

The Supreme Court of South Carolina

The State,

Respondent,

v.

Jeffrey S. Evans,

Petitioner.

The Honorable Alexander S. Macaulay
Anderson County
Trial Court Case No. 2007-GS-04-02532

ORDER

For good cause shown, the request for an extension to serve and file the Brief of Petitioner and additional copies of the Appendix is granted and extended until April 4, 2012. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Drenda J. Shealy*
Chief Deputy Clerk

Columbia, South Carolina

March 6, 2012

cc: Appellate Defender Lanelle Cantey Durant
Assistant Attorney General David Spencer
Christina Theos Adams, Esquire

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Certiorari to Anderson County

MAR 5 2012

Alexander S. Macaulay, Circuit Court Judge S.C. Supreme Court

THE STATE,

RESPONDENT,

v.

JEFFREY S. EVANS,

PETITIONER

MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE THE BRIEF OF PETITIONER

Counsel for Jeffery S. Evans respectfully requests a **final extension of thirty (30) days until April 4, 2012** in which to file the brief of petitioner and additional thirteen (13) copies of the appendix in this case. This motion is made pursuant to the Order of the South Carolina Supreme Court dated March 18, 2009. This is a third request for an extension. In support of this request, counsel shows:

1. The brief of petitioner and additional thirteen (13) copies of the appendix are due to be served and filed with the Court today.
2. Counsel for Mr. Evans respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously

granted and the order in which counsel attempts to manage his caseload, counsel hopes that no further extension requests will be required.

3. Counsel is preparing for oral arguments in the case of State v. Patrick Herb in this Court tomorrow, March 6, 2012 and in the case of In the Matter of the Care and Treatment of Bobby Manigo in this Court Wednesday, March 7, 2012. On February 23, 2012, counsel filed the petition for rehearing in the case of State v. James Nash. On February 21, 2012, counsel filed the initial reply brief of appellant in the case of State v. Brian Phillips and the return to petition for rehearing in the case of In the Matter of the Care and Treatment of Orlando Williams. On February 15, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Daniel Rogers. On February 14, 2012, counsel had an oral argument in the case of State v. Jaymes Wood in the Court of Appeals and filed the initial brief of appellant and designation of matter in the case of State v. Alonza Dennis. On February 13, 2012, counsel had an oral argument in the case of State v. Kevin Epting in the Court of Appeals. On February 10, 2012, counsel filed the petition for writ of certiorari and appendix in the case of Mario Hunter v. State and the return to petition for writ of certiorari to the Court of Appeals in the case of State v. Phillip Sawyer. On January 27, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Anthony Tilmon. On January 25, 2012, counsel filed the return to petition for writ of certiorari to the Court of Appeals in the case of In the Matter of the Care and Treatment of Vincent Way and the petition for writ of certiorari and appendix in the case of Andre Methelus v. State. On January 19, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Shawn Reaves and the petition for rehearing in the case of In the Matter of the Care and Treatment of Gilbert Gonzalez. On January 17, 2012, counsel filed the initial brief of appellant and designation of matter in the case

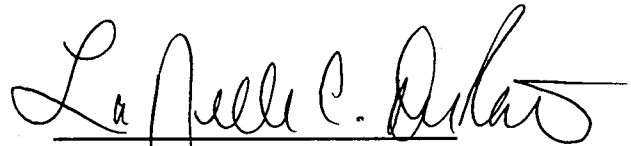
of State v. Bobby Barton. On January 3, 2012, counsel filed the petition for writ of certiorari, the brief of appellant pursuant to White v. State and appendix in the case of Clarence Robinson v. State.

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

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

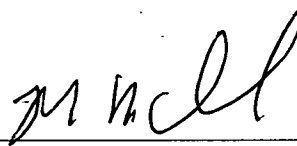
WHEREFORE, the undersigned counsel would respectfully request **a final thirty day extension until April 6, 2012** in which to file the brief of petitioner and additional thirteen (13) copies of the appendix in this case based upon the above exigent circumstances.

Respectfully submitted,



LaNelle C. Durant
Appellate Defender

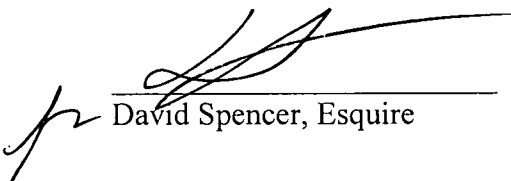
Attorney for Petitioner



Robert M. Dudek
Chief Appellate Defender

This 5th day of March, 2012

I Consent:



David Spencer, Esquire

The Supreme Court of South Carolina

The State,

Respondent,

v.

Jeffrey S. Evans,

Petitioner.

The Honorable Alexander S. Macaulay
Anderson County
Trial Court Case No. 2007-GS-04-02532

ORDER

For good cause shown, the request for an extension to serve and file the Brief of Petitioner and additional copies of the Appendix is granted and extended until March 5, 2012. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

February 3, 2012

cc: Appellate Defender Lanelle Cantey Durant
Attorney General Alan Wilson
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Salley W. Elliott
Assistant Attorney General David Spencer
Christina Theos Adams, Esquire

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Alexander S. Macaulay, Circuit Court Judge

RECEIVED

FEB - 2 2012

S.C. Supreme Court

(2)

THE STATE,

RESPONDENT,

v.

