

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
The Honorable J.C. Nicholson, Jr., Circuit Court Judge

SC Court of Appeals

Appellate Case No: 2014-001419

THE STATE

APPELLANT,

v.

JAMES A. SUMMERSETT

RESPONDENT.

RECORD ON APPEAL

TARA D. SHURLING
3614 Landmark Drive, Suite A
Columbia, South Carolina 29204
(803) 738-8622

ATTORNEY FOR RESPONDENT

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

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

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street
Charleston, SC 29401
(843) 958-1900

ATTORNEYS FOR APPELLANT

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FILED

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON 20 PM 3:13

IN THE COURT OF
GENERAL SESSIONS

JULIE J. ARMSTRONG
CLERK OF COURT
THE STATE OF SOUTH CAROLINA

BY JS

Order Vacating Sentence
and
Granting New Sentencing Proceeding

V.

JAMES A. SUMMERSETT, 216032
Defendant.

2002-GS-10-5115

THIS MATTER comes before the Court by way of a Motion to Reconsider Sentence. A hearing was held on this motion on November 13, 2013, at which time the Defendant was represented by retained counsel, Tara Dawn Shurling, Esquire. The State was represented by Jennifer Blanchard McCoy, Assistant Solicitor. At the conclusion of this proceeding this Court requested memoranda from both sides addressing certain issues raised during the motion hearing. Having now reviewed those submissions, this Court finds that the Defendant has demonstrated just cause for the reconsideration of the life sentence imposed following his conviction for voluntary manslaughter. For the reasons set forth below, this Court now finds that the Defendant's sentence to life without parole based upon his previous plea of *nolo contendere* to a charge of Assault and Battery with Intent to Kill was erroneously entered.

PROCEDURAL HISTORY

The Defendant was indicted for murder (2002-GS-10-5115) and Possession of a Firearm during the Commission of a Violent Crime (2002-GS-10-5516) by the Charleston County Grand Jury. He proceeded to trial by jury on February 2, 2003, before the Honorable Daniel F. Pieper, then circuit court judge. He was represented at trial by Richard

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BY [Signature]
DEPUTY CLERK

gen

Buchanan, Esquire, and Edward Hawkins, Esquire. At that trial, Defendant was convicted as charged. The South Carolina Court of Appeals affirmed his convictions and sentences¹; however, his judgments and sentences were subsequently reversed by the Supreme Court of South Carolina.² On remand, the Defendant had a bench trial before the undersigned circuit court judge. At the conclusion of his bench trial the Defendant was convicted of the lesser-included offense of voluntary manslaughter and was sentenced to life imprisonment pursuant to S.C. Code §17-25-45, on January 26, 2010. As is apparent from the record below, this Court was unaware that the State filed Notice of Intent to seek a life sentence pursuant to S.C. Code Ann. §17-25-45 until after judgment was announced by the Court. The Defendant filed a Motion to Reconsider Sentence on January 29, 2011. The Defendant was represented at trial by William J. Thrower, Esquire, of the Charleston County Bar. Attorney Thrower did not file a direct appeal on the Defendant's behalf.

The Defendant filed an Application for Post-Conviction Relief on October 1, 2010. In that application the Defendant generally alleged that he received ineffective assistance of counsel prior to and during his bench trial, in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the U. S. Constitution, as well as the South Carolina Constitution, and further, that trial counsel neglected to preserve his right to a direct appeal. The Respondent served its Return to this application on June 20, 2012.

Attorney Shurling was hired to represent the Defendant in his PCR action, and subsequently discovered that the Defendant's Motion to Reconsider Sentence was never heard. A hearing was convened on that matter in General Sessions Court on November 13, 2013. At the conclusion of that hearing, this Court requested memoranda on the issue of whether the Court of General Sessions properly accepted the Defendant's earlier *nolo*

¹ *State v. Summersett, Jr.*, unpublished Op. No. 2005-UP-373 (Cl. App. filed June 10, 2005).

² *State v. Summersett, Jr.*, Mem. Op. No. 2008-MO-025 (S.Ct. filed July 28, 2008).

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contendere plea to a charge of Assault and Battery with Intent to Kill and accordingly, whether that judgment could be used by the State as a predicate offense to support a sentence of life without parole pursuant to South Carolina's strike law. The Defendant's judgment on that offense was the sole basis for his sentencing to life without parole for voluntary manslaughter pursuant to S.C. Code Ann. §17-25-45 (1995 as amended).

At the hearing held on the Defendant's Motion to Reconsider Sentence, Defendant submitted that this Court violated his right to due process of law by sentencing him to life without the possibility of parole under South Carolina's strike law where the earlier strike was predicated upon his plea of *nolo contendere* to Assault and Battery with Intent to Kill which is a felony in this state. In support of this argument the Defendant submitted a copy of the records of the Clerk of Court on Indictment No. 1994-GS-10-4837, which clearly indicate that the plea in question was entered as a plea of "no contest".

FINDS OF FACT AND RULINGS OF LAW

The Defendant's plea to the predicate offense was entered on December 5, 1994. In *State v. Kibler*, 267 S.C. 250, 227 S.E.2d 199 (1976), our Supreme Court found that the Court of General Sessions had jurisdiction to accept a plea of *nolo contendere* inasmuch as the Court clearly had jurisdiction over the crime in question in that case, housebreaking, and had jurisdiction over the person of Defendant Kibler. *Id.* However, the Court went on to conclude that Section 17-504 of the 1962 South Carolina Code of Laws could be interpreted as limiting the acceptance of such pleas to misdemeanors where that statute expressly provided for the entry of pleas of *nolo contendere* to misdemeanor offenses and was silent on the propriety of such pleas to felonies. The High Court specifically ruled that it subscribed to that interpretation of this code section and found "that the proper procedure for our lower courts to follow is to refrain from accepting pleas of *nolo contendere* in felony

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cases until such are authorized by our legislature." The Supreme Court ultimately denied relief to Kibler finding that they saw "error in the trial judge's acceptance of the plea in the instant case nor any prejudice suffered by the Appellant." 267 S.C. at 255, 227 S.E.2d at 201. It is important to note that earlier in the *Kibler* decision, our Supreme Court expressly noted that "until this case, there has been no judicial denial of acceptance of such pleas ..." 267 S.C. at 254, 227 S.E.2d at 201. It is equally important to note that to this day, §17-23-40, previously §17-504, has not been amended by our legislature to provide for the acceptance of *nolo contendere* pleas in felony cases.

As the Supreme Court stated in *Kibler*,

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A plea of *nolo contendere* literally means 'I do not wish to contend.' For all practical purposes it is a plea of guilty in so far as the consequences in the particular case in which it is pled. 'Like a plea of guilty (it) leaves open for review only the sufficiency of the indictment and waives all defenses other than that the indictment charges no offense.'

Citing, *State v. Stokes*, 274 N.C. 408, 163 S.E.2d 770 (1968). Thus, while a plea of no contest allows a Defendant to plead while not admitting his guilt, it does not afford him the opportunity to subsequently challenge the sufficiency of the evidence.

It has been argued that a subsequent decision of our Supreme Court, *State v. Munsch*, stands for the proposition that a plea of *nolo contendere* is an admission of elements of the offense for which he is charged. 287 S.C. 313, 338 S.E.2d 329 (1985). This Court does not find that interpretation of holding in *Munsch* to be convincing. A careful reading of the portion of that decision often cited for that conclusion reveals otherwise. In *Munsch*, the Supreme Court cited *Kibler* for the general principal that "a plea of *nolo contendere* leaves open for review only the sufficiency of the indictment and waives all other defenses." 287 S.C. at 314, 338 S.E.2d at 330. For that reason, the Court went on to find that,

A court cannot hear testimony after accepting the plea to determine either the fact or the degree of the defendant's guilt because the plea admits all the elements of the offense charges. In *Kibler, supra*, we stated that 'once a plea of nolo contendere is entered, it is beyond the province of the court to make any determination of the accused's guilt.'

287 S.C. at 314, 338 S.E.2d at 330.

Therefore, this Court finds that a fair reading of this portion of the *Munsch* decision, in context, makes clear that by entering a plea of *nolo contendere* a defendant waives his right to challenge the sufficiency of the evidence to establish guilt. As both *Kibler* and *Munsch* clearly indicate, although a defendant does not acknowledge his guilt by entering a *nolo contendere*, he waives his right to have the court review the sufficiency of the evidence and any other defenses he might have otherwise raised but for his decision to enter such a plea. As stated in both cases, for "all practical purposes it is a plea of guilty in so far as the consequences in the particular case in which it is pled." Long ago, the United States Supreme Court held that such a plea "like a plea of guilty, is admission of guilt for the purposes of the case." *Hudson v. United States*, 272 U.S. 451, 455. (1926) (Emphasis added). In so ruling, the Court noted the limited use of such a plea in another legal action, finding that such a plea did not, for example, "estop the defendant to plead and prove his innocence in a civil action." *Id.* at 455. South Carolina recognizes this limitation on the use of a judgment entered pursuant to a plea of *nolo contendere*. See *Kibler*, 267 S.C. at 253, 227 S.E.2d at 201, fn.1. In the landmark case of *North Carolina v. Alford*, 400 U.S. 25 (1970), The United States Supreme Court cited *Hudson, supra*, for the proposition that a plea of *nolo contendere* was a plea by which the defendant did not expressly admit his guilt but "nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty." *Id.* at 35. (Emphasis added).

PCW

The use of judgments entered by way of a plea of *nolo contendere* for purposes beyond "the purposes of the case" in which the plea was entered has recently been called into question in a case from the Fourth Circuit Court of Appeals. In *United States v. Davis*, 679 F.3d 177 (2012), the court found that Davis' "no contest" plea in state court "could not alone provide the necessary evidentiary basis to support" a sentence enhancement under a provision of the federal sentencing guidelines. *Id.* at 187. In analyzing this important issue, the Fourth Circuit observed that a defendant in North Carolina did not "admit any facts alleged in the charging indictment" by his plea of "no contest." In so ruling the Court noted that some states, such as Virginia³, have expressly found that a defendant entering a plea of *nolo contendere* admits the truth of the charge. *Id.* at 186. In the case before the Court, the State has taken the position that the language addressed herein from the *Munsch* decision stands for the proposition that South Carolina takes the same approach to a plea of *nolo contendere*. The Defendant has strongly contested that view and argues that a close reading of South Carolina case law addressing *nolo contendere* pleas supports his position that the State is overreaching in its assertion that *Munsch* stands for that proposition. This Court agrees.

Similarly, the Fourth Circuit found that an enhanced sentence under the Career Criminal Act may not rest on a conviction based on a guilty plea tendered pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), unless "the Defendant's own admissions or accepted finding of fact confirm the factual basis of a valid plea." 611 F.3d at 226. *United States v. Alston*, 611 F.3d 219 (4th Cir. 2010). While there is no transcript of the Defendant's 1994 *nolo contendere* plea before this Court, the Defendant's position concerning the facts surrounding the shooting which lead to the 1993 charge of Assault and

³ See, *United States v. DeJesus Ventura*, 565 F.3d 870, 879 (D.C. Cir. 2009).

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CLERK, C.D. GA.
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Battery with Intent to Kill was discussed at length in the decisions of the South Carolina Court of Appeals and the Supreme Court of South Carolina following the Defendant's initial conviction inasmuch as they were the subject of debate during the Defendant's original trial. It is clear from these decisions that the Defendant not only pleaded *nolo contendere*, but asserted the shooting in question was accidental. Thus, it is clear that the Defendant made no admissions of the truth of the charges found in the indictment to which he pleaded *nolo contendere*.

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The Defendant has acknowledged that the statute under which he was sentenced to life without the possibility of parole, §17-25-45, does expressly provide for judgments for most serious and serious offenses entered as a result of a plea of *nolo contendere* to be applied as "strikes" under the terms of that sentencing provision. The Defendant argues that the fact that the legislature saw fit to draft such a provision and make it law does not mean that the provision is constitutionally sound. In support of his position, the Defendant notes that, for example, just last year our Supreme Court struck down a sentencing provision that called for the lifetime electronic monitoring of individuals convicted of First Degree Criminal Sexual Conduct with a Minor or Lewd Act on a Minor without provision for judicial review as unconstitutional under the due process clause. See *State v. Dykes*, 403 S.C. 499, 744 S.E.2d 505 (S.Ct. 2013).

Our judicial system has long protected a Defendant from the use of such a plea as an admission in a subsequent civil proceeding. It is irrational to suggest that a defendant should be protected against the use of such a plea to establish civil liability, but that he can be deprived of liberty for the rest of his life, arguably decades longer than his sentence otherwise would have been for voluntary manslaughter, based on the same type of plea. The Defendant has acknowledged that the case law is clear that such a plea has the same

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consequences as a guilty plea as it relates to the charge on which it was entered; however, Defendant argues that this proposition does not support the use of such a plea as the foundation for the imposition of a life without parole sentence in a subsequent case. This Court is convinced of both the logic and wisdom of this position.

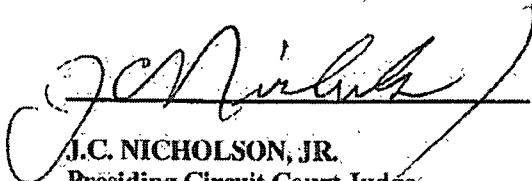
As of the *Kibler* decision in 1976, *nolo contendere* pleas were not supposed to be accepted in our courts in felony cases unless and until the legislature saw fit to change §17-23-40 to expressly permit them on felony charges. While, as in *Kibler*, the Defendant may not be able to demonstrate prejudice in his Assault and Battery with Intent to Kill case arising from the Court's acceptance of his *nolo contendere* plea on that charge, he clearly has been substantially injured by application of that prior judgment to the imposition of sentence in the case currently before this Honorable Court.

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The Defendant has submitted that the use of a plea in which he in no way admitted the truth of the allegations against him to support his sentence of life without parole pursuant to §17-25-45 violates his rights pursuant to the due process clause of the United States Constitution, U.S.C.A. Const. Amend.14. The Defendant further argues that such a conclusion would not result in defendants being able to use a plea of *nolo contendere* to insulate themselves from sentencing under our statutory strike law inasmuch as our Courts clearly have to consent to the entry of such a plea under §17-23-40. This Court agrees.

This Court finds that the record before this Court, at the time of Defendant's receipt of the life sentence in dispute, did not demonstrate that either "the Defendant's own admissions or accepted finding of fact" confirmed the factual basis of a valid plea." *United States v. Alston*, 611 F.3d 219, 226 (4th Cir. 2010). Therefore, this Court finds that the life without parole sentence imposed for voluntary manslaughter violated the Defendant's right to due process of law. This Court now grants the Defendant's request that the sentence

previously entered on the his judgment for voluntary manslaughter be set aside and orders that the Defendant be resentedenced for that offense within the statutory sentencing scheme for that crime provided by S.C. Code Ann. §16-3-50 at the time of his conviction, on January 26, 2010. A new sentencing hearing is to be schedule before me as soon as practical.

IT IS SO ORDERED.


J.C. NICHOLSON, JR.
Presiding Circuit Court Judge
Ninth Judicial Circuit

This 19 day of June, 2014.

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2014 JUN 20 PM 3:43
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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

STATE OF SOUTH CAROLINA

Plaintiff,

V.

JAMES ARTHUR SUMMERSETT, Jr.

Defendant.

