

VOLUME TWO OF TWO

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal from Horry County

S.C. Supreme Court

J. Cordell Maddox, Jr., Circuit Court Judge

DERRICK HOLLINGSWORTH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000308

APPENDIX

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QUESTION FROM THE JURY

501

1 (WHEREUPON, COURT'S EXHIBIT NUMBER 4 WAS MARKED.)

2 (WHEREUPON, THE JURY ENTERED THE COURTROOM AT
3 6:24 P.M.)

4 THE COURT: MR. FOREMAN, I HAVE YOUR WRITTEN
5 COMMUNICATION AND I UNDERSTAND THAT THE JURY HAS NOT BEEN
6 ABLE TO REACH A UNANIMOUS VERDICT ON THE DEFENDANT
7 HOLLINGSWORTH; IS THAT CORRECT?

8 MR. FOREMAN: YES, SIR.

9 THE COURT: AS I TAKE IT FROM YOUR NOTE YOU HAVE
10 REACHED A UNANIMOUS VERDICT ON THE OTHER DEFENDANT?

11 MR. FOREMAN: YES, SIR.

12 THE COURT: AND IS THE VERDICT WRITTEN AND TO A
13 POINT IT CAN BE TURNED OVER TO THE COURT?

14 MR. FOREMAN: I HAVEN'T WRITTEN IT ON HERE YET.

15 THE COURT: YOU HAVEN'T WRITTEN IT ON THERE YET?

16 MR. FOREMAN: NO, SIR.

17 THE COURT: LET ME ASK ALL OF YOU TO GO BACK AND
18 DO THAT AND MAKE SURE YOU'VE GOT A UNANIMOUS VERDICT ON
19 THAT PART OF THE CASE AND COME BACK AND ADVISE US AS SOON
20 AS YOU'VE DONE THAT. SO IF ALL OF YOU ALL WOULD GO BACK TO
21 YOUR JURY ROOM PLEASE.

22 (WHEREUPON, AT 6:25 P.M. THE JURY RETIRED TO THE
23 JURY ROOM.)

24 THE COURT: ALL RIGHT, COUNSEL. I THOUGHT THAT
25 WAS A BETTER WAY TO DO IT TO SEND THE WHOLE JURY BACK THERE

QUESTION FROM THE JURY

502

1 RATHER THAN JUST SEND THE FOREMAN SO THAT THERE WOULD BE NO
2 QUESTION THAT THE VERDICT THEY DO RETURN ON MR. SWINTON'S
3 CASE WOULD BE UNANIMOUS. SO WE'LL WAIT JUST A MINUTE UNTIL
4 THEY ADVISED US THEY'RE READY TO COME OUT. ANY OBJECTIONS
5 FROM THE STATE ON THE PROCEDURE BEING USED?

6 MR. HUMPHRIES: NO, SIR.

7 THE COURT: FROM THE DEFENSE?

8 MR. CHRISCO: NONE, YOUR HONOR.

9 MR. MONCKTON: NO, YOUR HONOR.

10 THE COURT: ALL RIGHT. SEE IF THEY'RE READY.

11 (WHEREUPON, THE JURY ENTERED THE COURTROOM AT
12 6:26 P.M. TO DELIVER ITS VERDICT AS TO DEFENDANT DERRICK
13 LAMONT SWINTON.)

14 THE COURT: MR. FOREMAN, HAS THE JURY REACHED A
15 VERDICT AS DEFENDANT MR. SWINTON?

16 MR. FOREMAN: YES, SIR.

17 THE COURT: ALL RIGHT. WOULD YOU HAND IT UP TO T
18 CLERK PLEASE.

19 ALL RIGHT, LADIES AND GENTLEMAN, IS THE VERDICT
20 THAT'S BEEN HANDED TO ME BY THE FOREMAN THE UNANIMOUS
21 VERDICT OF EACH AND EVERY ONE OF YOU? IF SO, PLEASE RAISE
22 YOUR HAND.

23 (WHEREUPON, ALL JURORS RESPONDED AFFIRMATIVELY.)

24 THE COURT: ALL RIGHT, THANK YOU. WITH REGARD TO
25 THE CHARGES REMAINING AGAINST MR. HOLLINGSWORTH I'M GOING

ALLEN CHARGE

503

1 TO GIVE YOU AND ADDITIONAL CHARGE. IT HAS TO DO WITH
2 REACHING A VERDICT BECAUSE HOPEFULLY YOU CAN MAKE ANOTHER
3 EFFORT AND REACH A VERDICT IN THIS CASE.

4 I HAVE SOME VERY BRIEF COMMENTS THAT I WOULD LIKE
5 TO MAKE BY WAY OF FURTHER INSTRUCTION ON THE MATTER OF YOUR
6 BEING ABLE TO REACH A VERDICT.

7 ALLEN CHARGE

8 AS I HAVE ALREADY TOLD YOU YOU ARE THE SOLE
9 JUDGES OF THE FACTS AND THE EVIDENCE IN THE CASE. NOW AS
10 THE JUDGE, AS I HAVE ALREADY TOLD YOU, I AM NOT PERMITTED
11 TO EVEN GIVE YOU A HINT AS TO HOW I FEEL MAY ABOUT FACTUAL
12 MATTER AND CERTAINLY CAN GIVE YOU NO HINT ABOUT WHAT
13 VERDICT YOU OUGHT TO BRING IN THIS CASE. IT IS MY DUTY TO
14 STATE THE LAW OF THE CASE AS I HAVE DONE AND IT IS YOUR
15 DUTY TO BRING IN A VERDICT. BUT I CAN SAY THAT WHEN A
16 MATTER IS IN DISPUTE IT IS NOT ALWAYS EASY FOR EVEN TWO MEN
17 TO AGREE OR TWO PERSONS OR TWO MEN, OR TWO WOMEN AND WHEN
18 12 MUST AGREE IT BECOMES OBVIOUSLY CORRESPONDINGLY MORE
19 DIFFICULT THOUGH IT IS PART OF LITIGATION AND THIS IS
20 LITIGATION BE ENDED IF IT MAY BE ENDED WITHOUT A SINGLE ONE
21 OF YOU DOING VIOLENCE TO YOUR CONSCIENCE. NO JUROR IS
22 EXPECTED TO GIVE UP AN OPINION BASED ON REASONING
23 SATISFACTORY TO HIMSELF OR HERSELF MERELY FOR THE PURPOSE
24 OF BEING IN AGREEMENT AND I WANT THAT TO BE CLEARLY
25 UNDERSTOOD. YOU'RE NOT CALLED UPON OFTEN TO TRY CASES.

ALLEN CHARGE

504

1 THERE ARE 46 CIRCUIT COURT JUDGES WHOSE WORK IT IS TO TRY
2 CASES FROM DAY TO DAY THROUGHOUT THE YEAR. IT IS VERY
3 UNUSUAL, ALMOST UNHEARD OF, FOR A JURY TO GO OUT AND RETURN
4 PROMPTLY WITH A VERDICT. THIS IS WHAT WOULD HAPPEN IF THE
5 JURY WAS NORMALLY IN AGREEMENT TO START WITH. AT THE SAME
6 TIME, WE USUALLY GET A VERDICT. WHAT THAT MEANS IS IS THAT
7 IT IS NORMAL FOR JURORS TO DISAGREE AT FIRST. BUT THE FACT
8 THAT WE NORMALLY GET A VERDICT ALSO MEANS THAT AFTER
9 REASONABLE PERSONS LAW ASIDE ALL EXTRANEIOUS MATTER AND
10 DETERMINE TO DECIDE A CASE ON THE LAW AND THE EVIDENCE,
11 THEY DO COME TO A COMMON UNDERSTANDING AND WRITE A VERDICT.
12 IT HAS NEVER BEEN INTENDED THAT THE VERDICT OF THE JURY
13 SHOULD BE THE VERDICT OF ONE PERSON. CONVERSELY, THE
14 VERDICT OF THE JURY IS THE COLLECTIVE REASONING OF ALL THE
15 PERSONS PUT TOGETHER AND THAT IS WHY WE HAVE A JURY SO THAT
16 WE MAY HAVE THE BENEFIT OF COLLECTIVE THOUGHT, COLLECTIVE
17 REASONING. IT BECOMES YOUR DUTY TO TELL THE OTHER JURORS
18 HOW YOU FEEL ABOUT THE CASE AND I'M SURE THAT YOU HAVE BEEN
19 DOING THAT. IT ALSO BECOMES THE OTHER JURORS' DUTY TO
20 EXCHANGE VIEWS WITH YOU AND YOU SHOULD LISTEN TO EACH OTHER
21 GIVE TO EACH OTHER'S THOUGHTS SUCH MEANING AS YOU THINK IT
22 SHOULD HAVE AND TO SOME DEGREE IT CAN BE SAID THAT JURY
23 SERVICE IS A MATTER OF GIVE AND TAKE. IF YOU DO NOT AGREE
24 ON A VERDICT IT JUST MEANS THAT AT SOME FUTURE TERM OF
25 COURT BEFORE SOME OTHER JUDGE PERHAPS, THAT SOME OTHER JURY

ALLEN CHARGE

505

1 WILL SIT WHERE YOU ARE SITTING, THE SAME PARTICIPANTS WILL
2 COME, THE SAME LAWYERS WILL PROBABLY COME AND THEY WILL ASK
3 PRETTY MUCH THE SAME QUESTIONS AND GET PRESUMABLY PRETTY
4 MUCH THE SAME ANSWERS. AND WE WILL GO THROUGH THE PROCESS
5 ALL OVER AGAIN. I HAVE NO REASON TO BELIEVE THAT ANY OTHER
6 12 CITIZENS OF HORRY COUNTY WILL BE MORE CAPABLE OF SOLVING
7 THIS CONTROVERSY THAN YOU. AND SO I AM GOING TO ASK YOU AT
8 THIS TIME TO DELIBERATE FURTHER AND SEE IF YOU CAN WRITE A
9 VERDICT IN THIS CASE. BUT I WANT TO CLOSE THIS PART OF THE
10 ALLEN CHARGE BY REMINDING YOU AGAIN THAT WHILE IT IS
11 IMPORTANT THAT LITIGATION BE ENDED IT SHOULD BE ENDED IN
12 THE FORM OF A VERDICT BY NO JUROR DOING VIOLENCE TO HIS OWN
13 CONSCIENCE. NO JUROR IS EXPECTED TO GIVE UP AN OPINION
14 BASED ON REASONING SATISFACTORY TO HIMSELF MERELY FOR THE
15 PURPOSE OF BEING IN AGREEMENT.

16 WITH THAT ADDED INSTRUCTION I AM GOING TO ASK
17 THAT YOU RETIRE TO YOUR JURY ROOM AND DELIBERATE FURTHER
18 WITH ON THE CHARGES WITH REGARD TO MR. HOLLINGSWORTH.
19 THANK YOU, PLEASE GO BACK TO YOUR JURY ROOM.

20 (WHEREUPON, THE JURY RETURNED TO THE JURY ROOM AT
21 6:32 P.M. TO CONTINUE DELIBERATIONS.)

22 THE COURT: ARE THERE ANY EXCEPTIONS FROM THE
23 STATE WITH REGARD TO THE ADDITIONAL INSTRUCTIONS, MR.
24 HUMPHRIES?

25 MR. HUMPHRIES: NO, YOUR HONOR.

ALLEN CHARGE

506

1 THE COURT: MR. CHRISCO? YOU'VE ALREADY GOT A
2 VERDICT. I DON'T NEED TO HEAR FROM YOU. MR. MONCKTON?

3 MR. MONCKTON: NO, SIR, YOUR HONOR.

4 THE COURT: WE'LL BE AT EASE UNTIL WE HEAR FROM
5 THE JURY WITH REGARD TO ---

6 MR. CHRISCO: YOUR HONOR.

7 THE COURT: YES, SIR.

8 MR. CHRISCO: I WOULD MOVE TO THE COURT THAT THEY
9 WOULD PUBLISH THE VERDICT SINCE THE JURY IS BACK IN THE
10 JURY ROOM.

11 THE COURT: I KNOW YOU MADE THAT COMMENT. I GOT
12 TO THINKING ABOUT IT. I THINK THE PUBLICATION OF THE
13 VERDICT NEEDS TO BE MADE WHEN THE JURY IN THE COURTROOM.
14 AND THAT IS WHAT WE WERE TRYING TO AVOID BECAUSE THERE MAY
15 BE SOME QUESTION THAT COMES UP WITH REGARD TO POLLING OR
16 SOMETHING AND I DON'T KNOW WHETHER THAT WOULD BE THE
17 QUESTION OR NOT. SO I'M NOT SURE I CAN DO THAT AT THIS
18 POINT. WHAT'S YOUR THOUGHT ON IT.

19 MR. HUMPHRIES: IN AN ABUNDANCE OF CAUTION I
20 AGREE WITH YOU.

21 THE COURT: I THINK IT'S JUST BEING OVERLY
22 CAUTIOUS JUST TO MAKE SURE THAT WE DON'T HAVE ANY PROBLEMS.
23 I DON'T KNOW IF IT'S EVER BEEN DONE OR WHAT THE SITUATION
24 IS BUT I DON'T KNOW WHETHER THE JURY SHOULD BE IN HERE WHEN
25 THE VERDICT IS PUBLISHED OR NOT. I DON'T KNOW OF ANY LAW

ALLEN CHARGE

507

1 ON THAT SUBJECT. BUT I FEEL LIKE THAT WITH THE
2 CONFIGURATION OF THIS THAT MIGHT BE AN ISSUE. IT MIGHT BE
3 THAT THEY'LL EVEN COME BACK WITH ANOTHER QUESTION. THEY
4 MIGHT WONDER WHAT THE STATUS OF THE OTHER DEFENDANT IS AND
5 SO I JUST THINK IT'S BETTER TO HOLD EVERYTHING IN ABEYANCE
6 UNTIL WE FIND OUT WHETHER THEY'RE GOING TO BE ABLE TO REACH
7 A VERDICT ON MR. HOLLINGSWORTH.

8 MR. HUMPHRIES: THANK YOU, YOUR HONOR.

9 (WHEREUPON, THE JURY KNOCKED WITH A VERDICT AT
10 7:18 P.M.)

11 THE COURT: ALL RIGHT COUNSEL, I UNDERSTAND WE DO
12 HAVE A JURY VERDICT AND BEFORE I HAVE THE JURY COME BACK IN
13 AND THE VERDICTS ARE PUBLISHED, I WANT TO TELL EVERYONE IN
14 THE COURTROOM THAT THE COURT WILL NOT TOLERATE ANY
15 EXPRESSIONS OF EMOTION OR OUTBURSTS OR ANYTHING ELSE WHEN
16 THE VERDICTS ARE PUBLISHED. OBVIOUSLY THERE IS A GREAT
17 DEAL OF SENTIMENT IN THIS CASE AND THE PARTIES HAVE BEEN
18 HERE ALONG. THERE IS A GREAT DEAL OF EMOTION INVOLVED ON
19 BOTH SIDES BUT THE COURT FEELS THAT THIS A COURTROOM AND
20 THE COURT WILL NOT TOLERATE ANY KINDS OF EXPRESSION OR
21 OUTBURSTS, OR ANYTHING OF THAT NATURE. AND IF THERE IS
22 ANYONE IN THE COURTROOM WHO FEELS THEY CANNOT CONTROL THEIR
23 EMOTIONS THEN THEY NEED TO LEAVE NO BECAUSE I'M NOT GOING
24 TO TOLERATE IT. IF THERE IS ANY THAT PERSON OR PERSONS IS
25 SUBJECT TO CONTEMPT OF COURT. IF THERE IS ANYBODY WHO

VERDICT

508

1 FEELS THAT WAY NOW IS THE TIME TO LEAVE. ALL RIGHT, I
2 EXPECT EVERYBODY TO BE QUITE AND RESPECTFUL WHEN THE
3 VERDICT IS RETURNED INCLUDING THE SPECTATORS, PARTIES,
4 LAWYERS, EVERYONE. ALL RIGHT, BRING THE JURY IN.

5 (WHEREUPON, THE JURY ENTERED THE COURTROOM AT
6 7:21 P.M. TO DELIVER ITS VERDICT.)