JEFFREY S. EVANS,

PETITIONER

MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE THE BRIEF OF PETITIONER

Counsel for Jeffery S. Evans respectfully requests an extension of thirty (30) days in which to file the brief of petitioner and additional thirteen (13) copies of the appendix in this case. This motion is made pursuant to the Order of the South Carolina Supreme Court dated March 18, 2009. This is a second request for an extension. In support of this request, counsel shows:

1. The brief of petitioner and additional thirteen (13) copies of the appendix are due to be served and filed with the Court today, February 2, 2012.
2. Counsel for Mr. Evans respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously

granted and the order in which counsel attempts to manage his caseload, counsel hopes that no further extension requests will be required.

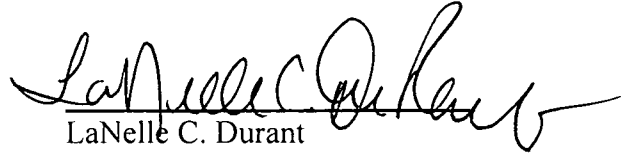
3. On January 27, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Anthony Tilmon. On January 25, 2012, counsel filed the return to petition for writ of certiorari to the Court of Appeals in the case of In the Matter of the Care and Treatment of Vincent Way and the petition for writ of certiorari and appendix in the case of Andre Methelus v. State. On January 19, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Shawn Reaves and the petition for rehearing in the case of In the Matter of the Care and Treatment of Gilbert Gonzalez. On January 17, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Bobby Barton. On January 3, 2012, counsel filed the petition for writ of certiorari, the brief of appellant pursuant to White v. State and appendix in the case of Clarence Robinson v. State. On December 22, 2011, counsel filed the petition for rehearing in the case of State v. Tarus Henry. On December 21, 2011, counsel filed the initial brief of appellant and designation of matter in the case of State v. Kevin Burgess. On December 7, 2011, counsel filed the petition for writ of certiorari and appendix in the case of James Abercrombie v. State and had an oral argument in the case of In the Matter of the Care and Treatment of Orlando Williams in the Court of Appeals. On December 6, 2011, counsel had an oral argument in the case of State v. James Nash in the Court of Appeals.

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

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

WHEREFORE, the undersigned counsel would respectfully request a thirty day extension in which to file the brief of petitioner and additional thirteen (13) copies of the appendix in this case based upon the above exigent circumstances.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "LaNelle C. Durant", written in a cursive style. The signature is positioned above the printed name and title.

LaNelle C. Durant
Appellate Defender

Attorney for Petitioner

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Alexander S. Macaulay, Circuit Court Judge

THE STATE,

RESPONDENT,

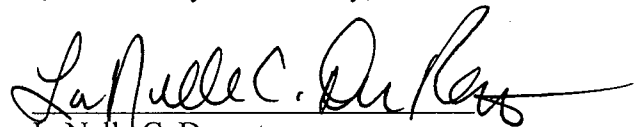
v.

JEFFREY S. EVANS,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the motion for an extension of time in which to file the brief of petitioner and additional thirteen (13) copies of the appendix in the above case has been served upon David Spencer, Esquire, this 2nd day of February, 2012.



LaNelle C. Durant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day
of February, 2012.



(L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017.

The Supreme Court of South Carolina

The State,

Respondent,

v.

Jeffrey S. Evans,

Petitioner.

The Honorable Alexander S. Macaulay
Anderson County
Trial Court Case No. 2007-GS-04-2532

ORDER

The request for an extension to serve and file the Brief of Petitioner and additional copies of the Appendix is granted and extended until February 2, 2012. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Shanda J. Shealy*
Chief Deputy Clerk

Columbia, South Carolina

January 5, 2012

cc: Appellate Defender Lanelle Cantey Durant
Attorney General Alan Wilson
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Salley W. Elliott
Assistant Attorney General David Spencer
Christina Theos Adams, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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

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

RECEIVED

JAN - 3 2012

S.C. Supreme Court

(1)

January 3, 2012

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

Re: The State v. Jeffery Evans
NO. 2010-180746

Dear Mr. Shearouse:

The brief of petitioner and additional copies of appendix in this case are due to be served and filed with the Court today January 3, 2012. However, because of my heavy workload at this time, I am requesting an extension for 30 days, in which to serve and file the brief.

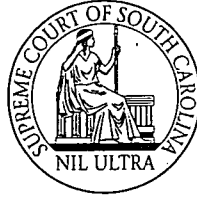
By copy of this letter, I am informing David Spencer, of the Attorney General's Office, of my request.

Sincerely,

LaNelle C. Durant
Appellate Defender

LCD/pds

cc: David Spencer, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

December 1, 2011

Appellate Defender Lanelle Cantey Durant
South Carolina Commission
on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Evans, Jeffrey S.

Dear Counsel:

Enclosed is the Order granting your Petition for Writ of Certiorari in the above entitled matter.

It will be necessary for you to furnish this office with an additional thirteen (13) copies of the appendix within thirty (30) days from the date of this letter.

Brief of Petitioner should be served and filed on or before January 3, 2012. The brief is not properly filed until we have proof of service.

Brief of Respondent should be served and filed within thirty (30) days after petitioner's brief is filed. We must have proof of service. Any reply brief should be served and filed within ten (10) days after filing of respondent's brief.

Very truly yours,

Daniel E. Shearouse
35
CLERK

The State v. Evans, Jeffrey S.