FILED
2010 JAN 29 AM 11:39
IN THE COURT OF GENERAL SESSIONS
FOR THE NINTH JUDICIAL CIRCUIT

CLERK OF COURT
BY MSH

MOTION FOR RECONSIDERATION
OF SENTENCE

H099111

YOU WILL PLEASE TAKE NOTICE that the above-captioned Defendant, by and through the undersigned attorney, moves this Honorable Court for a reconsideration of the sentence of Life for Voluntary Manslaughter imposed on the defendant January 26, 2010 by the Honorable J. Nicholson, Jr..

The within motion will be made upon the grounds that the sentence imposed is unnecessarily severe under the circumstances, and upon such other and further grounds as may be hereinafter presented.

Respectfully submitted,

William J. Thrower

William J. Thrower, Esquire
Attorney for the Defendant

Charleston, South Carolina
Date: January 28, 2010

State of South Carolina

Charleston County
101 Meeting Street, Suite 400
Charleston, SC 29401
Phone (843) 958-1900
Fax (843) 958-1905



Berkeley County
300-B California Avenue
Moncks Corner, SC 29461
Phone (843) 723-3800 ext. 4529
Fax (843) 719-4588

SCARLETT A. WILSON

Solicitor, Ninth Judicial Circuit

December 13, 2013

To: Honorable J. C. Nicholson (via jnicholsonlc@sccourts.org)

Re: **State v. James Summersett, Motion to Reconsider Sentence**
2002-GS-10-5115, H099111

Judge Nicholson,

Please accept this letter in response to your request for a 2-3 page letter outlining the law re: whether someone may plead no contest (or "nolo contendere") to a felony and, if so, whether such a plea may be counted as a "strike" for enhancement purposes under South Carolina law following the hearing on Defendant's Motion to Reconsider Sentence heard on November 13, 2013.

Defendant James Summersett pleaded no contest to Assault and Battery with Intent to Kill, docket no. 1994-GS-10-4837 on December 4, 1994. He was counseled at the time by attorney Bill Thrower and sentenced to 20 years suspended upon the service of 5 years followed by 5 years of probation. (See attached sentencing sheet.) A plea of no contest has been long recognized by our courts of law. In *Hudson v. U.S.*, the United States Supreme Court held that "like a plea of guilty, [a plea of nolo contendere] is an admission of guilt for the purposes of the case." *Id.*, 272 U.S. 451 at 455, 47 S. Ct. 127 (1926). Our code of laws specifically contemplates such pleas under S.C. Code 17-23-40 in which it states, "the defendant in any misdemeanor case in any of the courts of this State may, with the consent of the court, enter a plea of "nolo contendere" thereto and upon doing so such defendant shall be dealt with in the like manner as if he had entered a plea of guilty thereto." S.C. Code Annotated 17-23-40. Furthermore, our courts have determined that, while the statute does not specify that a plea of no contest may be entered as to felony offenses, there is also no prohibition against entering such a plea in a felony case. (See *Kibler v. State*, 267 S.C. 250, 227 S.E.2d 199 (1976), "Application for vacation of plea of nolo contendere to housebreaking was properly denied where, although there is no express provision for such a plea in felony cases, there is also no

Summersett 1

prohibition of such a plea in felony cases.”) In *Kibler*, the defendant appealed his conviction in part on the ground that the court of general sessions had no authority for acceptance of such a plea to a felony. However, the supreme court determined that the court had jurisdiction over the offense as well as the defendant, such that it was “rather a matter of the willingness of the State to allow an accused the collateral benefits of such a plea.” (*Kibler* at 253-54, noting that a plea of nolo cannot be used as an admission against defendant in civil litigation.) The court declined to accept defendant’s argument that the lack of any similar provision applying to felonies precludes acceptance of nolo contendere pleas to such offenses, noting that the lower court did not commit any prejudicial error for which defendant was entitled to complain. *Id.* at 254. While the court ultimately held that the proper procedure for the lower courts is to refrain from accepting pleas of nolo contendere in felony cases until such are authorized by our legislature, there was no question that the *Kibler* court was within its jurisdiction to accept such a plea. *Id.* at 254-55.

South Carolina criminal courts treat no contest pleas the same as guilty pleas. “A plea of nolo contendere is for all practical purposes a plea of guilty, and leaves open for review only the sufficiency of the indictment and waives all other defenses. A court cannot hear testimony after accepting the plea to determine either the fact or degree of the defendant’s guilt because the plea admits all the elements of the offense charged. Any evidence taken after the plea has been accepted is merely to enable the court to determine the extent of the sentence.” *State v. Munsch*, 287 S.C. 313, 338 S.E.2d 329 (1985). The 4th Circuit Court of Appeals has addressed this issue recently examining North Carolina law. However, in North Carolina, unlike in many states including South Carolina, a defendant who pleads “no contest” does not admit to any facts alleged in the charging document. In *U.S. v. Davis*, the 4th Circuit observed”

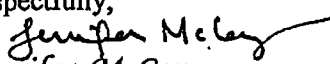
To be sure, for some purposes, a conviction pursuant to a “no contest” plea or an *Alford* plea will undoubtedly comport with the purposes of the advisory sentencing guidelines, and such a conviction will enable the Government to satisfy its burden at sentencing in many cases. See, e.g., *United States v. King*, 673 F.3d 274 (4th Cir.2012) (“[W]e first consider whether a district court’s acceptance of an *Alford* plea qualifies as an ‘adjudication of guilt’ under U.S.S.G. § 4A1.2(a). We conclude that it does. A court’s acceptance of an *Alford* plea, like an acceptance of a guilty plea, indisputably qualifies as an ‘adjudication.’”).

U.S. v. Davis, 679 F.3d 177, 186 -187 (4th Cir. (N.C.) 2012). Pursuant to *Munsch*, South Carolina law clearly provides that a plea of “no contest” is, in effect, an admission to the elements of the crime charged. See *Munsch*, *supra*. Our Rules of Evidence even reference the treatment of a plea of nolo contendere under Rule 609 governing impeachment by evidence of conviction of crime, stating “[f]or the purposes of this rule, a conviction includes a conviction resulting from a trial or any type of plea, including a plea of nolo contendere or a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970).” SCRE 609.

For purposes of the South Carolina LWOP statute, section 17-25-45(C)(3) of the South Carolina Code defines "Conviction" as "any conviction, guilty plea, or plea of nolo contendere." The State would also note that all of the qualifying offenses set forth under the LWOP statute are felonies. Clearly, the legislature contemplated a plea of no contest to a felony to qualify as a "strike" under its law. For the purpose of sentencing Defendant James Summersett, the State met its initial burden of proving the prior conviction existed by producing a certified copy of his conviction to the court at trial. That conviction for Assault and Battery with Intent to Kill is a most serious offense under S.C. Code 17-5-45(C)(1), and it was entered prior to the commission of the instant offense of voluntary manslaughter. Considering our courts' presumption of regularity that attaches to final judgments in that we may presume they were entered knowingly and voluntarily (*see State v. Payne*, 332 S.C. 266, 504 S.E.2d 335 (1998); *see also Parke v. Raley*, 506 U.S. 20, 113 S.Ct. 517 (1992)), the State maintains that the Defendant's prior conviction is a valid strike under both South Carolina statutory and case law, and therefore the sentence of life without parole should be upheld for the reasons contained herein as well as those outlined during oral argument. Furthermore, it is the State's position that the proper venue for such a collateral attack on the prior conviction is by direct appeal and/or Post-Conviction Relief.

Please do not hesitate to contact our office should Your Honor need any further information regarding the case.

Respectfully,


Jennifer McCoy

Assistant Solicitor

cc: Charleston County Clerk of Court
Tara Dawn Shurling, Esq. (via email only to tdslaw@shurlinglaw.com)
William J. Thrower, Esq. (via email only to williamjthrower@gmail.com)

Summersett 3

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

GENERAL SESSIONS COURT
SENTENCE CH. ABWIK

CH. 2000 offense during comm.
CASE NO. 94-GS-10-4837
TICKET/WARRANT NO. 1713908/CH
TICKET WARRANT NO. Indigent

The defendant, James A. Scrimmsett, is committed to the State Dept.

of Corrections/County Detention Center/under Youthful Offender Act for a term of 20 days/months/

years and/or to pay a fine of \$ _____; provided the sentence be suspended upon the service of

5 days/months/years and/or payment of \$ _____ plus pay/waive costs and assess-

ment as applicable*, the balance suspended with probation for 5 months/years.

Special conditions: intensive supervision with home detention;

attended drug counseling and vocational rehabilitation;

random drug testing.

Restitution (YES/NO)\$ _____ 13% _____ Total \$ _____

Weekly/Monthly \$ _____

to Clerk for _____

Public Defender Funds _____

Date: 12/5/94 _____

Resident/Presiding Judge, Ninth Judicial Circuit

Fine	\$ _____	INFORMATION ON DEFENDANT Age: <u>23</u> S.S. No. <u>251-51-4009</u> M ☒ F _____ Married _____ Single _____ Date of Birth: <u>11-11-71</u> Attorney: <u>B. THROWER</u> ***** ALL PAYMENTS MUST BE MADE BY CASH, MONEY ORDER OR CASHIER CHECK. WE CANNOT ACCEPT PERSONAL CHECKS. *****
Law Enforcement and Hall	\$ _____	
of Fame	\$ _____	
Community Corrections	\$ _____	
Assessment/Waive Indigent	\$ _____	
25% of Fine or \$50.00	\$ _____	
DUI Test, if Applicable	\$ _____	
10.00 G.S. Assessment	\$ _____	
3% County, if Applicable	\$ _____	
Indigent Defense Fee	\$ _____	
Total	\$ _____	

Clerk of County/Deputy Clerk

White copy _____ to Clerk

Canary _____ to Detention Center

Pink _____ to Probation

Goldenrod _____ to Defendant

Green _____ to Solicitor

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JULIE J. ARMSTRONG (SEALED)
CLERK OF COURT

Julie J. Armstrong
DEPUTY CLERK

740-5700

94-06-CL-2056

WITNESSES

JOHN BURNETT AND/OR BOB BALCERZAK
HONAN, T.A., CCSO
OCA# 93-008900B

ARREST WARRANT NO.

ACTION OF GRAND JURY

True Bill

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury

Date:

DOCKET NO. 94-GS-10-4837

The State of South Carolina,

County of CHARLESTON

COURT OF GENERAL SESSIONS

SEPTEMBER TERM 1994

THE STATE

vs.

JAMES SUMMERSETT

AW# D 713908 and DIRECT INDICTMENT

DOA: 6-15-94

Indictment for Assault and
Battery With Intent To Kill
and Possession of Firearm
or Knife During
Commission of or Attempt
to Commit Violent Crime

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK OF COURT
DEPUTY CLERK

WITNESSETH AND PLEAD GUILTY
TO THE WITHIN INDICTMENT.

James A. Summersett

WITNESS

DATE 12-5-94

Robert D. ...

WITNESSETH AND PLEAD GUILTY

James A. Summersett

WITNESS

DATE 12-5-94

Robert D. ...

FORM 8 (12-287)

INDICTMENT FOR ASSAULT AND
BATTERY WITH INTENT TO KILL
AND POSSESSION OF FIREARM OR
KNIFE DURING COMMISSION OF OR
ATTEMPT TO COMMIT A
VIOLENT CRIME

STATE OF SOUTH CAROLINA 1
COUNTY OF CHARLESTON 1

At a Court of General Sessions, convened on SEPTEMBER 6, 1994,
the Grand Jurors of CHARLESTON County present upon their oath:

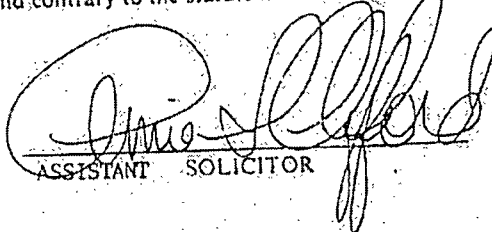
COUNT ONE — ASSAULT AND BATTERY WITH INTENT TO KILL

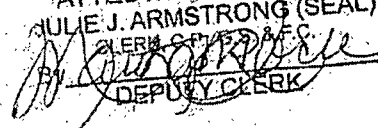
That JAMES SUMMERSETT
did in CHARLESTON County on or about February 1, 1993, with
malice aforethought commit an assault and battery upon one Ernest Riley, Jr.
with intent to kill the said victim.

COUNT TWO — POSSESSION OF FIREARM OR KNIFE DURING COMMISSION
OF OR ATTEMPT TO COMMIT A VIOLENT CRIME

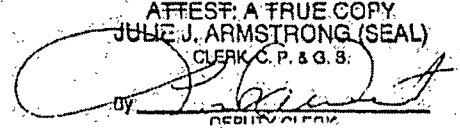
That JAMES SUMMERSETT
did in CHARLESTON County on or about February 1, 1993, possess or
visibly display a firearm or visibly display a knife during the commission or attempted commission
of a violent crime, to wit: assault and battery with intent to kill
in violation of Code Section 16-23-490, *Code of Laws of South Carolina*, (1976), as amended.

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


ASSISTANT SOLICITOR

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK C.P. & G.S.
BY 
DEPUTY CLERK

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK C.P. & G.S.

BY 
DEPUTY CLERK

imprisonment. The Defendant filed a Motion to Reconsider Sentence on January 29, 2011. The Applicant was represented at trial by William J. Thrower, Esquire of the Charleston County Bar. Attorney Thrower did not file a direct appeal on the Applicant's behalf.

The Application for Post-Conviction Relief currently before the Court was filed on October 1, 2010. The Applicant alleged generally that he received ineffective assistance of counsel prior to and during his bench trial, in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the U. S. Constitution as well as the South Carolina Constitution, and further, that trial counsel neglected to preserve his right to a direct appeal. The Respondent served its Return to this application on June 20, 2012.

Undersigned counsel was hired to represent the Defendant in his PCR action however; Counsel subsequently discovered that the Defendant's motion to reconsider Sentence had never been heard. A hearing was convened on that matter before Judge Nicholson on November 13, 2013. At the conclusion of that hearing, the Court requested memoranda on the issue of whether the Court of General Sessions had properly accepted the Defendant's earlier *nolo contendere* plea to a charge of Assault and Battery with Intent to Kill. The Defendant's judgment on that offense was the basis for his sentencing to Life without parole for Voluntary manslaughter pursuant to S.C. Code Ann. §17-25-45 (1995 as amended).

At the hearing held on the Defendant's Motion to Reconsider Sentence, he submitted that this Court violated his right to due process of law by sentencing him to life without the possibility of parole under South Carolina's strike law where the earlier strike was predicated upon his plea of *nolo contendere* to Assault and Battery with Intent to kill which is a felony in this state. In support of this argument the Defendant submitted a copy of the

records of the Clerk of Court on Indictment No. 94-GS-10-4837, which clearly indicate that the plea in question was entered as a plea of "no contest".

DISCUSSION

The Defendant's plea to the predicate offense was entered on December 5, 1994. In *State v. Kibler*, 267 S.C. 250, 227 S.E.2d 199 (1976), our Supreme Court found that the Court of General Sessions had jurisdiction to accept a plea of *nolo contendere* inasmuch as the Court clearly had jurisdiction over the crime in question in that case, housebreaking, and also had jurisdiction of the person of the defendant, Kibler. The Court went on to conclude however, that Section 17-504 of the 1962 South Carolina Code of Laws could be interpreted as limiting the acceptance of such pleas to misdemeanors where that statute expressly provided for the entry of pleas of *nolo contendere* to misdemeanor offenses and was silent on the propriety of such pleas to felonies. The Court went on to specifically rule that it subscribed to that interpretation of this code section and found "that the proper procedure for our lower courts to follow is to refrain from accepting pleas of *nolo contendere* in felony cases until such are authorized by our legislature." The Court ultimately denied relief to Kibler finding that they saw "error in the trial judge's acceptance of the plea in the instant case nor any prejudice suffered by the Appellant." *Id.*, 267 S.C. at 255, 227 S.E.2d at 201. It is important to note that earlier in the *Kibler* decision, our Supreme Court expressly noted that "until this case, there has been no judicial denial of acceptance of such pleas ..." *Id.*, 267 S.C. at 254, 227 S.E.2d at 201. It is equally important to note that to this day, §17-23-40, previously §17-504, has not been amended by our legislature to provide for the acceptance of *nolo contendere* pleas in felony cases.