7 THE COURT: ALL RIGHT, MR. FOREMAN, HAVE YOU
8 REACHED A VERDICT?

9 MR. FOREMAN: YES, SIR.

10 THE COURT: WOULD YOU PASS IT UP TO THE CLERK,
11 PLEASE.

12 THE COURT: ALL RIGHT, LADIES AND GENTLEMEN, LET
13 THE RECORD REFLECT THAT THE VERDICT IN MR. SWINTON'S CASE
14 WAS HANDED TO THE COURT SOME TIME AGO AND HAS BEEN
15 CONTINUOUSLY IN THE COURT'S POSSESSION SINCE THAT TIME. IT
16 HAS NOT YET BEEN PUBLISHED AND THE COURT IS GOING TO GIVE
17 IT TO THE CLERK TO PUBLISH. THE COURT NOW HAS THE VERDICT
18 IN THE HOLLINGSWORTH CASE AND I WILL TELL HER, ONE, THAT
19 THE VERDICTS DO APPEAR TO BE CORRECT AS TO THE FORM IS
20 CONCERNED. I WOULD ASK THE MEMBERS OF THE JURY THE SAME
21 QUESTION I ASKED YOU ON MR. SWINTON'S CASE. IS THE VERDICT
22 THAT YOUR FOREMAN HAS HANDED UP TO ME ON MR.
23 HOLLINGSWORTH'S CASE THE VERDICT OF EACH AND EVERY ONE OF
24 YOU AND IF IT IS WOULD YOU PLEASE RIGHT YOUR RIGHT HAND?

25 (WHEREUPON, ALL JURORS RESPONDED AFFIRMATIVELY.)

POLLING OF THE JURY

509

1 THE COURT: ALL RIGHT. MADAM CLERK, HERE ARE THE
2 TWO VERDICTS AND I WOULD ASK THAT YOU PUBLISH THE VERDICTS
3 PLEASE.

4 MADAM CLERK: THIS IS INDICTMENT NUMBER 99-GS-26-
5 1651, STATE OF SOUTH CAROLINA V. CORTEAL LAMONT SWINTON,
6 INDICTED FOR MURDER, THE VERDICT IS NOT GUILTY.

7 THIS IS INDICTMENT 99-GS-26-1653, STATE OF SOUTH
8 CAROLINA V. DERRICK MARCEL HOLLINGSWORTH, INDICTED FOR
9 MURDER, THE VERDICT IS GUILTY AS CHARGED, PHILLIP WEHRUNG,
10 FOREMAN, DATED APRIL 13TH, 2000.

11 THE COURT: IS THIS YOUR VERDICT SO SAY YOU ALL?
12 (WHEREUPON, ALL JURORS ANSWERED AFFIRMATIVELY.)

13 THE COURT: ANYTHING BEFORE WE DISCHARGE THE
14 JURY, MR. MONCKTON?

15 MR. MONCKTON: YOUR HONOR, WE WOULD REQUEST
16 POLLING.

17 THE COURT: ALL RIGHT. PLEASE POLL THE JURY.

18 MADAM CLERK: I WILL ASK YOU A QUESTION. WHEN I
19 CALL YOUR NAME PLEASE STAND. AFTER YOU ANSWER PLEASE BE
20 SEATED.

21 PHILLIP WEHRUNG.. IS THIS YOUR VERDICT AND STILL
22 YOUR VERDICT?

23 MR. WEHRUNG: YES, IT IS.

24 MADAM CLERK: HUBERT GIBSON. IS THIS YOUR
25 VERDICT? IS IT STILL YOUR VERDICT?

POLLING OF THE JURY

510

1 MR. GIBSON: IT IS.

2 MADAM CLERK: BOBBY FRAZIER. IS THIS YOUR
3 VERDICT AND IS THIS STILL YOUR VERDICT?

4 MR. FRAZIER: YES.

5 MADAM CLERK: PATRICIA MURPHY. IS THIS YOUR
6 VERDICT AND IS THIS STILL YOUR VERDICT?

7 MS. MURPHY: YES.

8 MADAM CLERK: DANNY OWENS. IS THIS YOUR VERDICT
9 AND STILL YOUR VERDICT?

10 MR. OWENS: YES, MA'AM.

11 MADAM CLERK: CHRISTOPHER WARD. IS THIS YOUR
12 VERDICT AND STILL YOUR VERDICT?

13 MR. WARD: YES, IT IS.

14 MADAM CLERK: SHIRLEY CAUSEY. IS THIS YOUR
15 VERDICT AND STILL YOUR VERDICT?

16 MS. CAUSEY: IT IS.

17 MADAM CLERK: VIVIAN SIMMONS. IS THIS YOUR
18 VERDICT AND STILL YOUR VERDICT?

19 MS. SIMMONS: YES, MA'AM.

20 MADAM CLERK: CRAIG HEMINGWAY. IS THIS YOUR
21 VERDICT AND STILL YOUR VERDICT?

22 MR. HEMINGWAY: YES.

23 MADAM CLERK: EUGENIA POTTS. IS THIS YOUR
24 VERDICT AND STILL YOUR VERDICT?

25 MS. POTTS: YES, MA'AM.

POLLING OF THE JURY

511

1 MADAM CLERK: DENNIS NEAL. IS THIS YOUR VERDICT
2 AND STILL YOUR VERDICT?

3 MR. NEAL: YES, MA'AM.

4 MADAM CLERK: HUBERT RICHARDSON. IS THIS YOUR
5 VERDICT AND STILL YOUR VERDICT?

6 MR. RICHARDSON: YES, MA'AM.

7 THE COURT: ALL RIGHT. THE JURY HAS BEEN POLLED
8 AND THEY HAVE INDICATED THE UNANIMOUS VERDICT OF EACH ONE
9 OF THEM. IS THERE ANYTHING ELSE BEFORE WE DISCHARGE THE
10 JURY, MR. MOMCKTON?

11 MR. MONCKTON: NO, SIR, YOUR HONOR.

12 THE COURT: LADIES AND GENTLEMEN OF THE JURY, I
13 WILL EXCUSE YOU AT THIS FROM ANY FURTHER SERVICE ON THIS
14 CASE. I WILL TELL YOU THE I MAKE IT A PRACTICE TO NEVER
15 COMMENT ON THE VERDICT OF THE JURY EVEN AFTER THE JURY HAS
16 RETURNED ITS VERDICT. IN MY VIEW, THE JURY'S ROLE IN THE
17 FACT FINDING PROCESS IS SO IMPORTANT THE TRIAL JUDGE SHOULD
18 NOT COMMENT ON THE VERDICT EVEN AFTER A JURY HAS RETURNED
19 ITS VERDICT. I WILL TELL YOU THAT THERE WAS EVIDENCE IN
20 THE RECORD BY WHICH YOU COULD HAVE THE TWO VERDICTS THAT
21 YOU HAVE REACHED. I'M GOING TO EXCUSE YOU AND DISCHARGE
22 YOU FROM THIS CASE AND WILL TELL YOU THAT ONCE YOU HAVE
23 BEEN DISCHARGED AS JURORS IN THIS CASE, IT IS NOT ILLEGAL
24 FOR YOU TO TALK TO ANYONE ABOUT YOUR SERVICE THE CASE NOR
25 IS IT ILLEGAL FOR ANYONE TO TALK TO YOU ABOUT YOUR SERVICE.

POLLING OF THE JURY

512

1 IT IS A PRACTICE OF WHICH I STRONGLY DISCOURAGE AND ONE
2 WHICH I STRONGLY DISAPPROVE OF BUT IT IS NOT ILLEGAL. YOU
3 HAVE THE RIGHT TO TALK WITH ANYONE BUT YOU ALSO HAVE THE
4 RIGHT NOT TO TALK WITH ANYONE. IF ANYBODY SHOULD WANT TO
5 CONTACT YOU AND TALK WITH YOU ABOUT THIS CASE AND YOU DON'T
6 WANT TO TALK TO THEM AND THEY CONTINUE TO BOTHER YOU OR
7 HARASS YOU, YOU LET ME KNOW, OR LET THE COURT KNOW AND I
8 WILL DEAL WITH THEM. I'M GOING TO DISCHARGE YOU FROM NOT
9 ONLY THIS CASE BUT I'M GOING TO DISCHARGE YOU FROM ANY
10 FURTHER SERVICE THIS WEEK. WE'RE NOT GOING TO DRAW ANYMORE
11 CASES FOR TRIAL THIS WEEK SO THIS WILL TERMINATE AND END
12 YOUR JURY SERVICE AND I WANT TO THANK YOU ON BEHALF OF THE
13 CITIZENS OF HORRY COUNTY AND THE STATE OF SOUTH CAROLINA
14 FOR YOUR SERVICES THIS WEEK. I KNOW THAT IT IS NEVER
15 CONVENIENT TO SERVE ON THE JURY. BUT WE COULD NOT RUN THE
16 COURTS AND WE COULD NOT HAVE OUR SYSTEM OF JUSTICE EVEN
17 WITH ITS FLAWS IT THE BEST IN THE WORLD WITHOUT THE CITIZEN
18 PARTICIPATION SUCH AS WE HAVE ON JURIES AND THAT IS WHAT
19 MAKES OUT SYSTEM THE BEST IN THE WORLD. AND I DO
20 APPRECIATE YOUR SERVICE AND APPRECIATE THE ATTENTION AND
21 DILIGENCE IN THIS CASE. SOME WEEK NEXT TIME YOU WILL
22 RECEIVE A SMALL CHECK FROM THE CLERK'S OFFICE. IT WILL IN
23 NO WAY COMPENSATE FOR YOUR BUT IT IS A SMALL TOKEN OF
24 APPRECIATION FOR YOUR SERVICE ON THE JURY THIS WEEK.

25 I WOULD ALSO TELL YOU IF ANY A CERTIFICATE FROM

POLLING OF THE JURY

513

1 THE CLERK'S OFFICE -- IS THERE SOMEONE AVAILABLE FROM THE
2 CLERK'S OFFICE? YOU THEY NEED TO DO IT TOMORROW OR WHAT?

3 MADAM CLERK: IF THEY CAN'T DO IT TOMORROW I CAN
4 DO IT TONIGHT.

5 THE COURT: IF ANY OF YOU NEED A CERTIFICATE FROM
6 THE CLERK, IF YOU WILL SEE THIS LADY WHEN WE ADJOURN SHE
7 CAN GIVE YOU A CERTIFICATION TO SHOW THAT YOU WERE SERVING
8 ON THE JURY THIS WEEK. I WOULD ALSO TELL YOU THAT BY
9 SERVING ON THE JURY THIS WEEK YOU HAVE MET YOUR CITIZENSHIP
10 REQUIREMENTS FOR JURY SERVICE FOR THE NEXT THREE YEARS FOR
11 JURY SERVICE IN THE CIRCUIT COURT, EITHER CIVIL, OR
12 CRIMINAL, EITHER COMMON PLEAS OR GENERAL SESSIONS FOR THE
13 NEXT THREE YEARS. THE FIRST YEAR YOU ARE DISQUALIFIED. IF
14 YOUR NAME CAME UP YOU'D BE AUTOMATICALLY DISQUALIFIED IN
15 THE FIRST YEAR. THE SECOND AND THIRD YEARS YOU HAVE AN
16 EXEMPTION WHICH MEANS THAT IF YOU DON'T WANT TO SERVE YOU
17 WOULD NOT HAVE TO SERVE. THAT ALL APPLIES TO CIRCUIT, THAT
18 IS, UP HERE IN THIS COURTROOM OR ONE OF THE OTHER
19 COURTROOMS IN THIS BUILDING, IN THE CIRCUIT COURT. IN
20 OTHER WORDS. IF YOU GET CALLED CAN'T HELP YOU IN
21 MAGISTRATE'S COURT. IF YOU GET CALLED IN MAGISTRATE'S
22 COURT OR IN FEDERAL COURT, YOU'D JUST HAVE SERVE. I HAVE
23 NO CONTROL OVER THAT BUT AS FAR AS IN THE CIRCUIT COURT
24 YOU'VE MET YOUR CITIZENSHIP REQUIREMENT FOR THE NEXT THREE
25 YEARS.

MOTION FOR MISTRIAL BY DEFENDANT HOLLINGSWORTH

514

1 AGAIN, LET ME THANK YOU FOR YOUR SERVICE THIS WEEK. I
2 HOPE THAT YOU HAVE FOUND IT INTERESTING AND LEARNED
3 SOMETHING FROM IT. I KNOW THAT YOU THAT HAVE PROBABLY
4 LEARNED THAT IS A GREAT DEAL DIFFERENT FROM TELEVISION. IT
5 NEVER CEASES TO AMAZE ME THAT ON TELEVISION YOU CAN HAVE A
6 CRIME COMMITTED, AN INVESTIGATION, PREPARATION FOR TRIAL,
7 TRIAL, AND VERDICT, ALL IN 60 MINUTES LESS COMMERCIALS. IT
8 JUST DOESN'T WORK THAT WAY IN REAL LIFE. IN ANY EVENT, I
9 HOPE THAT YOU HAVE FOUND YOUR SERVICE THIS INTERESTING AND
10 I DO THANK YOU AGAIN ON BEHALF OF THE COUNTY AND ON BEHALF
11 OF THE STATE. I'M GOING TO EXCUSE YOU NOW AND ALLOW YOU TO
12 GO TO YOUR FAMILY AND FRIENDS. YOU ARE FREE TO GO. I
13 WOULD ASK THAT EVERYONE ELSE REMAIN SEATED IN THE COURTROOM
14 AND I WOULD ASK THAT ONE OR MORE OF THE LAW ENFORCEMENT
15 OFFICERS ESCORT THE JURY OUT OF THE BUILDING PLEASE. YOU
16 ARE FREE TO GO.

17 THE COURT: ANY MOTIONS?

18 MR. MONCKTON: YES, YOUR HONOR. AT THIS TIME I
19 WOULD RENEW MY MOTION FOR A MISTRIAL AND MOVE FOR JUDGMENT
20 N.O.V. BASED ON THE INSUFFICIENCY OF THE EVIDENCE IN THE
21 RECORD OR IN THE ALTERNATIVE A NEW TRIAL.

22 THE COURT: BASED UPON WHAT THEY THOUGHT THE
23 EVIDENCE SHOWED AND BASED UPON THE FACT THEY REACHED TWO
24 DIFFERENT VERDICTS IN THE CASE SHOWED THEY DID GIVE A GREAT
25 DEAL OF THOUGHT IN THE MATTER. SO THE COURT WILL

MOTION FOR MISTRIAL BY DEFENDANT HOLLINGSWORTH

515

1 RESPECTFULLY DENY THOSE TWO MOTIONS, THREE MOTIONS.

2 ALL RIGHT, MR. CHRISCO AND MR. SWINTON, THE JURY
3 HAVING FOUND YOU NOT GUILTY OF THE CHARGES AGAINST YOU.
4 YOU ARE DISCHARGED FROM CUSTODY AND YOU MAY LEAVE THE
5 COURTROOM AT THIS TIME.

6 MR. CHRISCO: YOUR HONOR ---

7 THE COURT: THE COURT IS IN SESSION. I DON'T
8 WANT TO HEAR ANYTHING FROM ANYBODY. THAT INCLUDES YOU
9 MA'AM. YES, SIR.

10 MR. CHRISCO: YOUR HONOR, MY CLIENT IS PRESENTLY
11 INCARCERATED FOR ANOTHER CHARGE FOR WHICH A BOND HAS BEEN
12 SET. WE'LL HANDLE THAT AT ANOTHER TIME, YOUR HONOR.

13 THE COURT: ALL RIGHT. THEN HE'S -- HE'S
14 REMANDED TO THE CUSTODY OF THE HORRY COUNTY DETENTION
15 CENTER.

16 MR. CHRISCO: THANK YOU, YOUR HONOR.

17 THE COURT: GO AHEAD AND HAVE MR. SWINTON LEAVE
18 THE COURTROOM.

19 MR. CHRISCO: THANK YOU.

20 THE COURT: MR. HUMPHRIES, DO YOU HAVE THE
21 SENTENCING SHEET.

22 MR. HUMPHRIES: I'M HANDING IT UP AT THIS TIME,
23 YOUR HONOR.

24 THE COURT: ALL RIGHT, COME AROUND MR.
25 HOLLINGSWORTH AND MR. MONCKTON. ANYTHING ON BEHALF OF THE

MOTION FOR MISTRIAL BY DEFENDANT HOLLINGSWORTH

516

1 STATE? WHAT ABOUT A PRIOR RECORD? NOT THAT IT REALLY
2 MATTERS IN THIS CASE BUT I WANT TO KNOW WHAT IT IS.

3 MR. HUMPHRIES: BEGGING THE COURT'S INDULGENCE
4 JUST ONE MOMENT.

5 THE COURT: YES, SIR.

6 MR. HUMPHRIES: IN MAY OF 1996 HE WAS ARRESTED
7 FOR ARMED ROBBERY, CRIMINAL CONSPIRACY. HE PLEAD GUILTY ON
8 FEBRUARY 6, 1997 TO COMMON-LAW ROBBERY AND RECEIVED EIGHT
9 MONTHS, 14 DAYS. HE DOES HAVE SOME MINOR MUNICIPAL COURT
10 OFFENSES.