Page Two

December 1, 2011

DES/lda

Enclosure

cc: Attorney General Alan Wilson
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Salley W. Elliott
Assistant Attorney General David Spencer
Christina Theos Adams, Esquire
The Honorable Tanya Gee

The Supreme Court of South Carolina

The State,

Respondent,

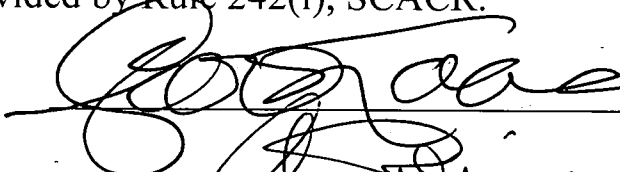
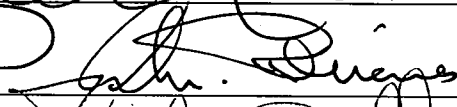
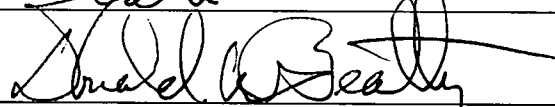
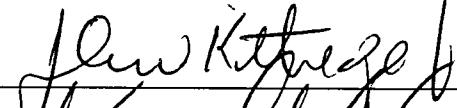
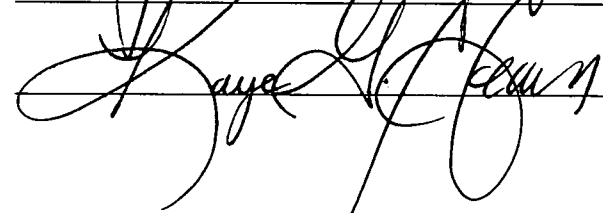
v.

Jeffrey S. Evans,

Petitioner.

ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' decision in State v. Evans, Op. No. 2010-UP-464 (S.C. Ct. App. filed October 25, 2010) as to petitioner's Question 1 and deny the petition as to the remaining question. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

 C. J.
 J.
 J.
 J.
 J.

Columbia, South Carolina

December 1, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Alexander S. Macaulay, Circuit Court Judge

Opinion No. 2010-UP-464 (S.C. Ct. App. filed 10/25/2010)

07-GS-04-2532.

C. M. G. 12/20/10

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S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

JEFFREY S. EVANS,

PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 11/19/2010.

QUESTION PRESENTED

1. Whether the Court of Appeals erred in affirming the trial court's denial of petitioner's motion for a mistrial after two prosecution witnesses referred to petitioner as the robber which was outside the scope of evidence because no witness had identified petitioner as the robber?
2. Whether the Court of Appeals erred in affirming the trial court's denial of petitioner's motion for a directed verdict on the armed robbery charge when the state did not prove the elements of armed robbery because no personal property had been taken from Paula Ayers, an employee of the Goodwill Store?

STATEMENT OF THE CASE

On August 28, 2007, the Anderson County Grand Jury indicted Jeffrey Scott Evans on the charges of armed robbery (AR) and possession of a knife during the commission of a violent crime. On August 4-5, 2008, Evans proceeded to trial before the Honorable Alexander S. Macaulay and a jury. The jury returned verdicts of guilty as indicted. Judge Macaulay sentenced Evans to life without the possibility of parole (LWOP) as required by S.C. Code Section 17-25-45. Evans had prior convictions for burglary and armed robbery. ROA. 49, ll. 12 – 25; ROA. 50, ll. 1 – 24. Evans' attorney filed a notice of appeal. The Court of Appeals affirmed the trial court's rulings in State v. Evans, Op. No. 2010-UP-464 (filed October 25, 2010). Appellate counsel filed petition for rehearing on November 9, 2010. The Court of Appeals issued an Order on November 19, 2010 denying the petition for rehearing. This petition for a writ of certiorari to the Court of Appeals follows.

ARGUMENT

I.

The Court of Appeals erred in affirming the trial court's denial of petitioner's motion for a mistrial after two prosecution witnesses referred to petitioner as the robber which was outside the scope of evidence because no witness had identified petitioner as the robber.

On May 24, 2007, Paula Ayers was working at the Goodwill Store on South Main Street in Anderson as the cashier. Several customers were still in the store as it was near closing time. As she was checking out a customer, a man who she could not identify put a knife to her side and demanded the money from the cash register. The man then ran from the store with the money. ROA. 14, ll. 7 – 23; ROA. 15, ll. 4 – 25; ROA. 16, ll. 1 – 25; ROA. 17, ll. 1 – 25; ROA. 22, ll. 16 – 25; ROA. 23, ll. 1 – 18.

Kevin Matheson, investigator for the Sheriff's Department, was assigned to this case. He obtained information through other investigators that the robber's name was "Scott" and that he was at the Sunrise Motel. He also had a partial tag number for the car the robber was driving from a witness. As result of the investigation and looking at the surveillance video from the store, he focused on Jeffrey Scott Evans. ROA. 33, ll. 4 – 18; ROA. 34, ll. 1 – 25; ROA. 35, ll. 1 – 25; ROA. 36, ll. 1 – 25; ROA. 37, ll. 1 – 25; ROA. 38, ll. 1 – 20.

Evans was arrested at the home where he was staying. ROA. 39, ll. 9 – 25; ROA. 40, ll. When he was questioned by Investigator Matheson, Evans gave a statement admitting the robbery. ROA. 41, ll. 14 – 25; ROA. 42, ll. 1 – 25; ROA. 43, ll. 1 – 25; ROA. 44, ll. 1 – 25. During the pretrial hearing, Evans testified that he only gave a statement because Investigator Matheson told him that the most time he would probably get would be ten

years. Evans said he had been up six days smoking crack and ice at the time of the statement. ROA. 1, ll. 1 – 25; ROA. 2, ll. 1 – 25; ROA. 3, ll. 1 – 25.

