, it only hurts him, because
20 then the person who shot him doesn't get -- doesn't pay for
21 what they have done. I don't understand why that somehow is
22 immediately suspect. I could see if they were, you know, a
23 defendant's friend or a co-defendant, then you might say
24 well, yeah, there could be something in that. I don't see
25 how it works that way with a victim in the case.

1 THE COURT: Was that discussed at the trial? Did
2 Mr. Greeley ask him about that, or anything like that about
3 whether he was getting any?

4 MR. THOMPSON: I don't remember from the -- I
5 didn't read completely the transcript, so I don't know if
6 Mr. Greeley asked him if there was any deal made, but
7 obviously I know from my discussions with Mr. Greeley that,
8 you know, I did not do -- I did not make any deals with him.
9 I would have told Mr. Greeley that as well, but I don't
10 remember if he specifically asked him about that, but I know
11 he asked him about everything else that he could possibly
12 ask him about, including the ABHAN, and the fact that his
13 bond would not let him be at that residence, that he should
14 have been away from it, that, you know, he had been charged,
15 that -- you know, those sorts of things.

16 MR. LEDDY: Your Honor, it's not just whether or
17 not it's exculpatory as to what they said. If it goes
18 against my client, then it also goes against their
19 credibility, because they changed their story. It would be
20 of impeachment value. So those notes that would be of
21 impeachment value should have been turned over and those
22 would be the notes that I want now.

23 In other words, if he goes out and interviews a
24 witness, Mr. Beverly, he tells him one thing and then it's
25 different from what he told law enforcement, it's different

1 from what he told them at trial, you can impeach him on what
2 he told law enforcement. You can impeach him on what he
3 just said at trial. If you don't have the other notes
4 because they are work product, that's just not the fair.

5 All those notes are not his work product if they
6 fall under the intents in Brady and all those cases. And it
7 sounds, just from what I have heard, that those were not
8 turned over because of the understanding of the solicitor is
9 that those aren't subject to being turned over, that they
10 are work product.

11 THE COURT: He's saying he made notes of -- when
12 he went out and interviewed witnesses he made handwritten
13 notes. And then with those handwritten notes he used those
14 for trial purposes to see if a person changed their
15 testimony at trial. And he had made -- he says he wrote
16 notes in the margins and everything else during the trial
17 and preparation for trial and he couldn't separate those
18 out, because they were made for trial purposes to impeach
19 somebody at trial or see if they changed their testimony if
20 they said something different at trial, is what he said.

21 Now, if there is something that is exculpatory or
22 helpful to your client, he's saying anything that came up
23 like that, that he provided that to Mr. Greeley by -- you
24 know, he gave them that information, if there was anything
25 different. So --

1 And then, of course, you had the trial where
2 questions were asked and impeachment. Both sides had the
3 ability to impeach the other side.

4 Is there any exculpatory that might be helpful at
5 all to the defendant in your notes?

6 MR. THOMPSON: Not that I'm aware of, Your Honor,
7 I mean, back at the time I certainly didn't think so, and
8 what I have reviewed at this point -- I haven't read every
9 note I wrote, because there is a lot of stuff in the file,
10 and I didn't read all of Mr. Pope's notes, and I didn't --
11 you know, and so -- you know, I don't think there are.

12 I know that at the time we discussed things going
13 into it. I know we had a lot of discussions with Mr.
14 Greeley, because we were trying to get the defendant to
15 plead. So things that even were bad for the defendant, we
16 were telling Mr. Greeley so that he would be able to relay
17 things to his client, and, you know, we tried to work out a
18 plea at that point in time. So, you know, we did our best
19 to make sure everything was covered.

20 I think that this is just a fishing expedition.
21 And if we allow it to happen now, then there is nothing to
22 stop it from happening in every case. And then when cases
23 are tried --

24 You know, the result ultimately will be, judge, is
25 that I won't take notes as well when it comes down to it,

1 because these are not -- it's -- it's going to have a
2 chilling effect on just keeping things that sometimes would
3 be helpful to the prosecution, because, of course, later on
4 we get questioned about things and those notes helps us to
5 be able to testify about things that people said or what
6 happened, but they are work product, and I think that's
7 plain and simple. And --

8 This is a fishing expedition. It's not showing
9 good cause for any of those things, and so at this point
10 he's wasted a lot of my time having to go back and review
11 just reams of paperwork in the file and to pull things up
12 and try to look at it all just in the, you know, off chance
13 that, you know, I can find something that might help the
14 defendant, and I found nothing that helps the defendant.
15 Everything was in that trial and working against the
16 defendant and thus his conviction. So to allow it at this
17 point is -- you know, again, it's --

18 Basically what we are hearing, it will save him
19 some time. That's not a good cause.

20 The things that he lists for, the reasons that he
21 has for his PCR, one is that the defendant failed to call
22 several witnesses who saw gunfire coming from the victim's
23 vehicle. Well, obviously if he knows that, he knows who
24 those witnesses are. I don't know how my file helps him
25 with that, because there were a ton of witnesses called. If

1 he could name some off, it might be a little bit easier.
2 Almost all of them testified, as far as I remember. And I
3 know not all did, but most did. And some who didn't, I have
4 a good idea why they didn't, because they were completely
5 untrustworthy and there is a reason why some of those were
6 not called by Mr. Greeley, and I know that.

7 The video of I think American Auto Sales where
8 it's alleged that the victims had on their way back from
9 their going to the Clover Police Department after the
10 shooting, they had stopped because the girl become panicky
11 who was driving and couldn't drive right and so they
12 switched places in the car, and they are supposed to -- or
13 they alleged there was a video from American Auto Sales that
14 might show them getting rid of a weapon, or something of
15 that nature. That was thoroughly looked into back at that
16 time and there was no video. The fact that they may have
17 failed to get a video of the defense, once again, that's not
18 in our file. How does our file help them with that?

19 The fact that they failed to accept the 15 year
20 guilty plea and Mr. Greeley didn't do enough to try to
21 convince the defendant of that, I don't know how our file
22 could help with that.

23 And then the fact that he failed to write a writ
24 of cert to the South Carolina Supreme Court, which is in our
25 file, that could ever, you know, help him with that.

1 So the reasons for his PCR don't even cover these
2 things, so I don't know why they are even relevant to bring
3 up now. And so not only are they work product and they're
4 things that there is just not good cause shown to get,
5 because if there was, every case would be. We'd be handing
6 this over. I would be sitting down in every case -- after
7 conviction I would have to sit down and do a privileged log
8 for everything and I would have to write everything out,
9 and, you know, that's just kind of ridiculous, because there
10 is really no need for that, because it is work product. It
11 is something that's protected, and it's something that I
12 think the statute is plain here. You can't get discovery in
13 these cases unless you show good cause, and it just doesn't
14 seem like there is any good cause here.

15 MR. LEDDY: Your Honor, I mean, I could just call
16 at the PCR hearing and subpoena the solicitors. Bring them
17 in, bring all their files, and then after the hearing we go
18 through all those -- the court goes through all those
19 materials, things that turns out to be --

20 THE COURT: Why would the court go through all
21 those materials when you subpoena them in, if it's work
22 product, unless you, -- you know, how can you even subpoena
23 them in, unless you got some cause reason to discover
24 something from them?

25 MR. LEDDY: I have the power to subpoena people

1 and have them testify and answer the questions that I want
2 to ask them.

3 THE COURT: Yeah, you do.

4 MR. LEDDY: Yeah.

5 And then as far as the file not being relevant to
6 certain claims in my pleadings, those pleadings can be
7 changed well after the hearing to conform to the --

8 THE COURT: I don't disagree with that.

9 MR. LEDDY: Yes, sir.

10 THE COURT: But you can't form your theory after
11 you go out and explore and do discovery that you are not
12 allowed to do without showing good cause, and you need to be
13 able to show what you expect to find there.

14 It's not "I might be able to find something in
15 there I can add as a ground to my PCR application and amend
16 it and put it in there. I might could find it."

17 I want to know what it is that you expect to find
18 that you think is there. That's good cause.

19 Not to say, "well, you know, there is a file out
20 there. If I throwed this fishing net out there, maybe I'll
21 find a fish in there somewheres when I bring it in."

22 If I do that for you in this case, then it has to
23 be done in every case for any other lawyer who decides he
24 wants to see all of their files and have the court review
25 all of their files. Then we will do it in every single case

1 because they hope they might find something in there that
2 might be helpful to them so they can amend their
3 application, and I don't think that's what should be done.
4 I don't think that's what's meant by the rule of showing
5 good cause. If that's the case, you wouldn't have to ever
6 show good cause. You just say "there might be something in
7 there that's helpful to me and I don't think it's work
8 product, and, therefore --

9 You know, I need something more specific than
10 that --

11 MR. LEDDY: Well --

12 THE COURT: -- to do that. Otherwise, I'm looking
13 at your case, but I'm also looking at every other case.

14 If you say "I might could find something in their
15 file that's helpful to me, notes they made and that sort of
16 thing that might be helpful to me," then I don't know why
17 every other lawyer in every other PCR case can't do the same
18 thing. And then you open discovery up without good cause
19 shown to everybody who decides they want to do discovery,
20 and then there would be no reason for the rule. You have
21 got to show good cause.

22 You see my problem here? I don't want to --

23 MR. LEDDY: Right, but --

24 THE COURT: If I open it up to you, I open every
25 other PCR case, the files in every other PCR case, whether

1 they showed good cause or not, because they say "well, there
2 might be something in there that they didn't reveal to us
3 that would be helpful to us."

4 MR. LEDDY: Well, what I have heard this morning
5 is that we have are voluminous notes on witnesses that were
6 interviewed and that they weren't turned over and --

7 THE COURT: Well, they were made for their trial
8 purposes is what they said. They didn't take statements
9 from them, but there was a trial and these witnesses were
10 called. The witnesses are out there. Everybody knows who
11 the witnesses are. You can go and interview the witnesses
12 yourself. I mean --

13 MR. LEDDY: There is no way for me to establish
14 that they should have been turned over, unless I can get my
15 hands on them, and I can do that at the hearing.

16 THE COURT: Counsel, if you tell me "they got
17 something in there that wasn't turned over that is helpful
18 to me and I'm pretty sure of that, that this is it," I'll
19 get that. I'll find out if it's work product or not and
20 I'll turn it over to you.

21 But if you say "open up the whole file to me,
22 including all of their files, every note they have made and
23 everything else in preparation for trial, you, judge, review
24 it all. Make them come up with all of it, bring it into the
25 court and let the court review it all and decide if there is

1 anything that possibly" --

2 And I don't know how I can tell if it's going to
3 be -- if it's something that's obviously exculpatory, I will
4 be able to see that, but if it's not, I don't know what --
5 you want me to go back again and read the transcript to see
6 all who testified and what statements they gave and see if
7 there is any conflict in that and all that? You want me to
8 do that all? You do that.

9 MR. LEDDY: I'll be happy to.

10 THE COURT: No, not the file. You do it yourself
11 with the stuff. You got the transcript. You got the
12 witnesses. You know who was called. Your client knows who
13 was there. Go out and interview them and see what they said
14 and what they did.

15 If you get a witness who says "I told the
16 solicitor so and so. He came out and interviewed me and I
17 told him so and so," and that's helpful to your client, then
18 you come back to me and say "I want that information and I'm
19 entitled to it in discovery." And if you can show good
20 cause why you need that, I'll open it to you. I'll look at
21 it and see and if I think it's exculpatory, then you are
22 going to get it.

23 But if you come in and say "there might be
24 something in their file that's helpful to me. I want you to
25 make them spend hours pulling all this stuff up, looking at

1 it, cross-checking it, and either I'm going to give it to
2 you, Your Honor, and you look at it, you review it and see
3 if you can find any exculpatory stuff in there, or whether
4 it's actually not work product or some sort -- something
5 that's exculpatory, something that my client, you want us
6 all to do that," if I do it for you, I got to do it for
7 every other lawyer that comes in here on a PCR, don't I?

8 MR. LEDDY: If they -- if they have some --

9 THE COURT: You have got nothing. You are coming
10 in here with nothing, counsel. Where is it? Where is the
11 good cause? What is it that you are going to find over
12 there, or you expect to find, or you have a good reason to
13 believe that is there?

14 MR. LEDDY: Mr. Thompson said this morning that
15 people changed their stories.

16 THE COURT: Well, yes, and he talked about that
17 and he said all that was explored with Mr. Greeley and it
18 was explored at trial and people were cross-examined about
19 it if they gave a different statement, but he said there was
20 nothing there that's exculpatory to your client. If there
21 was, he revealed that to Mr. Greeley.

22 And what I'm asking you to do is you are saying "I
23 learned from Mr. Thompson today that he interviewed some
24 witnesses or something and that some of them changed their
25 stories." Well, all that was fleshed out at the trial. We

1 don't need to flesh it out here in this motion hearing.