As the Supreme Court stated in *Kibler*,

A plea of *Nolo contendere* literally means 'I do not wish to contend.' For all practical purposes it is a plea of guilty in so far as the consequences in the

particular case in which it is pled. 'Like a plea of guilty (it) leaves open for review only the sufficiency of the indictment and waives all defenses other than that the indictment charges no offense.' Citing, *State v. Stokes*, 274 N.C. 408, 163 S.E.2d 770 (1968).

Thus, while a plea of no contest allows a Defendant to plead while not admitting his guilt, it does not afford him the opportunity to subsequently challenge the sufficiency of the evidence. It has been argued that a subsequent decision of our Supreme Court, *State v. Munsch*, 287S.C. 313, 338 S.E.2d 329 (1985) , stands for the proposition that a plea of *nolo contendere* is an admission of elements of the offense for which he is charged. The Defendant herein would respectfully disagree with this interpretation of holding in *Munsch*. A careful reading of the portion of that decision cited for that conclusion reveals otherwise. In *Munsch* our high court cited *Kibler* for the general principal that "a plea of *nolo contendere* leaves open for review only the sufficiency of the indictment and waives all other defenses." *Munsch*, 287 S.C. at 314, 338 S.E.2d at 330. For that reason, the Court went on to find, that,

A court cannot hear testimony after accepting the plea to determine either the fact or the degree of the defendant's guilt because the plea admits all the elements of the offense charges." In *Kibler, supra*, we stated that 'once a plea of *nolo contendere* is entered, it is beyond the province of the court to make any determination of the accused's guilt.

Munsch, 287 S.C. at 314, 338 S.E.2d at 330.

The Defendant therefore submits that a fair reading of this portion of the *Munsch* decision, in context, makes clear that by entering a plea of *nolo contendere* a defendant waives his right to challenge the sufficiency of the evidence to establish guilt. As both *Kibler* and *Munsch* clearly indicate, although a defendant does not acknowledge his guilt by entering a *nolo contendere*, he waives his right to have the court review the sufficiency of the evidence and any other defenses he might have otherwise raised but for his decision to

enter such a plea. As stated in both cases, for “all practical purposes it is a plea of guilty in so far as the consequences *in the particular case in which it is pled*.” Long ago, the United States Supreme Court held that such a plea “like a plea of guilty, is admission of *guilt for the purposes of the case*.” *Hudson v. United States*, 272 U.S. 451, 455 (1926) (Emphasis added). In so ruling the Court noted the limited use of such a plea in another legal action, finding that such a plea did not, for example, “estop the defendant to plead and prove his innocence in a civil action.” *Id*, at 455. South Carolina has recognized this limitation on the use of a judgment entered pursuant to a plea of *nolo contendere*. See, *Kibler*, 267, at 253, 227 S.E.2d at 201, fn.1. In the landmark case of *North Carolina v. Alford*, 400 U.S. 25 (1970), The United States Supreme Court cited *Hudson, supra*, for the proposition that a plea of *nolo contendere* was a plea by which the defendant did not expressly admit his guilt but “nonetheless waives his right to a trial and authorizes the court *for purposes of the case* to treat him as if he were guilty.” *Id*, at 35. (Emphasis added).

The use of judgments entered by way of a plea of *nolo contendere* for purposes beyond “the purposes of the case” in which the plea was entered has recently been called into question in a case from the Fourth Circuit Court of Appeals. In *United States v. Davis*, 679 F.3d 177 (2012), that court found that Davis’s “no contest” plea in state court “could not alone provide the necessary evidentiary basis to support” a sentence enhancement under a provision of the federal sentencing guidelines. *Id*, at 187. In analyzing this important issue, the Fourth Circuit observed that a defendant in North Carolina did not “admit any facts alleged in the charging indictment” by his plea of “no contest.”¹ In so ruling the Court noted that some states, Virginia was given as an example³, have expressly found that a defendant entering a plea of *nolo contendere* admits the truth of the charge. *Id*, at 186. It is

³ See, *United States v. DeJesus Ventura*, 565 F.3d 870, 879 (D.C.Cir. 2009).

the State's position that the language addressed herein from the *Munsch* decision stands for the proposition that South Carolina takes the same approach to a plea of *nolo contendere*. As previously noted, the Defendant strongly contests that view and submits that a close reading of South Carolina case law addressing *nolo contendere* pleas supports his position that the State is overreaching in its assertion that *Munsch* stands for that proposition.

Similarly, the Fourth Circuit has found that an enhanced sentence under the Career Criminal Act may not rest on a conviction based on a guilty plea tendered pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), unless "the Defendant's own admissions or accepted finding of fact confirm the factual basis of a valid plea." *Id.* at 611 F.3d at 226. *United States v. Alston*, 611 F.3d 219 (4th Cir. 2010). While there is no transcript of the Defendant's 1994 *nolo contendere* plea before this Court, the Defendant's position concerning the facts surrounding the shooting which lead to the 1993 charge of Assault and battery with Intent to Kill was discussed at length in the decisions of the South Carolina Court of Appeals and the Supreme Court of South Carolina following the Defendant's initial conviction inasmuch as they were the subject of debate during the Defendant's original trial. It is clear from these decisions that the Defendant not only pleaded *nolo contendere* but, asserted the shooting in question was accidental. Thus, it is clear that the Defendant made no admissions of the truth of the charges found in the indictment to which he *pleaded nolo contendere*.

Lastly, the Defendant acknowledges that the statute under which he was sentenced to life without the possibility of parole, §17-25-45, does expressly provide for judgments for most serious and serious offenses entered as a result of a plea of *nolo contendere* to be applied as "strikes" under the terms of that sentencing provision. The Defendant would most respectfully note however, that the fact that the legislature saw fit to draft such a

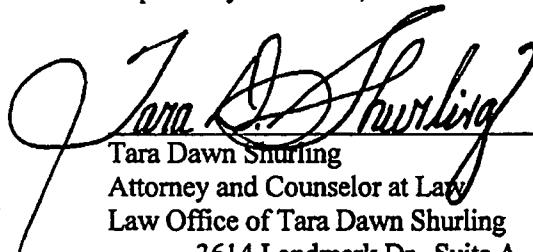
provision and make it law, does not mean that the provision is constitutionally sound. For example, just last year our Supreme Court struck down as unconstitutional under the due process clause a sentencing provision that called for the lifetime electronic monitoring of individuals convicted of First degree Criminal Sexual Conduct with a Minor or Lewd Act on a Minor without provision for judicial review. See, *State v. Dykes*, 403 S.C. 499, 744 S.E.2d 505 (S.Ct. 2013).

Our judicial system has long protected a Defendant from the use of such a plea as an admission in a subsequent civil proceeding. It is irrational to suggest that a defendant should be protected against the use of such a plea to establish civil liability but, that he can be deprived of liberty for the rest of his life, arguably decades longer than his sentence otherwise would have been for voluntary manslaughter, based on the same type of plea. The Defendant respectfully asserts that the case law is clear that such a plea has the same consequences as a guilty plea as it relates to the charge on which it was entered however, however, that does not support the use of such a plea as the foundation for the imposition of a life without parole sentence in a subsequent case. As of the *Kibler* decision in 1976, *nolo contendere* pleas were not supposed to be accepted in our courts in felony cases unless and until the legislature saw fit to change §17-23-40 to expressly permit them on felony charges. While, as in *Kibler*, the Defendant may not be able to demonstrate prejudice in his Assault and Battery with Intent to Kill case arising from the Court's acceptance of his *nolo contendere* plea on that charge, he clearly has been substantially injured by application of that prior judgment to the imposition of sentence in the case currently before this Honorable Court.

The Defendant submits that the use of a plea in which he in no way admitted the truth of the allegations against him to support his sentence of life without parole pursuant to

§17-25-45 violates his rights pursuant to the due process clause of the United States Constitution. U.S.C.A. Const. Amend.14. The Defendant would note that such a conclusion would not result in defendants being able to use a plea of *nolo contendere* to insulate themselves from sentencing under our statutory strike law inasmuch as our Courts clearly have to consent to the entry of such a plea under §17-23-40. The Defendant now respectfully asks that this Court reconsider the sentence previously entered on the Defendant's judgment for voluntary manslaughter, set aside that sentence and grant the Defendant resentencing for that offense within the statutory sentencing scheme for that crime provided by S.C. Code Ann. §16-3-50 which calls for a sentence of two (2) to thirty (30) years.

Respectfully submitted,



Tara Dawn Shurling
Attorney and Counselor at Law
Law Office of Tara Dawn Shurling
3614 Landmark Dr., Suite A
Columbia, S.C. 29204
(803) 738-8622
(803) 738-1600 (fax)
tdslaw@shurlinglaw.com

ATTORNEY FOR THE APPLICANT

This 20th day of January, 2014.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

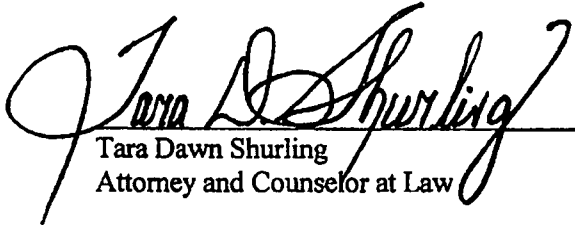
IN THE COURT OF GENERAL SESSIONS

THE STATE OF SOUTH CAROLINA,)
)
)
V.)
)
JAMES A. SUMMERSETT, 216032)
Defendant.)
)
_____)

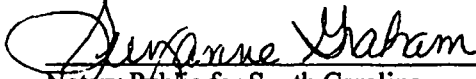
CERTIFICATE OF SERVICE

2002-GS-10-5115

The undersigned counsel hereby certifies that one copy of the Memorandum in Support of Motion to Reconsider Sentence in the above-entitled case has been served upon Jennifer Blanchard McCoy, Assistant Solicitor, by email and U. S. Mail with correct postage to 101 Meeting Street, 4th Floor, Charleston, SC 29401 this the 21st day of January, 2014.


Tara Dawn Shurling
Attorney and Counselor at Law

SWORN TO BEFORE me this 21st day
of January, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/2024

IN THE COURT OF GENERAL SESSIONS

CERTIFICATE OF SERVICE

JAMES A. SUMMERSETT, 216032
Defendant.

2002-GS-10-5115

Tara Dawn Shurling
Tara Dawn Shurling
Attorney and Counselor at Law

Daphne Graham (L.S.)

Notary Public for South Carolina

My Commission Expires: 2/28/2024

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
STATE OF SOUTH CAROLINA)
-versus-)
JAMES A. SUMMERSETT)
Defendant.)

IN THE COURT OF GENERAL SESSSIONS
NINTH JUDICIAL CIRCUIT

Indictment No.: 2002-GS-10-5115

2014 JAN 31 PM 12:04
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

STATES'S BRIEF IN REPLY TO DEFENDANT'S MOTION TO RECONSIDER

TO: The Honorable J. C. Nicholson, Circuit Court Judge

The State offers the following brief reply to the Defendant's Memorandum in Support of his Motion to Reconsider. Because the Memorandum submitted by the Defendant is itself a reply brief to the law cited by the State, the State stands by its original analysis and application of those cases to the issue at hand. Namely, that the plea of "no contest" to the predicate offense of Assault and Battery with Intent to Kill is a valid strike under South Carolina law.

I. South Carolina courts treat pleas of no contest the same as guilty pleas

In our state, a plea of no contest admits all the elements of the offense charged. *State v. Munsch*, 287 S.C. 313, 338 S.E.2d 329 (1985). South Carolina courts have not confined the consequences of such a plea to the particular case in which it is pled, as the Defendant would like the Court to rule. In fact, as the State pointed out in its initial Brief, the 4th Circuit in *U.S. v. Davis* specifically pointed out that its ruling was based on the fact that in North Carolina, Defendants who plead no contest do not admit any facts alleged in the charging document. *Id.* at 679 F.3d 186. The Fourth Circuit takes careful note to point out the contrasting views of states and that its holding in *Davis* was confined to *North Carolina's* treatment of such pleas. *Id.*

(emphasis added). The State avers that our South Carolina Supreme Court was crystal clear in its holding that our courts view a plea of no contest as an admission to all the elements of the offense charged. *Munsch*, supra. Therefore, the plea of no contest is a valid predicate offense and should count as a “strike” under S. C. 17-25-45.

II. The South Carolina legislature intended for pleas of no contest to qualify as predicate offenses under the LWOP statute

“The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature.” *Nelson v. Ozmint*, 390 S.C. 432, 436, 702 S.E.2d 369, 371 (S.C. 2010) citing *Bryant v. State*, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009). The legislature’s intent upon drafting S.C. 17-25-45 is clear. Pleas of nolo contendere to the felonies set forth under the statute are “convictions” within the meaning of the law. This is no mistake or oversight by the legislature, nor is it a failure to comply with constitutional requirements, as suggested by the Defendant. A similar provision is set forth under the South Carolina Sex Offender Registry statute, S.C. 23-3-430, which provides:

(D) Upon conviction, adjudication of delinquency, guilty plea, or plea of *nolo contendere* of a person of an offense not listed in this article, the presiding judge may order as a condition of sentencing that the person be included in the sex offender registry if good cause is shown by the solicitor.

Code 1976 § 23-3-430 (emphasis added). Furthermore, both our Rules of Evidence and case law treat pleas of no contest the same as any guilty plea. Rule 609 of the South Carolina rules of evidence provides that “evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment. For the purposes of this rule, a conviction includes a conviction resulting from a trial or any type of plea, including a plea of nolo contendere or a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25

(1970)." SCRE 609. (Citing *State v. Lynn*, 277 S.C. 222 (1981) in the Notes section for the proposition that "[a]llowing a plea of nolo contendere to be used for impeachment is consistent with prior law." See also, *Brown v. Theos*, 345 S.C. 626, 632, 550 S.E.2d 304, 307 (2001) "Entering a plea of no contest does operate as a conviction, as does a guilty plea. Furthermore, as the Court noted in *Lynn, supra*, a no contest plea is very similar to a guilty plea.)

It is clear that both South Carolina courts and lawmakers intend for a plea of no contest to give the same effect as a guilty plea in all circumstances except civil matters. Defendant's assertion that this is "irrational" is simply not supported by the law in our state.

III. Defendant and his attorney were properly served with LWOP Notice and Defendant consistent with the requirements under South Carolina case law

In the email accompanying the submission of his Memorandum, the Defendant also states that "the failure to advise the Court of the State's intent to seek LWOP under the strike law before this bench trial is another significant issue in this request for reconsideration." There is no question that both Defendant and his attorney were served notice of the State's intention to seek a sentence of life without parole prior to the trial in accordance with the requirements under the statute. There is no evidence in the record that this court was not aware of the possibility of that sentence prior to trial, but under our law, the statute's notice requirements have been met. *James v. State*, 372 S.C. 287, 641 S.E.2d 899 (2007) ("so long as the defendant and his counsel, at least ten days prior to trial, possess actual notice of the State's intention to seek a sentence under South Carolina's recidivist statute, the statute has been satisfied.") The defendant knowingly waived his right to a jury trial, as evidenced by this court's thorough examination of

him prior to trial. (See pp. 10-14 of the trial transcript dated January 25, 2010.) There is no question that the Defendant was aware of the possible punishment at stake. Therefore, for the reasons stated above and in its initial Brief to the court, the State respectfully requests the Defendant's sentence remain a life sentence.