When Paula Ayers testified, she said in response to the state's questions:

Q. Okay. And so the register, in fact, came open?

A. Yes, it did.

Q. All right. So then what was the next thing you remember happening?

A. Okay. I was fixing to give the lady her change, and the defendant.

ROA. 18, ll. 2 – 7.

At that point, defense counsel immediately objected and asked to consider an issue outside the presence of the jury. ROA. 18, ll. 7 – 25. Counsel argued to the court that he had been informed by the state that none of the witnesses could identify Evans as the robber. Based on that, counsel did not request a hearing to determine if the identification was reliable. He argued that the witness had just identified Evans as the robber by stating that the “defendant” had robbed the cash register. ROA. 19, ll. 1 – 6.

The state responded that the witness, Ms. Ayers, had not been able to identify Evans as the robber and could not pick him out of a photo line-up. That was the reason there was no hearing. She could give a description. ROA. 19, ll. 7 – 15.

The judge instructed the state to rehabilitate the witness since the witness was not able to identify but would leave it the solicitor as to how to do it. The judge said he would give a curative instruction if he felt it was necessary. ROA. 19, ll. 19 – 25; ROA. 20, ll. 1 – 14. The solicitor told the judge that none of the witnesses from the Goodwill Store could identify Evans as the robber. ROA. 20, ll. 10 – 23. The judge told the state to make it clear

in the testimony that the witness could not identify the robber. He again said he might have to issue a curative instruction. ROA. 20, ll. 24- 25; ROA. 21, ll. 1 – 1 – 7.

Defense counsel then made a motion for a mistrial because he believed that the identification might have an effect on the jury. He explained that the state said in their opening statement that no witness could identify Evans as the robber and then the very first State's witness identified him. Counsel asked for a new trial. The judge denied his motion for the time because the judge said it would depend on if the state "put the testimony in the proper perspective." ROA. 21, ll. 9 – 25.

The state was able to get Paula Ayers to testify that she was not able to pick out from a photo line-up "or otherwise" the person who committed this crime. ROA. 22, ll. 8 – 14.

The second witness, Pat French, was working at the Goodwill Store at the time of the incident. When she testified, she said:

Q. So when you got to Register one, what happened if anything?

A. I was gonna talk to the cashier and help her, and I looked up and I seen the defendant running out.

Supp. ROA. 3, ll. 1 – 25; Supp. ROA. 4, ll. 1 – 17.

Defense counsel again objected and moved for a mistrial again. The court instructed the state to take a break and talk with future witnesses to say "they saw someone." He instructed her to tell them what they could testify to and what they could not testify to. The judge denied defense counsel's motion for a mistrial. However, the judge stated that he was taking it under advisement "because as each of the testimony begins, it becomes compounded" and "at some point the pounds will have greater weight then

deserving”. Supp. ROA. 4, ll. 18 – 25; Supp. ROA. 5, ll. 1 – 25; Supp. ROA. 6, ll. 1 – 24.

The judge warned the state that if the problem continued, he would have to consider whether the prejudice could be overcome by cross-examination. He said that court would proceed subject to defense counsel’s prior motions and his rulings. Supp. ROA. 7, ll. 3 – 18. The judge did not give a curative instruction to the jury either time the motion for a mistrial was made. ROA. 22, ll. 1 – 25; Supp. ROA. 7, ll. 1 – 25; ROA. 25, ll. 1 – 25.

The other two witnesses, Barbara Cooley and Suzanne Shirley, testified that a “gentleman” took money from the cash register and Ms. Shirley said “somebody” did it. Both stated they could not pick out the robber from a photo line-up. ROA. 26, ll. 1 – 25; ROA. 27, ll. 18 – 25; ROA. 28, ll. 1 – 25; ROA. 29, ll. 1 – 8; ROA. 30, ll. 4 – 25; ROA. 31, ll. 1 – 25; ROA. 32, ll. 15.

The decision to grant or deny a motion for a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008); State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct.App. 1999); State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999); State v. Stanley, 365 S.C. 24, 33, 615 S.E.2d 455(Ct. App. 2005).

The granting of the motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way. State v. Vazquez, 364 S.C. 293, 613 S.E.2d 359 (2005); State v. Patterson, 337 S.C. 251, 522 S.E.2d 845 (Ct. App.1999); State v. Edwards, 373 S.C. 230, 644 S.E.2d 66 (Ct. App. 2007).

When an objection is timely made to improper remarks of counsel, the judge should rule on the objection, give a curative charge to the jury, and instruct offending counsel to desist from improper remarks. State v. Primus, 341 S.C. 592, 535 S.E.2d 152 (Ct.App.2000) citing State v. Harry, 321 S.C. 273, 468 S.E.2d 76 (Ct.App.1996).

In order to receive a mistrial, a defendant must show error and resulting prejudice. State v. Culbreath, *supra*.

In State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996), the Supreme Court reversed the trial court and remanded the case because the trial court should have issued a curative instruction where the solicitor referred to the defendant's failure to call witnesses. The Supreme Court ruled this was necessary although the solicitor made only one reference to defendant's failure to call witnesses.

In Evans' case, the state allowed two witnesses to say the "defendant" committed the robbery which they did not know was so. The trial court should have granted a mistrial or at least issued a curative instruction after the second witness gave inadmissible testimony. The trial court did not do either.