2 All I'm asking you to do is show good cause; that
3 is, what do you expect to find, that you think will find,
4 you have good reason to believe that they have got something
5 there that they have haven't turned over or haven't
6 revealed; or, if they got a statement from a particular
7 witness that said something that's helpful to your client
8 and they didn't turn it over, if you think that's the case,
9 you know, then you have got good cause for the court to at
10 least review it and look at it and see if that's the case,
11 okay, but you --

12 You know, you haven't -- if you talked to your
13 witnesses and find out some witness says they told the
14 solicitor this, that and the other, and it was helpful to
15 your client, it would have been helpful to him at his trial
16 and you have got something that you could show the court, I
17 would be glad to -- you know, we will look at it and see,
18 okay? But just to come in here and asking me to make them
19 pull all their stuff together and bring it into court and
20 let the court review it all, that's -- that's a time
21 consuming process.

22 If something that you should be done -- if you got
23 some specific things that you expect to find in there or
24 have good reason to believe will find there, then I'll do
25 it, okay, but I'm not going to do it in every case because

1 somebody says "I might find something. If I throw this
2 fishing net out there, I might come out with a fish
3 somewhere in there," then I'm not going to require the
4 solicitors to go back and compile all of this stuff and
5 bring it into court and have the court review it on the
6 premise that you might find something in there that's
7 helpful to you.

8 You got to show me that there is something in
9 there that you expect to find or have good reason to believe
10 is there, then, yes, then we will look at it and we will
11 look at discovery, whether it's the court, or whether I
12 ought to turn it over to you. But just to come in here and
13 say "open up your files, I think I might could find
14 something," I'm not going to do that. I don't think that's
15 required under the rules, the discovery rule on PCR cases.
16 I think you would have to have some good cause shown.

17 Show me something that you expect to find or you
18 have a reason to believe that they had information that they
19 didn't provide, okay?

20 If you say there may be something in there, that's
21 true in every case. That's the same allegation to be made
22 in every case or the same thing could be said in every case
23 if somebody is seeking discovery, or whatever, the
24 solicitor's office had in their file, but I'm not going to
25 do that in every case. I'm not going to require them to

1 pull all of the information together in their files and
2 check and cross-check and pull it together and bring it into
3 court and the court to review in these complicated cases
4 like this, unless you can show me something specific that
5 you think you will find there, have good reason to believe.
6 If you can do that, that's what the discovery rules are for.

7 MR. LEDDY: Okay.

8 THE COURT: But I simply am not going to set the
9 precedent of requiring the solicitor to open their file in
10 every single case when there is absolutely no good cause
11 shown and simply just going to explore their files. I'm not
12 going to do that.

13 MR. LEDDY: One thing in particular, Your Honor,
14 that Mr. Thompson brought up was there was -- the people who
15 left in the vehicle that had the shooting in it, they
16 stopped at this location. I went to this location and
17 talked to the owner and they had a video surveillance system
18 at the time. And it was always told to Mr. Greeley that
19 there was no tape there. Well, I went and talked to the guy
20 and nobody had ever even gone out there. Well, Mr. Thompson
21 said that it had been explored by law enforcement that there
22 wasn't one. So if they actually went out there and talked
23 to him, they should have some sort of note that they talked
24 to the guy. That would be very helpful to me then to
25 impeach him saying that they didn't even come out there. I

1 mean, the car stopped there, they didn't find any weapons in
2 the car, it would be a great place to get rid of them, and
3 so that's really important to the case. I mean, that's just
4 one --

5 THE COURT: All right. Okay. Well, I -- if you
6 are asking me a specific, then I think you are entitled to a
7 have an answer to that, okay?

8 MR. LEDDY: Yes, sir.

9 THE COURT: Of course, that can be done at the PCR
10 hearing, but -- if you are alleging a ground, you have
11 alleged that ground.

12 But, solicitor, you did make a statement to the
13 court in this hearing that there was no video. Do y'all
14 have anything in your file to indicate that?

15 MR. THOMPSON: As I said, Your Honor, I haven't
16 reviewed the whole file specifically for that, so I don't --
17 I don't know if there is something in the file for that.

18 I know that law enforcement went through -- even
19 because one of the things that the defense had requested
20 right after this happened is that the possibility of them
21 throwing something out alongside the road. So law
22 enforcement actually went out and examined alongside the
23 road from the spot where this happened all the way to the
24 Clover Police Department, from what I recall, at our request
25 to make sure. And they had already looked at a number of

1 spots, but they had gone through those spots.

2 THE COURT: Have y'all got anything that where it
3 was checked to see if there was anything on a videotape of
4 this business or anything at all?

5 MR. THOMPSON: I would have look specifically for
6 that, judge.

7 THE COURT: Let's look for that. You have got to
8 do it at the PCR hearing anyway.

9 MR. THOMPSON: I know that -- I know that
10 Investigator Parrish went and talked to Rodney at American
11 Auto Sales fairly recently regarding that, because in my own
12 memory -- I haven't -- you know, I know what I think I
13 remember, but I don't know if that's quite the case, and I
14 don't remember there being a video that they actually had
15 that they could produce for us at the time.

16 THE COURT: Well, if you got any notes to that
17 effect, or --

18 MR. THOMPSON: Right.

19 THE COURT: -- anything, or if -- you know, I
20 don't know if Mr. Greeley checked on his own or -- he is
21 saying that -- his information is that he believes that
22 y'all told Mr. Greeley that there was no video; and,
23 therefore, he didn't go check himself to see if there was a
24 video.

25 My question is, have you got anything on that?

1 That's something that he would be entitled to get at the PCR
2 hearing, if he's alleging that there was not -- that his --
3 that the attorney didn't go check it out, and, therefore,
4 was rendered ineffective assistance, because he didn't go
5 check it out. Well, if y'all have some notes on that, I
6 think he's entitled to know that.

7 MR. THOMPSON: Okay.

8 THE COURT: And you are going to have to do that
9 at the PCR hearing or --

10 MR. THOMPSON: I can even go through the file. It
11 will take a fair amount of time, but I'll go through the
12 file.

13 THE COURT: Whatever you have got on that, I think
14 you are going to have to produce it anyway.

15 MR. THOMPSON: All right.

16 THE COURT: You will have to produce it at the --
17 if he asked you about it at the PCR hearing, you are going
18 to have to answer that answer, because that would be a PCR
19 issue.

20 MR. THOMPSON: Right.

21 THE COURT: And so if you have information on
22 that, I think you ought to go ahead and provide what you
23 have got on that.

24 MR. THOMPSON: Okay.

25 THE COURT: Or Ms. Elliott needs to do that.

1 MS. ELLIOTT: And, Your Honor, if I could be
2 provided. I'm sure Mr. Thompson -- for the record, if I
3 could be provided whatever opposing counsel is provided
4 with --

5 THE COURT: Right.

6 MS. ELLIOTT: -- because I have not had access to
7 those matters either, just for the record.

8 THE COURT: Well, what else Mr. Leddy? You
9 pointed to one thing.

10 MR. LEDDY: Your Honor, at this point I think I'll
11 just bring them up at the hearing and we will go one by one.

12 THE COURT: All right. We will do it that way.

13 I just -- if you are going through the discovery
14 process, it's not going to be any carte blanche open check.
15 You are going to have to be able to show what you hope to
16 find, or what you expect to find, what reason you have to
17 believe that you might find something in there that's
18 helpful to your client. If you can do that, you know, or
19 you can point to something that you believe they withheld,
20 specifically something specific they withheld from you, we
21 will certainly go into that. The court would at least look
22 at it and see, but it's got to be something specific, not
23 just open the file, or the court -- prepare your files and
24 get them to the court and let the court review them and see
25 if the court finds anything. That's a lot of work for the

1 court as well. You know, we are busy every single hour of
2 the day. We don't go back and spend hours on just a blanket
3 assertion that there may be something. You got to point to
4 something that you believe is reasonable, believe is there,
5 then we will do it, okay? I don't mind doing it then. I'll
6 be glad to. But if I do it in your case, whatever I do in
7 your case, I have got to do it in every case and then it
8 becomes impossible. I mean, we can't --

9 If you got something specific, we will go into the
10 file. We will do what we need to do to allow discovery or
11 find out what's there and not there, if you got something
12 specific, but you have got to have something specific that
13 you can point to to show good cause. That's the reason it
14 says show good cause. Okay. I'm just trying to make sure
15 you understand my position on it.

16 MR. LEDDY: Yes, sir.

17 THE COURT: It's not that I want anything withheld
18 from you. You just got to tell me what it is you think they
19 are withholding from you.

20 MR. LEDDY: I understand.

21 THE COURT: And then we will look at it.

22 You can go to -- when you got to the PCR hearing,
23 of course, you can get into whatever you need to get into
24 and the court can consider it at that time, but I think you
25 need to show some kind of showing, but right now you haven't

1 done that.

2 But I would say to the solicitor, if there's
3 something with regard to those grounds that you have, you
4 can go ahead and look into those and turn over what you have
5 got on that issue or be prepared to do it at trial.

6 MS. ELLIOTT: And, Your Honor, just for
7 clarification, the notes regarding the video surveillance
8 would be the notes that were taken or generated around the
9 time of the trial, before the trial, and at the time of
10 trial.

11 THE COURT: Anything to do with it at the trial,
12 before the trial, or at the trial, or --

13 His ground is that Mr. Greeley should have done
14 more with regard to trying to determine if there was a
15 video; and if so, to be able to get a copy of it and view it
16 and see if there is anything to be helpful to him on that
17 video. That's a ground they are going to raise. It's going
18 to have to be addressed, so I think that they are entitled
19 to know what the State knew about that, if the State -- if
20 Mr. Greeley, particularly Mr. Greeley, relied on a bunch of
21 those grounds. He is saying he thinks that's the case, but
22 I don't know that, but I guess that will all come out at the
23 hearing. Okay.

24 All right.

25 MR. LEDDY: Thank you, Your Honor.

1 MS. ELLIOTT: Thank you, Your Honor.
2 MR. THOMPSON: Thank you, Your Honor.
3 (END OF REQUESTED TRANSCRIPT OF RECORD)
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CERTIFICATE

I, the undersigned, Michael R. Watts, Official Court Reporter for the Sixteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case in the Court of Common Pleas for YORK County, South Carolina, on the 13th day of JULY, 2012.

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

OCTOBER 4, 2012

Michael R. Watts

Michael R. Watts
Circuit Court Reporter

1 STATE OF SOUTH CAROLINA

2 -----X

3 BERRY BOLIN,

4 Petitioner,

5 Case No.

6 -against-

2010-CP-46-0435

7 STATE,

8 Respondent.

9 -----X

10 October 11, 2012

11 York, S.C.

12

13 B E F O R E:

14 HONORABLE EDGAR W. DICKSON

15

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

17 MICAH LEDDY, Esquire

18 Attorney for the Applicant

19

20 SALLEY W. ELLIOTT, Esquire

21 Attorney for the State

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Alfred Butler

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Official Court Reporter

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I N D E X.

WITNESS

DIRECT CROSS REDIRECT RECROSS

Willy Thompson

Mr. Leddy 7

Roger Ravens

Mr. Leddy 30 38

Ms. Elliott 31 38

Eric Brown

Mr. Leddy 39 52

Ms. Elliott 43

Leiland Stobrey

Mr. Leddy 55 135

Ms. Elliott 101

Podney Nivens

Ms. Elliott 140 27

Mr. Leddy 147

Willy Thompson

Ms. Elliott 148

Mr. Leddy 172

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EXHIBITS

	<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVD</u>
Applicant's	1-2	Statements	4	
Applicant's	3	Statute		62
Applicant's	4	Decision		62
Applicant's	6-9	Boxes	186	
State's	1	Nine emails		151
State's	2	Privilege list		182

1 (Applicant's Exhibit One and Two, Statements,
2 marked for identification as of this date.)

3 THE COURT: All right, Mr. Bolin is in Court. Ms
4 Elliot.

5 MS. ELLIOTT: Your Honor, the next matter before
6 you, Berry Bolin versus State. Docket number
7 2010-CP-46-0436. Mr. Bolin is present in Court and
8 represented by Micah Laddy.

9 Would you like a procedural background of the case.

10 THE COURT: If you wouldn't mind.

11 MS. ELLIOTT: Mr. Bolin was arrested in May
12 of 2006 for discharging a firearm into an occupied
13 vehicle. Two counts of assault with intent to kill.
14 One count of assault and battery with intent to kill.
15 Murder and possession of weapon during the commission
16 of a violent crime. Actually he was also charged with
17 possession of weapon by a person under the age of 21.
18 The prior charge was discharging a fire arm into an
19 occupied vehicle and also possession of weapon during
20 the commission of a violent crime.

21 He proceeded to trial in September 2006 actually, I
22 think it may have started in August. Through August
23 10th 2006 to September 1, 2006. He was is convicted
24 of discharging a fire arm into a vehicle. He was
25 convicted of the lesser included offense of assault of

1 a high and aggravated nature. He was convicted of
2 two counts of a lesser included offense of assault
3 and battery of a high and aggravated nature and a
4 lesser offense of voluntarily manslaughter.