Respectfully submitted:



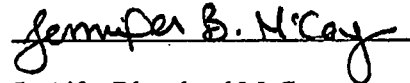
Jennifer B. McCoy
Assistant Solicitor, Ninth Circuit
Charleston, South Carolina

FILED
2014 JAN 31 PM 12:04
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSSIONS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
STATE OF SOUTH CAROLINA	)	
	)	
-versus-	)	
	)	Indictment No.: 2002-GS-10-5115
JAMES A. SUMMERSETT	)	
Defendant.	)	
	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the State's Brief in Reply to the Defendant's Motion to Reconsider has been served upon the Defendant via his attorney, Tara Dawn Shurling, by email to tdslaw@shurlinglaw.com this 31st day of January, 2014, and the original has been filed with the clerk's office.


 Jennifer Blanchard McCoy
 Assistant Solicitor, Ninth Circuit

FILED
 2014 JAN 31 PM 12:04
 JULIE L. ARMSTRONG
 CLERK OF COURT
 BY _____

1 THE COURT: I understand, through your attorney, Mr.
2 Thrower, that you have, that you would like to waive a jury
3 trial, is that correct?
4 THE DEFENDANT: Yes, sir.
5 THE COURT: And you have signed an affidavit and
6 notarized by Mr. Thrower, is that correct?
7 THE DEFENDANT: Yes, Your Honor.
8 THE COURT: And in that affidavit you state that you
9 wish to waive your right to a jury trial and be tried in a
10 bench trial, is that correct?
11 THE DEFENDANT: Yes, Your Honor.
12 THE COURT: You're not under the influence of any
13 drugs?
14 THE DEFENDANT: No, Your Honor.
15 THE COURT: And you understand the charges against you?
16 THE DEFENDANT: Yes, Your Honor.
17 THE COURT: You understand the punishment that may be,
18 be imposed?
19 THE DEFENDANT: Yes, Your Honor.
20 THE COURT: And do you understand that, a jury trial,
21 it would take all twelve jurors, unanimous twelve to find
22 you guilty?
23 THE DEFENDANT: Yes, sir.
24 THE COURT: Do you understand?
25 THE DEFENDANT: Yes, sir.

1 THE COURT: Do you have any questions about a jury
2 trial?
3 I think this case went to a jury trial back in 2002, is
4 that correct?
5 THE DEFENDANT: Yes, Your Honor.
6 THE COURT: So, you have been through a jury trial?
7 THE DEFENDANT: Yes, Your Honor.
8 THE COURT: Do you have any questions about a jury
9 trial?
10 THE DEFENDANT: No, Your Honor.
11 THE COURT: And I believe you've signed this waiver on
12 January the 11th, 2010, is that correct?
13 THE DEFENDANT: Yes, Your Honor.
14 THE COURT: Do you need any further time to talk to
15 your attorney about your rights to your jury trial?
16 THE DEFENDANT: No, Your Honor.
17 THE COURT: Have you taken any -- have you taken any
18 drugs?
19 THE DEFENDANT: Prescription medication.
20 THE COURT: All right. What prescription medication
21 are you taking?
22 THE DEFENDANT: Therozine and Prozac and antibiotics
23 and high blood pressure medication.
24 THE COURT: And what's it all for?
25 THE DEFENDANT: Sickel cell.

1 THE COURT: I know you said high blood pressure.
2 What else?
3 THE DEFENDANT: Sickel cell.
4 THE COURT: Sickel cell?
5 THE DEFENDANT: Yes, sir.
6 THE COURT: Did you take it today?
7 THE DEFENDANT: Yes, sir, Your Honor.
8 THE COURT: Take it every day?
9 THE DEFENDANT: Yes, Your Honor.
10 THE COURT: All right. Does it affect your thought
11 process?
12 THE DEFENDANT: No, Your Honor.
13 THE COURT: You understand why you're here today?
14 THE DEFENDANT: Yes, Your Honor.
15 THE COURT: Do you have any questions about why you're
16 here?
17 THE DEFENDANT: No, Your Honor.
18 THE COURT: Have you ever been diagnosed with an
19 emotional or mental condition by a doctor?
20 THE DEFENDANT: No, Your Honor.
21 THE COURT: How far did you go in school, Mr.
22 Summersett?
23 THE DEFENDANT: I completed the tenth grade and I got a
24 GED.
25 THE COURT: Got a GED?

1 THE DEFENDANT: Yes, Your Honor.
2 THE COURT: Have you worked anywhere?
3 THE DEFENDANT: Yes, Your Honor.
4 THE COURT: what type of work have you done?
5 THE DEFENDANT: I've been in the music industry, Your
6 Honor.
7 THE COURT: what do you do in the music industry?
8 THE DEFENDANT: I had a record label and a recording
9 studio.
10 THE COURT: Okay. And how long did you operate that?
11 THE DEFENDANT: For two years.
12 THE COURT: Two years?
13 THE DEFENDANT: Yes, Your Honor.
14 THE COURT: Are you married?
15 THE DEFENDANT: No, Your Honor.
16 THE COURT: Have you ever been married?
17 THE DEFENDANT: No, Your Honor.
18 THE COURT: Do you have any children?
19 THE DEFENDANT: Yes, Your Honor.
20 THE COURT: How many children?
21 THE DEFENDANT: Six.
22 THE COURT: Six?
23 THE DEFENDANT: Yes, Your Honor.
24 THE COURT: what are their ages?
25 THE DEFENDANT: Eighteen. Two of them eighteen. One

1 twenty, one seventeen, one nine, and one eight.
2 THE COURT: And how old are you?
3 THE DEFENDANT: Thirty-eight.
4 THE COURT: Thirty-eight.
5 I think you have been in jail eight years,
6 approximately eight years, is that right?
7 THE DEFENDANT: Yes, Your Honor.
8 THE COURT: All right. Mr. Thrower, is there anything
9 you would like to say concerning his right to a jury trial
10 or would you like to ask him any questions?
11 Anything you'd like to put on the record though?
12 MR. THROWER: No, sir, we discussed it at length. I
13 would just ask that his waiver be made a part of the record
14 in this case.
15 THE COURT: All right. I'm gonna mark the affidavit
16 signed by Mr. Summersett waiving his right to a jury trial
17 as Court's Exhibit No. 1, and I'll find that Mr. Summersett
18 knows the charges against him, is aware of the charges, he
19 understands the jury trial, and is knowingly waiving his
20 right to a jury trial.
21 Thank you very much.
22 (WHEREUPON, the affidavit was marked as Court's Exhibit
23 No. 1 and received into evidence at this time.)
24 THE COURT: Is the State ready to proceed?
25 MR. MCCOY: Yes, sir, Your Honor.

1 THE COURT: Okay. Is that everything?

2 MR. THROWER: Yes, Your Honor.

3 THE COURT: From the defense standpoint?

4 MR. THROWER: Yes, sir.

5 THE COURT: Okay. All right. Thank y'all very
6 much.

7 All right. It's now ten minutes after 1:00. I'm
8 going to take a lunch break till about 2:30 or thereafter,
9 then I want to look at all the exhibits because I haven't
10 seen the exhibits. I'll give you a decision as soon as I
11 have made up my mind on the case.

12 MR. DURANT: Do you want us back here at 2:30?

13 THE COURT: Why don't y'all come on back about
14 three o'clock.

15 MR. DURANT: Three o'clock, yes, sir.

16 THE COURT: And before we get to that. Charles
17 Smalls' testimony, during the middle of it, somewhere in the
18 middle of his testimony he made a statement that they were
19 crossing the ditch and he said -- I couldn't determine
20 whether he said the gun flew or the gun blew. Will you look
21 in that transcript and type out what you put down in the
22 transcript when he said that? He either said the gun flew
23 or the gun blew, but I couldn't understand which he said. I
24 want to see what you put in the transcript, okay? It
25 started in the middle of his testimony. He said they were

1 crossing the ditch and then he fell and the gun either flew
2 or the gun blew, and I couldn't determine what he said,
3 okay?

4 (The court reporter nods head up and down.)

5 THE COURT: Thank y'all very much. I'll see you at
6 3:00 ---

7 MR. THROWER: Thank you, Your Honor.

8 MR. MCCOY: Thank you, Judge.

9 THE COURT: --- or whenever I make a decision.

10 (A lunch break is taken at approximately 1:10 p.m.)

11 (The trial reconvenes at approximately 3:35 p.m.,
12 the defendant being present with counsel, and the following
13 proceedings were had:)

14 THE COURT: All right. Based on the evidence
15 presented, I find the defendant guilty of voluntary
16 manslaughter.

17 Do you have a sentencing sheet?

18 MR. MCCOY: Your Honor, I do not, but I can get
19 that right now.

20 THE COURT: All right. Get me a sentencing sheet,
21 okay?

22 MR. MCCOY: Yes, sir.

23 THE COURT: Let me see the attorneys up here before
24 you go and get the sentencing sheet.

25 (There was an off-the-record bench conference.)

1 (Said bench conference being concluded, the
2 following proceedings were had:)

3 THE COURT: Have you got a sentencing sheet?

4 MR. MCCOY: I do, yes, sir.

5 THE COURT: Do you want to hand it up.

6 MR. MCCOY: Yes, sir.

7 (Document tendered to the Court.)

8 MR. MCCOY: I'll be right back.

9 THE COURT: Thank you, sir. Let me know when
10 you're ready.

11 MR. MCCOY: Yes, sir.

12 (Mr. McCoy leaves the courtroom.)

13 THE COURT: All right. We'll just take a short
14 recess, waiting on the solicitor to come back. Everybody,
15 as far as the audience is concerned, everybody keep your
16 seat, please.

17 (A brief recess is taken.)

18 (The trial reconvenes, the defendant being present
19 with counsel, and the following proceedings were had:)

20 THE COURT: All right. Solicitor, I understand
21 that Mr. Summersett was convicted of a most serious charge
22 previously; is that correct?

23 MR. MCCOY: That's correct, Your Honor.

24 THE COURT: I don't know what the law clerk did
25 with -- here is the -- it was an assault and battery charge,

1 it looks like intent to kill, on 1/29/1992. Is that
2 correct?

3 MR. MCCOY: Yes, sir, Your Honor.

4 THE COURT: Okay. Mr. Thrower, do you agree with
5 that?

6 MR. THROWER: Yes, Your Honor.

7 THE COURT: All right. Now, Mr. Summersett, you
8 were convicted at that time of assault and battery with
9 intent to kill. I believe you said you got probation. Is
10 that correct?

11 THE DEFENDANT: Five years.

12 THE COURT: Five years' probation. Okay. I'm
13 going to mark the rap sheet, or do you have a copy of that
14 prior indictment by any chance?

15 MR. DURANT: I do, Your Honor.

16 THE COURT: Why don't you mark that as a Court
17 exhibit rather than the rap sheet.

18 I'll be glad to hear any motions you may have.

19 MR. THROWER: Your Honor, I'd make a -- renew my
20 motion for a directed verdict on both counts that I made
21 earlier and I'd also make a motion for JNOV. I know that's
22 unusual, considering you're the one who rendered the verdict
23 and I'm asking you to reconsider your own verdict; but
24 that's what I'm doing, asking you to reconsider it, find him
25 guilty of involuntary manslaughter, find him guilty of

1 possession of a pistol during commission of a violent crime,
2 and take us away from this statute, is what I'm asking you
3 to do.

4 THE COURT: Okay. Thank you very much. The motion
5 is denied. Both motions denied.

6 MR. THROWER: Yes, sir.

7 THE COURT: All right. I understand that you have
8 served him with notice to seek a life sentence; is that
9 correct?

10 MR. MCCOY: That's correct, Your Honor.

11 THE COURT: I saw where it was done in 2002. Has
12 it been done recently?

13 MR. MCCOY: It has been done, yes, sir, Your Honor,
14 around ---

15 THE COURT: Do you want to mark that as a Court's
16 exhibit, please, and the service.

17 MR. MCCOY: Your Honor, I'm going to pass this up
18 to you. This is the latest one.

19 THE COURT: Okay. Just mark it as a Court's
20 exhibit.

21 MR. MCCOY: Yes, sir.

22 THE COURT: I just want to make it part of the
23 record.

24 (Court's Exhibit No. 2, Notice of Intention to Seek
25 a Sentence of Life without Parole, is marked for

1 identification.)

2 THE COURT: All right. Mr. Thrower.

3 MR. DURANT: Your Honor, may I approach?

4 THE COURT: Yes, sir.

5 MR. DURANT: This is the certified conviction for
6 the prior ABWIK and indictment.

7 THE COURT: All right. Just mark it a Court's
8 exhibit.

9 (Court's Exhibit No. 3, copy of sentence dated
10 12/15/94, is marked for identification.)

11 THE COURT: Mr. Thrower, under the statute, with
12 the second conviction of a most serious offense, according
13 to the statute it's a mandatory life sentence. The Court
14 has no authority to reduce the life sentence, but I'll be
15 glad to hear you. Anything you'd like to tell me concerning
16 sentencing?

17 MR. THROWER: Nothing, Your Honor.

18 THE COURT: There's nothing I can say, quite
19 frankly. If convicted of voluntary manslaughter the maximum
20 is thirty years, but under the statute it's the second most
21 serious so it's a mandatory life sentence. Quite frankly,
22 the Court disagrees with that statute. I think it's
23 probably the worst statute the legislature's passed in the
24 last 20 years, but it's there and the Court's obligated to
25 follow it.

1 Is there anything else?

2 MR. THROWER: (Shakes head side to side.)

3 MR. MCCOY: Your Honor, if I could, just for the
4 record, I know that the victim's wife and daughter would
5 like to address you.

6 THE COURT: Well, what are they going to tell me?
7 I'm going to put him in jail for life. I can't do anything
8 worse than that, okay? I've listened to the trial and heard
9 the testimony ---

10 MS. KIMBERLY GRANT: I just want to give honor to
11 God.

12 THE COURT: Ma'am, I'm not talking to you.

13 I'm sorry, what?

14 MR. MCCOY: Your Honor, they just wish to address
15 you, Your Honor.

16 THE COURT: I'll be glad to hear them. Who would
17 like to speak?

18 MS. KIMBERLY GRANT: Sir, pretty much, I -- I just
19 want to give honor to God for giving me the strength to make
20 it through the first trial, two appeals, and now the second
21 trial. I don't think you did anything wrong. I don't think
22 the system did anything wrong. This is going to bring peace
23 to our family. I give honor to God first, and without Him I
24 wouldn't have the strength to go through this, but then this
25 one brings peace to us and our community. We won't have to

1 worry about him hurting anyone else.

2 And I also want to say, James Summersett, if you
3 take this sincerely, please, hopefully it brings peace to
4 you. Hopefully it does. And remember the only way you can
5 find peace, you be responsible for what you did, be
6 accountable for what you did, and ask God for forgiveness.
7 And I am sincere when I say that, please believe me.

8 I have nothing else to say.

9 THE COURT: And I'm awfully sorry for your loss and
10 your daughter's loss, and thank you so very much for telling
11 me what you just told me. I appreciate it. Thank you very
12 much.