The trial court certainly should have granted the mistrial after the second witness identified Evans as the robber by saying the "defendant". The judge did not give a curative instruction although he admitted the testimony was prejudicial. He used the term "compounded with each testimony" and was considering granting the mistrial motion as indicated by the fact he said he was taking it under advisement. Supp. ROA. 6, ll. 3 – 5.

The Court of Appeals held that whether to grant a mistrial was a matter within the trial court's discretion, would not be disturbed on appeal absent an abuse of discretion relying on State v. Culbreath, 377 S.C. 326, 331, 659 S.E.2d 268, 271 (Ct. App. 2008).

The Court of Appeals misapprehended the issue as Evans was prejudiced because the testimony of two primary eyewitnesses stated “the defendant” was the robber, when they did not know whether this was so. The judge commented on that when he said he would have to consider if the prejudice could be overcome by cross-examination. Supp. ROA. 7, ll. 3 – 10.

The state should have instructed the future witnesses on what they could testify to or not immediately after the first witness made the error of referring to Evans as the robber. The judge made it clear to her at that point that it was not admissible testimony.

The prejudice was sufficient to require the court to grant a mistrial and select a new jury. There was a reasonable probability that the idea that Evans was the robber was in the minds of the jurors when the first two eyewitnesses identified him by saying the defendant did it. The judge believed the statements were prejudicial when he admitted they were. Supp. ROA. 6, ll. 3 – 5.

ARGUMENT

II.

The Court of Appeals erred in affirming the trial court's denial of petitioner's motion for a directed verdict on the armed robbery charge when the state did not prove the elements of armed robbery because no personal property had been taken from Paula Ayers, an employee of the Goodwill Store.

After the state presented its case and rested and the judge talked to Evans about his right to testify or not, defense counsel made a motion for a directed verdict on the armed robbery charge. ROA. 45, ll.1; ROA. 45, ll. 22 – 25; ROA. 46, ll. 2 – 25. Counsel argued that the state had not met all of the elements of armed robbery but particularly the element regarding the taking of the personal property of another. ROA. 47, ll. 4 – 12.

Counsel said one of the elements was the taking and carrying away personal property of another with the intent to deprive with the use of force or a deadly weapon. He argued that there was no testimony that any personal property was taken from Paula Ayers. The property was money taken from a cash register owned by Goodwill. ROA. 46, ll. 25; ROA. 47, ll. 1 – 12.

The state argued in response that Ms. Ayers had custody and control of the cash register as an employee of Goodwill. She stated that someone stole the money from Ms. Ayers. ROA. 47, ll. 13 -25; ROA. 48, ll. 1 – 2.

The court ruled that there was sufficient evidence for the armed robbery to go to the jury. He denied the motion for a directed verdict. ROA. 48, ll. 5 – 11.

In a pretrial motion, defense counsel made a motion to quash the indictment on armed robbery because the language in the indictment indicated that Evans did take away

property from the person of Paula Ayers. Counsel argued then that the indictment was defective because the money was taken from the cash register owned by the Goodwill Store and not Paula Ayers. ROA. 10, ll. 6 – 20.

The judge ruled that it was clear that the owner was the Goodwill Store because the indictment said Paula Ayers was an employee of the Goodwill Store. The judge ruled that the indictment regarding the armed robbery was proper because Paula Ayers was in possession of the property. ROA. 11, l. 25; ROA. 12, ll. 1 – 5.

The offense of armed robbery occurs when a person commits a robbery while armed with a deadly weapon, and the display of the deadly weapon is not essential element of the crime. State v. Nix, 288 S.C. 492, 343 S.E.2d 627 (Ct. App. 1986); State v. Douglas, 359 S.C. 187, 597 S.E.2d 1 (Ct. App. 2004). “Robbery” is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting person in fear. State v. Al-Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003).

In State v. Philips, 73 S.C. 236, 53 S.E.370 (1906), the Supreme Court held that in an indictment for larceny the property may be laid in one who had merely the lawful possession. In that case, a cow was stolen from W. J. Bates who was the agent for the estate of Ms. Cornelia Bates. He was also her son. Evans’s case is distinguished because Paula Ayers was the cashier, and not the designated agent for Goodwill Stores as Mr. Bates was the designated agent for the estate of his mother.

The state should have put in the indictment that the money belonged to Goodwill Stores but the indictment was not clear. See Indictment ROA. 51. From a reading of the indictment, the money could have belonged to Paula Ayers who just happened to be an

employee of Goodwill. In this case, the indictment was not clear to whom the money belonged.

The Court of Appeals relied on the case of State v. Moore, 374 S.C. 468, 476, 649 S.E.2d 84, 88 (Ct. App. 2007) which held that the appellate court may reverse the trial court's denial of a motion for a directed verdict only if there is no evidence to support the ruling, and the case should be submitted to the jury if there were any evidence that reasonably tended to prove the guilt of the accused or from which guilt could be fairly and logically deduced.

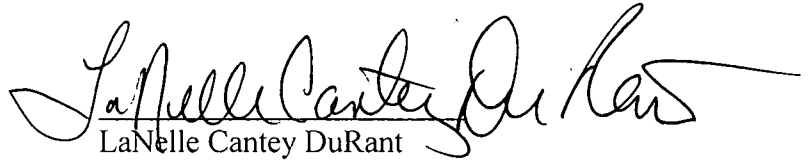
The Court of Appeals misapprehended the issue. A trial judge should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004). A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged. State v. Gentry, 363 S. C. 93, 610 S. E. 2d 494 (2005). In reviewing a motion for a directed verdict, a trial judge is concerned with the existence of the evidence, not with its weight. Id.