5 The charge of possession of a pistol by a person
6 under the age of 21, that indictment was quashed by
7 the trial judge.

8 That matter went up on direct appeal by the State
9 during the trial and the trial judge found that the
10 statute was unconstitutional as it applied to Mr.
11 Bolin. The Court of Appeals affirmed that decision.
12 Or it might have been been the Supreme Court who
13 affirmed that decision. Mr. Bolin appealed from his
14 convictions and sentences. That conviction -- those
15 convictions and sentences were affirmed by the South
16 Carolina Court of Appeals. He thereafter filed a
17 timely application for post-conviction relief.

18 In this application he is alleging that counsel was
19 ineffective for failing to advise him, or properly
20 advise him to accept a guilty plea and then failing to
21 revisit the guilty plea with the solicitor after the
22 judge ruled on the protection of persons and property
23 act issued that was pending at the trial. He also
24 asserts that trial counsel was ineffective for
25 failing to challenge and trial court's imposition of

1 restitution without adequate -- without considering
2 adequate factors.

3 He claims that counsel was ineffective for failing
4 to call several witnesses who were present at the scene
5 who can say they saw gunfire coming from the victim's
6 automobile in order to bolster his defense of self-
7 defense.

8 He also submits that, or asserts, that counsel was
9 ineffective for failing to subpoena or obtain a
10 videotape surveillance from a location where the
11 victim's vehicle stopped on the way to the police
12 station. And he asserts the trial counsel, who is also
13 appellant counsel, was ineffective for failing to
14 file a Writ of Certiorari from the South Carolina
15 Court of Appeals and the South Carolina Supreme Court
16 and I would ask Mr. Leddy to correct me if I misstated
17 any of those allegations.

18 MR. LEDDY: No.

19 THE COURT: All right. All right, Mr. Leddy, I
20 got his application. I got your amended application.
21 Are you all ready to proceed?

22 MR. LEDDY: Yes, Your Honor.

23 THE COURT: All right.

24 MR. LEDDY: Your Honor, did you receive a pretrial
25 memorandum that I filed with consent of Miss Elliot

1 that sort of gave a brief factual background?

2 THE COURT: We have it on the computer. Do you
3 have an extra copy? We will try to get it printed up
4 here.

5 MR. LEDDY: I am not sure if I brought a copy of
6 that or not.

7 THE COURT: We can probably find a way to get it
8 printed.

9 MR. LEDDY: Well, that is okay, I can just go
10 through some of it with the witnesses.

11 THE COURT: Okay. And we got it for me to review.

12 MR. LEDDY: Your Honor, I think first I would like
13 to call Deputy Solicitor Willy Thompson.

14 WILLY THOMPSON, after being duly sworn, testified
15 as follows:

16 THE COURT: All right, Mr. Leddy.

17 MR. LEDDY: Thank you, Your Honor.

18 DIRECT EXAMINATION

19 BY MR. LEDDY:

20 Q Mr. Thompson, did you receive your subpoena to be here
21 today?

22 A Yes, I did.

23 Q Did you take note of the documents that were compelled
24 to be brought to the Court today based on the subpoena?

25 A Yes, I did.

1 Q And have you produced those documents today.

2 A Those documents are sitting right over there?

3 Indicating:

4 Q Those four boxes?

5 A Yes.

6 Q Okay.

7 A You wanted everything on Mr. Bolin and everything on
8 Mr. Falls, correct?

9 Q Yes, sir. Are those all work product documents?

10 A Well, no. Because one box you actually looked through
11 yourself. One was the discovery that we handed over
12 specifically numbered. The other boxes are work product. Much
13 of which was handed over in discovery, but a lot of it is also
14 work product and don't let the volume scare you. A lot of it is
15 I had a notebook that I used in trial that I prepared. Tommy
16 Pope had a notebook he used in trial that he prepared. Our
17 investigators had notebooks they used in trial. So all of those
18 things, a lot of it is duplicative.

19 Q Okay. Do you recall when we were here back on July
20 13th?

21 A Yes.

22 Q Okay, and can you tell the judge what that was about?

23 A It was about the -- I guess simply whether these files
24 could be handed over to you at that time, or should be handed
25 over to you at that time. Whether you have shown good cause to

1 go through our files and I believe Judge Alford said you had
2 not.

3 Q So I filed a motion to open Discovery in this PCR?

4 A Correct.

5 Q And that was a little unusual because you do not have
6 Discovery normally in non-capital PCR?

7 A Correct.

8 Q And the judge said that I didn't show good cause and so
9 he did not at that time compel you to produce those?

10 A Correct.

11 Q All right. And so then I filed this. Served you with
12 the subpoena to bring it today, which you have done?

13 A Yes.

14 Q And does that include everything you had asserted a
15 privilege for?

16 A It does.

17 Q Okay.

18 A And I still continue to assert that privilege and would
19 object to you receiving the documents. I brought them to Court
20 as required, but I would oppose the distribution of those
21 documents.

22 NP. LEDDY: Well, at this time, I am going to
23 move to make them an Exhibit of the Court, part of
24 the record so that the Court can go through and
25 determine if there are three boxes worth of things

1 that are all covered by work product privilege.

2 THE COURT: And Mr. Leddy, let me see if I got
3 this right. Judge Alford already ruled on this,
4 is that correct?

5 MS. LEDDY: No, sir. He ruled that I couldn't get
6 prehearing Discovery opened. The issue of whether or
7 not they could be made a part of the record wasn't
8 before the Court at the time.

9 THE COURT: Okay. All right. Miss Elliott.

10 MS. ELLIOTT: Your Honor, the State opposes that
11 request to make all three boxes a Court's file. It is
12 my understanding, and Your Honor has a copy of the
13 hearing transcript from that July 2012 hearing that we
14 had.

15 It was my understanding that Judge Alford ruled
16 that there had not been a showing of good cause
17 requiring the State -- or not the State.

18 If I may back up first of all and just put this on
19 the record. In a Post Conviction Relief case our
20 office represents, basically stands in the shoes and
21 represents South Carolina Department of Corrections as
22 the custodian of the person filing the application
23 for Post Conviction Relief because PCR basically takes
24 the place of a Habeas Corpus. We do not represent the
25 solicitor's office. We are not the solicitor's

1 office. We are not law enforcement.

2 And our position is and always has been that the
3 files of investing agencies and prosecuting agencies
4 are the files of those entities. We do not have
5 authority to turn them over or not turn them over.

6 We are served with discovery in a non-capital PCR
7 case we will -- we will assert that they must be a
8 showing of good cause and then traditionally the
9 solicitor's or the law enforcement agencies will make
10 the arguments about, or agree to disclosure or make
11 the arguments about why disclosure should not be made.
12 And that is what happened in this case. I had not had
13 access to anything. Mr. Leddy has not had access to.
14 But I will submit that it is my understanding and I
15 maybe wrong -- it was my understanding that Judge
16 Alford has already ruled that these documents are not
17 subject to Discovery unless Mr. Leddy found something
18 specific in there and was able to identify something
19 specifically that he wanted produced to show, I
20 believe try to show, that maybe there was a Brady
21 violation or something of that sort. And I oppose the
22 motion to make this a Court Exhibit because it is my
23 understanding that now Mr. Leddy is getting around
24 Judge Alford's denial of his request for Discovery and
25 just moving these files in wholesale.

1 They are not relevant. There has been no showing
2 that these are relevant to any of the issues that are
3 pending in the PCR case and certainly if there was any
4 effort to amend the application after the hearing based
5 on what might be in those files we would oppose that
6 because we would be prejudiced. And I believe there
7 can be an amendment when the issues are litigated
8 during the PCR case but not to the disadvantage or
9 prejudice of the opposing party.

10 So on that ground, or on those grounds, we would
11 object to making these files a part of the record at
12 this time because I don't know what is in there and I
13 am not prepared and can't prepare for it.

14 MR. LEDDY: Your Honor, we can always -- these are
15 great thoughts, but I was taught to read the rules
16 before stating great thoughts. And the rule that is
17 applicable is Rule 15. Rule 45-D and that's says that
18 " A person responding to a subpoena to produce
19 documents shall produce them as they are kept in the
20 usual course of business or shall organize and label
21 them to correspond to the categories in the
22 demand". And subsection two says "When information
23 subject to a subpoena is withheld on a claim that is
24 privileged or subject to protection as trial
25 preparation materials, the claim shall be made

1 expressly and shall be supported by the description
2 of the nature of the documents, communications, or
3 things not produced that is sufficient to enable the
4 demanding party to contest the claim".

5 Q So I would ask Mr. Thompson if he has expressly -- has
6 made basically what is commonly referred to as privilege law?

7 A I have.

8 Q Do you have that with you today?

9 A I do. If I may step up. I believe I have it sitting
10 on counsel's table.

11 THE COURT: Yes. Please.

12 MS. ELLIOTT: And Your Honor, just to restate my
13 objection. These documents are not relevant to the
14 proceedings or have not been shown to be relevant.

15 MR. THOMPSON: I have a copy for the Court as well,
16 Your Honor.

17 THE COURT: Thank you, sir. And Mr. Thompson the
18 box labeled the "Discovery box" ---

19 MR. THOMPSON: Yes.

20 THE COURT: --- that is a box of the information
21 that was provided to the defense attorneys at trial?

22 MR. THOMPSON: Correct. And that box we have
23 a ready allowed Mr. Leddy to sit down and look
24 through.

25 THE COURT: All right. Mr. Leddy.

1 MR. LEDDY: Your Honor, just on the second page
2 of number eight on top of this, it says "Notes,
3 handwritten notes of interviews taken of potential
4 witnesses by Martha Perison, who is an investigator
5 for the Solicitor's office.

6 THE COURT: All right.

7 MR. LEDDY: I would -- let me just ask Mr.
8 Thompson.

9 Q So you have a copy of the transcript from that
10 Discovery hearing?

11 A No, I do not.

12 MR. LEDDY: Okay, may I approach, Your Honor.

13 THE COURT: You may.

14 Q If can you turn to page 14, please.

15 A Yes.

16 Q And on the third line there, can you start reading
17 where it says "really"?

18 A "Really everything in that file is our work product.
19 Does not include interviews of Travis Falls".

20 Q Did you say it does include interviews with Travis
21 Falls?

22 A I am sorry. It does. Yes, and it does include
23 interviews of Travis Falls.

24 Q All right. Can you turn to page 25, please?

25 A Okay.

1 Q And can you just start reading on line nine and go
2 through line 23, please?

3 A "Your Honor, we didn't take any statements from people.
4 We simply went and interviewed them in preparation for trial.
5 There were already statements in existence that we knew would
6 be -- sorry, that we knew would be people from and then we
7 learned of some people who had never struck around for the
8 police. That those people later told us about what -- about
9 that" I am sorry.

10 "That those people later told us about that we went and
11 interviewed. Once again" -- I guess that should be once
12 again.

13 Q I think that is a typo.

14 A Yes. "Once again, we didn't take statements. We just
15 took notes of what they told us and that is work product. That
16 is in preparation for the trial."

17 Do you want me to keep going?

18 Q Yes.

19 A "That is not in the arrest of -- that is not in the
20 arrest or the other things. Those things are done way before
21 this. We are forced to do this in any case. To talk to a
22 witness and for us to have to hand over our notes seems a little
23 ridiculous. If it is not our work product I really don't know
24 what it is."

25 Q So, are you familiar with those cases that we talked

1 about at that hearing like State versus Gibson?

2 THE COURT: Mr. Leddy. I am not going to go over
3 the hearing that you already had with Judge Alford.
4 Okay. This is, as I understand it, this is still a
5 Post Conviction Relief action?

6 MR. LEDDY: Yes.

7 THE COURT: Isn't it suppose to show what his
8 defense attorney did or did not do?

9 MR. LEDDY: Well, it does involve that. It also
10 encompasses any sort of prosecutorial misconduct.

11 THE COURT: It doesn't have anything to do
12 prosecutorial misconduct.

13 MR. LEDDY: Right does.

14 THE COURT: What is the prosecutorial misconduct?

15 MR. LEDDY: Well, Your Honor, in those cases that
16 proceeded this one; Gibson, Riddie, there were things
17 that were not divulged to the defense that impeached
18 the witnesses and were held to be reversible Brady
19 error. And since he has claimed the privilege the
20 remedy is for the Court, or the Appellant Court as the
21 case may be, to look through what has been claimed to
22 be work product and see if it is indeed is.

23 In the case of Riddie there were hundreds of pages
24 just like this one where it was claimed to be a work
25 product and it wasn't even close to be a work product

1 and that wasn't discovered for 20 years, Your Honor.
2 So that is the purpose of the subpoena. Why I asked
3 him to produce this and why I want to make it part of
4 the Court record. If it is not something that I
5 can't get because it is work product, then I will
6 never see it.