13 MS. KIMBERLY GRANT: Thank you.

14 THE COURT: Is there anybody else that would like
15 to say anything? I'll be glad to hear them.

16 MR. MCCOY: I think that's it, Your Honor.

17 THE COURT: Okay. Anybody else like to say
18 anything? I'll be glad to hear anything from the
19 defendant's family if they would like to say something.

20 (There was no response.)

21 THE COURT: All right. Indictment number
22 2002-GS-10-5115, the defendant is sentenced to the State
23 Department of Correction for a period of life.

24 Thank you very much.

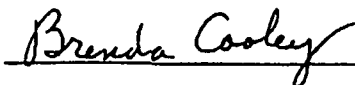
25 (Whereupon, the trial is concluded at 4:05 p.m.)

1 CERTIFICATE OF THE COURT REPORTER

2
3 I, the undersigned, Brenda Cooley, Court Reporter for
4 the Ninth Judicial Circuit of the State of South Carolina at the
5 time of the foregoing proceedings, do hereby certify that the
6 foregoing is a true and accurate transcript of record of the
7 proceedings had and the evidence introduced in Day Two of the
8 hearing of the captioned case, pages 3 through 149, inclusive,
9 relative to appeal, in the Court of General Sessions for
10 Charleston County, Charleston, South Carolina, on the 26th day
11 of January 2010.

12 I do further certify that I am neither of kin,
13 counsel, nor interest to any party hereto.
14
15

16 December 10, 2012
17

18 

19 Brenda Cooley

20 Circuit Court Reporter (Retired)
21
22
23
24
25

1 State of South Carolina
2 County of Charleston. Court of General Sessions
2002-GS-10-5115

3 _____/

4 State of South Carolina,

5 Plaintiff(s),

6 vs. Transcript of Record

7 James Summersett,
8 Defendant(s).

9 _____/

10

11

12 November 13, 2013

13 Charleston, South Carolina

14

15 B E F O R E:

16 The Honorable J.C. Nicholson

17

18 A P P E A R A N C E S:

19 For The Defendant: Tara Dawn Shurling, Esquire

20 For The State: Jennifer McCoy, Asst. Solicitor

21 Also Present: Bill Thrower, Esquire

22

23 *Mona L. Manley, Ninth Circuit Court Reporter*

24

25

PROCEEDINGS

THE CLERK: We are going to hear a motion first in the case of State of South Carolina versus James Arthur Summersett, Junior. Motion for reconsideration of sentence, in the court of general sessions for the Ninth Judicial Circuit. Indictment number 2002-GS-10-5115.

THE COURT: Do you want to come around?

MS. SHURLING: Yes, Your Honor.

THE COURT: Have you got a caption?

MS. SHURLING: I do, Your Honor. I think that the court reporter has a caption. We gave her one this morning.

THE COURT: You already gave her the caption?

MS. SHURLING: Yes, sir.

THE COURT: Okay. All right.

All right. Ms. Shurling, I understand that you are representing Mr. Summersett on a PCR; is that correct?

MS. SHURLING: Your Honor, I was hired to represent him in a PCR. In the process I discovered that there had not been a direct appeal. And when investigating why there had not been a direct appeal I discovered that

1 there was a motion to reconsider sentence that
2 had been pending within shortly, after
3 within --

4 THE COURT: What was the date of the
5 trial?

6 MS. SHURLING: The date of the trial, Your
7 Honor, would be January the 26th, 2010.

8 THE COURT: January the 26th?

9 MS. SHURLING: Yes, Your Honor.

10 THE COURT: The motion to reconsider was
11 filed January the 28th, 2010, and that's never
12 been heard, right?

13 MS. SHURLING: Correct, Your Honor.

14 THE COURT: Okay. I can't gave you any
15 reason as to why it hasn't been heard, but it
16 hasn't. So that is what we are here for today?

17 MS. SHURLING: Yes, sir.

18 THE COURT: I'll be glad to hear you on
19 the motion to reconsider the sentence in the
20 case of State versus James Arthur Summersett.
21 I don't see the -- let me see.
22 2002-GS-10-5115.

23 MS. SHURLING: Thank you, Your Honor.

24 THE COURT: I'll be glad to hear you. I
25 had briefly reviewed the transcript that you

1 sent to me scratching the sentencing part about
2 life. My understanding is it was the second
3 most serious. And I believe that I stated in
4 the record that I didn't have any choice in the
5 matter.

6 MS. SHURLING: I understand that, Your
7 Honor. I do have --

8 THE COURT: So, tell me that I can modify
9 the sentence.

10 MS. SHURLING: I have two arguments in
11 that regard, Your Honor, that I would like to
12 place on the record and hopefully can convince
13 Your Honor of their merit.

14 First, Your Honor, as you are aware, the
15 statutory provision controlling strikes
16 requires a mandatory life without parole
17 sentence for a person receiving a second most
18 serious strike. I don't contest that.

19 However, and the statutory provisions also
20 require that the Defendant and/or his counsel
21 be given notice within ten days of trial of the
22 State's intent to pursue that option and seek
23 life without parole as a penalty.

24 THE COURT: Within ten days of seeking the
25 option?

1 MS. SHURLING: Yes, sir, Your Honor.

2 THE COURT: All right. Okay. And in
3 fact, at trial Your Honor had marked as Court's
4 Exhibits 2 and 3 the documentation presented by
5 the State concerning a predicate strike back in
6 1994 for assault and battery with intent to
7 kill.

8 With regard to the imposition of a life
9 without parole sentence on the facts of this
10 case I would make two essential arguments.
11 One, Your Honor, is that while the statute
12 requires notice to the Defendant and Defense
13 counsel, it is silent on the question of
14 whether or not the presiding judge be given
15 advance notice of the State's intent to seek a
16 life without parole sentence in any given case.

17 As Your Honor no doubt recalls, certainly
18 after reviewing the transcript provided by the
19 Defendant, this was a bench trial.
20 Historically, Your Honor, one of the few
21 benefits a Defendant receives for giving up his
22 right to have a jury of 12 of his peers decide
23 the question of whether or not he's guilty or
24 not guilty and electing to proceed with a bench
25 trial is that in a bench trial the finder of

1 fact is aware of the penalties at stake.

2 Now, having said that, I'm certainly
3 perfectly aware of both court of appeals and
4 Supreme Court case law stating that where a
5 jury is concerned the potential penalties
6 involved in offenses before the Court is not a
7 proper consideration for them in their
8 deliberations.

9 However, it is an unavoidable fact that
10 when you waive your constitutional right to
11 trial by jury and elect to be tried by a judge,
12 it is a given that the Judge presiding over the
13 proceeding is well versed in the penalties for
14 the various offenses before the Court.

15 In reading this record, Your Honor, it is
16 apparent, or at least I believe that it's
17 apparent, both in the record and in my
18 discussions with trial counsel present with me
19 at Defense table this morning, Bill Thrower,
20 that Your Honor was apparently not aware that
21 the State was seeking to impose a life without
22 parole sentence in this case until after Your
23 Honor had found my client guilty, not of
24 murder, but of voluntarily manslaughter.

25 I believe that in the interest of equity

1 and due process it was appropriate that the
2 State put not just the Defendant and Defense
3 counsel on notice, but Your Honor as the finder
4 of fact in a bench trial on notice of their
5 intent to try to lock my client up for the rest
6 of his life under the strike provisions of our
7 law prior to this trial.

8 I would ask that Your Honor first, on that
9 basis, consider vacating the life without
10 parole sentence and that you enter a sentence
11 that would be appropriate in your judgment on
12 the facts of this case for a finding of
13 voluntary manslaughter which is the verdict
14 that Your Honor rendered.

15 Secondly, there's another issue involving
16 sentencing in this case that I have been unable
17 to find any precedent concerning and that is
18 the fact that the predicate --

19 THE COURT: The what?

20 MS. SHURLING: The predicate offense in
21 this case, the assault and battery with intent
22 to kill charge from 1994, was entered as a
23 result of a plea of no contest. If Your Honor
24 looks at the documents in the Clerk of Court's
25 file labeled Court's Exhibit No. 3,

1 specifically, the cover page there should be an
2 indictment in the right-hand column, it
3 indicates that the Defendant appeared, and
4 where it says pled guilty it's struck through
5 and the words "no contest" are written above
6 guilty. And my client signed it on December
7 5th, 1994. Which is, of course, the same day
8 that the sentencing sheet for this offense
9 indicates a penalty of five years probation was
10 entered.

11 The law is silent on this subject. I
12 recognize that there's case law that tends to
13 indicate that a plea of no contest or an offer
14 plea for most purposes has the same effect in
15 terms of judgment and sentence.

16 THE COURT: Aren't the cases that say that
17 have the same effect on promulgating additional
18 time such as in, I guess, your larceny and
19 property cases?

20 MS. SHURLING: There are, Your Honor.
21 There are cases with regard to it being a
22 second offense with regard to, I believe, a
23 larceny case and there may even with a drug
24 case.

25 THE COURT: Drug case, right.

1 MS. SHURLING: Where the same applied.

2 THE COURT: Why wouldn't the same
3 rationale apply in this case?

4 MS. SHURLING: I think that, Your Honor, I
5 would be forced to rely on an argument more
6 often made in death penalty cases, which is
7 seeking to impose a sentence of life without
8 parole in a particular case, especially one
9 like this one, is profoundly different from
10 simply trying to slightly elevate the penalties
11 at stake.

12 Obviously our Court has not seen fit, our
13 Legislature rather, has not seen fit to tie
14 predicate offenses to any particular penalty
15 imposed. However, I would beg Your Honor to
16 make note of the fact that although this was an
17 assault and battery with intent to kill
18 judgment and sentence from 1994, it is one
19 which my client was allowed to enter a plea of
20 no contest to and it was apparently
21 insignificant enough or minor enough, I won't
22 say insignificant, but it was apparently minor
23 enough in terms of severity and factual
24 circumstances that the sentencing judge saw fit
25 to give him probation. A rather unusual

1 sentence for assault and battery with intent to
2 kill case.

3 THE COURT: What is the maximum for
4 voluntary? Thirty, I believe.

5 MS. SHURLING: Thirty, yes, Your Honor.

6 THE COURT: Okay, go ahead.

7 MS. SHURLING: I would also submit, Your
8 Honor, that I realize that I'm dealing with
9 case law that says juries shouldn't consider
10 penalties, but as I have said, albeit vested
11 with great power and authority, Judges are
12 still human and the facts remain that on the
13 facts in this case there was a factual basis
14 upon which Your Honor could have found this
15 particular Defendant guilty of not a voluntary
16 manslaughter but involuntary manslaughter.

17 And it is impossible to know what impact,
18 if any, a foreknowledge of the State's impact
19 to try to impose a life without parole sentence
20 based upon a predicate offense involving a
21 probation sentence prior to hearing the
22 evidence and making the ultimate determination
23 on guilt.

24 I believe based on both of those factors
25 it would be appropriate for Your Honor to set

1 aside the sentence of life without parole, and
2 as Your Honor has noted, the penalty for
3 voluntary manslaughter is up to 30 years.
4 However, Your Honor would have great latitude.
5 I believe the penalty at the time of this
6 offense was still 0 to 30, which would have
7 given Your Honor great latitude in sentencing,
8 but for the State's attempt to use this
9 previous no contest plea in support of their
10 efforts to give my client life without parole.

11 So, in sum, I think that is an equitable
12 argument and indeed a due process argument that
13 Your Honor, as the finder of fact at a bench
14 trial, should have been made aware of the
15 State's intentions prior to the hearing of
16 evidence and certainly prior to the
17 determination on the issue of guilt in this
18 case.

19 And further, that the fact that the prior
20 offense was one involving a no contest plea.
21 And as a side note, even a probationary
22 sentence is one that Your Honor is urged to
23 consider in reaching a decision concerning all
24 of these arguments..

25 I believe that on the facts of this case,

1 as I have said, this could easily have been an
2 involuntary manslaughter case, which would have
3 taken it out of the purview of the strike law.
4 For that reason, since we are before the Court
5 on a motion to reconsider sentence, I'll renew
6 Attorney Thrower's motions made at the end of
7 the bench trial for a new trial as well.

8 THE COURT: Well, I don't remember what
9 motions were made. What motions did he make?

10 MS. SHURLING: Your Honor, he made a
11 motion for a new trial asking Your Honor set
12 aside the finding of voluntary manslaughter and
13 change your verdict to involuntary
14 manslaughter.

15 THE COURT: He asked me to set aside
16 voluntary and find him guilty of involuntary?

17 MS. SHURLING: Involuntary, yes, sir.

18 THE COURT: I don't remember in reading
19 the transcript -- is that correct, Mr. Thrower?

20 MR. THROWER: That would be the only
21 option at the time because you already found
22 him guilty of voluntary, I would assume, so . . .

23 MS. SHURLING: Your Honor, one additional
24 factor that doesn't come to bear from the legal
25 argument for me --

1 THE COURT: I guess what I'm asking is on
2 his motion was he asking for a motion for a new
3 trial? I assume, as the 12th juror, although
4 not a jury trial, to reconsider the facts in
5 the case or to reconsider the facts in the case
6 and reduce them from voluntary to involuntary.
7 There's a little difference.

8 MS. SHURLING: I understand, Your Honor.

9 THE COURT: What do you ask for?

10 MS. SHURLING: My first prayer for relief,
11 Your Honor, would be that you set aside the
12 life without parole sentence and re-sentence
13 him to a penalty in Your Honor's discretion to
14 be appropriate within the range for voluntary
15 manslaughter at the time of this conviction,
16 which was 0 to 30.

17 Alternatively I would ask that Your Honor
18 set aside your own finding of voluntary
19 manslaughter and enter a judgment of
20 involuntary manslaughter and appropriately
21 sentence my client for that offense, which I
22 believe at the time of this offense carried a
23 maximum penalty of three years.

24 Your Honor, as an aside, not particularly
25 germane to the legal documents, but I think

1 that it's important for the court to have the
2 entire picture. My client, James Summersett,
3 suffers from two substantial physical
4 disabilities. One of the ones that made, I
5 believe, credible the involuntary manslaughter
6 argument had to do with the fact that he had
7 previously been shot and suffered substantial
8 injury to one of his legs resulting in his
9 inability to bend his leg at the knee. I can
10 personally attest to that because I have been
11 with him in numerous court proceedings where we
12 had to make allowances for his -- well,
13 actually, not court proceedings, interviews and
14 so forth, where we had to make allowances for
15 his inability to bend his leg.

16 THE COURT: Thank you. I don't mean to
17 interrupt you. Do you waive his presence?

18 MS. SHURLING: I do, Your Honor. I was
19 going to put that on the record. I apologize,
20 I forgot to. The other is, Your Honor, is that
21 he is a life-long sufferer of sickle cell
22 anemia. And that he has, of course, been
23 receiving some medical treatment while in the
24 South Carolina Department of Corrections. But
25 I can tell you as an officer of the court, I

1 would make a proffer under the Cabasaw
2 (phonetic) decision that I'm aware that he's
3 suffered some great physical difficulties
4 during his incarceration including severe pain
5 episodes as a result of sickle cell anemia and
6 a level of care that differs from that that
7 would be available to him were he not
8 incarcerated in the Department of Corrections.

9 I realize those are not legal arguments
10 but the are factors that I would remind Your
11 Honor because I think that they come to bear in
12 deciding what the appropriate penalty in this
13 case would be.

14 THE COURT: Let me ask you one thing:
15 What do the cases say about, in this particular
16 case, the max is 30 years, and because of the
17 statute, increased to life? What do the State
18 and cases say about the severe and unusual
19 aspect of finding someone guilty and he
20 receives more than the crime itself would
21 have -- could have received? That is on all of
22 these increases, okay, but what do the cases
23 basically say?