11 THE COURT: MR. MONCKTON, DO YOU UNDERSTAND THAT
12 TO BE HIS CRIMINAL RECORD?

13 MR. MONCKTON: YES, SIR.

14 THE COURT: ALL RIGHT, SIR. I'D BE GLAD TO HEAR
15 FROM YOU WITH REGARD TO MITIGATION.

16 MR. MONCKTON: YOUR HONOR, MR. HOLLINGSWORTH IS
17 21-YEARS OF AGE, SLIGHTLY AFTER THIS EVENT OCCURRED HE HAD
18 MOVED HIS FAMILY DOWN TO FLORIDA. IN FACT, THERE WAS AN
19 INCIDENT SHORTLY AFTER THIS EVENT WHERE HIS FAMILY WAS
20 THREATENED AND THE HOUSE WAS SHOT UP. SHORTLY, THEREAFTER,
21 HIS MOTHER AND BROTHER WERE KILLED IN AN AUTOMOBILE
22 ACCIDENT IN FLORIDA. YOUR HONOR THE TESTIMONY AND THE
23 PROOF PRESENTED BY THE STATE AND THE TYPE OF PROOF THE
24 STATE PUT FORTH AND I'D ASK YOUR HONOR TO CONSIDER THAT IN
25 SENTENCING.

SENTENCE OF THE COURT

517

1 THE COURT: MR. HOLLINGSWORTH, IS THERE ANYTHING
2 YOU'D LIKE TO SAY?

3 MR. HOLLINGSWORTH: NO, SIR.

4 MR. HUMPHRIES: YOUR HONOR, FOR THE RECORD I HAVE
5 SPOKEN TO THE FAMILY OF THE DECEASED AND THEY DO NOT WANT
6 TO ADDRESS THE COURT AT THIS TIME.

7 THE COURT: ALL RIGHT. THANK YOU, SIR. THE
8 SOLICITOR'S OFFICE HAS COMPLIED WITH THE VICTIM'S RIGHT
9 BILL. I ALSO RECOGNIZE THAT MANY MEMBERS OF THE VICTIM'S
10 FAMILY HAVE BEEN SITTING THROUGHOUT THE TRIAL OF THE CASE
11 AND THAT UNDER THE LAW THEY HAVE THE RIGHT TO ADDRESS THE
12 COURT. ACCORDING TO THE REPRESENTATION OF THE SOLICITOR'S
13 OFFICE THEY DO NOT WISH TO ADDRESS THE COURT.

14 AGAIN I WOULD SAY THAT AFTER I PRONOUNCE SENTENCE
15 IN THIS CASE AND AFTER COURT IS ADJOINED I DON'T EXPECT ANY
16 OUTBURST OR ANYTHING ELSE. I EXPECT YOU TO LEAVE THE
17 COURTROOM QUIETLY AND PEACEFULLY WITHOUT FANFARE AND
18 WITHOUT ANY OUTBURST AND SHOUTING.

19 MR. HOLLINGSWORTH, I DID HEAR THE TESTIMONY AND I
20 CAN SAY THAT BASED UPON THE TESTIMONY THAT THE COURT CANNOT
21 FIND ANY REASON OTHER THAN TO IMPOSE THE MAXIMUM
22 PUNISHMENT. THE SENTENCE OF THE COURT IS THE DEFENDANT IS
23 COMMITTED TO THE STATE DEPARTMENT OF CORRECTIONS FOR THE
24 TERM OF HIS NATURAL LIFE. ALL RIGHT. IS THERE ANYTHING
25 FURTHER?

SENTENCE OF THE COURT

518

1 MR. HUMPHRIES: NOT FROM THE STATE.

2 THE COURT: ALL RIGHT. COURT IS ADJOURNED UNTIL

3 9 O'CLOCK TOMORROW MORNING.

4 END OF REQUESTED TRANSCRIPT....

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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED BRENDA R. BABB, OFFICIAL COURT REPORTER THE SOUTH CAROLINA COURT ADMINISTRATION, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF GENERAL SESSIONS FOR HORRY COUNTY, SOUTH CAROLINA.

I DO FURTHER CERTIFY THAT I AM NEITHER KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

August 19, 2000

Brenda R. Babb
BRENDA R. BABB, CVR

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DERRICK MARCELL HOLLINGSWORTH,

APPELLANT.

FINAL BRIEF OF APPELLANT

DANIEL T. STACEY
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ATTORNEY FOR APPELLANT.

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred when it permitted a solicitor's closing argument which went outside the record to indicate threats against state's witnesses, seriously prejudicing appellant?

STATEMENT OF THE CASE

Appellant was indicted for murder in Horry County. He was tried along with Cortreal Swinton commencing April 11, 2000, at Conway, before the Honorable Howard P. King, and a jury. Swinton was acquitted; appellant was found guilty and sentenced to imprisonment for his natural life.

This appeal follows.

ARGUMENT

The court erred when it permitted a solicitor's closing argument which went outside the record to indicate threats against state's witnesses, seriously prejudicing appellant.

Prior to trial, appellant made a motion *in limine* to prevent the state from referring to possible threats against state's witnesses. ROA p. 302 – p. 303. At a pretrial hearing before the Honorable Rodney Peeples, the state expressly consented to this motion:

Your Honor, the next thing we can take up, if you will, are -- there are two motions, one on behalf of Mr. Hollingsworth and one on behalf of Mr. Wilson, motions in limine to prevent the state from referring to possible threats made against state witnesses. Your Honor, the state consents to that in the context of the state's direct examination of the state's witnesses in their case in chief.

ROA p. 9, lines 12-19.

The solicitor was absolutely clear that appellant was not involved in any threats:

Now, in relation to Mr. Hollingsworth, Mr. Hollingsworth's position, as I understand it is, "Those threats did not come from me; if they came from anybody at all, they came from Mr. Swinton." In that regard, Ms. Weaver will specify from whom the threats came, clearly identifying Mr. Swinton's family as opposed to anybody else. So, I believe in that respect it deals with Mr. Hollingsworth's issue regarding threats...

ROA p. 10, lines 12-20.

In any event, as will be seen, the case was tried without any evidence of threats against witnesses whatsoever being put into evidence. The evidence upon which appellant was convicted was far from compelling.

This case involved the killing of the victim Isaac Cox in Conway. The state relied upon shifting eyewitness testimony and a jailhouse snitch to convict appellant. The solicitor

in opening argument admitted that the case was "a question of credibility, the credibility of the people who know these defendants as far as who they recognize." ROA p. 33, lines 9-11.

Frederick McDonald was a first cousin of the victim. ROA p. 34, lines 21-25. He testified that on the day in question he was at his grandmother's house along with the victim, his girlfriend and another woman. ROA p. 36, lines 19-25. Tony, the decedent's brother, was also present. ROA p. 37, line 1. They left and went to the Exxon Express between 1:30 a.m. and 2:00 a.m. ROA p. 37, lines 5-10. They were standing around, having exited a cab, at which point, McDonald claimed, appellant rode up on a bicycle and rode around in circles "just staring at us and looking, gazing, looking at, you know." ROA p. 37, lines 20-23; ROA p. 40, lines 12-20. Appellant went in the Express and bought two beers. ROA p. 40, line 23 - p. 41, line 3. The McDonald group went in the store looking for a beer and, at some point, Isaac separated and began walking down the road. ROA p. 41, lines 4-17. McDonald heard gunshots. ROA p. 41, lines 18-24. He ran down the road and found Isaac on the ground and "cops all around telling us to get back and stuff." ROA p. 42, lines 2-17. McDonald went to the emergency room and then went riding around to see if he could find the perpetrators. ROA p. 43, line 13 - p. 44, line 16. At some point, they saw two people, one of whom was Cortreal Swinton and the other Curtis Wilson. They made eye contact and the two individuals "just broke out in a run. They were shocked to see us." ROA p. 46, line 4 - p. 47, line 13.

Kim Brown was riding by the area in a car with Vicky Campbell and Keisha Smith. ROA p. 56, lines 3-6. She was in the back seat on the passenger side. Vicky was in front of

her on the passenger side and Keisha was driving. ROA p. 56, lines 5-12. Her testimony continued:

As we proceeded in the intersection, I said, excuse my French. I said, "Oh, shit, it's gunshots." And I saw three shots coming from behind the oak tree and Vicky, she was in front of me, she said, "Oh, I know who that is. That's Beady."

ROA p. 57, lines 18-22. Beady was the victim, Issac Cox. Her testimony continued, "I know who that was. That's S.A. (nickname of appellant) and Cortreal." ROA p. 58, lines 12-13. Vicky said she was going to tell Spike, the victim's brother, that Isaac had been shot. ROA p. 64, lines 1-2. Brown was so upset she just went to her mother's house. ROA p. 64, lines 2-3. She herself made no identification of any perpetrator. Brown claimed that there was a "light tint" on the windows of the car. ROA p. 67, lines 16-18. It was dark up under the tree, five feet away from where the victim lay. ROA p. 68, lines 13-22.

Frederick Cox, the victim's brother, was in town at the North Conway Motor Inn. Vicky, Keisha and Kim came by. ROA p. 75, lines 14-24. They told him that his brother had just gotten shot and they had seen Treal (co-defendant) and Derrick Hollingsworth. ROA p. 77, line 22 – p. 78, line 7. He proceeded to the scene and saw his brother just laying there. ROA p. 78, lines 8-21.

On cross-examination, it came out that this witness had told the police that he had received the information the next day. ROA p. 84, line 9 – p. 85, line 3.¹ Cox only changed his testimony after he had talked to the solicitor:

Q. And you changed your testimony after speaking with Mr. Bellamy; isn't that correct?

¹ Of course, this would have taken the statement out of the "excited utterance" exception to the hearsay rule that made it inadmissible.

A. Yes, it was.

ROA p. 97, lines 9-11.

Sara Weaver claimed that she was at the scene and saw Cortreal Swinton and Derrick Hollingsworth shooting. She turned around and ran home. ROA p. 106, lines 5-18. On cross-examination, it was established that she had changed her story as to her vantage point from a previous statement given to the police. ROA p. 112, line 17 – p. 113, line 5. In fact, she admitted that she was standing at her mailbox and that it would be a two or three minute walk to the oak tree, which was the scene. ROA p. 114, lines 10-17. She also had a record for dishonesty. ROA p. 114, lines 18-22. In fact, if she were standing at the mailbox as she told the police originally, she could not have even seen the events:

Q. When you're standing at the mailbox at 1835, can you see accurately what's under the big oak tree? Yes or no?

A. No.

* * *

Q. Ms. Weaver, you stated that you were standing where the yellow mark is, the mailbox, and saw the shooting; is that correct?

A. That's what was on my first statement, yes, sir.

ROA p. 116, lines 7-10; ROA p. 117, lines 13-17.

Vicky Campbell claimed that she saw appellant shooting the victim, or at least that she had told Detective Sessions about this. ROA p. 136, line 7 – p. 137, line 22. Contrary to the testimony of the victim's brother, she denied telling him that Cortreal Swinton was one of the shooters. ROA p. 139, lines 15-23. She admitted that the car had a dark tint,

contrary to the prior testimony of Kim. ROA p. 141, lines 20-21. She also admitted that the people around the oak tree at the scene had hoods pulled up. ROA p. 144, lines 1-7.

Jailhouse snitch Howard testified that appellant had made an incriminating statement about the offense to him. ROA p. 161, lines 6-17. Howard had a long record for crimes of dishonesty. ROA p. 172, line 1 – p. 174, line 4. Also, the solicitor was hopefully going to write a letter to the parole board, indicating his cooperation. ROA p. 182, lines 4-15.

Keisha Smith, who was the driver of the automobile, testified for appellant. Contrary to the identification ascribed to her in the testimony above, she stated that she could not recognize who was there. They were wearing black and had hoods on. ROA p. 204, lines 16-24; ROA p. 209, lines 19-24. Thus, the factual basis upon which appellant was testified involved conflicting testimony, changed stories and deals with dishonest snitches.

There was no evidence in this record of any witness being threatened. However, during the solicitor's closing argument, he told the jury:

And who really wants to get up here after seeing somebody brutally executed, to have to come into court and testify against them. Ladies and gentlemen, you are the finders of facts and you may choose to find guilty and you may choose to find innocent. I'll tell you, when they leave that court house -- leave the witness chair and leave that court house, they have bulls eyes on them.

MR. MONCKTON: Objection, Your Honor.

THE COURT: What's your objection?

MR. MONCKTON: That the witnesses have been threatened, Your Honor.

THE COURT: He has not said that. Objection overruled.

ROA p. 246, lines 9-22. In view of the judge's ruling, the solicitor later argued forcefully to the jury:

Because, ladies and gentlemen, if you don't believe we haven't met out [sic] burden of proof they walk out of here. Guess who they get to see in the face again? That's powerful stuff. When you evaluate the credibility, look at -- think about that.

ROA p. 256, lines 9-13.

Counsel moved for a mistrial in view of the solicitor's argument, noting that there was no evidence of any threats in the record and that it was obviously improper to indicate that these witnesses had bulls eyes on them. ROA p. 257, line 21 – p. 258, line 8. The court refused any mistrial. ROA p. 258, line 9 – p. 259, line 2. Interestingly, while he ruled that the comment was not improper, he offered a curative instruction. ROA p. 259, lines 1-3. Furthermore, the court, while having ruled the matter was not improper, granted through lunch time to permit argument on the mistrial. ROA p. 259, lines 16-17. After further argument, the court denied a mistrial and offered to give a curative instruction, even though he did not think there was anything wrong with the argument. ROA p. 262, lines 1-21. Appellant stood on his objection and mistrial motion. ROA p. 262, line 22 – p. 263, line 10.

In *Mincey v. State*, 314 S.C. 355, 444 S.E.2d 510 (1994), the Supreme Court ruled, dispositively:

Counsel in a criminal case must confine themselves to the record in addressing the jury. *State v. Coleman*, 301 S.C. 47, 389 S.E.2d 659 (1990). References to threats or dangers to witnesses are improper unless evidence is offered connecting the defendant with the threats. *State v. Merriman*, 278 S.C. 74, 337 S.E.2d 218 (Ct. App. 1985). It would be a "prostitution of justice" to permit evidence that someone

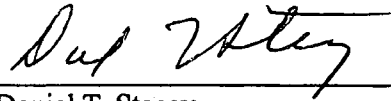
attempted to influence a witness by fear or fright without any evidence that connects the defendant with the tampering. *State v. Rogers*, 96 S.C. 350, 352, 80 S.E. 620, 621 (1914).

These holdings apply with equal force indeed, greater force in the instant record, because the evidence upon which appellant was convicted was conflicting and contradictory. The error cannot be harmless.

CONCLUSION

Appellant should receive a new trial.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Dan Stacey", written over a horizontal line.

Daniel T. Stacey
Chief Attorney

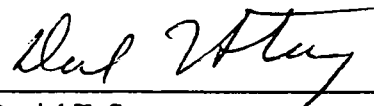
ATTORNEY FOR APPELLANT.

This 24th day of May, 2001.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 210(b), SCACR.

May 24th, 2001

A handwritten signature in cursive script, appearing to read "Dan Stacey", is written over a horizontal line.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

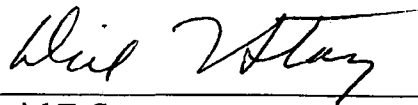
V.

DERRICK MARCELL HOLLINGSWORTH,

APPELLANT.

CERTIFICATE OF SERVICE

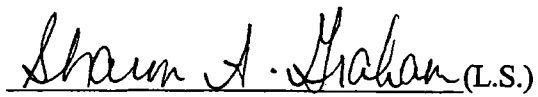
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William Edgar Salter, III, Esquire, this 24th day of May, 2001.



Daniel T. Stacey
Chief Attorney

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 24th day of May, 2001.


(L.S.)
Notary Public for South CarolinaMy Commission Expires: April 6, 2002.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Howard P. King, Circuit Court Judge

THE STATE,

Respondent,

v.

DERRICK MARCELL HOLLINGSWORTH,

Appellant.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the court erred when it permitted a solicitor's closing argument which went outside the record to indicate threats against state's witnesses, seriously prejudicing appellant?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

Has Appellant waived his claim that the trial judge erroneously denied his mistrial motion based upon the Assistant Solicitor's closing argument by refusing the trial judge's offer of a specific curative instruction? Alternatively, can Appellant show how the challenged argument so infected the trial with unfairness as to make the resulting conviction a denial of due process in light of the present record as well as the trial judge's charge that the jury's verdict had to be based upon evidence and that counsel's arguments did not have any evidentiary value?

STATEMENT OF THE CASE

The Horry County Grand Jury indicted Appellant¹ at the July 1999 term of court for murder, in connection with the killing of Isaac Lee Cox. (99-GS-26-1653). Cortreal Lemont Swinton (99-GS-26-1651) and Curtis Wilson, Jr. (2000-GS-26-442) were also indicted for murder in connection with Mr. Cox's death. Initially, the State planned to try all three defendants jointly. William H. Monckton, VI, Esquire, represented Appellant. William E. Chrisco, Esquire, represented Swinton and Kirk Truslow, Esquire, represented Wilson. The prosecution was represented by Fran Humphries and Howell Bellamy, of the Fifteenth Circuit Solicitor's Office.