7 THE COURT: That is correct.

8 MR. LEMMY: And that is fine, but I want it to be
9 in the Court's record.

10 MS. ELLIOTT: Your Honor, may I?

11 THE COURT: Yes.

12 MS. ELLIOTT: It is my understanding, and I
13 believe Mr. Thompson would testify that when they
14 engaged in interviews and these interview notes that
15 are being referenced, the prosecutor e-mailed Mr.
16 Greeley and told him any time there is a discrepancy
17 or change in something a witness told the solicitor or
18 the solicitor's investigator or law enforcement in
19 preparation for trial from what they had said in
20 previous statements. So all of that information has
21 been disclosed.

22 I don't know that Riddle stands for the proposition
23 that in a PFR the post conviction relief counsel has
24 the right to the notes. What I believe it stands for
25 the proposition that when there is a difference in a

1 witness's position or information that information
2 should be disclosed, whether it is impeaching or
3 whether it is exculpatory for the defendant it should
4 be disclosed. And it is our position that Mr.
5 Thompson disclosed those matters to Leland Greeley
6 every time something like that came up.

7 MR. LEDDY: And Your Honor, I would object to the
8 privilege law as being inadequate for me to make a
9 proper contesting of his assertion of the privilege.
10 And I think the that only way to know is for the Court
11 to review the material. The fact that it is hundreds
12 and hundreds of pages of things that have been claimed
13 to be privilege under work product, that in and of
14 itself is troubling to the applicant.

15 THE COURT: I understand it would be troubling to
16 the applicant. This was a fairly long trial from what
17 I can see. Is that correct?

18 MR. LEDDY: It was around three days I think.

19 THE COURT: Okay. Okay. You don't think there
20 was plenty of paperwork that was done in preparation
21 for that trial?

22 MR. LEDDY: I got plenty of paperwork too.

23 THE COURT: Yes, I am sure, and your paperwork is
24 not your work product?

25 MR. LEDDY: Some of it is, but most of it is

1 statements and things of that nature.

2 THE COURT: Okay. And the Discovery in that case
3 he has provided the statements, is that correct? But
4 you want me to look through those boxes.

5 That is what you want me to do?

6 MR. LEDDY: I want them to be made part of the
7 Court's record, so that they can be reviewed by a
8 judicial body, Your Honor.

9 THE COURT: Okay. You mean upstream?

10 MR. LEDDY: And I don't mean to burden the Court.

11 THE COURT: You mean upstream?

12 MR. LEDDY: If that's the first time, then that's
13 the first time.

14 THE COURT: Okay. All right.

15 MS. ELLIOTT: And Your Honor, of course I also
16 have a concern that these all this evidence is going
17 to be made exhibits and who knows what is going to
18 happen down the road on appeal. Again, we object
19 because they are not relevant to any allegation that
20 has been made in the application pending before the
21 Court today.

22 THE COURT: Okay.

23 MR. LEDDY: Your Honor, the Post Conviction Relief
24 statute encompasses all things that could have brought
25 under Habeas before. It is most commonly used for

1 ineffective assistance and we will get to that, but it
2 is also very broad in terms of what you are suppose to
3 bring up in a PCR.

4 MS. ELLIOTT: The problem is that has not been
5 alleged and we are here for the hearing today and the
6 State is prepared to go forward on what has been
7 alleged and there has been no allegation of
8 prosecutorial misconduct and I would oppose any
9 amendments at this time on that ground.

10 THE COURT: Okay. Mr. Leddy, I am assuming because
11 you signed this, that the first amended application
12 for Post Conviction Relief is the only thing I got;
13 is that correct?

14 MR. LEDDY: Yes, sir.

15 THE COURT: Is there anything about prosecutorial
16 misconduct in this?

17 MR. LEDDY: I don't think so, but of course that is
18 not the final document in the action necessarily.

19 THE COURT: We getting ready to have a hearing. Is
20 that correct?

21 MR. LEDDY: Yes, sir.

22 THE COURT: Okay. All right.

23 MR. LEDDY: But at the conclusion of the hearing,
24 Your Honor, we would move to conform the pleadings to
25 the evidence introduced at the hearing.

1 MS. ELLIOTT: Exactly Your Honor, and that is my
2 concern. He is trying to move these exhibits in as
3 a Court's exhibit without notice to me about what the
4 contingent is and basically I am getting blind sided
5 and that's my objection.

6 THE COURT: All right. We will stand down for a
7 second.

8 Did Judge Alford sign an Order based on this.

9 MS. ELLIOTT: He did not, Your Honor.

10 MR. LEDDY: But Your Honor, I recall that was to
11 open Discovery or not and we are done with Discovery.
12 He denied my request to open Discovery, so those
13 standards and issues are completely behind us.

14 THE COURT: Okay.

15 MR. LEDDY: Yes, sir.

16 THE COURT: He denied your request for Discovery,
17 then you subpoenaed the solicitor to bring all the
18 records?

19 MR. LEDDY: That is right and the reason I did,
20 Your Honor, in the manual that is written by John
21 Bloom on how to do this area of law, he says that you
22 can save a lot of time for everybody if you open
23 Discovery for things and get it out of the way and
24 that's what I tried to do back in July and they
25 opposed it and said, you are not entitled to it. I

1 said, well, fine. I will just bring it here and
2 that's why we are here today. I am sorry that Mr.
3 Thompson had to join us this morning, but it was
4 because of their own opposition to it.

5 THE COURT: All right.

6 MR. THOMPSON: Your Honor, if I may, just briefly,
7 if I can explain kind of the things that are in it to
8 help the Court know.

9 As I said there is our own files that we have. For
10 instance, my trial file, which would have copies of
11 everything handed over in Discovery, but it would have
12 my handwritten notes in them as well as investigator
13 notes because when I go to interview people my
14 investigator generally takes the notes and I use those
15 notes. I review them after the interview to make
16 sure they are accurate and then I make any additions
17 or changes I want and then I put them in a note book
18 to use that later on.

19 In this particular case, the Court needs to be
20 aware that basically all the witnesses in the case
21 were friends of either this defendant, Berry Bolin or
22 the other defendant, Lee Owens. They were all at a
23 party together when this occurred. So, a lot of those
24 people did change their statements or make alterations
25 in what they said happened and I emailed Mr. Greeley.

1 I know there was one very large email that had listed
2 a number of witnesses and how they changed materially
3 their statements and we had a number of discussions
4 about that as well saying, you know, I will tell Mr.
5 Greeley we spoke with so-and-so too because we --
6 leading up to this trial as we were able to find these
7 folks. They were hard for us to find. Quite honestly
8 a lot of them tried to avoid me.

9 As I would find them if something were different,
10 we talked on a regular basis and in talking with Mr.
11 Greeley I would tell him by the way, such and such
12 happened or this happened. There is also emails that
13 I sent him any time I talked to an officer about
14 something the defendant had said I would e-mail him
15 regarding the specifics of what that officer would
16 say. So I turned over all of the differences. So if
17 you are worried about things of impeachment or things
18 of that nature I handed those over.

19 So really the things that are left are our
20 personnel notes. Our thoughts on what to cross
21 examine them on. Pointing out discrepancies ourselves
22 so that we remember when it is time to cross examine
23 that witness and that sort of thing.

24 There are a lot of notes, from myself, from Mr.
25 Pope and his trial notes and from our investigators

1 that they took at our request.

2 THE COURT: Okay. Well, that actually is a big
3 help to me, Mr. Thompson. What I am going to do is --
4 well right now, rather than take a break right now, I
5 will not rule on whether it comes in.

6 Have you got any questions of Mr. Thompson?

7 MR. LEDDY: I do.

8 THE COURT: Okay.

9 MR. LEDDY: I just have a couple.

10 THE COURT: Okay.

11 COUN'T DIRECT

12 BY MR. LEDDY:

13 Q Mr. Thompson, do recall some discussion in the
14 Discovery hearing about American Auto Sales?

15 A Yes.

16 Q Can you explain what the significance of American Auto
17 Sales to the judge?

18 A The American Auto Sales is a little place that since
19 the owner has changed it around a lot. It doesn't look anything
20 like when this occurred. But apparently the victims in its case
21 after the shots had been fired into their car and they were
22 leaving they testified that the girl driving became hysterical
23 at some point and pulled over at American Auto and they switched
24 drivers and went to Clover Police Department straight from that
25 incident. And it would have taken -- it took them about five

1 minutes because if we look at the 911 calls, the first 911 call
2 came from a neighbor just a couple of minutes before midnight
3 and then there is 911 call that comes from Clover saying these
4 people have arrived about five minutes later. Five and a half
5 minutes later. Something like that. But somewhere along the
6 line they stop at American Auto to switch drivers. An
7 allegation was made that at that point they had a weapon that
8 they discarded and in particular I think the defense came to us
9 saying they felt that they had discarded a pistol at that
10 location and so ultimately it came up is there a video that
11 would show if anything happened at that location. That was the
12 basis for the interest in the American Auto.

13 Q Okay. Can you turn to page 33 in that hearing where
14 you discuss that?

15 A Okay.

16 Q Can you read starting on line seven until line 13?

17 THE COURT: Page twenty-three?

18 MR. LEDDY: Thirty-three, Your Honor.

19 A Okay? "The video of I think of American Auto Sales
20 where it alleges -- where it is alleged that the victims had on
21 their way back from there going to the Clover Police Department."
22 -- I guess I meant the way to the Clover Police Department,
23 "after the shooting they had stopped because the girl became
24 panicky who was driving and couldn't drive right so they
25 switched places in the car and they were suppose to, or they

1 alleged there was a video from American Auto Sales that might
2 show them getting rid of a weapon or something of that nature.
3 That was thoroughly looked into back at the time and there was
4 no video. The fact that they may have failed to get a video of
5 the defense once again that is not in our file. How does our
6 file help them with this."

7 Q Okay.

8 A And there is nothing in our file -- I can tell you
9 there is nothing in my file that indicates that there was ever a
10 video of American Auto Sales or notes about it.

11 I recall from my own memory that the defense had brought
12 that to our attention. I asked the detectives to go look into
13 that. I know they went and searched the area around American
14 Auto Sales to see if they can find anything because the victims
15 actually did admit that at some point they had thrown out a
16 large stick that was described something like a two-by-four, but
17 it wasn't quite a two-by-four that they had taken with them but
18 they had not used and they had thrown that out some time between
19 the time of the incident and where they got. But the officer
20 didn't find any weapon there. And I recall a discussion came up
21 about whether there was a video or not and asked them to look
22 into it and what I recall from that is that it was unfruitful
23 and I don't know whether there was a video that didn't show
24 anything or whether there was just no video or whether it was
25 too late to collect a video at that time.

1 Q Okay. So you are saying now that you don't recall
2 whether there was a video?

3 A My understanding since then is that the place had a
4 video recording system. But I am saying at the time of the
5 trial, what I remember from the time of the trial, I didn't
6 remember whether they had a video recording system or whether it
7 was great or not at that point.

8 Q Okay. Now, do you recall at that same hearing on page
9 44, where you said Investigator Parish had recently gone out to
10 American Auto Sales?

11 A Yes. And I have since spoken to Investigator Parish.
12 I was wrong about her going out. She didn't go out. They
13 called her. Apparently it was a something that they called
14 regarding an investigator, I am assuming from you had gone out
15 to speak I think to Mr. Nivens and he had apparently called an
16 Officer Dover at the Clover Police Department who then put him
17 in contact with Martha Parish and she talked to them about
18 whether there was a video. What was going on as far as the
19 video because he was concerned that he was being subpoenaed to
20 come in. And from what she's told me since then is that he had
21 described to her while he had a video at the time, it was
22 because cars were being stolen from his lot -- or not cars.
23 They were being broken into in his car lot. So he put a video
24 camera to show those cars and from what he understood where
25 these people would have pulled over wasn't all the way into his

1 parking lot and he wouldn't have seen what was happening with
2 that vehicle.

3 I am just relating what Miss Ferial told me. I didn't talk
4 to him myself.

5 Q Let's just stick with what you know personally?

6 A That is part of what I know. I means, personally I
7 never talked to Mr. Nivens. While I travel past American Auto
8 and I stopped in there parking lot back when this happened. I
9 didn't looked for Mr. Nivens. So personally I couldn't tell you
10 much at all about it. It is all what I asked people to do or
11 what they done or come back to me and said.