The court should have granted a directed verdict on the armed robbery.

CONCLUSION

By reason of the foregoing arguments, a petition for writ of certiorari to the Court of Appeals should be issued.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of December, 2010

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Alexander S. Macaulay, Circuit Court Judge

Opinion No. 2010-UP-464 (S.C. Ct. App. filed 10/25/2010)
07-GS-04-2532.

THE STATE,

RESPONDENT,

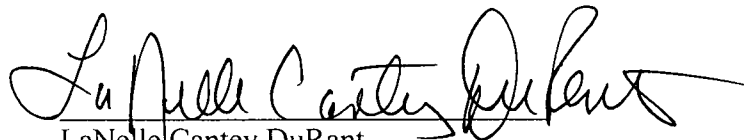
V.

JEFFREY S. EVANS,

PETITIONER

CERTIFICATE OF SERVICE

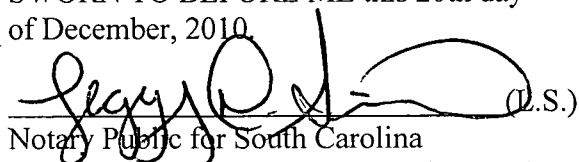
I certify that a true copy of the petition for writ of certiorari to the Court of Appeals and a copy of the appendix, in this case has been served on David Spencer, Esquire; upon Jeffrey S. Evans, and the S.C. Court of Appeals, this 20th day of December, 2010.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of December, 2010.



(L.S.)

Notary Public for South Carolina

My Commission Expires: December 4, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

FEB 15 2011

Certiorari to Anderson County
Alexander S. Macaulay, Circuit Court Judge

S.C. Supreme Court

THE STATE,

Respondent,

vs.

JEFFREY S. EVANS,

Petitioner.

**RETURN TO PETITION
FOR WRIT OF CERTIORARI**

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

Did the trial court correctly deny Appellant's motion for mistrial when no witnesses referred to Appellant as the "robber" and when no prejudice arose from the witnesses' testimony that referred to the "defendant?"

II.

Did the trial court correctly deny the motion for a directed verdict when there was sufficient evidence presented to send the case to the jury?

STATEMENT OF THE CASE

For purposes of this return, the Respondent concurs with the Statement of the Case provided by Petitioner.

ARGUMENT

I.

The trial court did not err in denying the motion for mistrial when no witnesses referred to Appellant as the “robber” and when no prejudice arose from the witnesses’ testimony that referred to the “defendant.”

No witnesses referred to the Appellant as the “robber.” Two witnesses did refer to the “defendant” as part of their testimony, but the objections from defense counsel came so quickly that neither one of the witnesses actually testified that the “defendant” did anything. In addition, on both occasions, after the trial court admonished the solicitor, the witnesses testified extensively that they could not identify the robber, that they did not know him, that they could not pick him out of a line-up, and that they could not identify him in court as the person who robbed the Goodwill Industries store. Thus, no prejudice arose from this testimony.

The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997). Our courts favor the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988). “It is only in cases of abuse of discretion which result in prejudice that this court will intervene and grant a new trial.” Id. A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons. State v. Patterson, 337 S.C. at 227, 522 S.E.2d at 851.

Appellate courts will not generally set aside convictions due to insubstantial errors which do not affect the result. State v. Douglas, 369 S.C. 424, 632 S.E.2d 845 (2006). In determining if an error is harmless, the appellate court will review the entire record to determine what effect the error had on the verdict. Id. “An insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.” State v. White, 372 S.C. 364, 386, 642 S.E.2d 607, 618 (Ct. App. 2007).

The State’s first witness was Paula Ayers. She was an employee of the Goodwill Industries and working one of the cash registers when the robbery occurred. R. pp. 15-17. She testified she was ringing up purchases for a woman and “I was fixing to give the lady her change, and the defendant. . .” Defense counsel objected before Ms. Ayers could finish her sentence and the jury was removed from the courtroom. R. p. 18. Ms. Ayers had not previously said anything about the robbery, or any suspicious activity. Defense counsel argued he was informed that none of the witnesses could identify the robber. He also complained he stated in his opening statement that no witnesses could identify the perpetrator. He moved for a mistrial, arguing that the testimony could affect the jury. R. pp. 19-21. The trial judge denied the motion and required the solicitor to rehabilitate the witness “in the sense that the witness was not able to identify the individual. . .” R. p.19, lines 19-23.

The solicitor complied with the Judge’s ruling. Upon the jury’s return, the first question the solicitor asked Ms. Ayers was, “Now, Ms. Ayers, isn’t it true that you were never able to pick out from a photo line-up or otherwise who committed this crime?” She responded, “That’s true.” R. p.22, lines 11-14.

On cross-examination, Ms. Ayers was questioned extensively about her inability to identify Appellant as the perpetrator. She testified that she did not get a good look at him, that the event happened very quickly, and that she was scared of what might happen if she turned around and looked. R. p. 24, Supp. R. pp.1-2.