On March 7 and 13-14, 2000, the Honorable Rodney A. Peeples conducted motions hearings. Each defendant was present and was represented by counsel. Although Judge Peeples had planned to try the case, he granted the State's motion for a continuance because of the inability to locate a crucial witness. The indictment against Wilson was *nolle prossed*.

On April 11-13, 2000, Appellant and Swinton were tried by the Honorable Howard P. King and a jury. Appellant's defense was predicated upon the State's inability to establish identity beyond a reasonable doubt. The judge instructed the jury on the State's burden to prove identity beyond a reasonable doubt and on accomplice liability. The jury found Appellant guilty as charged but acquitted Swinton. Appellant was sentenced to imprisonment for the balance of his natural life. A timely Notice of Appeal was served and filed. This appeal follows.

¹ Appellant also has a February 6, 1997, conviction for common law robbery. R. 298.

ARGUMENT

I.

Appellant has waived his claim that the trial judge erroneously denied his mistrial motion based upon the Assistant Solicitor's closing argument by refusing the trial judge's offer of a specific curative instruction. Alternatively, Appellant cannot show how the challenged argument so infected the trial with unfairness as to make the resulting conviction a denial of due process in light of the present record as well as the trial judge's charge that the jury's verdict had to be based upon evidence and that counsel's arguments did not have any evidentiary value.

Appellant contends that the trial judge erred by refusing his mistrial motion based upon the Solicitor's closing argument, which he contends went outside the record and indicated threats against prosecution witnesses. The State submits that Appellant has waived his right to complain about the denial of the mistrial motion because he refused the trial judge's offer to give a curative instruction which he was willing to allow Appellant to craft. Alternatively, the trial judge's ruling must be allowed to stand because Appellant cannot show that the Assistant Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process in light of the present record, including the trial judge's jury instructions that the jury's verdict must be based upon evidence and that counsel's arguments did not have any evidentiary value.

At the pre-trial motions hearings before Judge Peeples, Appellant asked the court to prohibit the State from referring to any possible threats made against prosecution witness

Sarah Weaver.² The State explained to the trial judge that one of its eyewitnesses, Ms. Weaver, had given at least two statements

which vary in terms of her vantage point. If pressed as to why there has been a change in her statement in terms of vantage points, she has indicated to the State that the reason she placed herself further away from the scene is because she had received threats from the family of Cortreal Swinton in regard to her participation or cooperation with law enforcement.

R. 2; 6; 9-10.

The State explained that Ms. Weaver would specify that the threats came from Mr. Swinton and his mother, as opposed to Appellant; and the State agreed to make Ms. Weaver available to counsel for both defendants. Furthermore, the State indicated that it had no intention to introduce evidence of any threats in this case-in-chief. Rather, the State only intended to introduce this evidence if either Appellant or his co-defendant opened the door by cross-examining her as to the differences between her trial testimony and her original statement. Judge Peeples indicated that he felt the evidence would be admissible if either defendant opened the door on cross-examination, but he declined to make a specific ruling *in limine*. R. 10-15; 16-18; 19-25. At subsequent pre-trial hearings before the trial judge, the parties informed the trial judge of what had occurred before Judge Peeples; but the State never made any effort to introduce evidence at trial that Ms. Weaver had been threatened by Swinton or his family. E.g., R. 27-29.

Although there was no evidence of any threats, the record clearly reflects that several eyewitnesses who lived in the Racepath community and knew the defendants were very

² His co-defendant, Wilson, made a similar motion. R. 6.

reluctant to testify and that some were admittedly scared to testify. Sarah Weaver lived in the area. She had known both defendants for three or four years but did not know the victim. She testified that she went back to the crime scene after the incident and spoke with a policeman. "I called him to the side because I was scared. I told him that I seen it but I wasn't going to talk there." **R. 107.**

Vicky Campbell, another eyewitness presented by the State, initially refused to testify and told prosecutors that they could put her in jail because she was not going to come in front of the defendants. **R. 124.** She changed her mind and did testify; but she was such a reluctant witness that the trial judge allowed the State to ask leading questions and cross-examine her with a prior custodial statement pursuant to Rule 611(a)(1), SCRE. **R. 131-32.** She testified that she was a Conway resident and that she knows Appellant and Swinton. She also knew the victim from school. She stated that she was there pursuant to a subpoena and against her will. **R. 133.** Appellant also elicited that she did not want to be in court. **R. 140-41.** In fact, she gave three different responses, in succession, as to whether she had told Detective Sessions that she saw Appellant and Swinton shoot and kill the victim when questioned on direct examination. Specifically she answered, "Yes -- Nope . . . I can't remember." **R. 136, ll. 13-23.** Further, Detective Sessions testified about her prior inconsistent statement in which she identified both Appellant and Swinton as the shooters. **Supp. R. 3-6.**

More importantly, one of Appellant's own witnesses, Lakeisha Smith, admitted on cross-examination that she was "just about scared to death to be [in court]" and she admitted that she did not tell the police what she had seen on the night of the shooting because "I was

scared to get involved.” R. 205-09. In closing argument, Appellant’s attorney vigorously assailed the State’s alleged failure to prove identity beyond a reasonable doubt and pointed out the various discrepancies between what the various witnesses had said, as well as discrepancies between the testimony of each witness and the witness’s prior custodial statement(s). R. 232-45. In the course of addressing the testimony from Vicky Campbell, Appellant’s counsel stated “no doubt in my mind, very reluctant witness, did not want to be here.” R. 236, ll. 9-10.

Against this backdrop, the Assistant Solicitor argued that Vicky Campbell, Kim Brown and Lakeisha Smith were all born and raised in Conway and that they had seen something which they had never seen before: they saw their friend, Isaac Cox, brutally killed before their eyes. R. 245-46. Then, he made comments which ultimately led to Appellant’s objection and the present argument:

The Racepath Community is not a good community. Sarah Weaver testified that she is ‘a street person. I know Cortreal Swinton and I know Derrick Hollingsworth for three or four years’ before the incident. Now what does that tell you? What can you infer from that? They’re all scared. No question they didn’t want to be here. They really didn’t want to have to take the witness stand and have to point the finger at these two defendants. They did want (sic) they did. And who really wants to get up here after seeing somebody brutally executed, to have to come into court and testify against them? Ladies and gentlemen, you are the finders of facts and you may choose to find guilty and you may choose to find innocent. I’ll tell you, when they leave that court house -- leave the witness chair and leave that court house, they have bulls eyes on them.

MR. MONCKTON: Objection, Your Honor.

THE COURT: What’s your objection.

MR. MONCKTON: That the witnesses have been threatened, Your Honor.

THE COURT: He has not said that. Objection overruled.

R. 246.

The Assistant Solicitor thereupon continued his argument by stressing that the prosecution witnesses did not have anything to gain by testifying.³ He asserted that the witnesses had testified for two reasons. First, they were subpoenaed and had to tell the truth when they testified. The other reason was because of the victim. He reiterated that the witnesses were scared, that they did not want to be in court and did not wish to testify. "It's a small community, . . . Cortreal Swinton, his family [,] they live on Hemingway Street. Derrick Hollingsworth. His family lives within the Racepath Community. So they've got to confront the family members of these two families. Think about that." R. 246-47. There was no objection to this portion of the argument.

After stating that the only question for the jury to resolve was that of identity and suggesting that the State had conclusively shown identity beyond a reasonable doubt, R. 247-55, the Assistant Solicitor concluded his argument by making the following comments, without objection:

Sarah Weaver identifies them at two different locations the same night. The point is she is a street person. She knows these two defendants. She's got everything to lose and nothing to gain. And when she walked out of the courthouse when she testified she's got a target on the front of her and she's got a target on the back of her. When you evaluate her credibility you need to think about somebody who puts themselves in a situation like this that's not advantageous to

³ He also again stressed Vicky Campbell's reluctance to testify.

them. They don't have to. If she could have gotten out of taking the stand she would. 'I don't know anything.' When Vicky Campbell got up on the stand it was like pulling teeth. She didn't want to talk. She didn't want to have to look these two individuals in the face. Because, ladies and gentlemen, if you don't believe we have[] met ou[r] burden of proof they walk out of here. Guess who they get to see in the face again? That's powerful stuff. When you evaluate the credibility, . . . think about that. It's not about vantage points. It's not about life. It's about who[m] you believe.

R. 255-56.

After the State's closing argument, Appellant moved for a mistrial based upon the absence in the record of any evidence that there had been a threat made to the witness. He explained that he had not objected the second time the Solicitor made the argument because the trial judge had overruled the first objection. **R. 257-58.** However, the trial judge observed that Appellant's only objection was that there was no evidence that the witness had been threatened. The trial judge explained that his ruling was based upon the fact that the State was not arguing that the witness had been threatened, but that the witness would have to potentially see the defendants or other witnesses in the future. "Target may not have been the best word but I can't say that it is improper." He then asked Appellant whether Appellant had a curative instruction that Appellant wished for the trial judge to give. Appellant asked for and was granted permission to think about the issue through the luncheon recess. **R. 258-59.**

After the luncheon recess, Appellant again renewed his mistrial motion but declined the offer to have the trial judge give a curative instruction in order to preserve the issue for

appeal.⁴ Counsel again explained that he had not objected to the remaining portions of the Solicitor's argument after the trial judge overruled his initial objection; and he again asserted that the only inference to be drawn from the Solicitor's comments was that the witness had been threatened. **R. 260-61.** The trial judge explained that there was evidence in the record about all of the people living in the same community; and that they would have to face the other witnesses, the defendants "and anybody else in the future." Still, he was willing to give a curative instruction if Appellant wanted one "to the effect that they should not in any way consider any intimidation or threats that may or may not have been referenced in the argument, or words to that effect. . . ." Although he did not view the argument as improper, he again offered to give a curative instruction, but Appellant refused his offer. **R. 262-63.**

Initially, the State submits that Appellant waived his right to complain about the State's closing argument because he refused the repeated offers by the trial judge to give a curative instruction (crafted by Appellant) because he deprived the trial judge of the opportunity to cure any prejudice inherent in the prosecution's argument. State v. Tucker, 324 S.C. 155, 169, 478 S.E.2d 260, 267 (1996) (defendant waived objection to prosecution's closing argument by refusing trial judge's offer of a curative instruction). Alternatively, the State submits that Appellant's argument must be rejected because he cannot show any prejudice based upon the present record. In State v. Tubbs, 333 S.C. 316, 321, 509 S.E.2d 815, 818 (1999), the Court held that:

Arguments must be confined to evidence in the record and reasonable inferences therefrom, although failure to do so will

⁴ He also mistakenly asserted that Judge Peebles had previously indicated that no evidence of threats could be made during the course of the trial. Swinton joined in the mistrial motion, but the trial judge ruled that Swinton's motion was not timely. **R. 260-61.**

not automatically result in reversal. State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997); State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). A new trial will not be granted unless the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L. Ed. 2d 431 (1974); accord State v. Hawkins, 292 S.C. [418,] 421, 357 S.E.2d [10,] 12 [(1987)]. '[I]t is not enough that the remarks were undesirable or even universally condemned.' Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L. Ed. 2d 144, 157 (1986).

(Emphasis in original and footnote omitted). See also Tucker, 324 S.C. at 169, 478 S.E.2d at 267-68.

Here, the Assistant Solicitor's closing argument was not that Appellant or his co-defendant had threatened any of the witnesses. Rather, as the trial judge properly observed, there was evidence in the record that the witnesses were reluctant or scared to testify and that they all lived in the same community. Also, they would have to go back into the community in which they lived and face the members thereof, including the two defendants and members of their families. Further, evidence was presented, without objection, that several witnesses were reluctant to testify and that several were scared to become involved in the case. Indeed, Appellant's closing argument pointed out that Vicky Campbell was a reluctant witness.

Therefore, although perhaps worded somewhat inartfully, the Assistant Solicitor's closing argument was based on evidence in the record and its reasonable inferences. He was merely attempting to emphasize that the prosecution's witnesses had nothing to gain by lying under oath because they would have to return to the small, closely-knit community where they lived and other members of the community would know that they had testified. See Donnelly, 416 U.S. at 647, 94 S.Ct. at 1873 ("a court should not lightly infer that a

prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, would draw that meaning from the plethora of less damaging interpretations"). See also State v. Garner, 14 S.W.3d 67, 76-77 (Mo. Ct. App. 1999) (prosecutor's closing argument that prosecution witnesses feared danger to their lives by testifying because this was a reasonable inference from the denial by two witnesses at trial of their previous statements implicating the defendant as well as the callous manner in which the defendant committed the murders; and, prosecutor's argument that a threat was implicit from the manner in which the murder was carried out did not constitute plain error); State v. Hinson, 341 N.C. 66, 73-74, 459 S.E.2d 261, 265-66 (1995) (prosecutor's closing argument that reason witness was reluctant to testify was fear of defendant, even if improper, was not so grossly improper as to warrant *sua sponte* action by trial judge, where witness testified that after murder he did not contact police for several days and he told the officer who came to interview him that he did not wish to testify; the evidence indicated that the defendant did not have any hesitation in killing complete strangers; he planned the killing for at least a day; and defendant made statement that he had been cheated in drug deal in the neighborhood where killing took place and was determined to seek revenge).

Nor does Mincey v. State, 314 S.C. 355, 444 S.E.2d 510 (1994), or State v. Rogers, 96 S.C. 350, 80 S.E. 620 (1914), require reversal. While the court in Mincey does state that "[r]eferences to threats or dangers to witnesses are improper unless evidence is offered connecting the defendant with the threats," Mincey, 314 S.C. at 358, 444 S.E.2d at 511, it is clear that this language was merely *dicta*. The main problem with the closing argument in Mincey was that the prosecutor not only attempted to argue intimidation of the witnesses

where there was no evidence of it, he relied upon the defendant's non-testimonial demeanor (i.e., his size) as proof thereof. Contra State v. Bellamy, 293 S.C. 103, 359 S.E.2d 63 (1987) ("It is best for the solicitor not to comment on the defendant's non-testimonial behavior"). Likewise, Rogers is not controlling because, here, there was no suggestion of any overt threat, whereas the State in Rogers introduced an unsigned letter, which was clearly intended as threatening and intimidating, although there was no evidence to connect the defendant to the letter.

Indeed, the present case is closely analogous to that before the Court in State v. New, 338 S.C. 313, 317-22, 526 S.E.2d 237, 239-41 (Ct. App. 1999), where the Court upheld the solicitor's argument that witness had nothing to gain but everything to lose in testifying against defendant because he would be known as a "rat" or a "snitch" when he returned to prison was based upon common knowledge as well as a reasonable inference from the evidence presented at trial; and, as such, was not improper. Surely, if the State had argued that these witnesses would be known as rats or snitches or that they would stick out like a sore thumb or a beacon, there could not be any serious contention of error. Id. Thus, the use of the challenged expression does not require reversal under Donnelly. See also State v. Caldwell, 300 S.C. 494, 505, 388 S.E.2d 816, 822 (1990) ("Solicitor's closing argument concerning the credibility of the State's witnesses based on the record and its reasonable inferences is not error").

Yet, Appellant still is not entitled to relief even if the Court finds that the Assistant Solicitor's argument was improper under Mincey and Rogers. Although the trial judge did not give a specific curative instruction, he charged the jurors at the outset of the trial that

it will be your duty to decide from the evidence what the facts are. You and you alone are the judges of the facts. . . The evidence will consist of testimony, documents and other things received into evidence as exhibits and any facts upon which the lawyers agree or which I may instruct you to accept. . . . Statements and arguments of the attorneys are not evidence. Questions and objections of the attorneys are not evidence and testimony that I instruct you to disregard is not evidence.

Supp. R. 1-2. He likewise instructed the jurors prior to closing arguments that

I will tell you now as I did at the beginning of this case that the arguments or statements or summations of counsel are not evidence in this case. They are simply the lawyer's views as to what they think the evidence shows. But the lawyers do have the right to address you now and to sum up and give you their views of what they think the evidence in this case shows. After they have done that I will then instruct you on the law . . . as it applies to the facts of this case as you may find those facts to be.

R. 218.

In light of these instructions, Appellant cannot show any prejudice resulting from the Assistant Solicitor's closing argument. Tucker, 324 S.C. at 169, 478 S.E.2d at 267. Also, he cannot show any prejudice since he failed to object to subsequent argument that was virtually identical to the comments of which he now complains. State v. Johnson, 298 S.C. 496, 497-98, 381 S.E.2d 732, 733 (1989) (erroneous admission of family court order, containing finding of physical abuse, was not prejudicial where defendant did not object to second order or letter which contained same information).

Further, Appellant's contention of prejudice ignores that the jury did not return a verdict against both defendants after brief deliberations. Rather, the jury began deliberating at 2:22 P.M. **R. 284, ll. 12-14.** Over four hours later and after again listening to testimony

of Ms. Brown and Ms. Campbell (R. 282, l. 18 - 283, l. 2), it announced that it had reached a unanimous verdict as to Swinton but could not agree as to Appellant. R. 287-89. Even after receiving an Allen charge,⁵ R. 290-92, the jury deliberated an additional forty-six minutes before returning a verdict against Appellant. R. 292; 294. Thus, the State's closing argument did not cause the jury to give thoughtful consideration to the evidence presented to it.