12 Q Okay. As far as the co-defendant in this case, do you
13 remember Lee Owens?

14 A Yes.

15 Q And you are familiar with the kind of one, kind of all
16 theory, accomplice liability?

17 A Yes.

18 Q Why was a decision made to charge him with such a minor
19 offense compared with Mr. Bolin?

20 A Oh, believe me, we look hard at whether we should
21 charge Mr. Owens with the murder. But it didn't appear that
22 they had acted in concert. It appeared they both acted
23 independently one of another. They didn't seem that they knew
24 each other very well. It didn't seem that they were there that
25 night with the intent of doing something together. It was there

1 individual reactions at that time in our opinion as to what
2 happened. So, it would have been improper of me to charge him
3 with mere or firing into a vehicle and the ballistics showed it
4 wasn't his weapon that killed Mr. Owens -- I am sorry, Mr. Hovis
5 and that -- so, I couldn't charge him with anything except the
6 discharging of firearm into a vehicle in any way because he was
7 trying to shoot the people in the vehicle. Where it would have
8 shown it was a nine-millimeter that was shot into the vehicle
9 and that is the gun he had. But of course the 45 that Mr. Bolin
10 had is a much larger bullet and they were able to describe those
11 as well, and that was the one in the head of Mr. Hovis and of
12 course it had gone into the wrist of Travis Falls, going into
13 Mr. Hovis's head. So the only thing we could charge him with is
14 what we had charges on?

15 Q I was just always curious about that.

16 Thank you. I don't have anything further.

17 THE COURT: Miss Elliott.

18 MS. ELLIOTT: I don't have any questions, Your
19 Honor.

20 THE COURT: You may step down.

21 MS. ELLIOTT: I am going to call him as my witness
22 later, but I don't have any questions for him as to
23 these files.

24 THE COURT: Okay. Subject to being recalled. All
25 right.

1 THE COURT: Mr. Leddy, call your next witness.

2 MR. LEDDY: Yes, sir, I would call Roger Nivens.

3 ROGER NIVENS, after being duly sworn, testified as
4 follows:

5 THE COURT: Mr. Leddy.

6 MR. LEDDY: Thank you, Your Honor.

7 DIRECT EXAMINATION

8 BY MR. LEDDY:

9 Q Mr. Nivens, can you tell the Court where it is that you
10 work?

11 A Well, I am American Auto Sales in Clover.

12 Q Okay. And you own that?

13 A Yes.

14 Q And did you own that at the time this occurred?

15 A Yes, sir.

16 Q And you heard about a video surveillance system?

17 A Certainly.

18 Q Did you have one at the time?

19 A Yes, sir.

20 Q And in fact do you recall it being used in a DUI case
21 at some point?

22 A Yes.

23 Q Okay. So, law enforcement had come out and gotten
24 video from you in the past?

25 A Yeah, county had.

1 Q Okay. Do you recall any one from law enforcement
2 coming out on this case and asking you for a video?

3 A No.

4 Q Okay. Do you have any recollection of anybody from the
5 solicitor's office coming out and asking you for a video?

6 A No.

7 Q And do you recall anybody from Mr. Greeley's, the
8 attorney for Mr. Holin at his trial coming out and asking you?

9 A No.

10 Q And if they had you would have had a video surveillance
11 from that night?

12 A Certainly.

13 Q No further questions Your Honor?

14 THE COURT: Your witness.

15 CROSS EXAMINATION

16 BY MS. ELLIOTT:

17 Q Hi Mr. Nivens, I am Shirley Elliott. How are you doing
18 today?

19 A Hi.

20 Q Describe your property for me if you can, as far as how
21 it is laid out as you pass by it on the street and what we would
22 see if we drove by?

23 A Well, if you drove by I have a real large driveway, you
24 know.

25 Q Actually, let me back up and ask you to describe it as

1 it existed in 2006?

2 A Like I say it is a real long driveway, probably 20
3 yards is the length of the driveway where you pull into the
4 dealership. So I assume that is where they are saying they
5 pulled in too.

6 Q And you had video cameras or video surveillance on your
7 property in 2006?

8 A Yes.

9 Q And how many cameras did you have?

10 A I had two on each corner on the front.

11 Q Of your building?

12 A Yeah.

13 Q And where would those cameras directed?

14 A Right down on the lot.

15 Q And why did you put them on?

16 A Just for security.

17 Q Okay. And if they were directed down on the lot would
18 that have been -- what exact -- were you photographing every day
19 or surveilling every day?

20 A Well, it surveilled 24 hours a day.

21 Q And would you review those videos?

22 A No.

23 Q You never reviewed them?

24 A No.

25 Q And were the videos trained on the cars that were for

1 sale or did they capture everything from your building to the
2 street? Exactly what area was captured?

3 A They captured everything.

4 Q Everything. All the way from the street down on the
5 driveway to your cars to your door?

6 A Yeah.

7 Q Okay. Is it fenced off there at all?

8 A Ma'am.

9 Q Is it fenced off? Did you have a fence then?

10 A No.

11 Q And what lighting did you have for night time?

12 A We had the real tail lights Duke Power provide.

13 Q And you have never looked at your videos so you don't
14 know the quality of what you could observe during the night
15 time; is that correct?

16 A Well, we did have an incident he was talking about when
17 the county came out and looked at some.

18 Q And was that at night?

19 A Yeah.

20 Q And where did that incident occurred?

21 A Somebody pulled up in the front of the dealership and
22 sat there for a while and then all of sudden they backed into
23 the building.

24 Q Okay, when you say pulled up in front of the dealership
25 that would be in front building?

1 A Yeah.

2 Q But not out on the street?

3 A No.

4 Q And if you haven't looked at your videos how do you
5 know it captures everything on your lot in 196 including the
6 street?

7 A Well, I mean, we have a video picture.

8 Q Okay.

9 A And we can watch it. We just don't go over every bit
10 of it.

11 Q But you didn't go back and look at the video during
12 that period of time. You don't know whether it was functioning
13 properly and whether it captured anything on the night in
14 question?

15 A No.

16 Q Okay. Did you know that there was a search conducted
17 around your property?

18 A No.

19 Q Are other people at your property other than you or are
20 you there every day the entire time it is open?

21 A No, my son is there.

22 Q Is anyone else there other than your son?

23 A Well, just the wash boy that washes cars.

24 Q Okay. And Lee Owens who was a co-defendant in this
25 case did he work for you at the time?

1 A Yeah.

2 Q And did he obviously would have known about the video
3 surveillance too, the cameras?

4 A Yeah, he knew about them.

5 Q He probably seen the same screens inside. Is that
6 correct?

7 A Yeah.

8 Q Did his attorney ask you for any video surveillance?

9 A No.

10 Q What is your son's name?

11 A Rodney.

12 Q Rodney. Okay. All right.

13 Q And what was your first name, I am sorry?

14 A Roger.

15 Q Roger. Okay. And you knew about Mr. Owen's trouble
16 when it happened?

17 A Yeah.

18 Q And did you offer the video tape at that time to him or
19 to anyone else?

20 A Nobody has ever asked me anything about that rape.

21 Q Do you know if Rodney has ever talked to anyone about
22 the video surveillance?

23 A No.

24 Q Okay. Have you ever talked to Martha Parish about the
25 video surveillance?

1 A Not that I can recollect.

2 Q Is Rodney here today?

3 A Yes.

4 Q Okay. Mr. Owen's worked for you back in 2006 at the
5 time that happened, is that correct?

6 A Yes.

7 Q Does he work for you now?

8 A Yeah.

9 Q And has worked for you after he was released from the
10 Department of Corrections and came back and worked for you?

11 A Right.

12 Q Okay.

13 MS. ELLIOTT: That's all, Your Honor.

14 THE COURT: Mr. Leddy?

15 MR. LEDDY: I don't have any further questions.

16 Your Honor, I ask that Mr. Nivens be excused.

17 THE COURT: I got a couple of questions.

18 CROSS EXAMINATION

19 BY THE COURT:

20 Q How long do you save your videos?

21 A I think what happens to them after thirty days it just
22 just --

23 Q Recycles?

24 A Yes. Just goes over again. It wasn't a system with a
25 tape to it. It was like a computer. That's why it just goes

1 over it?

2 Q Okay.

3 A I think they are obsolete now. They don't

4 Q But you still use that same system or do you have a new
5 system?

6 A No, I don't have a system now. I moved from that
7 building to another building and when I moved I just discarded
8 that system.

9 Q Okay. When did you move from one building to the
10 another?

11 Q It must have about 2009 -- 2010.

12 Q 2010?

13 A Yeah. In 2010 you also discarded that system there?

14 A Yeah.

15 Q And when you say discarded you mean trashed it. You
16 didn't save it in a warehouse?

17 A No.

18 Q But every thirty days it just wiped it out?

19 A Right.

20 Q Okay. And, Mr. Owen's was working for you?

21 A Yeah.

22 Q And you knew he got in trouble?

23 A Uh-huh.

24 Q And nobody checked the video within 30 days? You
25 didn't check the video during the 30 days to see if he showed up

1 out there?

2 A No, nothing was ever said to me about a car stopping
3 there or anything. I didn't know anything about that.

4 Q Okay. But after thirty days it wouldn't do any good?

5 A No.

6 THE COURT: Thank you sir. Mr. Leddy did my
7 questions lead to any questions by you.

8 REDIRECT EXAMINATION

9 BY MR. LEDDY:

10 Q Only, I did ask you to try and locate it, right?

11 A Yes.

12 Q And you weren't able to?

13 A No.

14 MR. LEDDY: Okay. I don't have any other
15 questions, Your Honor.

16 THE COURT: All right.

17 MS. ELLIOTT: Your Honor, I have one if that is
18 okay.

19 THE COURT: Yes.

20 RECROSS EXAMINATION

21 BY MS. ELLIOTT:

22 Q Mr. Nivens, if you don't routinely review the video
23 surveillance, how do you know it recycles every thirty days?

24 A That is just what the company said.

25 Q But you don't know for certain that is what happened?

1 A No.

2 MS. ELLIOTT: Okay. Thank you.

3 THE COURT: You may step down. Thank you sir. All
4 right. Mr. Leddy next witness.

5 MR. LEDDY: Your Honor, applicant calls ERIC Brown.

6 ERIC BROWN, after being duly sworn, testified as
7 follows:

8 THE COURT: All right, Mr. Leddy, your witness?

9 MR. LEDDY: Thank you, Your Honor.

10 DIRECT EXAMINATION

11 BY MR. LEDDY:

12 Q Mr. Brown, how are you today, sir?

13 A Fine. How are you sir?

14 Q Okay. Can you tell us where you are from? Where you
15 grew up?

16 A I am from Boiling Green. I have been raised there my
17 whole life. Clover/Boiling Green area.

18 Q Okay, and do you know my client, Barry Bolin?

19 A I do.

20 Q Can you tell the Court how you know him?

21 A We were raised together. I knew him since he was a
22 little kid. I was raised -- I have been raised around their
23 family my whole life.

24 Q All right. Mr. Brown were you present when this
25 incident occurred?

1 A Yes, sir.

2 Q And can you tell the Court where you were at the time
3 that -- can you just tell the Court where you were when the car
4 with the people showed up?

5 A Well, we were all in the house and then I think it was
6 Bradley Deal had received a phone call saying that they were in
7 front of the house. So, people started going out of the house
8 and as people were coming out of the house I just stopped at the
9 front porch right on the front door and there were two cars
10 sitting in front of the house and it wasn't but just a couple of
11 seconds I think it was Lori Moss was fighting with Travis Falls
12 and then all of sudden the cars that were sitting there was
13 gunfire coming out of cars towards the house and that's when Mr.
14 Bolin and Mr. Owens had started returning gunfire.

15 Q Okay. Now, you said that you saw the gunfire coming
16 out of the vehicles?

17 A Yes, sir.

18 Q Okay. And you said that was before --

19 A That was before Mr. Owens or Mr. Bolin either one
20 returned any gunfire.

21 Q Okay. And did you tell the police this back in 2006?

22 A Yes, sir. I didn't stay at the house when it all
23 happened. I left because I didn't know what else was going to
24 happen. So I left, you know, and I think it was a couple of
25 days later I had talked to a detective. I actually spoke with

1 him at Bradmore and Tonya Humphries' house.

2 Q Okay. And tell me what you told that detective?

3 A I told the detective that -- I am trying to remember
4 exactly, because I am pretty sure I wrote a statement on it, so
5 I don't want to cross reference myself in any way. But if I am
6 not mistaken I told the officer that there was two cars that
7 pulled up. That you know, Travis Falls and then pulled up first
8 and then there was another car that come around them and stopped
9 right in front of them. And Travis Falls and Lori was fighting
10 and then they started firing a gun out of the car at us and then
11 Mr. Bolin and Mr. Owens started firing back and that the cars
12 sped off. And that you know, it was just right after that that
13 I had left myself.

14 Q And did you recognize the person who started shooting
15 first?

16 A It kind of resembled Jeff Buck to me and I told the
17 officers that.

18 Q Tell me who Jeff Buck is?

19 A He is kind of friends with Bradley Deal and them and
20 also Travis Falls and Mr. Owens also.

21 Q He was sort of friends with both sides of the fight?

22 A Yes, sir.

23 Q And Travis Falls and them didn't know where Bradley and
24 Ricky Deal and them lived so Jeff Buck was the one that brought
25 him over there?