24 MS. SHURLING: Your Honor, I have spent,
25 as you might imagine, a great deal of time over

1 the years studying the recidivist violator
2 statute.

3 THE COURT: That is why I'm asking you the
4 question.

5 MS. SHURLING: Yes. Unfortunately taking
6 various analyses to support the decision,
7 Courts across the country have upheld, as has
8 our fourth circuit, recidivist violent offender
9 statutes as long as they require a
10 particularized finding of a predicate offense
11 sufficiently defined by statute. And that is
12 of course --

13 THE COURT: So, has the Supreme Court
14 addressed the issue?

15 MS. SHURLING: Our Supreme Court?

16 THE COURT: U.S. Supreme Court. Or do you
17 know?

18 MS. SHURLING: Yes, sir, Your Honor.

19 THE COURT: You said the Fourth Circuit.
20 The U.S. Supreme Court.

21 MS. SHURLING: Yes, sir, they have. And I
22 apologize. The name of the case escapes me at
23 the moment. Alzheimer's disease is catching
24 up. But neither our Supreme Court nor any
25 other Supreme Court that I'm aware of has

1 addressed the specific arguments that I have
2 advanced here today.

3 THE COURT: Okay. Anything else?

4 MS. SHURLING: No, sir, Your Honor, except
5 to say that I apologize for not making
6 arrangements for the transport of my client for
7 this proceeding. In Richland County when a
8 motion to reconsider sentence is placed on the
9 docket it is my understanding that they
10 automatically put someone on the jail list.
11 I'm afraid that I'm too accustomed to that rule
12 and didn't know that it was my place.

13 THE COURT: Unfortunately he's not in
14 Charleston County.

15 MS. SHURLING: I understand, Your Honor.

16 THE COURT: And in a protective order of
17 transport. I didn't prepare it, neither you
18 nor the solicitor prepared one?

19 MS. SHURLING: Yes, I understand, Your
20 Honor. What I would like to point out, all of
21 the folks on my side of the courtroom are
22 various members of Summerset County, with
23 varying degrees of kinship that are here to
24 show support for him here today. I had a
25 chance to meet with them briefly this morning

1 and explain to them that the arguments before
2 the Court are purely legal in the sense that
3 nothing they could say, no matter how well
4 intentioned, or for that matter nothing
5 Mr. Summersett could say, could impact Your
6 Honor's decision with regard to whether or not
7 to set aside the life without parole penalty
8 and re-sentence him to involuntary
9 manslaughter.

10 For that reason I said that it was my
11 intent as his counsel to waive his right to be
12 present here today. I would ask that in the
13 event that Your Honor sees fit --

14 THE COURT: If I set it aside we will have
15 another sentencing hearing and everybody will
16 be present, including your client. There's no
17 way that I'm going to sentence him without his
18 being here, if I said set it aside.

19 MS. SHURLING: Thank you, Your Honor.
20 That was my only remaining prayer, thank you.

21 THE COURT: One question. On the first
22 argument about the finding of fact being aware;
23 you say that you could find no law on that,
24 correct?

25 MS. McCOY: I could find no law having

1 ever addressed that issue previously, Your
2 Honor.

3 THE COURT: How about on the second
4 argument of a plea of no contest with five
5 years probation?

6 MS. SHURLING: Not with regard to the
7 usage of the recidivist violent offender
8 statute for purposes of imposing life without
9 parole. As Your Honor notes, there are cases
10 that have to do with the use of a prior where
11 an offer plea was entered for purposes of
12 accelerating, for example, a burglary to a
13 higher degree or drug offense to a second or
14 third. However, I was unable to find any case
15 law on point with regard to the use of such
16 judgment in a sentence in connection to an LWOC
17 offer.

18 THE COURT: Was it an offer or was it no
19 contest?

20 MS. SHURLING: It says no contest which is
21 in and of itself problematic because it is my
22 understanding --

23 THE COURT: Tell me your distinction
24 between offer and no contest.

25 MS. SHURLING: Historically, Your Honor,

1 my understanding of the case law is that a no
2 contest plea is entered in misdemeanor cases
3 and than an Alford plea, a plea under South
4 Carolina versus Alford is entered, under our
5 court rules, it must be entered with the
6 consent of the State in a factual situation
7 where the Defendant is willing to admit his
8 guilt -- pardon me -- is not willing to admit
9 he's guilty.

10 THE COURT: A jury would find him guilty
11 based on the facts?

12 MS. SHURLING: Essentially, to borrow
13 language from the actual Alford decision, they
14 say that there are many reasons that a person
15 might enter a plea other than being guilty and
16 that one of them is that, despite maintaining
17 your innocence, you may be aware of the State's
18 case such that you fear conviction despite your
19 innocence.

20 THE COURT: How would you distinguish the
21 no contest in Alford?

22 MS. SHURLING: I don't believe that there
23 is, for these purposes, a distinction other
24 than to say that it was just a mistake in
25 nomenclature on the written record.

1 Historically, guilty and no contest plea are
2 the same thing in my understanding.

3 THE COURT: They have always been treated
4 as the same.

5 MS. SHURLING: I believe that they are,
6 with exception of the fact that up until the
7 Alford decision was entered, which was a marker
8 case, the rule, the common law had been that
9 you could enter a no contest plea only in
10 misdemeanor cases, as I understood the rule.
11 And then along came Mr. Alford who entered a
12 plea pursuant to a plea bargain in a murder
13 case.

14 And by the time that he got to Federal
15 court on a petition for writ of habeas corpus,
16 he was asserting that the State trial court
17 erred in accepting his plea to guilty to murder
18 when the record in fact reflected that he
19 consistently vehemently maintained his
20 innocence and asserted that the trial court
21 should not have allowed him to enter a plea
22 under those circumstances.

23 It was in that case where the United
24 States Supreme Court in now a cornerstone case
25 that we cite weekly said, No, there are lots of

1 reasons why someone might enter a plea, and
2 only one of them is being guilty, among other
3 reasons is your fear of being convicted guilty
4 based on the strength of the State's case, even
5 though you maintain your innocence, that if you
6 want to make that calculated decision that the
7 deal that you are being offered is better than
8 taking the risk of being convicted, you have
9 the right to do that.

10 Now, unfortunately, in my judgment, what
11 that has evolved into is a strict court rule in
12 South Carolina that an Alford plea may not be
13 entered under any circumstances unless the
14 State is in agreement. I understand that an
15 Alford plea should have to be consented to by
16 the State where there has been a quid pro quo.
17 If the State has agreed to dismiss charges, for
18 example, has agreed to reduce charges, has
19 agreed to even negotiate a recommended cap or a
20 negotiated cap where there has been some
21 concession to the benefit of the Defendant in
22 exchange for his willingness to plead I believe
23 that the State could and should have the
24 ability to --

25 THE COURT: You think all of that is

1 required on a plea of no contest, the State's
2 consent and some benefit be received by the
3 Defendant as a result of the offer plea? You
4 think that those two elements are in no contest
5 also?

6 MS. SHURLING: There's no clear case law
7 on that that I'm aware of, Your Honor. I can
8 only say --

9 THE COURT: What I'm driving at, I'm
10 trying to get your thoughts: Can you plead no
11 contest to a felony?

12 MS. SHURLING: It is my understanding that
13 you could not.

14 THE COURT: That is my understanding too.

15 MS. SHURLING: It is my understanding that
16 you cannot plead no contest to a felony.

17 THE COURT: The distinction in my mind
18 between no contest and Alford is what you have
19 enumerated, is that Alford states the consent
20 that the Defendant has to receive some benefit.
21 And third, the Defendant has to acknowledge
22 based upon the facts that the State presents to
23 the Court that the Defendant would be -- a jury
24 would more than likely find the Defendant
25 guilty.

1 Those elements I understand no contest,
2 the person of the statutory court says, Judge,
3 I don't contest the facts period.

4 MS. SHURLING: All of which are all among
5 to reasons that I believe that this 1994
6 judgment and sentence entered pursuant to a no
7 contest plea should not have been available as
8 a predicate offense based upon which my client
9 can be given a life without parole sentence.
10 Which is part and parcel that my argument that
11 the life without parole sentence should be set
12 aside.

13 I should note, Your Honor, that my copy of
14 the items -- obtained copies of the cover sheet
15 from the 1994 charge and the sentencing sheets,
16 and on the copy I had -- much of what I had was
17 not clear. On my way in the courtroom this
18 morning I attempted to speak to Your Honor, I
19 saw you cutting through the clerk's office. I
20 got another copy.

21 And if I may approach, your Honor? On
22 this copy I was, for the first time, able to
23 faintly make out the notation that this was a
24 no contest plea.

25 THE COURT: I'm glad that you could make

1 it out, because I can't. Where do you see
2 that? Okay. Written here, No contest under
3 guilty.

4 Did they have sentence sheets back in '98?

5 MS. SHURLING: Your Honor, I apologize,
6 the State was just pointing something out to
7 me. My copy of the sentencing sheet was
8 likewise -- no, I can't blame it on the copy.
9 I read it incorrectly. My apologies.

10 Your Honor, I'll hand up a copy of what
11 was Court's Exhibit No. 3. And it does
12 indicate that my client received a sentence of
13 20 years suspended upon service of five years
14 with five years probation. It requires
15 intensive supervision with home detention,
16 attend drug counseling and vocational
17 rehabilitation, random drug testing.

18 What is not clear, Your Honor, is how much
19 time he had served as of the date of his
20 sentencing. The provisions of his probation
21 certainly sound as though he was about to be
22 released on time served but I can't tell that
23 from the document.

24 THE COURT: Department of Corrections
25 determined 20 years suspended for five years

1 and five years probation; is that correct?

2 MS. SHURLING: I am sorry, Your Honor, the
3 Respondent was asking me a question, I
4 apologize.

5 THE COURT: It appears 20 years, suspended
6 upon service of five years with five years
7 probation after he completed the five years,
8 that is the way that I read the sentence sheet.

9 MS. SHURLING: That is correct, Your
10 Honor. I apologize that I misspoke earlier.
11 And as has just been pointed out to me by
12 counsel of Respondent, that an offense -- we
13 had an offense date on that charge of February
14 1st, 1993. He was sentenced in -- the date on
15 the sentencing is November of '94, so we are
16 talking about -- we are talking about a year, a
17 year and nine months that he had already served
18 prior to being sentenced in this case -- in
19 that case rather, Your Honor.

20 THE COURT: Okay. All right. I'll mark
21 these as a Court's exhibit. I am going to get
22 the Clerk to produce a better copy of this. I
23 guess it looks like the back of the indictment
24 sheet. I'm looking at -- I'll get a better
25 copy of it. I'll mark that as a Court's

1 exhibit.

2 All right. Anything else?

3 MS. SHURLING: No, sir. Your Honor, with
4 the understanding that the documentation
5 concerning the entry of the no contest plea has
6 been entered as a Court's exhibit I will rest.

7 THE COURT: All right. I will be glad to
8 hear from the State.

9 MS. McCOY: Thank you, Your Honor. We
10 appreciate you hearing this today. And it is a
11 very important thing for us as well. I'll
12 address Ms. Shurling's argument a little bit
13 out of order as to her -- I think that we just
14 kind of cleared up her argument as to the
15 predicate offense, you know, him being
16 sentenced to probation, obviously we cleared
17 that up now. He was actually sentenced to 20
18 years, suspended to five years in jail with
19 five years probation to follow that. So it
20 wasn't merely a probationary type sentence.

21 As to the no contest argument, Your Honor.
22 Fortunately the Legislature has been clear
23 enough in their statute on LWOC for this, that
24 we don't need to consider this. Your Honor, if
25 you look at 172545 Section --

1 THE COURT: Sorry, 17 what --

2 MS. SHURLING: 172545, which is the LWOP
3 statute. Under Section C(3), which is the
4 definition, it says, Conviction means any
5 conviction, guilty plea, or plea of nolo
6 contendere. So, Your Honor, the State
7 understands that to mean that even a prior
8 conviction of no contest qualifies as a
9 conviction for the purposes of the two strike
10 law in South Carolina.

11 Therefore, this LWOP sentence that you
12 handed down was absolutely appropriate that
13 day.

14 The two offenses are most serious. The
15 assault and battery with intent to kill from
16 1994 and the voluntary manslaughter that Your
17 Honor found him guilty of after this retrial.
18 Therefore you sentenced him correctly, Your
19 Honor.

20 As to Ms. Shurling's argument that Your
21 Honor didn't receive notice prior to the bench
22 trial that this was an LWOP situation, Your
23 Honor, we would state that that's one of the
24 reasons that, you know, we have the judicial
25 system set up the way that we do in South

1 Carolina. You can't pick judges. It all goes
2 to the fairness of the trial for both sides,
3 the State and the Defense.

4 In a bench trial the Judge acts as a jury,
5 and a jury certainly wouldn't get prior notice
6 to an LWOP situation as discussed by the
7 Defendant. And Your Honor, in the transcript
8 at both the beginning -- actually, at the
9 beginning of the trial when you were discussing
10 with the Defendant on Page 10 of the
11 transcript, you were discussing with him, You
12 understand the charges against you, he says,
13 Yes, Your Honor. And you say, You understand
14 the punishment that may be imposed, and he
15 said, Yes, Your Honor. And we have proof in
16 the Court's exhibit in the retrial that he is
17 on notice of life without parole. And his
18 attorney signed it. They both signed it well
19 in advance of the trial, more than a month in
20 advance of the trial.

21 They were both well aware of the sentence
22 that he was facing, the possibility of the
23 sentence. And the state would ask Your Honor
24 to uphold the sentence imposed that day. And
25 as to the judgment notwithstanding the verdict,

1 the new trial motion that Defense counsel also
2 brought up at the end of her argument, I would
3 state that the ten days have passed for that,
4 Your Honor, they are untimely at this point and
5 inappropriate given the fact that you did
6 impose a correct sentence that day.

7 THE COURT: What was untimely?

8 MS. McCOY: I think that she made a motion
9 for the new trial.

10 THE COURT: I think that she made the
11 motion for new trial and I think that I denied
12 that and then she filed the motion two days
13 later for reconsideration, and that would be
14 part of the reconsideration. Why isn't that
15 timely? I'm not saying that I am not going to
16 grant a new trial but you said it is not
17 timely. Why is it not timely two days after
18 the trial? Motions to reconsider --

19 MS. McCOY: This motion that we are here
20 on today --

21 THE COURT: -- on all of the decisions
22 that were made.

23 MS. McCOY: This motion that we are here
24 on today is absolutely timely filed but I think
25 that any new additional motions that she would

1 make at this point.

2 THE COURT: I agree with that, but the
3 motion to reconsider would consider all of the
4 refer to everything, and the decision. I don't
5 understand what you say ain't timely.

6 MS. McCOY: I think only the motion to
7 reconsider we are here on today, that was
8 timely.

9 THE COURT: You don't think that she can
10 raise the issue on a motion to reconsider for a
11 new trial; is that your position?

12 MS. McCOY: I don't think that it is
13 articulated in the motion to reconsider the
14 sentence that was filed timely. If that makes
15 sense, Your Honor.

16 THE COURT: Okay. You are saying because
17 the reconsideration doesn't specifically
18 address new trial she can't raise it today,
19 basically?

20 MS. McCOY: Correct. We are here on the
21 sentencing alone.

22 THE COURT: Okay. Anything else?

23 MS. McCOY: No, Your Honor.

24 THE COURT: Ms. Shurling?

25 MS. SHURLING: Your Honor, I just would

1 respond to the last argument. I certainly
2 understand and agree that if Mr. Thrower had
3 not made a motion for a new trial at the
4 conclusion of the bench trial then I could not
5 make one for the first time in the context of
6 the motion to reconsider sentencing.