Finally, the State would note that any suggestion that Appellant was prejudiced by the closing argument ignores the overwhelming proof of guilt presented at trial. Frederick McDonald, the victim's cousin, testified that he was at his grandmother's house on the night of the murder, together with his girlfriend, Isaac Cox (the victim), the victim's brother Tony, and a woman named Valerie. After having a cookout, the group took a cab to the Exxon Express between 1:30 and 2:00 A.M. R. 34-37. As they were standing in the parking lot, Appellant rode up on his bicycle and circled them twice, staring at them. Appellant purchased two beers and left, heading down Racepath Avenue. After he left, McDonald's group went to the Save-Way across the street from the Exxon and the victim purchased a beer and potato chips. At that point, the victim became separated from the rest of the group and walked down Racepath Avenue. R. 37-41.

McDonald was startled by gunshots and ran down Racepath Avenue. He found the victim lying on the ground and the police were already present. The victim was taken to Conway Hospital and McDonald later went to the hospital. R. 41-43. Sometime between 3:00 and 6:00 A.M. that morning, McDonald and his brother were riding around Hemingway

⁵ Allen v. United States, 164 U.S. 492, 17 S.Ct. 754 (1896).

Street, trying to find who had shot their cousin. He saw Swinton and Appellant's other co-defendant, Curtis Wilson. When he made eye contact with them, they were stunned and "just broke out and run. They were shocked to see us." At the time he saw them, they were standing across the street from the home of Nora Jackson, who was a relative of Swinton. R. 43-48; 51-52.

Kim Brown testified that at the time of the shooting she was riding in the back seat of a car being driven by Lakeisha Smith and the group was traveling on Racepath Avenue towards Highway 378. Kim was in the back seat of the car, while Ms. Smith was driving and Vicky Campbell was sitting in the front passenger's seat. As Ms. Smith braked for the stop sign at the intersection of Racepath Avenue and Highway 378, Kim saw and heard three gunshots that came from a nearby oak tree. Vicky said, "Oh, I know who that is. That's Beady. I know who that was. That's S. A. and Cortreal." Kim explained that Beady was the victim's nickname and "S. A." was Appellant's nickname. Ms. Smith swerved to avoid getting hit by the bullets and stopped the car at Kim's insistence. Kim went back to the scene and an officer was already present. Kim stated that she had seen the victim and three other people. One person, whom she said was behind the oak tree, was approximately five feet six inches tall. The other two people who were "on the opposite of the curb" were much taller. These heights were consistent with the heights of Swinton (who is approximately five feet six inches tall), Appellant and Wilson. R. 53-63; 68-69; 71.

Kim testified that the car that she was in only had lightly tinted windows and that the headlights illuminated the immediate area. Although she could see the flashes from the gunshots, she could not see who the people were because it was too dark for her to discern

faces. Although Kim remained at the scene, Vicky told her that she and Lakeisha were going to tell the victim's brother, Frederick Cox, that "S. A." and "Cortreal" had shot the victim. R. 63-68; 72-74. Frederick Cox testified that he was at the North Conway Motor Inn with a woman when Vicky Campbell and Ms. Smith came to his room. They were upset and crying. They told him that his brother had just been shot on Racepath Avenue, and that they had seen "Treal [Swinton] pull[ed] the trigger first and they said they seen S. A. standing over him shooting." R. 74-75; 77-79.⁶

Vicky Campbell testified that when the vehicle passed the intersection of Racepath Avenue and Highway 378, she saw an altercation involving more than three people, but claimed that she could not remember how many. She also professed that she could not remember whether she told Detective Sessions in March 2000 that she had seen S. A. and Treal shoot and kill the victim. However, she admitted that she told Detective Sessions that she saw Appellant shoot the victim in the head after he was on the ground, and that she had seen Swinton standing in the area. All of the individuals involved in the altercation ran away after the shooting except for the victim. Appellant was last to run. R. 132-43.

She also described Swinton as the short person she had seen and Appellant and a third person as much taller than Swinton. She claimed that after they left the scene, she and Ms. Smith dropped off Kim. They then went to tell Frederick Cox that his brother had been shot. Yet, she claimed that she did not tell him who shot his brother. Although the individuals were wearing dark clothes with hoods, the lighting was "dim" and she could see

⁶ Appellant focuses on Cox's testimony on cross-examination in which he admitted that he had previously told the police on one occasion that the conversation with these three women occurred the day following the shooting. Appellant's argument, however, ignores that the substance of the statement concerning who committed the murder was consistent.

well enough to identify Appellant. **R. 132-43.** As discussed, Detective Sessions testified to Vicky's prior inconsistent statement in which she indicated that Treal (Swinton) and S. A. (Appellant) were the shooters. **Supp. R. 3-6.**

Sarah Weaver, a self-professed "street person," knew the victim by his name and face but did not know him because she had never seen him hanging out in the streets. However, she knew both Appellant and his co-defendant Swinton "[f]rom around the neighborhood" for approximately three or four years, and she was familiar with their voices. In the early morning hours of October 4, 1997, Weaver left her home on [REDACTED] and walked towards a local club known as B & B. However, she stopped at a point just past the City of Conway Police Substation. While she was there, she heard Appellant and Swinton arguing with someone. This argument escalated. "[T]he next thing I heard . . . was gunfire," and she saw Appellant and Swinton shooting. She immediately ran home. She testified that approximately ten minutes later she saw Appellant and Swinton run by her house real fast. Also, there was sufficient lighting for her to identify both men that morning. **R. 101-10; 115-16; 121-22.**

Appellant attacks the credibility of Weaver's testimony because she had previously given a statement indicating that she was at her mailbox at the time of the shooting, as opposed to near the police substation. However, the question before this Court is whether or not there was evidence of guilt, as opposed to whether or not this evidence was credible. Appellant's contention is best left for a jury argument, which he made. More importantly, it would be unfair for this Court to consider his argument in the present case because the *in*

limine proceedings reflect that Weaver had, in fact, been threatened by Swinton and his family and this was why she had changed her story.

Clarence Howard was serving a nine-year sentence at the time of trial because of his guilty plea to several charges of burglary in the second degree, grand larceny and receiving stolen goods. R. 172-73. He testified that he had a conversation with Appellant when the two men were being brought back to Horry County from Fulton County, Georgia, in September 1998.⁷ When asked why he was being brought back to Horry County, Appellant responded by asking Mr. Howard whether he had heard of a murder that happened on Racepath Avenue in Conway. Howard, however, said that he had never heard of such a murder. Appellant then asked when Howard had escaped and Howard told him in September 1997. Appellant said he would not have heard about the crime because it occurred in October. R. 150-56.

In a subsequent conversation while the two men were in the same holding cell at the J. Reuben Long Detention Center, Howard asked Appellant whether he was worried about the crime and whether the State had any evidence against him. Appellant responded that they did not. He also said that when he and his "homeboy had seen the guy on the phone, there wasn't nobody around when they shot him." Appellant further said that he was going to "bounce" as soon as bond was set, which Howard explained meant he was either going to leave the jail or leave the city. Finally, Appellant told Howard that the victim deserved to be shot because the victim had shot up "his people's house." R. 156-63.

⁷ Mr. Howard was being brought back because he had escaped from the J. Reuben Long Detention Center.

Therefore, Appellant cannot show any prejudice resulting from the Assistant Solicitor's closing argument based upon the present record, even assuming *arguendo* that the Assistant Solicitor's comments were improper. Tucker.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

CHARLES M. CONDON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

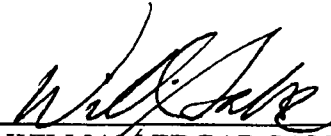
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By:



WILLIAM EDGAR SALTER, III

ATTORNEYS FOR RESPONDENT

June 15, 2001.

WES

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Horry County
Honorable Howard P. King, Circuit Court Judge

THE STATE,

Respondent,

vs.

DERRICK MARCELL HOLLINGSWORTH,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with SCACR 210(b).



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ATTORNEY FOR RESPONDENT

June 15, 2001.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Horry County
Honorable Howard P. King, Circuit Court Judge

THE STATE,

Respondent,

vs.

DERRICK MARCELL HOLLINGSWORTH,

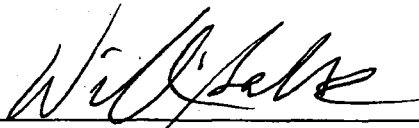
Appellant.

PROOF OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appellant by depositing three (3) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Daniel T. Stacey, Esquire, South Carolina Office of Appellate Defense, 1122 Lady Street, Suite 940, Columbia, South Carolina 29201.

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

This 15th day of June, 2001.


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ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Derrick Marcel Hollingsworth,

Appellant.

Appeal From Horry County
Howard P. King, Circuit Court Judge

Unpublished Opinion No. 2001-UP-504
Submitted September 19, 2001 - Filed November 15, 2001

AFFIRMED

Chief Attorney Daniel T. Stacey, of SC Office of
Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy
Attorney General John W. McIntosh, Assistant Deputy
Attorney General Donald J. Zelenka and Senior Assistant
Attorney General William Edgar Salter, III, all of
Columbia; and Solicitor J. Gregory Hembree, of
Conway, for respondent.

PER CURIAM: Derek Marcel Hollingsworth appeals from his

murder conviction.¹ Hollingsworth argues the trial judge erred in allowing the solicitor's closing argument to go outside of the record resulting in serious prejudice. We affirm this case pursuant to the Rule 220, SCACR, and the following authorities: City of Columbia v. Myers, 278 S.C. 288, 294 S.E.2d 787 (1982) ("Once an objection has been overruled, it is not necessary to make a motion for mistrial or new trial to preserve an error for appellate review."); State v. Woomer, 277 S.C. 170, 174, 284 S.E.2d 357, 359 (1981) (stating solicitors should confine their closing arguments to evidence in the record, tailoring comments to the evidence presented and its reasonable inferences); State v. New, 338 S.C. 313, 318, 526 S.E.2d 237, 240 (Ct. App. 1999) ("If a solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs.").

AFFIRMED.

HEARN, C.J., GOOLSBY and HUFF, JJ., concur.

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

Duplicate/ To Be "Clocked In

And Returned TO _____

Applicant/2002-CP-26-4025

STATE OF SOUTH CAROLINA

County of Horry

#265683

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

vs.

The State of South Carolina
Name of Respondent.

In the Court of Common Pleas

2002-CP-01-16

APPLICATION FOR
POST-CONVICTION RELIEFHorry County
02 JUL 16 AM 10:05
JENNIFER ROBERTS
CLERK OF COURTINSTRUCTIONS — 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 it clear to which question any such continued answer refers.

Since every application must be sworn to 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 applicant was convicted.

1. Place of detention Conway / Horry County
2. Name and location of Court which imposed sentence Court of General Sessions,
Conway South Carolina
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 99-GS-26-1653 Murder
 - (b) _____
 - (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) April 13, 2000 30 yrs / Life
 - (b) _____
 - (c) _____

CERTIFIED A TRUE
AND CORRECT COPY

Jennifer Roberts
Horry County Clerk of Court
BY A. Amels

MT

5. Check whether a finding of guilty was made

- (a) after a plea of guilty ✖ ✖ ✖ ✖
 (b) after a plea of not guilty _____
 (c) after a plea of nolo contendere _____

6. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

- i. South Carolina Court of Appeals
 ii. _____
 iii. _____

(b) the result in each such Court to which you appealed:

- i. Denied
 ii. _____
 iii. _____

(c) the date of each such result:

- i. November 19, 2001
 ii. _____
 iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

- i. ✖ ✖ ✖ ✖
 ii. _____
 iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

- (a) ✖ ✖ ✖ ✖
 (b) _____
 (c) _____

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) "Murder" Ineffective Assistance Counsel violated
 (b) Sixth Amend Rights - Deficients in Indictment
 (c) material Variance didn't alleged degree of Murder, via, due Proc

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

- (a) See attachments
 (b) See attachments
 (c) _____

11. 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 petitions in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? NO
- (d) any other petitions, motions or applications in this or any other Court?
NO

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

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

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

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

- i. N/A
- ii. _____
- iii. _____
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

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

- i. N/A
- ii. _____
- iii. _____

15. If any ground set forth in (9) 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) N/A
- (b) _____
- (c) _____

16. 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? Yes

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

- i. Daniel T. Stacey - South Carolina Office of Appellate Defense - 1122 Lady St, Suite 940 Columbia SC 29201-3243
- ii. Monckton Law Firm, PA (Mr. William H. Monckton, V.I.)
- iii. 1300 Professional Drive, Suite 102 Myrtle Beach South Carolina 29577

(b) the proceedings at which each such attorney represented you:

- i. Daniel T. Stacey - SC Appellate Court
- ii. Monckton - SC State Court, (trial)
- iii. _____

18. State clearly the relief you seek in filing this application.

That sentence and Conviction be vacated, or any other relief court deems just and Proper.

19. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA

County of Horry

VERIFICATION

I, Derrick Hollingsworth #265683, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Derrick Hollingsworth
Derrick Hollingsworth

SWORN to and subscribed before me this 1stday of July2002

[Signature] (L.S.)
 Notary Public

My Commission Expires: 08-06-2004

**APPLICATION TO PROCEED WITHOUT PREPAYMENT
 OF COSTS AND AFFIDAVIT
 IN SUPPORT THEREOF**

I, Derrick Hollingsworth #265683, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security therefor.

Derrick Hollingsworth
Derrick Hollingsworth
 Applicant

SWORN or affirmed to and subscribed before me this

1st day of July, 2002

[Signature]
 Notary Public

My Commission Expires 08-06-2004

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IN THE STATE OF SOUTH CAROLINA
Court of Common Pleas

Horry County, South Carolina
Case number:

15th Judicial Circuit

Derrick Hollingsworth - Applicant

VS.

STATE OF SOUTH CAROLINA

Respondent

ARGUMENT TO Application
For Post Conviction Relief

Submitted by.

S/Derrick Hollingsworth

Derrick Hollingsworth
E.C. I P.O. Box 29512-01
FI-194-A
Bennettsville, SC
29512

Submitted this 1 day of July 2002

Duplicate To Be Clocked In And Returned
To Applicant

HORRY COUNTY
02 JUL 16 PM 10:05
JEANNE J. ROBERTS
CLERK OF COURT

570

Derrick Hollingsworth # 265683
Evans Correctional Institution
P.O. Box 29512-02
FI-194-A
Bennettsville, SC 29512

HORRY COUNTY
02 JUL 16 AM 10:05
JEANNE J. ROBERTS
CLERK OF COURT

July 1, 2002

MS. Jeanne J. Roberts
- Clerk -
P.O. Box 677
Conway, SC 29528-0677

RE: MS. Roberts:

Enclosed is an argument to my Application, along with the certificate of Service, please file these documents with you office and return to me a copy stamped with the file date on them in the envelope.

Thank you for your assistance in this matter.

S/Derrick Hollingsworth
Derrick Hollingsworth

Derrick Hollingsworth #265683

Edans Correctional Institution

P.O. Box 29512-02

Bennettsville, SC. 29512

Monckton Law Firm, P.A.

1300 Professional Drive, Suite 102

Myrtle Beach, South Carolina 29577

RE: Argument to Application for PCR
Case NO.

Dear Mr. Monckton:

Enclosed is an Application with arguments for Post Conviction Relief, being filed with The Clerk of Horry County Court. I am allegeing ineffective assistance of counsel of your services, before and during my trial.

Date: July 1, 2002

STATE OF SOUTH CAROLINA) Court of Common
County of Horry) Pleas

Derrick Hollingsworth, #265683) 15th Judicial Circuit
VS. Applicant)

STATE OF SOUTH CAROLINA) Case NO.
Respondent.)

Memorandum of Law

In Support of Arguer

To Application for PCR

Brought Pursuant To

S.C. Code ANN. §

17-27-50, and the

Uniform PCR Act,

Comes now, Derrick Hollingsworth #265683 the
Applicant Seeking relief in this Honorable Court by
argument to original Application for Post Conviction Relief
(PCR) pursuant to S.C. Code ANN. § 17-27-50 and the
uniform PCR Act wherein it is required to bring forth all
grounds justifying relief before this Honorable Court.

The Applicant alleges that his rights to effective
assistance of counsel was violated at, and before

and these rights to effective assistance of counseling and
the process of law, before this court.

The reason Applicant reserves this right because
at this point pertaining to case without these
documents in clerk's file Applicant task in delineating
specific deficient performance by William H. Monckton, VI
and evidencing specific errors and omissions by attorney
Mr. Monckton completely, is not possible.