1 Q And do you remember if he was kind of being the
2 go-between?

3 A Yes, sir.

4 Q Egging it on?

5 A Yes, sir. That is who called Bradley Deal and said
6 they were in front of the house.

7 Q Okay. Where is Mr. Buck today?

8 A He overdosed. He is deceased.

9 Q Okay. And -- all right.

10 Now, how many times do you think you told the police
11 that you saw gunfire coming out of this car?

12 A I think -- I think five or six shots. I think.

13 Q Okay. But how many occasions did you get interviewed
14 by the police?

15 A I think I spoke with them twice and then when I came to
16 Court I spoke with them again.

17 Q Okay. Did you ever get interviewed by the solicitor's
18 office?

19 A I think I may have talk to Willy, I believe.

20 Q All right. What was their reaction? Did they --

21 A To me it kind of seemed like they just blew me off.

22 Q Okay. Did you ever get interviewed by Mr. Greeley's
23 office?

24 A Yes. I believe so. I believe his private investigator
25 spoke with me.

1 Q What did you tell him?

2 A The same thing that I told everybody else. That I saw
3 gunfire coming from a car before anybody started shooting from
4 the house.

5 Q And if you had been call - - now were you called as a
6 witness in Mr. Bolin's trial?

7 A I was, but they never called me as a witness on to the
8 stand. No, sir.

9 Q So you got subpoenaed?

10 A Yes, sir, I got subpoenaed, but I was never called as a
11 witness.

12 Q Okay. And, if you had been called as witness is this
13 how you would have testified?

14 A Yes, sir.

15 Q Please answer any questions the State has.

16 A Yes, sir.

17 CROSS EXAMINATION

18 BY MS. ELLIOTT:

19 Q Mr. Brown, you came to the party that night. Who did
20 you ride with?

21 A Mr. Bolin.

22 Q Okay. And Samantha Mason, was she also in the car with
23 you or the truck?

24 A No, ma'am.

25 Q And your statement to law enforcement officers shortly

1 after the incident that you heard some hollering like you said
2 today and you went downstairs from upstairs?

3 A No, I was never upstairs.

4 Q All right. Well, didn't you later during a polygraph
5 indicate that you admitted later that you were upstairs?

6 MR. LEDDY: Objection, Your Honor.

7 A No, ma'am.

8 Q You never said that to anybody?

9 MR. LEDDY: Objection, Your Honor. I
10 particularly didn't go into any polygraph stuff
11 because the Court has the polygraph.

12 MS. ELLIOTT: We are not using it, Your Honor. We
13 are talking about credibility of witnesses and whether
14 witnesses should be called. So I think that is very
15 relevant.

16 THE COURT: Okay. I will let her ask the
17 question. Okay. Go ahead.

18 Q Let me back up a little bit. After you talked to law
19 enforcement officers shortly after the incident, did you also
20 appear and provide a polygraph?

21 A Yes, ma'am. The day of trial.

22 Q Right before trial?

23 A Yes, ma'am.

24 Q And that was at Mr. Thompson's request?

25 A I am not sure whose request it was.

1 Q And you talked to law enforcement officers? Law
2 enforcement interviewed you before the polygraph; is that
3 correct?

4 A I was interviewed. I wasn't interviewed here by a
5 detective.

6 Q No, but I am talking about the officer who administered
7 the polygraph. Talked to you about the facts of the incident
8 and talked to you about what happened?

9 A No, the only thing he asked me -- he asked me was I
10 there. Yeah, I guess. He asked me a couple of questions and
11 then he took me in and gave me a polygraph.

12 Q And during that discussion with the officer at the
13 polygraph did you not admit that you are not sure if you saw a
14 gun in that second car or not? It might have been just
15 reflections?

16 A No, ma'am. I told the officer that I saw a gun come
17 out of the window of the car and he proceeded to fire at the
18 house. At the people that was in the yard.

19 Q Did you not tell the officer that Samantha Eason was
20 taking Xanax that night?

21 A I don't recall telling the officer.

22 Q She was though, wasn't she?

23 A I am not a hundred percent if she was or not.

24 Q You told the polygraph operator that, didn't you?

25 A Not that I recall.

1 Q You are denying now you told the polygraph operator you
2 are not sure whether you saw a gun or not? You just saw
3 flashes?

4 A No, I seen the flashes from the gun barrel coming out
5 of the car. I told the polygraph officer that.

6 Q And that was a second car, is that what you are talking
7 about?

8 A Yeah, there were two cars in front of the house, yes,
9 ma'am.

10 Q You never saw any flashes from the victim's car? You
11 are saying you saw it from a car you suspect Jeff Buck may have
12 been in?

13 A Yes, ma'am.

14 Q And Mr. Buck is dead, isn't he?

15 A Yes, ma'am.

16 Q And did you say anything about that in your first
17 statement to law enforcement officers about Jeff Buck?

18 A I wasn't one hundred percent sure.

19 Q You weren't sure?

20 A Who it was for sure, but I mean you know, I had a lot
21 of time to sit around and think about it and really play it
22 through my head and it is just like it happened yesterday. I
23 haven't forgotten anything.

24 Q Who all did you talk to about that?

25 A Just the law enforcement and then the private

1 investigator for Greeley and now Mr. Leddy.

2 Q Well, didn't you talk to Robert Beverly about it the
3 next day?

4 A Not about who it was that was in the car shooting or
5 anything like that, but me and Robert Beverly lived next door to
6 each other so we talked. That is our best friend.

7 Q And have you talked to anybody since the trial about
8 it?

9 A Just people that asked me. You know. Was I there and
10 things of that nature.

11 Q What people?

12 A I don't know. I mean Clover is small town. A lot of
13 people asked me a lot of questions.

14 Q Have you spoken to any of Mr. Bolin's family members?

15 A I mean I talked to Mitch and I talked to Cricker.

16 Q You are a good friend of Mr. Bolin, is that correct?

17 A Yes, ma'am.

18 Q Did you all go to high school together?

19 A No, ma'am, I am older than Mr. Bolin.

20 Q How do you know him? How did you become friends with
21 him?

22 A I grew up across the street from his aunt. I grew up
23 with his cousin.

24 Q So you have a long standing relationship with Mr.
25 Bolin?

1 A Yes, ma'am.

2 Q And you would like to see him get a new trial, wouldn't
3 you?

4 A Wouldn't anyone. I mean I don't think he is guilty.

5 Q And have you talked to -- who asked you to come testify
6 today?

7 A Mr. Leddy.

8 Q And did anybody ask you to come testify without a
9 subpoena?

10 A No.

11 A I would have come without a subpoena though. I
12 wouldn't have to be subpoenaed.

13 Q I believe you have a prior convictions for failure to
14 stop for a blue light; is that correct?

15 A Yes, ma'am.

16 Q Fraudulent check?

17 A Yes, ma'am. They were my own checks though.

18 Q I am sorry?

19 A They were my own checks.

20 Q Well, you were convicted by of fraudulent check,
21 weren't you?

22 A Yes, ma'am. I wrote a bad check.

23 Q Where were you standing when all this started?

24 A Right as you come out the front door. Right beside the
25 front door on the front porch.

1 Q Who was there with you?

2 A Kristen Jackson was there. She's a Jackson now. She
3 was a Moss then I believe.

4 Q No one else?

5 A Not that I recall of.

6 Q And what did you do?

7 A I stood there and watched as everything happened.

8 Q The whole time?

9 A Yeah. I froze. I didn't know what to do.

10 Q You and Kristen Moss didn't go jump under her jeep?

11 A No. Kristen Moss asked me what should she do and I
12 told her to go hide under her jeep.

13 Q But you weren't there with her?

14 A No, ma'am.

15 Q So you just stood there and let people shoot at you?

16 A Yes, ma'am. Like I said I froze. I didn't know what
17 to do.

18 Q And after all this happened I believe everybody pretty
19 much left the area; is that correct?

20 A Yes, ma'am.

21 Q What did you do?

22 A I got in Caroline Keys car and drove me, Caroline and
23 Jimmy Powell (phonetics) and Lori Moss out of there.

24 Q And did you all go to police?

25 A No, ma'am, I went home.

1 Q Didn't Lori go to the police?

2 A I don't know what Lori did after they let me out of the
3 car.

4 Q So you never reported that you saw gunfire coming from
5 a second car ---

6 A I did once I talked --

7 Q --- right after it happened? You didn't go to the
8 police station?

9 A No, ma'am.

10 Q Look what I saw?

11 A No, ma'am.

12 Q Here is what I saw. Do something about it?

13 A No, ma'am, I didn't.

14 Q In fact they had to track you down at a bar the next
15 day, didn't they?

16 A They didn't track me down at the bar. I told you all
17 just a few minutes ago where I spoke to the detective and I
18 spoke to him at Earl Moore and Tonya Humphries house. Right
19 beside L & M Ford in Clover.

20 Q So, do they live at the Outer Limits bar?

21 A No, ma'am. The Outer Limits bar is on the south end of
22 Clover. I don't even go to the Outer Limits bar.

23 Q You knew that folks were coming to fight? You all were
24 going to have a fight, didn't you?

25 A Not until they had pulled up in front of the house. I

1 mean they had been words said that, you know, that there might
2 end up being trouble, but it wasn't -- you know what I mean.

3 Q So you knew there might be a fight?

4 A I mean a lot of people say they are going to come jump
5 on somebody and never shown up.

6 Q But you knew there could be a fight?

7 A I guess so.

8 Q You all are just a fighting crowd, aren't you?

9 A No, ma'am.

10 Q Aren't you a fighting crowd?

11 A I meaning I have.

12 Q Aren't you a fighting person?

13 A I don't cause trouble, but I don't take, you know. I
14 never been the type to be bullied if that is what you are
15 asking.

16 Q Did you tell officers that Eric Brown called and said
17 that the person in the other car was Jeff Buck. Is that how you
18 determined it was Jeff Buck?

19 A My name is Eric Brown.

20 Q I am sorry. Yes, you are.

21 Did you recognize him or are you just speculating based
22 on --

23 A No, ma'am. I recognized that it was Jeff Buck. There
24 was another -- there was also a black, a colored gentlemen in
25 the car with him and there was a girl driving the car.

1 Q And why didn't you tell officers?

2 A I told the officers that there was a colored gentlemen
3 and that there was a girl driving and that I was pretty sure it
4 was Jeff Buck that was in the passenger seat shooting.

5 Q And didn't you tell the polygraph operator that they
6 shot the wrong car. Meaning the defendant and the co-defendant

7 ---

8 A No, ma'am.

9 Q --- shot the wrong car because it was the second car or
10 the other car you saw reportedly with Jeff Buck in that was
11 actually firing shots?

12 A I didn't tell the polygraph man that they shot the
13 wrong car.

14 Q Well, they did didn't they?

15 A I suppose.

16 MS. ELLIOTT: That's all I have.

17 THE COURT: Anything or redirect?

18 REDIRECT EXAMINATION

19 BY MR. LEDDY:

20 Q Did you know Bobby Harris and Travis Falls?

21 A Yes, sir, I did.

22 Q Did you know they had just put a guy in the hospital
23 two weeks before?

24 A Yes, sir, Bradley Deal and they weren't suppose to be
25 -- they had restraining orders and stuff. They weren't suppose

1 to be anywhere Bradley Deal or his residence at all.

2 Q And that was a condition of their release?

3 A That was a condition of their release. Yes, sir. And

4 I also just to state, I am also friends with Travis Falls and

5 Bobby Kovis. I knew both of them guys too. I went to school

6 with Travis Falls. I grew up with Travis Falls.

7 Q They are the ones that like to get into fights?

8 A Yeah, they are the fighting crowd. They go looking for
9 trouble.

10 Q Thank you, Mr. Brown.

11 A Yes, sir.

12 THE COURT: Anything on recross?

13 MS. ELLIOTT: No, Your Honor.

14 THE COURT: All right. Mr. Brown, thank you, sir.
15 You may step down.

16 THE WITNESS: Thank you, Your Honor.

17 THE COURT: All right. We will take about a ten
18 minute break.

19 MR. LEDDY: Thank you, Your Honor.

20 (Short recess was taken.)

21 THE COURT: All right Mr. LEDDY, are you ready to
22 proceed?

23 MR. LEDDY: Yes, Your Honor

24 THE COURT: Is the State ready?

25 MS. ELLIOTT: Yes, Your Honor.

1 THE COURT: All right. Mr. Leddy, next witness.

2 MR. LEDDY: Your Honor, we have a statement that
3 the Attorney General is going to report to admitting
4 for a witness that is not present. I tried to compel
5 her attendance.

6 THE COURT: Did you subpoena her?

7 MR. LEDDY: I did, Your Honor, unfortunately my
8 investigator served her in North Carolina, so I don't
9 think that is proper. So, I hoped she would be
10 here but she is not.

11 THE COURT: You didn't try and route of having a
12 Circuit Judge in --

13 MR. LEDDY: By the time I knew she hadn't been
14 served we didn't have time to do it.

15 THE COURT: And you said the State consents to the
16 statement.

17 MS. ELLIOTT: We would agree to admit the two
18 statements that she gave.

19 MR. LEDDY: I am offering these up to be marked.

20 THE COURT: In evidence without objection.

21 (Petitioner's One and Two, statement of Samantha
22 Eason received in evidence as of this date.)