7 I am, however, the Court still has
8 jurisdiction over the matter and I have done
9 nothing more than to renew a motion that was
10 made immediately following Your Honor's
11 rendering of the judgment and sentence, which
12 was a motion for a new trial.

13 THE COURT: All right. Thank you all very
14 much.

15 MS. SHURLING: Of course, I had a
16 three-tier argument. Number one is to have the
17 life without parole sentence set aside and the
18 client sentenced for voluntary manslaughter.
19 And Your Honor, that's based not just on the no
20 contest, but on the failure of notice to the
21 court on the arguments that I have already
22 made. I won't re-invent the wheel.

23 But also, Your Honor, we are asking in the
24 event Your Honor does not see fit to simply set
25 aside the sentence that Your Honor allow him a

1 favorable ruling, reconsider your earlier
2 ruling on the motion for new trial and grant
3 him a new trial. Thank you.

4 THE COURT: I would ask both parties to
5 send me a two- or three-page letter. You can
6 do it in letter form on the issue of whether
7 someone can enter a plea of no contest to
8 assault and battery with intent to kill. And
9 if in fact that is the law, how does that
10 affect the issue of using that particular plea
11 to enhance life without parole? I want that
12 addressed. And I'll give you ten days. You
13 can do it in letter form and it should take you
14 two or three pages. Don't send me a 20-page
15 memo, okay.

16 MS. SHURLING: Yes, sir, Your Honor.
17 Beggars can't be choosers, but -- and I know
18 that this has been pending a long time. But
19 I'm booked solid in court for the next week.
20 Could we possibly have 15 days instead of 10?

21 THE COURT: I'll give you as much time as
22 you want. How much time do you need?

23 MS. SHURLING: I would ask for 30.

24 THE COURT: That's fine. I will give you
25 thirty. I'm not trying to rush the issue. I'm

1 just saying when you prepare it don't send me a
2 10- or 15-page memo. I want to know how the no
3 contest applies. If in fact you can't plead no
4 contest to a felony, how does that apply to the
5 sentencing?

6 MS. SHURLING: And I gather from that Your
7 Honor is not interested on any further argument
8 on the issue of whether or not --

9 THE COURT: No, ma'am. Thank you very
10 much.

11 MS. SHURLING: Thank you. May I approach?

12 THE COURT: I don't need -- you made a
13 very good argument. I don't need anything
14 else. I understand your argument.

15 MS. SHURLING: Thank you. May we
16 approach?

17 THE COURT: Thank you very much for being
18 here.

19 (End of excerpt.)
20
21

22 CERTIFICATE

23

24 STATE OF SOUTH CAROLINA:

25 COUNTY OF CHARLESTON:

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

STATE OF SOUTH CAROLINA

-versus-

JAMES SUMMERSETT

Defendant.

) IN THE COURT OF
) GENERAL SESSIONS
) INDICTMENT NO(S). 2002-GS-10-5115,
) 2002-GS-10-5116
)
)
)

) *NOTICE OF INTENTION TO SEEK A*
) *SENTENCE OF LIFE WITHOUT PAROLE*
)
)

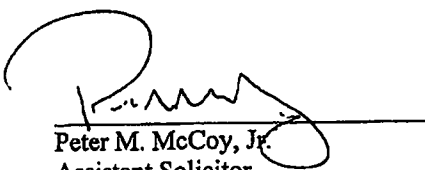
) Warrants: H099111, H099112
)
)

) Charges: MURDER, Possession of a Pistol
) During a Violent Crime
)
)
)

TO: JAMES SUMMERSETT, DEFENDANT, AND WILLIAM THROWER, ATTORNEY FOR
THE DEFENDANT:

PLEASE TAKE NOTICE that the trial of the above-entitled action, to be scheduled on a date at
least ten (10) days hence, of which you will be timely notified, the State will seek the Defendant to be
sentenced to a term of imprisonment for life without the possibility of parole, pursuant to the South
Carolina Code of Laws Section 17-25-45 (1995) as amended.

This notice is based upon defendant's December 5, 1994 conviction of Assault and Battery with Intent to
Kill ("ABWIK"), on indictment number 1994-GS-10-4837.


Peter M. McCoy, Jr.
Assistant Solicitor

Charleston, South Carolina

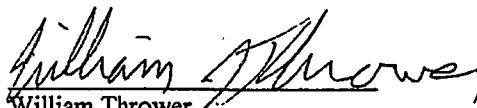
DATE: 11-5, 2009

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., S.S. & F.C.
By  DEPUTY CLERK

COURT'S	
EXHIBIT NO.	2
IDENTIFICATION/EVIDENCE	
DXT. #	
DATE	11-5-09

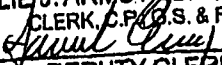
STATE OF SOUTH CAROLINA	)	IN THE COURT OF
	)	GENERAL SESSIONS
COUNTY OF CHARLESTON	)	
	)	INDICTMENT NO(S):
	)	2002-GS-10-5115, 5116
	)	
STATE OF SOUTH CAROLINA	)	
	)	ACKNOWLEDGMENT OF SERVICE
	)	
-versus-	)	OF NOTICE OF INTENTION TO
	)	SEEK A SENTENCE
	)	OF LIFE WITHOUT PAROLE
	)	
JAMES SUMMERSETT	)	
	)	Charge(s): MURDER, Possession of a
	)	Pistol During a Violent Crime
	)	
Defendant.	)	WARRANT NO(S). H099111, H099112
	)	

SERVICE OF THE Notice of Intention to Seek a Sentence of Imprisonment for Life without the Possibility of Parole acknowledged, and copies retained this 17th day of October, 2009.


 William Thrower
 Attorney for the Defendant

Charleston, South Carolina

DATE: 11-17, 2009⁹

ATTEST: A TRUE COPY
 JULIE J. ARMSTRONG (SEAL)
 CLERK, C.P.D.S. & F.C.
 By 
 DEPUTY CLERK

STATE OF SOUTH CAROLINA	)	IN THE COURT OF
	)	GENERAL SESSIONS
COUNTY OF CHARLESTON	)	
	)	INDICTMENT NO(S):
	)	2002-GS-10-5115, 5116
	)	
STATE OF SOUTH CAROLINA	)	
	)	ACKNOWLEDGMENT OF SERVICE
	)	
-versus-	)	OF NOTICE OF INTENTION TO
	)	SEEK A SENTENCE
	)	OF LIFE WITHOUT PAROLE
	)	
JAMES SUMMERSETT	)	
	)	Charge(s): MURDER, Possession of a
	)	Pistol During a Violent Crime
	)	
Defendant.	)	WARRANT NO(S). H099111, H099112
	)	

SERVICE OF THE Notice of Intention to Seek a Sentence of Imprisonment for Life without the Possibility of Parole acknowledged, and copies retained this 30th day of November, 2009.

James Summersett
James Summersett
Defendant

Charleston, South Carolina

DATE: 11/30, 2009.

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, S.P.S. & F.C.
By David C. Cuff
DEPUTY CLERK

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

GENERAL SESSIONS COURT
SENTENCE CH. ABWIK

Ch. 700 - Offense during commission of violent crime
CASE NO. 94 GS-10-4837

TICKET/WARRANT NO. 0713908/Grand Indictment

TICKET WARRANT NO. _____

The defendant, James A. Sumner, Jr., is committed to the State Dept.

of Corrections/County Detention Center / under Youthful Offender Act for a term of 20 days/months/

years and/or to pay a fine of \$ _____; provided the sentence be suspended upon the service of

5 days/months/years and/or payment of \$ _____ plus pay/waive costs and assess-

ment as applicable*, the balance suspended with probation for 5 months/years.

Special conditions: intensive supervision with home detention;
attend drug counseling and vocational rehabilitation;
random drug testing.

Restitution (YES/NO) \$ _____ / % _____ Total \$ _____

Weekly/Monthly \$ _____

in Clerk for _____

Public Defender Fund \$ _____

Date: 12/5/94

Bruce M.
Resident/Presiding Judge, Ninth Judicial Circuit

Fine \$ _____
Law Enforcement and Hall of Fame \$ _____
Community Corrections Assessment/Waive Indigent \$ _____
25% of Fine or \$50.00 \$ _____
DUI Test, if Applicable \$ _____
10.00 G.S. Assessment \$ _____
3% County, if Applicable \$ _____
Indigent Defense Fee \$ _____
Total \$ _____

INFORMATION ON DEFENDANT

Age: 23 S.S. No. 951-57-4004

M ☒ F _____ Married _____ Single _____

Date of Birth: 11-11-71

Attorney: B. THROWER

ALL PAYMENTS MUST BE MADE BY CASH,
MONEY ORDER OR CASHIER CHECK. WE
CANNOT ACCEPT PERSONAL CHECKS.

Clerk of County/Deputy Clerk

White copy _____ to Clerk

Canary _____ to Detention Center

Pink _____ to Probation

Goldenrod _____ to Defendant

Green _____ to Solicitor

CLERK OF COURT
ATTEST: A TRUE COPY 2144 MELBOURNE AVE.
JULIE J. ARMSTRONG (SEA) CHARLESTON, SC 29405

Julie J. Armstrong
CLERK OF COURT
DEPUTY CLERK

740-5700

94-06-CL-2056

WITNESSES

JOHN BURNETT AND/OR BOB BALCERZAK
HONAN, T.A., CCSO
OCA# 93-008900B

ARREST WARRANT NO.

ACTION OF GRAND JURY

True Bill

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury

Date:

DOCKET NO. 94-GS-10-4837

The State of South Carolina,

County of CHARLESTON

COURT OF GENERAL SESSIONS

SEPTEMBER TERM 1994

THE STATE

vs.

JAMES SUMMERSETT

AME D 713908 and DIRECT INDICTMENT

DOA: 6-15-94

Indictment for Assault and
Battery With Intent To Kill
and Possession of Firearm
or Knife During
Commission of or Attempt
to Commit Violent Crime

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK OF COURT
BY *[Signature]* DEPUTY CLERK

WE AFFIRM AND PLEAD GUILTY
TO THE WITHIN INDICTMENT.

No Contest
James A. Summersett

WITNESS

DATE 12-5-94

Robert D. Dwyer

WE AFFIRM AND PLEAD GUILTY
TO THE WITHIN INDICTMENT.

No Contest
James A. Summersett

WITNESS

DATE 12-5-94

Robert D. Dwyer

FORM 8 (12-87)

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

INDICTMENT FOR ASSAULT AND
BATTERY WITH INTENT TO KILL
AND POSSESSION OF FIREARM OR
KNIFE DURING COMMISSION OF OR
ATTEMPT TO COMMIT A
VIOLENT CRIME

At a Court of General Sessions, convened on SEPTEMBER 6, 1994,
the Grand Jurors of CHARLESTON County present upon their oath:

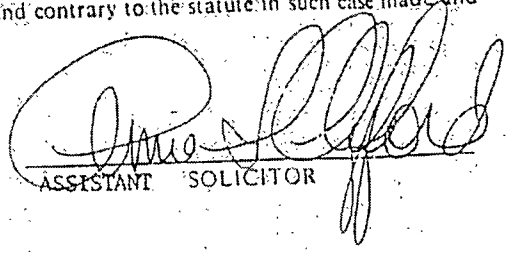
COUNT ONE — ASSAULT AND BATTERY WITH INTENT TO KILL

That JAMES SUMNERSETT
did in CHARLESTON County on or about February 1, 1993, with
malice aforethought commit an assault and battery upon one Ernest Riley, Jr.
with intent to kill the said victim.

COUNT TWO — POSSESSION OF FIREARM OR KNIFE DURING COMMISSION
OF OR ATTEMPT TO COMMIT A VIOLENT CRIME

That JAMES SUMNERSETT
did in CHARLESTON County on or about February 1, 1993, possess or
visibly display a firearm or visibly display a knife during the commission or attempted commission
of a violent crime, to wit: assault and battery with intent to kill,
in violation of Code Section 16-23-490, *Code of Laws of South Carolina*, (1976), as amended.

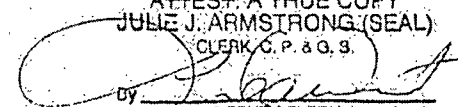
Against the peace and dignity of the State; and contrary to the statute in such case made and
provided:


ASSISTANT SOLICITOR

ATTEST: A TRUE COPY

JULIE J. ARMSTRONG (SEAL)
CLERK C.P. & G.S.
DEPUTY CLERK

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK C.P. & G.S.

By 
DEPUTY CLERK

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT
BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

James A. Summersett, Jr., Appellant.

Appeal from Charleston County
Daniel F. Pieper, Circuit Court Judge

Unpublished Opinion No. 2005-UP-373
Heard April 4, 2005 – Filed June 10, 2005

AFFIRMED

Jack B. Swerling, of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Donald J.
Zelenka, and Assistant Attorney General Melody
J. Brown, all of Columbia; and Solicitor Ralph E.
Hoisington, of Charleston, for Respondent.

PER CURIAM: James Summersett appeals his conviction for murder, arguing the trial court erred in three of its evidentiary rulings. We are asked to decide: (1) whether certain testimony admitted was improper character evidence; (2) whether evidence of a prior bad act was properly admitted under Rule 404(b), SCRE; and (3) whether two rap songs admitted into evidence were sufficiently relevant and not unfairly prejudicial. Finding no reversible error or abuse of discretion, we affirm.

FACTS/PROCEDURAL HISTORY

This case concerns a fatal shooting that occurred during a street brawl involving Summersett and several other individuals on April 15, 2002. During the fight, Summersett fired a pistol, killing Julian Grant. Summersett claimed the shooting was an accident. He was tried and

convicted for murder.

The Fight and Shooting

The fight involved two families who lived on the same street and had known each other for many years. It erupted in front of the home of Josephine Hawkins, the victim's grandmother. Summersett's parents lived next door.

The fight initially started between Jason Grant (the victim's brother) and Travis Brown (Summersett's cousin) during an argument over an unpaid debt. Their argument quickly escalated and turned physical. Others soon joined in the fight, including Jeremy Hawkins (the victim's cousin) and Summersett's brother, Quincy. Hawkins began striking Quincy in the head, prompting Summersett to join the fight. Using the butt of his pistol, Summersett struck Hawkins in the head. The victim, Julian Grant, then intervened. According to trial testimony, Julian Grant was attempting to break up the fight, and in so doing, pushed Summersett, causing him to fall to the ground. At that point, Summersett's gun fired, fatally wounding Grant.

Summersett then fled the area. Law enforcement was called to the scene and immediately launched a search for Summersett. A few hours after the shooting, Summersett telephoned William Thrower, an attorney who had represented Summersett in the past. Thrower testified that Summersett explained he had shot Julian Grant by mistake. Summersett also told Thrower he would not turn himself in until he could obtain a statement from eyewitnesses that could corroborate his version of events.

Law enforcement continued its investigation and search for Summersett, but he managed to avoid detection in the days following the shooting. Approximately two weeks later, Summersett was found living in a North Charleston motel where he was arrested and charged with the murder of Julian Grant.

At Trial

Summersett testified at trial, denying he intentionally shot Grant. On the stand, he admitted firing the weapon, but he maintained it was purely unintentional, discharging accidentally after he was pushed and fell to the ground.