Sworn to and subscribed before me
this 1st day of July 2002
Oscar B. Smith
(Notary Public of South Carolina)
My Commission Expires 08-06-2009

Submitted by

S/ Derrick Hollingsworth
Derrick Hollingsworth

ARGUMENT

The Circuit Court Lacked Subject Matter Jurisdiction to absent Applicant's trial because of the deficients in the indictment for Murder. because of material variance in the indictment and testimony at the trial. the Counsel Mr. Monckton was ineffective to point out the deficients in indictment which denies Applicant Sixth Amendment rights.

On Jul 8, 99 the Horry County grandjury indicted the Applicant for Murder 16-3-20. The Applicant contends that the Circuit Court lacked Subject matter jurisdiction to enter or impose sentence, for the offense because of a variance in indictment, Applicant was not inform. of what degree of Murder he was being charge with.

The indictment in the instant case reads as follows:

The on the above date on Racepath Street in the City of Conway the Defendant and a Co-Defendant did shoot a victim Issac Lee Cox four times at point blank range. The injuries sustained caused death to the victim. The acts of the accused constitute the offense of Murder.

An indictment is sufficient to convey jurisdiction if it apprises the defendant of the elements of the offense intended to be charged and informs the defendant of the circumstances he must be prepared to defend. Granger v. State, 507 S.E. 2d 2322 (1998). In the instant case the indictment alleges that, the Applicant along with Co-Defendant, kill one Issac Lee Cox, by shooting, victim four times at point blank range, therefor causing victim death, Applicant was Charge with murder, the proof offerred at trial hearing denied, Applicant of a fear trial, by creating a material variance from the allegations in the indictment, and counsel failed to point out, what

rather First, Second, or manslaughter, thereby denying the applicant the opportunity to prepare for the circumstance presented at trial.

Without a prior indictment, the circuit court lacks subject matter jurisdiction to impose sentence for a crime. S.C. Code of Law § 17-19-10, S.C. Const. art. I § 11. an indictment is proper if it is sufficient in charging the elements of the offense, and is returned true-billed by the grand jury, or presentment is waived. State v. Beachum, 342 S.E. 2d 597 (1986). An indictment is sufficient in the charge if it contains the necessary elements of the offense, and give notice to the defendant of what he must be prepared to meet. State v. Smalls, 519 S.E. 2d 792 (1999). Hence, if the indictment fails to give sufficient notice to the defendant, the indictment sufficient, and the circuit court lacks authority to enter a conviction or impose sentence for a crime. Beachum v. Supra. Issue relating to the sufficiency.

Of the indictment are challenges to subject matter jurisdiction and may be raised at anytime, State v.

Funderburk, 191 S.E. 2d 520 (1972).

Thus, the Applicant may challenge the sufficiency of the indictment for the first time in this argument to his Application for Post Conviction Relief.

Instant case the indictment clearly alleges that Applicant along with Co-Defendant, did Murder one Issac Lee Cox, and it is equally clear theres a material variance in indictment by not specifying which degree from allegations made in the indictment.

In U.S. v Camps, 32 F.3d 102, 105 (4th Cir) (1994) the Court found a material variance prejudicial where government prove separate conspiracy from one charged in the indictment, cert. denied, 115 S.Ct. 1118 (1995). In instant case the state abscent Applicant trial for Murder Counsel ineffective to point out the deficient indictment to point out marterial variance indictment cause did alleged murder but not the degree.

The Applicant was denied fair proceeding due process, counsel's deficient performance, counsel was aware of such denial and did nothing to correct the situation, if not for counsel's deficient performance, the Applicant, would not have taken a trial, or may have receive less time for the charges. if he did, The outcome at the trial would have been differnt, the Applicant was denied his Sixth Amendment Right to the effective assistance of counsel.

Conclusion

The Applicant believes that since he was improperly indicted, he is entitled to a vacate of his sentence.

Submitted

S/ Derrick Hollingsworth
Derrick Hollingsworth

Also, Counsel Mr. Monckton, should have requested a Blair hearing before Applicant trial, this to denies Applicant Sixth Amendment rights due process which denies a fair proceeding. Applicant request sentence to once again be vacated by this Honorable Court.

The Applicant request this court to appoint counsel to represent him in this matter, appointed at earliest possible date. Surely better practice to counsel when requested without delay. Sanders v. South Carolina 296 F. Supp. 563 (D.S.C. 1969). The Applicant reserves right amend Application PCR pursuant to section §17-27-50 of S.C. Code Laws in order comply with Application Rule uniform PCR ACT. wherein Applicant required bring all grounds facts justifying relief before this Court.

Applicant, Derrick Hollingsworth contends his Counsel Mr. Monckton performance, the outcome of trial would have been different cause of

Applicant competency to stand trial, therefore Applicant request that his sentence and conviction be vacated, and any other relief^{the} court deems just and proper.

State v. Blair, 273 S.E. 2d 536 (1981)

Appellant Blair argues court erred in failing to conduct a Competency hearing pursuant to § 44-23-430. The state, contends Blair waived right by failing to request hearing, In similar case, United States Supreme Court found a sanity hearing cannot be waived.

Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.ed 2d 815 (1966) In Pate, the accused failed to demand a Sanity hearing. The hearing was provided by Illinois law. Supreme court found fact counsel placed accused's sanity in issue through out trial. Therefore, we found failure to request hearing did not waived right to such hearing.

STATE OF SOUTH CAROLINA

County of Horry

Derrick Hollingsworth
(Applicant)

Vs.

STATE OF SOUTH CAROLINA
(Respondent)Court of Common
Pleas15th Judicial Cir

Case No.

Certificate of
ServiceJEANNE J. ROBERTS
CLERK OF COURT
Horry County
02 JUL 16 AM 9:05

The undersigned, the Applicant, Certifies that he
has served a copy to his argument to Application PCR
with argument attached on the below listed parties by
depositing a copy of same in the United States mail address-
ed to below address, postage prepaid, on this 1st day of
July, 2002

MS. Jeann J. Roberts
Horry County Clerk of Court
P.O. Box 677
Conway, SC 29528-0677

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

2002-CP-26-4025

Derrick Hollingsworth, # 265683,

Applicant,

v.

State of South Carolina,

Respondent.

RETURN

The Respondent, making its Return to the application for Post-Conviction Relief (PCR) filed July 16, 2002, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. The Applicant was indicted at the July 1999 term of the Horry County Grand Jury for Murder (1999-GS-26-1653). He was represented by William H. Monckton, VI, Esquire. On April 11-13, 2000, the Applicant proceeded to trial after which he was found guilty of the charge. He was sentenced by the Honorable Howard P. King to confinement for a period of life.

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 conviction and sentence. State v. Hollingsworth, Op. No. 2001-UP-504 (S.C. Ct. App. filed November 15, 2001).

Attached herewith and incorporated herein by reference are the records of the Horry County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the Applicant's appellate records. Any of the above not so attached will be forwarded upon receipt.

II.

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

1. Ineffective assistance of counsel.
2. "Deficients in Indictment."

III.

The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Butler, Id. 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

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, Id. 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*. 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.

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

IV.

The Respondent interprets the Applicant's second allegation to be a claim that the trial court lacked subject matter jurisdiction. The Respondent submits that this is without merit. Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong. Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994). A review of the record clearly indicates that there is no basis upon which to conclude that the trial court lacked subject matter jurisdiction. Further, the Applicant's indictments are facially valid and proper.

An indictment is adequate and valid on its face if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent prosecution. State v. James, 472 S.E.2d 38 (S.C. 1996); State v. McIntire, 221 S.C. 504, 71 S.E.2d 410 (1952). The indictments in this case are facially valid because they contain all the necessary elements of the offenses intended to be charged, state the date of the offenses, and the name of the accused. The respondent moves for summary dismissal pursuant to South Carolina Code Ann. §17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that this allegation should be dismissed as a matter of law.

V.

The State therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the State moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VI.

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

VII.

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

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Assistant Deputy Attorney General

CHRISTOPHER L. NEWTON
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

August 26, 2004.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

)
) IN THE COURT OF COMMON PLEAS
)

2002-CP-26-4025

Derrick Hollingsworth, # 265683,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

FILED
Horry County
Clerk of Court
JAN 11 2006

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 16, 2002. The Respondent made its Return on August 26, 2004. An evidentiary hearing into the matter was convened on March 22, 2005, at the Horry County Courthouse. The Applicant was present at the hearing and was represented by Robert Gwin, II, Esquire. The Respondent was represented by Christopher L. Newton of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. William H. Monckton, VI, Esquire, testified for the State. This Court also had before it the records of the Horry County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. The Applicant was indicted at the July 1999 term of the Horry County Grand Jury for Murder (1999-GS-26-1653). He was represented by William H. Monckton, VI, Esquire. On April 11-13,

2000, the Applicant proceeded to trial after which he was found guilty of the charge. He was sentenced by the Honorable Howard P. King to confinement for a period of life.

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 conviction and sentence. State v. Hollingsworth, Op. No. 2001-UP-504 (S.C. Ct. App. filed November 15, 2001).

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

1. Ineffective assistance of counsel; and,
2. Lack of subject matter jurisdiction.

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 (1985).

During the evidentiary hearing, the Applicant testified that he could not recall viewing the discovery in the case. He stated that he told his trial counsel that he was innocent and that he wanted to testify in his own defense. The Applicant further testified that he told his trial counsel that he had an alibi witness who did not testify, one Michelle Skipper. He also claimed that he told his trial counsel that he wished to get any tapes in the case, but was told no tapes were available. The Applicant alleged as well that he believed he should have had a psychiatric evaluation prior to his trial, although he admitted there was no reason to believe that he was mentally ill or incompetent. The Applicant claimed in addition that the indictment in his case was defective for failing to allege

the degree of murder and other elements.

Trial counsel William H. Monckton, VI, testified that he had met with the Applicant several times and had discussed all of the discovery in the case with him. Monckton stated that he did interview the alibi witness, but she refused to testify after the Solicitor told her he would prosecute her for perjury if she lied under oath. Monckton further testified that he had no tapes, and that he had no reason to obtain a mental evaluation of the Applicant. Monckton recommended that the Applicant not testify due to his temper, his prior record, and his poor performance during test cross-examinations; the Applicant agreed with him, according to Monckton. Trial counsel Monckton stated as well that he had cross-examined the witnesses on their inconsistent statements. Unfortunately, Monckton noted, there were about three eyewitnesses to the incident, and the Applicant was positively identified as one of the shooters by at least one of the eyewitnesses.

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 811 (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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Courts use a two-pronged test 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, 385 S.E.2d at 625, citing Strickland. 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.

This Court does not find the Applicant's testimony to be credible on the issues in this case. Trial counsel's testimony is found credible. This Court finds that trial counsel did meet sufficiently with the Applicant and discussed the case with him thoroughly. Trial counsel articulated a valid strategic reason for recommending that the Applicant not testify, namely the Applicant's prior record and his poor performance under test cross-examination. This Court notes that the Applicant elected not to testify after consultation with his counsel. Trans. p. 422, ll. 2-23. Trial counsel met with the Applicant's alleged alibi witness, and she refused to testify because of the threat of perjury charges should she lie under oath. Trial counsel thoroughly cross-examined all the witnesses and pointed out various inconsistencies in their testimony and statements. The Applicant has not shown any credible evidence to support the existence of any tapes in this case.

Given the above findings, the Applicant has failed to carry his burden of proof in this case. Trial counsel's performance did not fall below reasonable professional standards. Further, the Applicant suffered no prejudice as a result of the alleged errors. There is no reasonable probability that the result of the trial would have been different but for the alleged errors. Further, this Court specifically finds a valid and reasonable trial strategy on the part of trial counsel regarding the Applicant's decision to testify or not to testify. That recommendation by counsel cannot therefore be deemed ineffective. See Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992).

The Applicant's claim that the trial court lacked subject matter jurisdiction due to defects in the indictment is without merit. Subject matter jurisdiction is the power of a court to hear a particular class of cases, and it has nothing to do with the indictment document. See State v. Gentry, Op. No. 25949, 2005 WL 524813 (S.C.); Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994). An Applicant may challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), *overruled in part by Gentry, supra*. However, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." Gentry, supra, *4; See also S.C. Const. Art. V, § 7. Therefore, the indictment could not affect the court's subject matter jurisdiction at all. First, this Court notes that South Carolina does not recognize degrees of murder. Second, the indictment, even if a timely and proper objection had been raised to its sufficiency, is sufficient on its face. A murder indictment is legally sufficient when it alleges time and place, along with a plain statement of the manner in which the death of the victim occurred and charges that the accused did "feloniously, wilfully and of his malice aforethought" proximately cause the death of the victim. S.C. Code § 17-19-30 (2003). See also Winns v. State, 2004 WL 3250294 (S.C.); Joseph v. State, 351 S.C. 551, 571 S.E.2d 280 (2002). As with all indictments, an indictment for murder must be viewed with a "practical eye" in light of the surrounding circumstances to ascertain whether it fulfills its functions: to notify the accused of the charge he must answer, notify the court of what judgement and sentence to pronounce, and present a bar to subsequent prosecution. See State v. Gentry, Op. No. 25949, 2005 WL 524813 (S.C.). The indictment here mirrors the language of S.C. Code Ann. § 17-19-30 and more than sufficiently meets the requirements for a murder indictment therein.

CONCLUSION

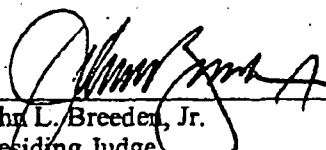
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court advises Applicant that he must file and serve a notice of intent to appeal within thirty (30) days from the receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. His attention is also directed to South Carolina Appellate Court Rule 227 for appropriate procedures after notice has been timely 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 24 day of May, 2006.


John L. Breeden, Jr.
Presiding Judge
Fifteenth Judicial Circuit

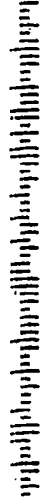
Crimm, South Carolina.

Daniel Hunnicutt, Esq.
PO Box 1735
Conway, SC, 29526



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

29211133030



FORM 5

STATE OF SOUTH CAROLINA)

County of Horry)

IN THE COURT OF COMMON PLEAS

2011-2843

Derrick M. Hollingsworth #265583

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

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (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 Lieber Corr. Inst., P.O. Box 205 EA-40
Ridgeville, SC. 29472
2. Name and location of Court which imposed sentence Horry County
General Sessions
3. Name(s) of co-defendant(s) (if any) Cortez L. Swinton, Curtis Wilson, Jr
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 99-GS-26-1653 (murder)

2011 MAR 29 AM 8:51
HELANE HUGGINS, WARD
CLERK OF COURT

HORRY COUNTY

- (b) _____
- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) April 13, 2000 (30 years/life)
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty trial jury
- (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. South Carolina 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. November 19, 2001
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. unknown
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) n/a

- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) ineffective assistance of counsel:
- (b) denial of 6th & 14th amendments U.S. Const.
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) actual innocence; mere presence; counsel failed to
- (b) investigate; counsel didn't put up any defense and
- (c) as a result I was denied a fair trial.
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. n/a
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. n/a
- ii. _____
- iii. _____

iv. _____

(c) the disposition thereof:

i. n/a

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. n/a

ii. _____

iii. _____

iv. _____

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

i. n/a

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 : first pcr

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

(a) which grounds have been presented:

i. n/a

ii. _____

iii. _____

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

i. n/a

ii. _____

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) first pcr was filed but haven't received any notice
- (b) _____
- (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? yes
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. William H. Monckton VI., esquire
1300 Professional Drive; Suite 102, Myrtle Beach
- ii. same as above
- iii. Daniel T. Stacy, esquire
S.C. Appellate Defense
- (b) the proceedings at which each such attorney represented you:
- i. trial / sentencing
- ii. appeal
- iii. Robert H. Gwin III, PCR Hearing

2011-2843

19. State clearly the relief you seek in filing this application:

vacate sentence and conviction; or whatever relief this
court deems appropriate

20. Are you now under sentence from any other court that you have not challenged?

no

Revised 3/2003

STATE OF SOUTH CAROLINA)

VERIFICATION

County of Dorchester)

I, Derrick Hollingsworth, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Derrick Hollingsworth

SWORN to and subscribed before me this 3rd
 day of February, 2011.

Quedeen Bryant (L.S.)
 Notary Public

My Commission Expires: May 26, 2010

FILED
 2011 MAR 29 AM 8:51
 MELANIE HUGGINS-WARD
 CLERK OF COURT

2011, 2843

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Derrick Hollingsworth, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Derrick Hollingsworth
Applicant

SWORN or affirmed to and subscribed before me this
3rd day of February, 2011.