23 MR. LEDDY: And I call Leland Greeley, Your Honor.

24 LELAND GREELEY, after being duly sworn, testified
25 as follows:

1 DIRECT EXAMINATION

2 BY MR. LEDDY:

3 Q Hey, Mr. Greeley.

4 A Good morning.

5 Q Mr. Greeley, do you recall when you were retained by
6 Mr. Bolin on this case?

7 A I don't remember the exact day. I remember that it was
8 -- they contacted me probably I know it was the week following
9 the incident, when I was first contacted. It was pretty early
10 on.

11 Q Okay.

12 A Because his son was in jail and one of the first things
13 we were talking about was bond and how that would be handled and
14 how he couldn't have a bond set except by a Circuit Court judge.

15 Q All right. And so this would have been late February,
16 early March?

17 A Well, the incident was the evening of February the 18th
18 I believe, and that was a Saturday evening, I believe. So it
19 would probably been the first of the following week.

20 Q All right. And do you have an investigator that works
21 for you regularly?

22 A Well, I got an investigator who when I need an
23 investigator I will call. He is an independent person. He has
24 his own investigation company.

25 Q What is his name?

1 A Scott Bernard.

2 Q And did you retain him in this case?

3 A Yes. I had him meet with the family and after I had
4 called Scott and we talked about it after the family had decided
5 they wanted me to work the case then I called Scott and we ended
6 up meeting at some point.

7 Q Could you give us just a really brief recitation of
8 what you recall?

9 A The basic facts of the case. Well, they are not basic.
10 Okay. But I understand what you are saying.

11 All right. This was a February the 18th, 2006. Barry had
12 been with friends that afternoon. Eventually he went with
13 friends over to Bradley Deal's house for a party. He didn't
14 know everybody at the party but he knew Bradley Deal and he knew
15 a few of the people at the party. At some point in the evening
16 for some reason, there already has been the mention of Jeff
17 Buck. It appeared that Jeff Buck had decided he was going to
18 get two folks back together that didn't like each other and Jeff
19 Buck started making phone calls back and forth I think between
20 Bradley Deal and between Travis Falls.

21 Travis Falls was out of jail at that point in time. He had
22 gotten out of jail about two weeks before because he was charged
23 with assault and battery of a high and aggravated nature against
24 Bradley Deal. Travis and a few of his buddies coaxed Bradley
25 into going out to some lot or some field somewhere near Clover

1 and beat him up pretty good. And so he was under a bond not to
2 go around Bradley Deal at all. And Travis Falls was out with
3 Holly McCarter. They evidently were an item at that time. They
4 had children together and so evidently some how or another a
5 confrontation brewed that was going to occur with Travis Falls
6 and Holly McCarter. Mr. Hovis and Mr. -- his first name is
7 Michael. I can't remember his last name now. And then they had
8 picked up another fella in a bar who was quite an entertaining
9 witness in this case to come over to Bradley Bill's house to
10 fight.

11 Now, the witness statements in this case came from a lot of
12 different areas. From a lot of different people who were out
13 there. But the long and short of it is that at some point in
14 time a fight broke out in the roadway apparently between Miss
15 Moss and Miss McCarter and Travis Falls came out of the car and
16 knocked out Miss Moss and the fella they picked up at the bar,
17 who I can't remember his name right now, had gone up into the
18 driveway with a beer bottle and then they ended up getting back
19 into the car. And Mr. Owens and my client had obtained a
20 pistol. My client from his truck, and shots were fired and one
21 of the shots fired went through the back window of the car
22 striking Mr. Falls and striking Mr. Hovis unfortunately. And
23 that's kind of the scenario of the incident.

24 Q All right. Now, do you recall in June of 2006 the
25 Legislature being passed by our general assembly?

1 A Protection of property act.

2 Q Protection of persons and property act?

3 A Right.

4 Q Kind of known as Castle Doctrine?

5 A Well, it was based on the Castle Doctrine. Somebody
6 tried to you base it on the Castle Doctrine. It was somewhat
7 helpful to us, but it was a very poor piece of legislature.

8 Q Okay. It was poor in what sense?

9 A The way it was drafted. Just in general as a law.

10 Q And being poorly drafted did that create a problem for
11 you representing Mr. Holin?

12 A No. It probably created more problems for the State.

13 Q Okay. Can you explain that?

14 A Well, yeah, I mean what it does it sets up certain
15 factual scenarios and then it says that people are immune from
16 prosecution. I am not quite sure what immune from prosecution
17 or when that kicks in, and that was one of the problems that we
18 had in this case was, at the time the case came to trial the law
19 was only about two months old and I don't know if there was any
20 other state that had drafted it the way that we had drafted it.
21 So, anyway, you know, procedurally it presents some interesting
22 issues as to when a person is suppose to be immune and who makes
23 that determination.

24 Q Okay. What about its applicability either
25 retrospectively or prospectively?

1 A Well, I was hoping that it would be retroactive,
2 because our case had occurred in February. The law came into
3 existence in June. If it was not to be retroactive then we were
4 not going to benefit from it. If it would be retroactive and
5 none of that had been decided at that point in time by a Court,
6 if it could be retroactive then I think that we would have been
7 in a position to possibly benefit from it because we had certain
8 facts in our case that you could find the language in the
9 statute.

10 Q Okay. And you say that -- now did you attempt to
11 determine whether it would be applied retroactively or not?

12 A Well, I think there is a savings clause in it. In that
13 in that law, but I know that, you know, with kind sure that I
14 think before our appeal was argued, orally argued, another case
15 had come out. The Court of Appeals or the Supreme Court had
16 found it would not be applied retroactively.

17 Q Okay. Now, the savings clause that you mentioned when
18 did that -- first of all let me hand up a couple of things.

19 Your Honor, may I approach?

20 THE COURT: Yes.

21 (Applicants Exhibit three and four, marked for
22 identification as of this date.)

23 Q I know you have seen this before but I will hand it to
24 you just in case.

25 Now, Mr. Greeley, do you recall is the savings clause

1 MR. LEDDY: Yes, sir.

2 THE COURT: Just wants to make sure.

3 MR. LEDDY: Thank you.

4 THE COURT: Yes, sir.

5 Q In section four there, can you read that for the Court,
6 please?

7 A Sure. "The repeal or amendment by this act of any law
8 whether temporary or permanent or civil or criminal does not
9 affect pending actions, rights, duties or liabilities founded
10 thereon, or alter or discharge, release or extinguish any
11 penalty, forfeiture or liability incurred under the repeal or
12 amended law unless the repeal or amended proviso shall so
13 expressly provide. After the effective date of this act all
14 laws repealed or amended by this act must be taken and treated
15 as remaining in full force and effect for the purposes of
16 sustaining any pending or vested rights, civil action, special
17 proceeding or criminal prosecution or appeal existing as of the
18 effective date of this act. And for the enforcement of rights,
19 duties, penalties forfeiture and liabilities as they stood under
20 the repeal or amended laws."

21 Q Do you recall, whether you read that prior to advising
22 Mr. Bolan on the applicability of this statute?

23 A Well, I am sure I did. Okay. And I am sure that I
24 knew at that point in time just like I do reading it now that it
25 is not very favorable to us that language. Okay. Given the

1 actually in the language of the statute itself?

2 A At this point in time, I don't know.

3 Q When you do you recall the first time that you
4 mentioned this legislature to Mr. Bolin and his family?

5 A No, I don't. I do recall the first time I mentioned to
6 it Mr. Thompson.

7 Q Okay. Can you tell me about that?

8 A Yeah. I walked in to Mr. Thompson's office. We were
9 going to meet. I walked in in June and I had a copy of it and I
10 said have you seen this. And he says I don't know, what is it
11 and I showed it to him and he said I heard about it, but I
12 haven't read it. Or something to that effect. And that's why I
13 brought it to him because it had just come into law. And so we
14 sat there and both of us kind of knew at that point in time that
15 this would probably be an issue in the case, and I would be
16 arguing for it and he would be arguing against it.

17 Q All right. And what is your understanding of -- is
18 there a default rule of whether a statute is retroactive or
19 prospective?

20 A I can't tell you off the top of my head right now.

21 Q Do you remember researching that issue then?

22 A No, I don't.

23 Q If you will turn to page six of the bill.

24 THE COURT: Mr. Leddy, that is number six on the
25 copy that you have?

1 fact that we have a prosecution that has already begun. We have
2 a date of offense that has already begun. Okay. But yet it was
3 a new law. We had no interpretations of this law. We had no
4 procedures by which to follow this law. We were going to be
5 possibly plowing new territory, and so that is why I tried as
6 best as I could do it somebody may have been able to do it
7 better than I could, but I tried as best as I could to make
8 this a part of the case.

9 Q All right. And so do you remember --

10 MR. LEDDY: And Your Honor, I want to get that
11 introduced. If I may approach.

12 THE COURT: Yes. Any objection?

13 MS. ELLIOTT: No objection.

14 THE COURT: So it will be Petitioner's 3 and the
15 decision by the Court of Appeals will be Petitioner's 4.

16 MR. LEDDY: Yes, Your Honor.

17 (Petitioners Exhibit three and four, received in
18 evidence as of this date.)

19 Q Looking at your appeal decision, the Court of Appeals
20 quoted that Saving clause is that right?

21 A Yes. In fact I guess they did. Yeah, I would think so.
22 That is what they based the ruling on.

23 Q Now, prior to the trial, do you remember I handed you
24 up just a moment ago a written motion?

25 A Yes.

1 Q Do you remember filing this motion?

2 A I do.

3 Q And can you tell the Court, put on the record what
4 this, motion was? The title of this motion?

5 A Well, it is a motion to quash the indictments and seize
6 prosecution pursuant to the Protection of Persons and Property
7 Act.

8 Q Okay. So were you attempting at this point to make a
9 pretrial determination?

10 A Yes. You have to remember there had been no case that
11 showed how procedurally this was to be done and so what I
12 decided the best way that I knew that it might be able to do, is
13 to try and quash the indictments, since they had already been to
14 the Grand Jury and they were the formal charging documents, and
15 by quashing the indictments have the Court instruct the State to
16 stop doing what they were doing which was prosecuting my client.

17 Q And that was an attempt to evoke the immunity
18 provisions of that statute?

19 A Yeah.

20 Q Okay.

21 A I guess so. I haven't read this motion in a while.

22 Q I am not going to ask you to read the whole thing. I
23 would ask you to turn the page -- they aren't numbered, but it
24 is the third page of the motion?

25 A Okay.

1 Q The second to last paragraph.

2 A Okay.

3 Q If you could read that for the Court, please?

4 A "In the current case Barry Scott Borin has been
5 suffering criminal prosecution from February the 18th, 2006
6 until the present. This act was effective June 9, 2006 during
7 the pendency of this prosecution. Given the facts of this case
8 the defendant is entitled to protection under this act."

9 Q Now, following that paragraph is there any citation to
10 anything in the act that would stand for that, is there?

11 A No, there is not, but I think that the key word in
12 there is what is prosecution. When does it begin and when does
13 it end. Okay.

14 What acts by the state constitutes a prosecution and is the
15 prosecution ongoing. It is continuous even though we would have
16 a retroactivity back to the date of the incident could it come
17 under this law if the prosecution is still continuing but there
18 hasn't been a trial or conviction yet.

19 Q Is it your testimony that you wrote this after having
20 consulted that Savings Clause provision?

21 A I consulted the law, I guess.

22 Q Well, the issue is, you attached the actual law to this
23 motion, right?

24 A Yeah. That was a copy of the law that I had at that
25 time. It was brand new.

1 Q All right. Can you find that Savings provision in the
2 copy of the law that you attached to your motion?

3 A No.

4 Q Well, that is precisely the point, is that section was
5 part of the enactment, but it wasn't published as part of the
6 law.

7 So my question is, do you recall if you found that Savings
8 clause prior to writing this motion?

9 A I don't remember. I don't know.

10 Q All right. Would you agree if you had consulted that
11 Savings clause that you really wouldn't have much confidence in
12 the success of this motion?

13 A I didn't have much confidence in the success of the
14 motion at trial anyway. Okay.

15 Q Okay. But did you consult with Mr. Bolin on that?

16 A Well, I told him that we were going to be -- this was
17 one of the things that we were going to try and do. Okay.

18 Q Did you give him an estimate of your likelihood of
19 success?

20 A No. I don't no. I don't recall giving him that. I
21 rarely give a percentages. I don't recall cases where I give
22 percentages. That is misleading.

23 Q Did you think that this statute was going to apply to
24 his case?

25 A I was going to argue that it applied to the case. I

1 was hoping it was going to apply to the case.

2 Q Did you think it would?

3 A Well, given that all I had was a brand new statute with
4 no guidance from any court or any other case applying this, I
5 was hoping it would.

6 Q Okay. Now, you actually -- do you recall how many
7 times that you actually evoked this particular statute at the
8 stages of the trial?