The next witness for the State was Patricia French, who testified she was the manager of the Goodwill Industries store and on the evening of the robbery, she was coming out of the back room to check out one of the cashiers in preparation of closing the store for the evening. Because Ms. Ayers had a lot of customers, Ms. French went to the other register. Ms. French testified that when she got there, "I was gonna talk to the cashier and help her, and I looked up and I seen the defendant running out . . ." Supp. R. p.4, lines 16-17; Supp. R. pp.3-4. Defense counsel again objected before the witness could finish her sentence and the jury was again removed from the courtroom. Supp. R. p.4. Defense counsel again moved for mistrial. The trial court denied the motion but warned the solicitor that each time it happened, the problem became more compounded. The judge cautioned the solicitor and instructed her to take time to instruct her witnesses not to refer to Appellant as the "defendant." He also warned if it happened again, he would consider "whether or not there is prejudice that can be overcome by cross-examination." Supp. R. pp.5-7; p. 7, lines 9-10.

When the jury returned, the solicitor asked Ms. French, "Isn't it true that you were never able to pick out who robbed the Goodwill store that night?" Ms. French responded, "That's correct." Ms. French testified that she could not pick out the robber through a photo line-up or otherwise, and that she could not pick him out in the courtroom that day. R. p. 25.

Defense counsel's prompt objections and the solicitor's rehabilitation prevented any

prejudice from arising. Ms. Ayers and Ms. French both made clear they could not identify the defendant in a photo line-up or in person in the courtroom. While both witnesses did use the word “defendant,” neither witness actually testified Evans was the robber and neither witness identified Evans as the robber. Because no prejudice arose to Evans, the trial judge did not err in denying the motion for mistrial.

Additionally, Evans never objected or moved for mistrial after, per the trial court’s instructions, the solicitor rehabilitated both witnesses. Consequently, the issue should not be reviewed on appeal. See State v. Morris, 307 S.C. 480, 486, 415 S.E.2d 819, 823 (Ct. App. 1992) (finding where defense counsel did not renew his mistrial motion after the trial court gave curative instructions, the denial of mistrial was not preserved for review).

Further, even if the trial judge did err, a review of the entire record demonstrates that the error did not effect the verdict in light of the conclusive evidence of guilt. State v. Douglas, supra; State v. White, supra. Evans gave a confession to law enforcement, admitting he went to Good Will to snatch a purse, and then ended up robbing the woman at the cash register and that he had a knife. R. pp. 42-44. Appellant’s confession constitutes overwhelming evidence and negates any harm caused by the witnesses’ testimony referring to him as the “defendant.”

Accordingly, the trial court did not err in denying the motion for mistrial.

II.

The trial court did not err in denying the motion for a directed verdict when there was sufficient evidence presented to send the case to the jury.

Evans argues the trial court erred in denying the motion for directed verdict because no personal property was taken from the cashier. The trial court did not err as property, not belonging to Evans, was taken from the custody of the cashier at knife point.

Armed robbery occurs when a person commits robbery while either armed with a deadly weapon or alleging to be armed by the representation of a deadly weapon. S.C. Code Ann. § 16-11-330 (2003). Included in armed robbery is the lesser-included offense of robbery, which is defined as “the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear.” State v. Al-Amin, 353 S.C. 405, 424, 578 S.E.2d 32, 42 (Ct. App.2003). Larceny, which is a lesser included offense in the crime of robbery, is defined as the felonious taking and carrying away of the goods of another against the owner's will or without his consent. Id. “Thus, it is the use or alleged use of a deadly weapon that distinguishes armed robbery from robbery, and the employment of force or threat of force that differentiates a robbery from a larceny.” State v. Moore, 374 S.C. 468, 477, 649 S.E.2d 84, 89 (Ct. App.2007).

Evans frames the issue as an attack on the judge's denial of the motion for a directed verdict, but the argument focuses on the indictment. Appellant argues the indictment was not clear as to who was the owner of the money stolen and the State was required to include in the indictment that the money belonged to Goodwill. However, Appellant does not

challenge the sufficiency of the indictment in the issue on appeal and cannot include this argument in his brief. Rule 208(b)(1)(B), SCACR. See Langehans v. Smith, 347 S.C. 348, 554 S.E.2d 681 (Ct. App. 2001) (In order for an issue to be properly presented for appeal, the appellant's brief must set forth the issue in the statement of issues on appeal). See also State v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008)(same).

As Appellant conceded, the Supreme Court has held that property may be laid in one who had merely lawful possession. State v. Phillips, 73 S.C. 236, 53 S.E. 370 (1906). However, Appellant attempts to distinguish the instant case because the victim in Phillips was an agent for the estate from which the property (a cow) was stolen.

Appellant raises a distinction without a difference. Phillips cites with approval State v. Addington, 17 S.C.L. 310 (App. 1829), which notes: "it is a very clear general rule, that he, who has the lawful possession of a chattel, is to all intents the legal owner, except as to the rightful owner. If this be correct, the only inquiry is, whether [complainant] was in the lawful possession of the mare in question."

"It is essential that the stolen goods be owned by someone other than the thief, but it is not ordinarily essential that the thief should know who the owner is." State v. Sweat, 221 S.C. 270, 273, 70 S.E.2d 234, 235-36 (1952). In Sweat, an indictment naming five defendants alleged the warehouseman as owner of stolen tobacco, when the owner was actually C.W. Walters Tobacco Company, which bought the tobacco. Defendants moved to quash the indictment on grounds that the indictment failed to name the true owner and once the State rested, moved for directed verdict on grounds of a variance of proof from the indictment because the persons named in the indictment were not the true owners. The Court

found no error, and cited 32 Am.Jur., § 22 as follows:

It is sufficient if he knows that the property is not his own and takes it to deprive the true owner of it. Nor is it necessary, in order to make the taking larceny, that the person from whom the property is stolen should have the general ownership. It is sufficient that he has possession as bailee.