Ludiean Bryant
Notary Public

My Commission Expires: May 26, 2020

FILED
JOY COUNTY
2011 MAR 29 AM 8:51
MELANIE HUGGINS-WARD
CLERK OF COURT

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Derrick M. Hollingsworth, # 265683,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

2011-CP-26-2843

RETURN AND MOTION TO DISMISS
(Successive and Statute of Limitations)

Respondent, making its Return and Motion to Dismiss to the Application for post-conviction relief filed March 29, 2011, by Derrick M. Hollingsworth, would respectfully show this Court:

I. – Procedural History

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to a conviction from Horry County. The Applicant was indicted in July 1999 for the murder of Isaac Lee Cox (1999-GS-26-1653). The Applicant was represented by William H. Monckton, VI, Esquire. He was tried before the Honorable Howard P. King, and the jury convicted him on April 13, 2000. He was sentenced to life imprisonment. A notice of appeal was timely filed, and Daniel T. Stacey, Esquire, represented the Applicant on appeal. The conviction was affirmed by the South Carolina Court of Appeals on November 19, 2001 (2001-UP-504).

Mr. Hollingsworth filed his first PCR Application on July 16, 2002 (2002-CP-26-4025). A hearing was held on January 20, 2005, before the Honorable John L. Breeden, Jr. The Applicant was represented by Robert H. Gwin, III, Esquire. Judge Breeden denied post-conviction relief by Order dated May 24, 2006.

Incorporated herein by reference are the records of the Horry County Clerk of Court regarding the conviction, the Applicant's direct appeal records, and the Applicant's prior post-conviction relief file (2002-CP-26-4025). Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II. -Current Allegations

In his current Application, Mr. Hollingsworth raises the following allegation(s):

1. Ineffective assistance of counsel:
 - a. Actual innocence;
 - b. Mere presence;
 - c. Counsel failed to investigate;
 - d. Counsel did not put up any defense and as a result Applicant was denied a fair trial; and
2. Denial of 6th and 14th Amendments, U.S. Constitution.

The Applicant states he is seeking vacation of his sentence and conviction or whatever relief the court deems appropriate.

III. - The Application is Procedurally Barred

First, the Application must be summarily dismissed because it is impermissibly successive. The Uniform Post Conviction Procedure Act provides that:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

S.C. Code Ann. § 17-27-90 (2003). Successive applications are disfavored and the burden is on Applicant to establish that he *could not have raised* any ground raised in a subsequent

application in a previous application. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981) (emphasis added). The Applicant in this case could have raised these allegations in his previous application for PCR; therefore, he cannot raise them now in a successive application. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice v. State, *supra*; see also Graham v. State, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008). Therefore, this Application must be dismissed as impermissibly successive.

In addition, the Application must be dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160 (Supp. 2003). S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations applies to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant in this case was convicted on April 13, 2000, and his direct appeal concluded in November 2001. However, this Application was not filed until March 29, 2011, approximately 10 years later. Therefore, it must be dismissed as barred by the statute of limitations.

A motion for summary judgment may properly be used to raise a statute of limitations defense. See RWE Nukem Corp. v. ENSR Corp., 73 S.C. 190, 194, 644 S.E.2d 730, 732 (2007). In addition, S.C. Code Ann. § 17-27-70(c) (2003) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, the Respondent requests that this Court summarily dismiss the Application for post conviction relief for the reasons discussed above.

IV.

Each and every allegation, statement, or claim contained within the Application not expressly admitted, qualified, or explained is hereby DENIED.

V.

WHEREFORE, having made its Return and Motion to Dismiss, Respondent requests that the Application be summarily dismissed:

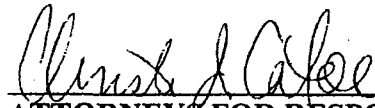
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

CHRISTINA J. CATOE
Assistant Attorney General



ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

April 19, 2011

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY }

COURT OF COMMON PLEAS

DERRICK M. HOLLINGSWORTH)
265683

PETITIONER,)

v.)

TRANSCRIPT OF RECORD
11-CP-26-2843

STATE OF SOUTH CAROLINA,)

RESPONDENT.)

August 28, 2013
Conway, South Carolina

BEFORE :

THE HONORABLE J. CORDELL MADDOX, JR., JUDGE

APPEARANCES:

DANIEL HUNNICUTT, ESQ.
Attorney for the Petitioner

JOSHUA THOMAS, ESQ.
Attorney for Respondent

FRANCES BAKIS-RAY, RPR
Circuit Court Reporter

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EXHIBITS**DEFENDANT'S:**

No.	Description	I.D./EVD
1	Letter	14/14
2	Letter	17/17
3	Letter	20/20

1 THE COURT: This is Derrick Hollingsworth
2 versus the State of South Carolina.

3 MR. THOMAS: That's correct, Your Honor.
4 It's case number 2011-CP-26-284. he was indicted in
5 July 1999 for murder. He was represented on that
6 charge by William Monckton. He went to trial
7 April 11th through 13th, 2000. He was convicted of
8 murder. The Honorable Howard P. King sentenced him
9 to life in prison without parole. He filed an
10 appeal, Daniel T. Stacey of the Office of Appellate
11 Defense. I believe that went to a full briefing.
12 The Court of Appeals affirmed his conviction in an
13 unpublished opinion 2001-UP-504. He filed his first
14 PCR action on July 16th, 2002. He was represented
15 in that PCR by Robert H. Gwin. The Honorable John
16 L. Breeden, Jr., held a hearing on that and issued
17 an order denying his PCR on May 24th, 2006. This
18 PCR was filed, the present one — it's the second
19 one — was filed March 29th, 2011. It's basically
20 an Austin appeal.

21 We initially filed a response and motion
22 to dismiss. Judge John signed a conditional order
23 of dismissal on July 14th, 2011. At that point
24 Mr. Hollingsworth sent a reply to conditional order
25 raising Austin claim so we subsequently set it for a

1 hearing. He's present, he's present in court today,
2 he's represented by Daniel Hunnicutt and the State
3 would make a motion now to dismiss the application
4 as untimely and barred by the doctrine of laches and
5 successive.

6 THE COURT: Okay. Yes, sir, I'll be happy
7 to hear from you. On the face of it it sounds like
8 it may be barred, but I'll be happy to hear anything
9 you want to tell me.

10 MR. HUNNICUTT: Well, Your Honor, it
11 appears that my client was never informed that his
12 PCR application had been dismissed on the first,
13 after the first hearing. He was never served with a
14 copy of the order. He was never told that he had a
15 right to appeal, and of course, an appeal was never
16 filed. He informed me that he wrote letters to
17 everybody he could think of, including his counsel,
18 the court, trying to find out what the status of his
19 PCR was; and he never was able to find out until
20 2011 when, you know, when he filed this instant PCR
21 action. There's no doubt that his previous PCR
22 counsel did not file a notice of appeal. And as the
23 Austin case states, he does have a right to have his
24 appellate issues briefed and presented by his PCR
25 counsel. And so, you know, as far as any laches

1 argument, I would argue that any prejudice to the
2 State, you know, my client is at least as prejudiced
3 as they are by the loss of the hearing transcript
4 and —

5 THE COURT: Is it something that I can
6 order a delayed appeal on? I've done that before.

7 MR. THOMAS: Your Honor, our position
8 would be that it's even the Austin appeal is barred
9 by the doctrine of laches, and I can put his counsel
10 up and get a little testimony on this but. He's at
11 least, you know, the hearing was in 2005. The order
12 was issued in 2009. I have a letter from the court
13 reporter that the transcript has been destroyed from
14 that hearing. And I have, you know, I can put his
15 PCR counsel up and we can get a little testimony on.
16 He's communicated with them and there's — our
17 position will be that he was informed of the right
18 to appeal and never asked for one.

19 THE COURT: Okay. Why don't we at least
20 make a record, then I'll figure out what to do with
21 it, okay. Well, I'll tell you what, why don't you,
22 I want you to call him and let him — we'll make a
23 full record, but you don't need to go too deep to
24 it. My main issue right now is not any grounds for
25 a PCR but any notice he had so I can deal with that

PW - D. HOLLINGSWORTH - DIRECT

1 issue.

2 MR. HUNNICUTT: Yes, sir, we would call
3 the defendant up.

4 THE COURT: Come on up, sir.

5 THE CLERK: Place your left hand on the
6 Bible, raise your right hand.

7 WHEREUPON,

8 **DERRICK M. HOLLINGSWORTH,**
9 having been duly sworn by the Clerk, testified as
10 follows:

11 THE CLERK: Have a seat. State your first
12 and last name for the Court.

13 THE WITNESS: Derrick Marsell
14 Hollingsworth.

15 **DIRECT EXAMINATION**

16 BY MR. HUNNICUTT:

17 Q Mr. Hollingsworth, you remember your original PCR
18 hearing back in 2005?

19 A Yes, sir.

20 Q And your attorney was Mr. Gwin; is that correct?

21 A Yes, sir.

22 Q Now after the hearing, after the PCR hearing did
23 you have any further meetings with Mr. Gwin?

24 A Yeah, he said he'll get right on my appeal, the
25 form was filed, you know what I'm saying, they were

PW - D. HOLLINGSWORTH - DIRECT

1 denied. And they said they'd get right on my
2 appeal. He said him and — well, him and Willie
3 Monckton did the same thing. He said as soon as it
4 be denied or guilty, whatever, they'd get right on
5 my appeal. And then I had wrote him, I mean, after
6 like some months, probably like six to eight months
7 after that I ain't hear nothing, ain't hear nothing.
8 I wrote the clerk of court, I ain't hear nothing.
9 Then finally I heard something. In 2011 said I was
10 denied.

11 Q So at the first hearing the judge did not make a
12 ruling at the time; is that correct?

13 A No, he didn't make a ruling.

14 Q And so did Mr. Gwin ever inform you that your
15 original PCR application had been denied?

16 A No, I never heard until 2011.

17 Q Okay. Did you write to him to ask the status of
18 your case?

19 A Yeah, he been the first one I wrote and he said
20 he hasn't heard nothing yet.

21 Q How many times did you write to him?

22 A About two times.

23 Q Okay. And he always told you that he had not
24 heard anything?

25 A He ain't heard nothing yet.

PW - D. HOLLINGSWORTH - DIRECT

1 Q Who else did write you to?

2 A I wrote, I mean, Jennie Roberts was the clerk of
3 court at the time. She wrote me, she said she would
4 get with my, wrote Judge Breeden. He was the PCR
5 judge then. I wrote Jennie Roberts. Then finally
6 said that Jennie Roberts ain't been the clerk of
7 court anymore. It been, it been — no, it wasn't,
8 it was Huggins. It was Huggins first, then it been
9 Jennie Roberts, and she finally said it been denied
10 in it's 2006. That's when I finally realized, you
11 know what I'm saying, it was denied.

12 Q And so you never received any notice that your
13 PCR had been denied until 2011?

14 A No, I never had no paperwork until 2011.

15 Q And were you ever advised of your right to appeal
16 your PCR denial?

17 A Well, he said he was going to appeal it. I mean,
18 I figured he was going to appeal it. I didn't, I
19 mean, I ain't know how to do it, you know what I'm
20 saying, I ain't know nothing about it. He just said
21 that, you know what I'm saying, I will appeal it.
22 If it's denied I would appeal it, you know what I'm
23 saying, as soon as it was denied. And that was it.

24 Q And if you had known that your original PCR
25 application had been dismissed would you have filed

PW - D. HOLLINGSWORTH - CROSS

1 an appeal?

2 A Yeah, I'm gonna fight this till the end. I know
3 I ain't did it so I'm fighting till the end. I
4 ain't gonna give up my appeal.

5 Q And if you had realized that Mr. Gwin had never
6 filed a notice of appeal would you have done so
7 sooner?

8 A Yeah, I would have did it, yeah, on the time
9 limit. Yeah, I would have did it.

10 Q Thank you.

11 MR. HUNNICUTT: Nothing further, Your
12 Honor.

13 THE COURT: Okay.

14 Yes, sir, any questions?

15 MR. THOMAS: Just briefly.

16 **CROSS-EXAMINATION**

17 BY MR. THOMAS:

18 Q You said you wrote two letters to Mr. Gwin; is
19 that correct?

20 A Yeah, at least two.

21 Q At least two. Do you remember the dates of those
22 letters?

23 A Well, I know it was before 2011, I know that. I
24 know I had wrote him before it was denied in '06. I
25 know I wrote him another note. I should have got a

PW - D. HOLLINGSWORTH - CROSS

1 letter back saying it was denied and not the clerk
2 of court telling me it was denied in 2011.

3 Q So you wrote him a letter in 2006?

4 A 2006, that's when I wrote. About 7 or 8 months
5 after, you know what I mean, after I had went.

6 Q And then did he send you a reply to that letter?

7 A He say he ain't get no word on it, he ain't heard
8 any word on it, not yet. They ain't make a ruling
9 yet whatever, and I mean. And I wrote again. I
10 don't know if he actually wrote me back on the
11 second one.

12 Q Do you remember when the second letter was?

13 A It was probably a couple, about a year, maybe two
14 later.

15 Q And did he write you anything back on that one?

16 A I don't — I'm not for sure if he wrote me on
17 that one.

18 Q Did you ever send him a letter requesting a copy
19 of your file from your PCR?

20 A Yeah, I believe I did and he send — I end up
21 getting the same stuff. I end up getting — I had
22 did get the, only thing, I think I end up getting
23 the same little paperwork that I been getting. The
24 transcript, the trial transcript, I end up getting
25 that again, all loose papers. That was about it.

PW - D. HOLLINGSWORTH - CROSS

1 Q Did that, did that response, that packet of
2 information he sent you, did it contain a copy of
3 the order dismissing your PCR?

4 A I never got one. I never got one.

5 Q If you had gotten one would you have written him
6 something back saying, I would like for you to
7 appeal that order?

8 A Yeah, of course, but I would wonder why — I just
9 had wonder why he had sent me a 2000 page package
10 with a denial in it. Why wouldn't it just be one
11 piece of paper saying deny it.

12 Q Thank you. I have no further questions.?

13 MR. HUNNICUTT: Nothing further, Your
14 Honor.

15 THE COURT: Okay. Thank you, sir. You
16 can step down.

17 Anything else?

18 MR. HUNNICUTT: No, Your Honor.

19 THE COURT: Okay. Yes, sir.

20 MR. THOMAS: I would call Robert Gwin to
21 the stand.

22 WHEREUPON,

23 **ROBERT H. GWIN, III,**
24 having been duly sworn by the Clerk, testified as
25 follows:

RW - R. GWIN - DIRECT

1 THE CLERK: Have a seat. State your name
2 for the Court please.

3 THE WITNESS: Robert H. Gwin, III.

4 **DIRECT EXAMINATION**

5 BY MR. THOMAS:

6 Q Good morning, Mr. Gwin. Do you remember
7 Mr. Hollingsworth's first PCR?

8 A Yes, I do.

9 Q Do you remember the outcome of that PCR?

10 A Yes, I do.

11 Q Did you receive a copy of the judge's final
12 letter or final order in that matter?

13 A Yes, I did.

14 Q And what did that, what was his final decision?

15 A They denied his application for post-conviction
16 relief.

17 Q Did you have an opportunity to discuss with Mr.
18 Hollingsworth prior to that order being issued his
19 appellate rights?

20 A At the conclusion of the hearing I met with Mr.
21 Hollingsworth briefly to tell him that he would
22 have — if he disagreed with the judge's ruling
23 'cause I don't think the judge ruled from the Bench.
24 I think he said he took it under advisement. I told
25 him that if he disagreed with the judge's ruling he

RW - R. GWIN - DIRECT

1 would have the right to appeal, but he had to appeal
2 within 30 days after receipt of the order.

3 Q And do you recall -- I think he testified that
4 you met with him after his PCR hearing. Do you
5 recall meeting with him after the PCR hearing to
6 discuss that?

7 A It's normally, I mean, as a standard procedure --
8 do I have specific recollection of meeting with him,
9 no. But typically when I represented applicants in
10 the past I meet with them and discuss what went on,
11 what my thoughts were, and again, their right to
12 appeal.

13 Q And when you received a copy of the final order
14 do you recall sending a copy or informing
15 Mr. Hollingsworth of the judge's decision?

16 A I don't recall sending him a copy when I received
17 the order.

18 Q And he said he sent you some other correspondence
19 after the hearing. Do you recall receiving any
20 correspondence from him?

21 A The only correspondence I recall receiving from
22 him was a letter in January of 2007.

23 MR. THOMAS: Beg the Court's indulgence
24 one second.

25 THE COURT: Okay.

RW - R. GWIN - DIRECT

1 MR. THOMAS: May I approach the witness,
2 Your Honor.

3 THE COURT: Sure.

4 BY MR. THOMAS:

5 Q Do you recognize this letter?

6 A Yes, sir, I do.

7 Q And do you have a copy of it in front of you?

8 A Yes, I do.

9 Q And what is this letter?

10 A This is the letter that I received from Mr.
11 Hollingsworth.

12 Q And in this letter what is he asking for?

13 A He is asking for a complete and unabridged case
14 file in his case, all motions, briefs, court orders,
15 all transcripts, and whatnot.