9 A No. I know that the Court, I know that the Court took
10 it under advisement at the beginning of trial. And then he may
11 have ruled on that the second day of the trial. But I think he
12 waited until the end of the State's case.

13 I don't recall. It would be in the transcript.

14 Q Okay.

15 A I would just have to refer that question to the
16 transcript.

17 MR. LEDDY: Your honor, if I can approach.

18 THE COURT: You may. I have got a transcript.

19 MR. LEDDY: Very good.

20 THE COURT: You can lead him to the extent of
21 pointing out pages. Just so everybody is clear Miss
22 Elliot, this transcript is part of the record.

23 MR. LEDDY: Yes, sir.

24 THE COURT: So you don't need to mark it as an
25 exhibit. You can tell me what page it is.

1 MR. LEDDY: Great.

2 MS. ELLIOTT: And if I may note, I should have
3 done this at the beginning the hearing. Pages I think
4 six hundred to seven hundred or five hundred to six
5 hundred were omitted from your copy and they have been
6 provided separately.

7 THE COURT: I got it. I got the whole thing.

8 MR. LEDDY: I think it skipped in the copier.

9 THE COURT: Okay. So we are on page 161.

10 MR. LEDDY: Yes, sir.

11 Q This is just for the matter of background when you
12 were arguing the motion to quash?

13 A Yes.

14 Q You remember doing that?

15 A I do. I did it the first day.

16 Q Okay. If you could turn to page 165 please?

17 A Okay.

18 Q And on line six, you are arguing section C, which is
19 the part a big expansion of law and it allows for protection of
20 people in a place they have a right to be?

21 A And that's what I was arguing. He was a guest at a
22 house.

23 Q Okay. So if you could read on page six where the Court

24 - -

25 A The Court says "see it looks like it is a version of

1 self defense which would be for a jury as opposed to immunity."

2 Q And your response, the first two words of your
3 response?

4 A "Mr. Greeley. It is." Then you have E which is
5 establishes this sort of presumption I guess. A person who by
6 force to enters a residence or occupied vehicle in violation of
7 and there we get back to the problem with the dwelling with a
8 vehicle. Be in violation of order of protection, restraining
9 order or condition of bond, is presumed to be doing so with the
10 intent to commit an unlawful act."

11 Q Okay. Now, if you could turn over to 1E7, line seven?

12 A Right. "The Court. I am going to deny the motion at
13 this point."

14 Q All right. So, now as you recall the next time that
15 you raised the statute -- now before we move on, I know Deputy
16 Solicitor Thompson argued it wasn't retroactive, but nobody ever
17 quotes the Savings clause?

18 Do you know if you can agree or disagree with that?

19 A I will go with the transcript. If it is not in the
20 transcript then it wasn't quoted.

21 Q Okay. But you don't see it in the transcript before
22 you?

23 A Not in my scanning of things.

24 Q All right. Now the next time you raise it was at the
25 directed verdict stage?

1 A I believe I did. It would be in the transcript if I
2 did.

3 Q Okay.

4 THE COURT: Mr. Leddy, when you get to things
5 like that you don't have to ask him if he remembers
6 it. You can just say the next time I see in the
7 transcript is there and can you say does he remember
8 it somewhere else, but otherwise ---

9 MR. LEDDY: Yes, sir, I will try to be less --

10 THE COURT: You can go ahead and point directly to
11 the issue.

12 MR. LEDDY: Okay. Thank you, Your Honor.

13 THE COURT: Thank you, sir.

14 Q All right. Again was it successful at that point?

15 A No.

16 THE COURT: Do you have that page number so I
17 could have it as a reference.

18 MR. LEDDY: Page 1041.

19 THE COURT: Page 1041. All right, sir.

20 MR. GREELEY: This trial was seven days, Your
21 Honor.

22 THE COURT: Yes, sir. I can see it by my copy it
23 was a thorough trial.

24 Q And then the next time you raised it was in request for
25 a jury charge?

1 A Yes.

2 Q And you wanted to get the language from that statute
3 into the jury charge?

4 A Yes.

5 THE COURT: And what page was that?

6 MR. LEDDY: I don't know if I have that page
7 marked.

8 THE COURT: I can look it up.

9 MR. LEDDY: But I believe the request for charge
10 should be in the record that you have.

11 THE COURT: Okay. I sure it is. I just didn't
12 know if you already had it marked. It would save me
13 from looking for it. Thank you sir.

14 Q Was that because it was your understanding that the
15 Court should charge what the current law is?

16 A Well, what it gets back to is, okay, you got this
17 immunity statute. Now does that also jump the bridge over to
18 become a jury issue as well, or is this just a court issue for
19 presumption. Okay. Of immunity. And I wanted to try -- I was
20 just trying to cover both of those areas in case it could be a
21 jury trial -- a jury charge that could be done.

22 Q All right.

23 MR. LEDDY: If I may approach, Your Honor. I
24 would give you a copy of your brief. (Handed)

25 Q After Mr. Bolln was convicted you also handled his

1 appeal, right?

2 A Right.

3 Q And do you remember what issues you appealed?

4 A Well, we appealing of course the persons and property
5 decision.

6 Q And specifically you had attempted to evoke it three
7 times in the trial?

8 A Okay.

9 Q And you had two issues in the appeal?

10 A Yeah.

11 Q So, the issue of the pretrial motion to quash didn't
12 make it to the appeal?

13 A Okay.

14 Q Is that right?

15 A I see on here to where it was -- it did not.

16 Q All right. And then according to the Court of Appeals
17 decision, the second issue that you raised on appeal was whether
18 or not you should have been given a directed verdict because of
19 the statute that was abandoned at the oral argument, is that
20 right?

21 A It may have been. I can't recall.

22 Q But that is what the Court of Appeals decision says?

23 A Okay.

24 Q And so, all you argued in the end was that you should
25 have gotten a jury charge, is that right?

1 A I guess that is the case.

2 Q All right. Now, do you recall Mr. Bolin getting a
3 guilty plea offer?

4 A Yes.

5 Q Okay. And now the first day you guys have the jury
6 panel and you strike the jury?

7 A That is correct.

8 Q And they get sent home and that is when you have the
9 Castle Doctrine argument?

10 A Yes, we have Jackson versus Denno first and then we had
11 the Castle.

12 Q And the first thing the next morning is Lee Owen is
13 pleading guilty. Do you remember that?

14 A I do.

15 Q All right. And --

16 A Well, he plead nolo contendere.

17 Q Okay. And I was going to ask you about that. Are you
18 aware whether or not it is legal to plea nolo contendere to a
19 felony?

20 A I guess if the judge will take the plea and if nobody
21 appeals it then it is legal. I don't know.

22 Q Okay. Well, are you familiar with Alford pleas?

23 A Yes.

24 Q All right. Can you think of a reason why we would have
25 those if we can plea no contest to a felony?

1 MS. ELLIOTT: Your Honor, I am going to object.
2 This this don't have anything to do with the
3 representation of Mr. Berlin. This is the
4 co-defendant.

5 THE COURT: Can you tell me what reference that has
6 to this defendant?

7 MR. LEDDY: Yes, sir, because I am going to get
8 into how certain things weren't objected too
9 contemporaneously to this. I will not ask another
10 single question about it. You if you want to sustain
11 it that will be fine.

12 THE COURT: Well, I am going to sustain it, but
13 that was the other persons trial. He couldn't object
14 to anything in the other person's trial. The other
15 defendant plead not guilty, right.

16 MR. LEDDY: I was just proving his knowledge of the
17 law on that issue.

18 THE COURT: I will let you probe his knowledge of
19 the law as it affects this case.

20 MR. LEDDY: Yes, sir.

21 Q Now do you remember Judge Hayes interaction with Mr.
22 Owens?

23 A Yeah.

24 Q And do you remember him telling that he thought that he
25 was getting basically a sweetheart sentence?

1 A Yeah. He said, basically what he told Mr. Owens or he
2 told Mr. McKinney, he says, yeah, cowboy attitude. All right.
3 He referred to it as a cowboy attitude. And Mr. McKinney said
4 -- I forget what he said about that, but then he also told Mr.
5 Owens that he was getting a sweetheart deal for ten years
6 suspended upon five years with probation to follow. And that if
7 it was him it would have been a lot more.

8 Q Okay. Now, did you talk to Berry about that?

9 A Yeah. Well, I think it was shortly after that. I
10 don't remember the timing sequence, but I think I was shortly
11 after that. That the State came to us with an offer and the
12 offer was he would plead to a series of charges. The most
13 serious being voluntarily manslaughter, for a negotiated 15-year
14 sentence. Okay. And that was the first time that they had come
15 with 15 years.

16 I believe that there had been discussions prior to that,
17 so where the State didn't really give us a firm offer, but they
18 were throwing around the 20 year mark. Okay.

19 I had talked with my client and told him that we really
20 needed to consider if the State ever came to us with something
21 around ten years. I was hoping we would be able to get to that
22 point. Okay. We never did. But they came to us with a firm
23 offer of negotiated 15 years for voluntarily manslaughter and
24 concurrent sentences on some of the other charges.

25 Q Okay.

1 A And I talked to him about that.

2 Q And what was your discussion? Did you tell him whether
3 he should take that deal?

4 A Yeah. Oh, I did. See, Judge Hayes -- Judge Hayes has
5 a good way of kind of letting you know where he is and with his
6 comments to Mr. Owens there was our clue as to where he was.
7 And I talked with Berry and I talked with him first back here as
8 I recall in the holding cell. Just the two of us. And I told
9 him that I knew it was a long time, 15 years, because I was
10 dealing with a young man that was 19 that had no prior record
11 and never been to jail. And we are talking about a span of time
12 that is almost equal to the amount of time he has lived on this
13 earth. So in his mind that is a long, long time. Okay. And so
14 I told him, I said, I know that this is a long time, but I
15 recommend you do it and here is why. I said because even though
16 it is a violent offense and you will have -- you are going have
17 to do 81 percent of the sentence. I said, you are 19 years old.
18 Which is going to allow you when you get out, to be able to
19 marry, to have children, to have a job. And I told him, I said,
20 I do not believe that this jury will convict you of murder. But
21 it is very possible that they could convict of you voluntary
22 manslaughter. And if they do convict you of voluntary
23 manslaughter I want you to know Judge Hayes will give you 10
24 years. And I told him that. And I told his family that.
25 Because I then arranged for him to be able to go back in the law

1 library with his family alone, except for a deputy, Brady
2 Harper, who died about a month ago. And they met for about --
3 the judge allowed my to do it. So Barry got to meet with his
4 parents and family back there to discuss the plea deal for about
5 15 minutes. And I told them I recommend that he take it.

6 Q Okay. And let me ask you, why did you think they
7 wouldn't convict him of murder?

8 A Because you got a bunch of yahoos. Okay. The jury was
9 not going to look at this as a murder case. They were going to
10 look also at the fact that he is 19-year old kid. All right.
11 And they are going to know that murder is going to be life. And
12 they are also going to know that probably the bullets hit
13 somebody to where he may or may not have intended to kill
14 somebody, but at the same time shooting into the back window of
15 a car the jury may say, you can't let that happen. Okay. And
16 you may have had a few people on the jury that had the same
17 reaction that Judge Hayes had. All right. Cowboy attitude.
18 You know. So --

19 Q Okay. So, would you agree that Mr. Bolin was convicted
20 of what we might call straight compromise, split the verdict?

21 A Well, we don't know. We don't know what the jury does.
22 We never know what the jury does. Okay. But if you look at it
23 they reduced every charge that he was convicted of.

24 Q Every single one?

25 A Yeah.

1 Q And the weapon charge they found him not guilty of,
2 which is highly illogical, isn't it?

3 A The violent --

4 Q Possession of weapon during a violent?

5 A Yeah, they found him not guilty of that.

6 Q Because they didn't have a lesser to go to?

7 A Well, and I think that they did that probably -- well,
8 I don't know why they did it. If you want me to hypothesize,
9 one of the reasons they could have done it is because he was
10 charged with one charge of assault and battery with intent to
11 kill on Mr. Falls who did not die. He was charged with three
12 charges of assault with intent to kill on the other three people
13 in the car. And -- no, well, anybody in the car was intent to
14 kill if they didn't get hit. And they moved those down to high
15 and aggravated and so the violent offense they may have said,
16 well, since we reduced this down we will find him not guilty of
17 that. Although they could have attached it if they wanted to
18 to the voluntary and they didn't.

19 Q Your whole case was self defense, right?

20 A It was defensive of another.

21 Q Okay. But that was basically your case, defensive of
22 another?

23 A Well, it was defense of another, but at the same time
24 it was attacking the State's case. Okay. Because the States
25 case they had done things that we had problems with.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson, Presiding Circuit Court Judge

Docket No. 2010-CP-46-0436

Berry Bolin, ... Appellant.

v.

State of South Carolina, ... Respondent,

CERTIFICATE OF COUNSEL

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

September 9, 2014



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