Id., 221 S.C. at 273-74, 70 S.E.2d at 236 (internal quotations omitted).

“When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight.” State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). Furthermore, a defendant is entitled to a directed verdict at the trial level when the State does not produce evidence of the offense charged; however, if the State presents *any* evidence at trial which reasonably tends to prove the defendant's guilt, the case must go to the jury. State v. Gentry, 363 S.C. 93, 103, 610 S.E.2d 494, 500 (2005); State v. Ezell, 321 S.C. 421, 468 S.E.2d 679 (Ct. App.1996) (emphasis added).

In deciding whether the trial court erred in failing to direct a verdict in favor of a defendant in a criminal case, the appellate court must view the testimony in the light most favorable to the State. State v. Massey, 267 S.C. 432, 229 S.E.2d 332 (1976).

Sweat is controlling. Evans makes the same arguments that failed Sweat and his co-defendants. However, the evidence indicates that Ayers, the victim, was an employee of Good Will. She was assigned to the cash register she was stationed at from which Evans took the money. She was in control and custody of the money which Evans took. R. pp. 15-16; p. 22; Supp. R. pp. 3-4. Evidence supports that Evans took the property of another and therefore, the trial court properly denied the direct verdict.

Appellant's argument seems to focus on an alleged flaw in the indictment. This was

argued at trial and was denied by the trial judge (see R. pp. 10-13), but not set out in the issue on appeal and cannot be the basis of the argument that a directed verdict motion should have been granted.

The trial judge did not err in denying the motion for a direct verdict when ample evidence of guilt was presented to the jury. State v. Gentry, supra. That evidence included a voluntary confession given by Appellant admitting robbing the store. In addition, although not challenged on appeal, the trial judge did not err in denying Appellant's pre-trial motion to quash the indictment. The indictment clearly was sufficient to put Appellant on notice as to what charges he was facing. Id.

CONCLUSION

Based on the foregoing, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

DAVID SPENCER
Assistant Attorney General

CHRISTINA T. ADAMS
Solicitor, Tenth Judicial Circuit

BY:



DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

February 15, 2011.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County
Alexander S. Macaulay, Circuit Court Judge

RECEIVED

FEB 15 2011

S.C. Supreme Court

THE STATE,

Respondent,

vs.

JEFFREY S. EVANS,

Petitioner.

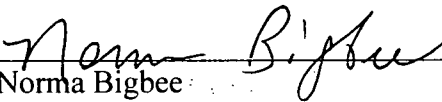
PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Lanelle C. Durant, Esquire
Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

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

This 15th day of February 2011.


Norma Bigbee
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727



ALAN WILSON
ATTORNEY GENERAL

February 15, 2011

RECEIVED

FEB 15 2011

S.C. Supreme Court

VIA HAND DELIVERY

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

RE: State of South Carolina v. Jeffrey S. Evans
2007-GS-04-2532

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

David Spencer
Assistant Attorney General

DS/nb
Enclosures

cc: Appellate Defender Lanelle C. Durant (2 copies)

The Supreme Court of South Carolina

The State,

Respondent,

v.

Jeffrey S. Evans,

Petitioner.

The Honorable Alexander S. Macaulay
Anderson County
Trial Court Case No. 2007-GS-04-2532

ORDER

The request for an extension to serve and file the Return to Petition for Writ of Certiorari is granted and extended until February 18, 2011. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Brenda J. Shealy*
Clerk

Chief Deputy

Columbia, South Carolina

January 20, 2011

cc: Appellate Defender Lanelle Cantey Durant
Assistant Attorney General David Spence



ALAN WILSON
ATTORNEY GENERAL

January 19, 2011

RECEIVED

JAN 19 2011

S.C. Supreme Court

VIA HAND DELIVERY

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

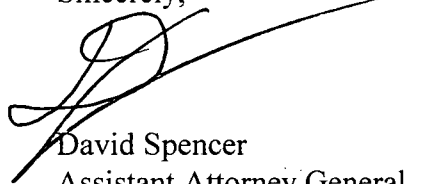
Re: State of South Carolina v. Jeffrey S. Evans
2007-GS-04-2532

Dear Mr. Shearouse:

The Return to Petition for a Writ of Certiorari in the above appeal is due to be served and filed today. I would respectfully request a 30-day extension in which to serve and file this Return.

This extension request is not intended for the purpose of delay, but is necessitated by my heavy workload.

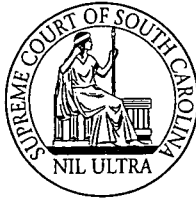
Sincerely,



David Spencer
Assistant Attorney General

DS/nb

cc: Appellate Defender Lanelle C. Durant



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

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December 22, 2010

Appellate Defender Lanelle Cantey Durant
South Carolina Commission
on Indigent Defense
P O Box 11589
Columbia, SC 29211

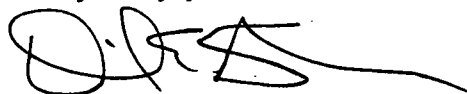
Re: The State v. Evans, Jeffrey S.
Case Tracking No. 2010-180746

Dear Counsel:

This office has received your Petition for Writ of Certiorari and Appendix in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,



CLERK

The State v. Evans, Jeffrey S.

Page Two

December 22, 2010

DES/lda

cc: Assistant Attorney General David Spencer
The Honorable Tanya Gee