16 MR. THOMAS: At this time, Your Honor, I'd
17 like to ask that we move in a copy of this letter as
18 Respondent's Exhibit Number 1.

19 THE COURT: All right. Any objection?

20 MR. HUNNICUTT: No objection.

21 THE COURT: Without objection.

22 (WHEREUPON, Defendant Exhibit No. 1 was
23 marked for identification and received
24 into evidence.)

25 BY MR. THOMAS:

RW - R. GWIN - DIRECT

1 Q And in response to that January 2007 letter did
2 you — what did you do?

3 A I had the secretary gather copies of the file,
4 make copies of the file, and sent it to him pursuant
5 to his request.

6 Q And what would have been in that, do you — well,
7 let me ask it this way a little more directly.

8 Would you have sent him, would have had a copy of
9 the order of dismissal in that file?

10 A Yes, there was a copy of the order of dismissal
11 in the file and that was sent to him at that time.

12 MR. THOMAS: And may I approach the
13 witness, Your Honor?

14 THE COURT: Sure.

15 BY MR. THOMAS:

16 Q I'm gonna show you this. Do you recognize this
17 letter?

18 A Yes, I do.

19 Q And you've got a copy of it in front of you?

20 A Yes, I do.

21 Q What is this letter?

22 A This is my response to his request dated
23 January 25th, 2007.

24 Q And what's the date of this letter?

25 A February 13th, 2007.

RW - R. GWIN - DIRECT

1 Q And what specifically, number four in this
2 letter, what does that — what does this letter say
3 you included with it?

4 A The order of dismissal dated May 24th, 2006.

5 MR. THOMAS: Your Honor, at this time I'd
6 move to have this letter Mr. Gwin's provided
7 introduced as Respondent's Exhibit Number 2.

8 MR. HUNNICUTT: Your Honor, apparently the
9 letter is not a signed copy. I would object to it
10 without a signed copy of it.

11 THE COURT: Yeah, if you would.

12 BY MR. THOMAS:

13 Q Have you reviewed the letter that's in front of
14 you?

15 A Yes, sir, I have.

16 Q Is it substan— is it exactly the same as the
17 letter you would have sent a signed copy of?

18 A It's exactly the copy that I did send.

19 Q And where did you, how did you produce this copy
20 of the letter today?

21 A It was on the computer file. I pulled it off my
22 computer file.

23 Q But you don't have, you didn't make a copy of the
24 signed?

25 A I couldn't — I didn't see a signed copy, no.

RW - R. GWIN - DIRECT

1 Q I notice there's some blank space at the top.
2 The original probably would have been on letterhead?

3 A That's correct.

4 MR. THOMAS: Your Honor, our position is
5 we've laid sufficient foundation. It's
6 substantially the same thing he sent.

7 THE COURT: Okay. Over your objection
8 I'll allow it to be introduced as 2.

9 (WHEREUPON, Defendant Exhibit No. 2 was
10 marked for identification and received
11 into evidence.)

12 BY MR. THOMAS:

13 Q And in response to that letter did you receive
14 anything back from Mr. Hollingsworth?

15 A No, I did not.

16 Q And you've had a chance to review your file from
17 Mr. Hollingsworth's PCR. Do you have any other
18 correspondence from him in that file?

19 A Not — there was some correspondence prior to,
20 well, it's referenced in this letter. After my
21 appointment I corresponded with him while prior to
22 the hearing. I had do not have any correspondence
23 from Mr. Hollingsworth since the hearing other than
24 the letters that I've just testified to.

25 Q Beg the Court's indulgence. I think that's all

RW - R. GWIN - CROSS

1 the questions I have. Thank you, Mr. Gwin.

2 THE COURT: Yes, sir.

3 **CROSS-EXAMINATION**

4 BY MR. HUNNICUTT:

5 Q Did you tell Mr. Hollingsworth that you were
6 going to file an appeal for him?

7 A No, I did not.

8 Q And as far as you're aware you did not send him a
9 copy of the order dismissing his PCR application
10 until he requested the full file?

11 A I could not find a transmittal letter in the file
12 where I sent him the order of dismissal so I do not
13 recall sending it to him once I received it.

14 Q So as far as you're aware the first notice he got
15 that his PCR application had been dismissed was in
16 that 2007 packet?

17 A The only thing — yes, but I want to believe that
18 the attorney general sent a copy to him when I
19 received a copy. I just have that vague
20 recollection, but there's nothing in my file to show
21 that I sent it to him.

22 Q Okay.

23 A Other than the response to his January 25th,
24 letter.

25 Q Mr. Hollingsworth testified that that file was

RW - R. GWIN - CROSS

1 around two thousand pages. Is that accurate?

2 A That seems a little, that seems a little — well,
3 I would say between 1000 and 1500. This was a two
4 day trial so the trial transcript itself and they
5 had motion hearings the day before, so I would say
6 that the transcript itself probably took 1200 pages
7 so, yeah, it could be 1500 to 2000 pages. That
8 could be correct.

9 Q And at any time did you file a notice of appeal
10 for Mr. Hollingsworth?

11 A No, I did not.

12 Q Did he express his desire to pursue an appeal?

13 A No, he did not.

14 Q When you met with him after his first PCR hearing
15 did he specifically tell you that he didn't want to
16 file an appeal?

17 A No, he did not specifically tell me that he did
18 not want to file an appeal.

19 Q So did he ever tell you he did not want to file
20 an appeal?

21 A No, he never told me he did not want to pursue an
22 appeal.

23 Q Thank you. I have nothing further.

24 MR. THOMAS: No redirect.

25 THE COURT: Okay, thank you, sir. You can

1 step down.

2 Anything else?

3 MR. THOMAS: Your Honor, at this time I'd
4 just like to also -- two, couple of things. First
5 I'd like to enter into evidence, perhaps as Court's
6 exhibit or even respondent's exhibit three, a
7 letter, copy of a letter from Brenda Babb who is the
8 court reporter in the PCR action. This letter is
9 dated July 3rd, 2012. Christina Cato, my
10 predecessor, sent her a request for the transcript
11 and this is just a letter saying that she does not
12 have a copy of the 2005 transcript.

13 THE COURT: Okay. Any objection?

14 MR. HUNNICUTT: No, without objection,
15 Your Honor.

16 MR. THOMAS: Do you want this as a Court's
17 exhibit or?

18 THE COURT: Yeah. Well, let's see, why
19 don't you do it as defendant's 3.

20 (WHEREUPON, Defendant Exhibits No. 3 was
21 marked for identification and received
22 into evidence.)

23 MR. THOMAS: At this time, Your Honor, we
24 would just renew our motion to dismiss based on the
25 doctrine of Laches and untimeliness. The evidence

1 shows that he at least received a copy of the order
2 of dismissal in 2007, and he did not request an
3 appeal at that time even though he knew of his
4 appellate rights.

5 THE COURT: Okay.

6 MR. HUNNICUTT: I would just point out
7 that laches is an equitable doctrine designed to
8 prevent people from sitting on their rights.
9 Mr. Hollingsworth by his own testimony made efforts
10 to find out the status of his PCR application and
11 was unsuccessful in finding those out; and so, it's
12 not like he sat on this for five, six years, and
13 then decided to pursue it. He was actively trying
14 to figure out what was going on with his case and
15 was unable to get any answers.

16 THE COURT: Okay. Well, let me look
17 through the record and I'll let you know something.
18 I'll take it under advisement.

19

20

21

22 * * * END OF REQUESTED TRANSCRIPT OF RECORD * * *

23

24

25

C E R T I F I C A T E O F R E P O R T E R

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE }

I, FRANCES BAKIS-RAY, Registered Professional Reporter (RPR), court reporter for the State of South Carolina, Third Judicial Circuit, do hereby certify that the foregoing proceeding is a stenographic report and was transcribed through computer-aided transcription; that the foregoing transcript contains a true record of the proceedings.

I further certify that I am neither counsel for, nor related to nor employed by any of the parties connected to the action, nor am I financially interested in the action.

Witness my hand at Florence, South Carolina, this 28th day of September, 2014.

Frances B. Ray

FRANCES BAKIS-RAY, RPR

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
DERRICK HOLLINGSWORTH,)
#265683)
Plaintiff,)
v.)
STATE OF SOUTH CAROLINA,)
Defendant.)

THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
2011-CP-26-2843

ORDER

FILED
HORRY COUNTY
2013 NOV -4 PM 1:51
MELANIE HUGGINS-WARD
CLERK OF COURT

This matter comes before the Court pursuant to the Plaintiff's application for post conviction relief filed March 29, 2011, seeking a finding of ineffective assistance of counsel stemming from a PCR application filed in July of 2002. Specifically, applicant seeks the right to belatedly file an appeal of his previous denial of post-conviction relief. Applicant argues that his initial PCR counsel was ineffective for not filing an appeal and for not informing applicant of his right to appeal. Respondent argues that even if applicant's initial PCR counsel was ineffective, applicant's request for relief should be barred by the doctrine of laches since he didn't file the instant petition for almost five years, and the transcript from the initial PCR hearing has been destroyed. For the reasons discussed herein, I find that applicant's current application is not barred by the doctrine of laches, and that his initial PCR counsel was ineffective for not pursuing an appeal of applicant's denial of his PCR application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to a conviction for murder from Horry County. Applicant was indicted in July of 1999 for the

RECEIVED

NOV 18 2013

Referred to Thomas/dm
Answered _____

murder of Isaac Lee Cox (199-GS-26-1653). Applicant was represented by William Monckton, Esquire, and was convicted on April 13, 2000. He was sentenced to life in prison. A notice of appeal was timely filed, and Applicant was represented by Daniel T. Stacey, Esquire, on appeal. The conviction was upheld by the South Carolina Court of Appeals on November 19, 2001 (2001-UP-504).

Applicant filed his initial PCR application on July 16, 2002 (2002-CP-26-4025). A hearing was held on January 20, 2005 before the Honorable John L. Breeden, Jr. The applicant was represented by Robert H. Gwin, III, Esquire. The Court denied post conviction relief by Order dated May 24, 2006. No notice of appeal was filed from this decision.

On March 29, 2011, applicant filed the instant application, seeking the right to belatedly appeal his denial of post conviction relief. Respondent filed a Return and Motion to Dismiss on April 19, 2011, asserting the application was successive and barred by the statute of limitations. The Court initially entered a Conditional Order of Dismissal on July 14, 2011, which gave Applicant time to show why the conditional dismissal should not become final.

On September 13, 2011, applicant filed a document entitled "Applicant's Opposition and Reply to the Conditional Order." The Honorable Steven H. John subsequently issued an order granting Applicant a hearing on the sole issue of whether the Applicant is entitled to seek belated review of the denial of his first PCR application. The order also appointed counsel for Applicant.

A hearing was held on August 28, 2013. Applicant was present and represented by Daniel Hunnicutt, Esquire, and Respondent was represented by Josh Thomas, Esquire. The sole issue before the Court was whether or not Applicant should be able to file his appeal from his denial of his first PCR application

EVIDENCE PRESENTED

Applicant testified that his initial PCR attorney, Robert Gwin, III, esquire, never informed him that his PCR application had been denied. He further testified that he made efforts for over a year to acquire a copy of his PCR file. When he finally received it, he testified there was nothing in it indicating that his application had been denied or indicating that he had the right to appeal. He testified that he waited so long to file this second application because he didn't know that he had the right to appeal and it took him that long to figure out that his initial PCR counsel hadn't informed him of his rights.

Applicant's initial PCR attorney, Robert Gwin, III, testified that he wrote a letter to the applicant letting him know his initial PCR application had been denied and that he had the right to an appeal, but he was unable to produce said letter. He further testified that he sent the applicant his complete PCR file almost a year after the initial PCR hearing was held, well after the time allowed for filing an appeal. He further testified that he never filed a notice of appeal for Applicant after the initial hearing.

ANALYSIS

According to *Austin v. State of South Carolina*, 409 S.E.2d 395 (S.C. 1991), the failure of PCR counsel to seek appellate review of a denial of PCR is in and of itself ineffective assistance of counsel. PCR counsel is required to brief and argue any colorable issues in order to safeguard the right to appeal. Since it is conceded that Applicant's initial PCR counsel neither filed an appeal nor advised Applicant of his right to appeal within the time for him to file one, Mr. Hollingsworth must be given that right at this time.

Respondent argues that this application should be barred based on the doctrine of Laches,

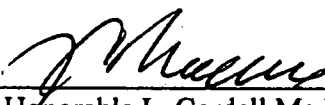
since Applicant waited almost five years to file the instant application. Laches is an equitable remedy which prevents a litigant from sitting on a right for such a long period of time that it deprives other parties of the opportunity to properly litigate the issue. Respondent argues that since the transcript of the original PCR hearing has been destroyed, it cannot properly present its arguments on appeal. However, as stated, Laches is an equitable remedy, and balancing the equities in the instant case I find that any prejudice to Respondent from the destruction of the transcript would certainly be less than any prejudice to the Applicant, and as such the doctrine of Laches does not bar this application.

THEREFORE, IT IS HEREBY ORDERED:

**1) DERRICK HOLLINGSWORTH'S APPLICATION FOR POST
CONVICTION RELIEF IS HEREBY GRANTED;**

**2) MR. HOLLINGSWORTH MUST FILE HIS NOTICE OF APPEAL WITHIN
THIRTY DAYS OF THE SIGNING OF THIS ORDER;**

IT IS SO ORDERED.



The Honorable L. Cordell Maddox, Jr.

Anderson, South Carolina
November 30, 2013
~~October~~

WITNESSES

Taylor/CPD

DOCKET NO. 99-CS-26-1653

The State of South Carolina,

County of Horry

54540-3

FAHJR.

COURT OF GENERAL SESSIONS

JULY

TERM 1999

THE STATE

vs.

DERRICK MARCEL HOLLINGSWORTH B/M

CONWAY, SC 29526

DOB: [REDACTED]

SSN: [REDACTED]

ARREST WARRANT NO. [REDACTED]

F475226

CDR: 0116 16-03-0010, 0020

D/A: 9/8/98

ACTION OF GRAND JURY

TRUE BILL

JUL 08 1999

Foreman of Grand Jury

VERDICT

Indictment for

MURDER

Atty: Wm. Monckton, IV

ORIGINAL

J. GREGORY HEMBREE, SOLICITOR

Foreman of Petit Jury

Date:

Judge: Howard D. King
CR - Prude Ruth

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT FOR

MURDER

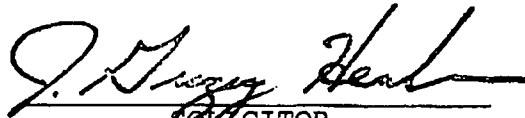
At a Court of General Sessions, convened on July 8, 1999, the Grand Jurors of Horry County present upon their oath:

MURDER

(CDR: 0116 16-03-0010, 0020)

That DERRICK MARCEL HOLLINGSWORTH did, along with Contrell Lamont Swinton and/or Curtis Wilson, Jr., in Horry County, on or about October 4, 1997, wilfully, feloniously, and intentionally, with malice aforethought, kill the victim, Isaac Lee Cox, by means of shooting the victim in the head and upper torso area, and the victim died as a proximate result thereof in Horry County on or about October 4, 1997, in violation of Section 16-3-10 of the Code of Laws of South Carolina, 1976, as amended, and the Common Law of South Carolina.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


PROSECUTOR

STATE OF SOUTH CAROLINA

COUNTY OF Harley

STATE VS.

DERRICK MARCEL HOLLINGSWORTH

AKA:

Race: BLACK Sex: MALEDOB: [REDACTED] Age: 23

SSN: _____

DL#: _____

SID#: _____

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:1999 -GS- 26 - 1653A/W#: F 475226Date of Offense: 10-4-97S.C. Code § : 16-03-0010, 0020CDR Code #: 0 / 1 / 1 / 6

SENTENCE

☐ PLEA [REDACTED]In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: MURDER (30 YRS / LIFE)in violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0 / 1 / 1 / 6☐ 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:

Samuel V. Bell
SolicitorDerrick Hollingsworth
DefendantW.H. Morekhan, Jr.
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of life 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.

☐ The Defendant is to be given credit for _____ days/months jail time.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

SPECIAL CONDITIONS:

☐ RESTITUTION ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine:\$ _____

§ 14-1-206 - Assessments 100%.....\$ _____

§ 14-1-211 - Surcharge.....\$ 100.00

(Exceptions: See § 14-1-211)

§ 56-5-2995 (DUI).....\$ _____

County (3%).....\$ 3.00TOTAL.....\$ 103.00Clerk of Court/Deputy Clerk Jeanne J. RobertsCourt Reporter: Brenda Babb

White - Clerk

Green - Corrections

Canary - Probation

Pink - Defendant

SCCA/217 (1/99)

PTUP _____
_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab. or Job Corps _____

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: _____

PRESIDING JUDGE Howard P. [Signature]Judge Code: 11817Sentence Date: 4-13-00