The State presented two factual theories for its murder case against Summersett. The first theory was simply that Summersett directly intended to shoot Grant. In support of this theory, the State called several witnesses who testified that Summersett deliberately pointed and aimed the gun at Grant and shot. The defense attempted to counter this theory by offering the testimony of eyewitnesses who claimed the gun fired accidentally when Summersett fell and hit the ground. Summersett also took the stand and claimed the shooting was purely accidental. The State attempted to rebut Summersett's claim of accident or mistake by offering the testimony of William Thrower regarding a 1993 incident in which Summersett shot a "friend" in the foot and claimed accident. Defense counsel objected to this evidence under Rule 404(b), SCRE. The objection was overruled, and the testimony was admitted under the "absence of mistake or accident" exception to Rule 404(b).

The second factual theory offered by the State was that Summersett actually intended to shoot another person involved in the brawl—Jeremy Hawkins—not Grant. In support of this alternate

theory, the State sought the admission of two rap songs written by Summersett and recorded at his music studio that contain lyrics expressing venomous threats directed at Hawkins. In conjunction with these songs, the State offered evidence that Hawkins had been involved in a sexual relationship with Summersett's girlfriend and also that Hawkins had been providing information to the federal government in its investigation of illegal narcotics activity in the area. Appellant objected to the admission of the rap songs, which the trial court overruled.

At the conclusion of the trial, the jury found Summersett guilty on all charges, and the trial court sentenced Summersett to life imprisonment without the possibility of parole.[1]

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). This court is bound by the trial court's factual findings unless they are clearly erroneous. Id. at 6, 545 S.E.2d at 829. "On review, we are limited to determining whether the trial judge abused his discretion." Id. "This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." Id. "The admission and exclusion of evidence is largely a matter of trial judge discretion and his rulings will not be overturned on appeal unless he manifestly abuses his discretion and the defendant suffered prejudice as a result." State v. Thompson, 305 S.C. 496, 502, 409 S.E.2d 420, 424 (Ct. App. 1991).

DISCUSSION

On appeal, Summersett challenges three of the trial court's evidentiary rulings. We address these arguments individually below.

I. Admission of Character Evidence

Summersett first argues the trial court erred in admitting improper character evidence in the form of testimony concerning the fact that Summersett fathered six children by five different women out of wedlock. We conclude that any error, if found, would be harmless in light of other evidence adduced at trial.

The State began its cross-examination of Summersett with the following colloquy:

SOLICITOR: All right, Jimmy. By way of background, let's get some clarity on some of these things. You were talking about you have one child?

SUMMERSETT: No.

SOLICITOR: You actually have five children; don't you?

SUMMERSETT: Six.

SOLICITOR: Six children?

SUMMERSETT: Yes.

SOLICITOR: By how many different women?

SUMMERSETT: Five.

SOLICITOR: Okay. Have you ever had any of those children while you were in wedlock with your wife? Did you ever have any children out of wedlock?

SUMMERSETT: I'm not legally married.

Defense counsel then objected that the State was attempting to introduce improper character evidence—specifically arguing that the State was using this line of questioning to imply that “if you have one child out of wedlock you are a bad person.” The trial court overruled the objection and allowed the State’s cross-examination on this subject to continue.

Initially, we note this argument may not be properly preserved for our review. Defense counsel’s objection to the solicitor’s cross-examination regarding Summersett having fathered multiple children out of wedlock came only after several questions on this subject had been asked and answered by Summersett. See State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) (holding that a contemporaneous objection is required to preserve an issue for appellate review); State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993) (holding that “[t]o preserve an issue for appellate review, an appellant must object at his first opportunity”). Therefore, it is arguable whether Summersett’s trial counsel effectively preserved the objection to this line of questioning.

Even if properly preserved, however, we find Summersett is not entitled to relief on this issue. Rule 404(a), SCRE, states the general rule that “[e]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion” However, when the accused offers evidence of his good character regarding specific character traits relevant to the crime charged, the prosecution has the right to cross-examine him as to particular bad acts or conduct. State v. Nelson, 331 S.C. 1, 6, 501 S.E.2d 716, 718 (1998). The State is restricted, however, to showing bad character only for the traits initially focused on by the accused. State v. Taylor, 333 S.C. 159, 174, 508 S.E.2d 870, 878 (1998).

The State argues the trial court properly admitted the evidence regarding Summersett having fathered six children by five different women out of wedlock because Summersett put this particular character trait in issue by virtue of several repeated references to his son, Ques, during his testimony on direct examination. These references to his son occurred during Summersett’s narrative of the events leading up to the April 15, 2002, shooting. In describing his activities and movement that afternoon, Summersett mentioned that he picked up his son from school and took him to his baseball game and that taking care of his son in this fashion was part of his normal routine.

In its argument to the trial judge and again in this appeal, the State asserts that the cumulative effect of this testimony was to paint a “broad picture” that Summersett was a “devoted father” by “showcasing only one son.” Accordingly, the State claims that Summersett’s testimony regarding his son “opened the door” to impeachment of his “good father image.”

Based on our review of Summersett’s testimony we find a close question is presented as to the admissibility of the testimony at issue. While it is perhaps arguable that Summersett was attempting to leverage his testimony to foster a “good father image,” it appears more likely that Summersett was simply referring to his son in a fashion purely incidental to his narrative description of the events prior to the shooting.

Nevertheless, we find it unnecessary to reach an ultimate determination as to whether the trial judge abused his discretion in admitting this testimony because the error, if found, would be harmless in light of the other evidence of Summersett’s promiscuity presented at trial. Our

supreme court has held that "where there is other properly admitted evidence of conduct demonstrating the particular character trait in question, there is no reversible error." State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003); see also State v. Brown, 344 S.C. 70, 75, 543 S.E.2d 552, 555 (2001) (noting that "[t]he erroneous admission of character evidence is harmless beyond a reasonable doubt if its impact is minimal in the context of the entire record"); State v. Williams, 321 S.C. 455, 463, 469 S.E.2d 49, 54 (1996) (instructing that error in admission of evidence is harmless where it is cumulative to other evidence which was properly admitted); State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (noting that any error in admission of evidence cumulative to other unobjected-to evidence is harmless).

In this case, three witnesses took the stand before Summersett who each testified that Summersett had an ongoing sexual relationship with Jeremy Hawkins' wife, Tasha Hawkins, while Summersett was either married or engaged to another woman. Additionally, Jeremy Hawkins testified that he was having an affair with Summersett's fiancée, and that Summersett was aware of this fact at the time. Summersett raised no objection to any of this testimony about his promiscuity. Accordingly, we conclude that the State's cross-examination of Summersett regarding his having children out of wedlock by different women was merely cumulative to the other, unobjected-to evidence of Summersett's promiscuity and infidelity contained in the record. Any error by the trial court in allowing the State to pursue this line of questioning was therefore harmless.

II. Admission of Prior Bad Act Evidence

Summersett next asserts the trial court improperly admitted into evidence a prior bad act as relevant to the issue of whether Summersett accidentally or intentionally shot the victim in the present case. We find no abuse of discretion.

At trial, the State sought to introduce evidence that Summersett had previously been charged with assault and battery with intent to kill (ABIK) stemming from an incident in which he shot another person during an argument. The trial court held a hearing outside the presence of the jury to determine the admissibility of this evidence.

During the hearing, the State presented the testimony of William Thrower, Summersett's former attorney. Thrower testified that Summersett shot Ernie Riley in the foot during a confrontation between the two in 1993. After the incident, Summersett fled the scene, but later called Riley to apologize for the shooting, claiming it was unintentional and purely accidental. Summersett was later found, arrested, and charged with ABIK. In his defense, Summersett claimed Riley was a friend and that he inadvertently shot Riley while aiming the pistol towards the ground. Thrower testified that Summersett ultimately entered a plea of nolo contendere to the ABIK charge.

The State argued that Thrower's testimony was admissible to show lack of mistake or accident by Summersett when he shot Grant in the present case. Summersett objected to the evidence of the prior shooting, arguing the incident with Riley was not relevant because it was too remote, dissimilar, and unrelated to the present charge and that admission of this evidence would be highly inflammatory and unfairly prejudicial. He also argued that the State had failed to offer clear and convincing proof of the underlying facts of the prior shooting.

The law in South Carolina regarding the admission of evidence of prior bad acts is well

established. As a general rule, evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual. State v. Pagan, 357 S.C. 132, 143, 591 S.E.2d 646, 652 (Ct. App. 2004). Such evidence is admissible, however, when it tends to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the person charged with the present crime. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible under one of these permitted exceptions, a prior bad act must first be established by clear and convincing evidence. State v. Beck, 342 S.C. 129, 135, 536 S.E.2d 679, 683 (2000). Next, the record must support a logical relevance between the prior bad act and the crime for which the defendant is accused. State v. Braxton, 343 S.C. 629, 634, 541 S.E.2d 833, 836 (2001). Finally, even if relevant, the trial court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999). Of course, the decision to admit contested evidence is entrusted to the sound discretion of the trial judge. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

In the present case, the trial court admitted the evidence of the prior shooting under the absence of mistake or accident exception to Rule 404(b), SCRE, and Lyle. However, it limited its ruling to admission of the underlying conduct, not admission of the resulting conviction. Summersett now contends the admission of this evidence was an abuse of discretion. We are unpersuaded.

A. Clear and Convincing Evidence

First, we find no reversible error in the trial court's finding there was clear and convincing evidence of the prior shooting. "When considering whether there is clear and convincing evidence of other bad acts, this court is bound by the trial judge's factual findings unless they are clearly erroneous." State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct. App. 2003); see also State v. Wallace, 364 S.C. 130, 611 S.E.2d 332, 335 (Ct. App. 2005) (noting that "[t]his court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence"). In this case, there is evidence in the record in the form of William Thrower's detailed testimony concerning his direct knowledge of the prior shooting and Summersett's subsequent claim of accident. The determination as to whether this testimony clearly and convincingly established that the prior shooting occurred is a matter well within the trial court's discretion. Tutton, 354 S.C. at 325-26, 580 S.E.2d at 190. We find no abuse of that discretion in light of Thrower's proffered testimony.

B. Relevance Under the Absence of Mistake or Accident Exception to Lyle

Having found the record supports the trial court's ruling that Summersett committed the prior bad act, we must next determine whether there is a logical relevance between the prior act and the crime charged. We find this necessary connection is sufficiently established.

The determination of logical relevancy does not depend simply upon an enumeration of the similarities between the two incidents. Rather, the evidence in question is relevant if it tends to prove or disprove a material fact or element of the crime charged. See State v. Bell, 302 S.C. 18, 28, 393 S.E.2d 364, 369 (1990); State v. Fletcher, 363 S.C. 221, 241, 609 S.E.2d 572, 582 (Ct. App. 2005). "[I]f [the evidence of the other crime] is logically pertinent in that it reasonably

tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime." Lyle, 125 S.C. at 416, 118 S.E. at 807.

The material fact at the very center of this case concerns whether Summersett intentionally or accidentally shot the victim. The evidence of the prior shooting of Ernie Riley is directly probative on this critical question of fact. Evidence in the record indicates that, in both incidents, Summersett engaged in a violent confrontation—whether actual or threatened—with an acquaintance. Both times Summersett wielded a firearm in a threatening manner. Ernie Riley testified that, in the first incident, Summersett confronted him on the street, grabbed Riley's gun, and threatened to shoot him. During this altercation, Summersett fired the weapon, striking Riley in the foot. Likewise, in the present case, Summersett entered a fight brandishing a weapon, hammer cocked, and even used the firearm as a blunt-force object to strike another person in the head. As in the Riley incident, Summersett fired the weapon during the brawl, wounding another person—this time fatally. In both cases, Summersett fled the scene and later claimed accident.

These closely parallel facts tend to prove Summersett acted with full knowledge of the risks that obtain when brandishing and using a firearm when engaged in actual or threatened physical violence against another person. Such knowledge makes it substantially less likely Summersett haplessly and unintentionally fired his weapon in the present case as he claims to have done. The logical relevancy between the two incidents is therefore clear and unmistakable.

We acknowledge that evidence of this prior shooting potentially paints Summersett as an individual prone to deadly violence. This fact is not to be lightly dismissed. Nevertheless, when, as in the instant case, the logical relevance between two incidents is clearly perceived, we may not—consistent with the mandate of Lyle—choose to ignore the evidence of the prior act simply because it incidentally proves the defendant is guilty of another crime.

C. Balancing Probative Value and Prejudice

Finally, even if the evidence is clear and convincing and logically relevant within a Lyle exception, the trial court must exclude it under Rule 403, SCRE, if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. See State v. Weaverling, 337 S.C. 460, 468, 523 S.E.2d 787, 791 (Ct. App. 1999) (citing Rule 403, SCRE). We find no abuse of discretion in the trial court's ruling that the Rule 403 balancing weighed in favor of admitting the evidence.

In this case, the Rule 403 calculus is in our view a close one. We recognize that the violent nature of the prior act and its similarity to the crime charged enhanced the danger of unfair prejudice in this case. However, it is exactly these close questions that give rise to the deferential abuse of discretion standard of review. Inherent in this standard is the well-settled recognition that there are difficult evidentiary questions that turn on matters uniquely within the purview of the trial court.

The trial court is uniquely positioned to make the careful, nuanced judgments required when balancing fact-specific concepts like probative value and prejudice, and we are reluctant to disturb the sound exercise of that discretion.^[2] See State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) (noting that the Court of Appeals should "review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to

give great deference to the trial court's judgment"); State v. Grace, 350 S.C. 19, 28, 564 S.E.2d 331, 335 (Ct. App. 2002) (stating that "[a] trial court's decision regarding the comparative probative value versus prejudicial effect of evidence should be reversed only in exceptional circumstances"); State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593 (Ct. App. 2001) (opining that "[a] trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence"), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

Because the balancing of probative value and the danger of unfair prejudice presented such a close question in this case, we find the issue fell squarely within the ambit of the trial court's sound discretion, and we are unpersuaded of the need to overturn the trial court's decision.

III. Admission of Rap Songs

Summersett's final argument on appeal is that the trial court abused its discretion in admitting two rap songs and related testimony into evidence. We disagree.

The State sought to introduce the rap songs into evidence in order to prove Jeremy Hawkins was Summersett's intended target when he fired his handgun during the street brawl in April 2002. Summersett admitted he participated in writing and producing both songs at his record studio and admitted the lyrics directly refer to Jeremy Hawkins (specifically mentioned in the song by his nickname, "Scrooge"). Importantly, Summersett does not deny the clear animus towards Hawkins conveyed throughout the lyrics to these songs. For example, Summersett explained that passages in the songs such as, "Now tell me how does it feel to be the snitch on the block / You sold your soul to the devil cuz' you have no heart," refer specifically to the fact that it was widely believed in the community that Hawkins was acting as a confidential informant for federal authorities in an ongoing narcotics investigation. Along this same line, a subsequent passage reads, "So you best check yourself, bulletproof yourself, and tell them feds they best help you protect yourself."

Other parts of the songs allude to Hawkins' adulterous affairs with Summersett's girlfriend and Summersett's own affair with Hawkins' wife: "Now let me tell you something that's true / When I was locked up, you f—ed my bitch and now I'm f—ing yours too." Again, Summersett admitted these lyrics refer specifically to Hawkins.

Defense counsel objected to the admission of these songs, arguing they were highly inflammatory because of the profanity and violence depicted and were not sufficiently probative of any intent by Summersett to harm Hawkins because the lyrics were too general or vague and were written at a time too remote from the shooting. The trial court overruled the objection and admitted the evidence with the following instruction to the jury:

If you should decide that the lyrics are generalized music lyrics, you must not consider them in any way because generalized lyrics including any generalized threats of violence found in a musical composition are not relevant in any way.

On the other hand, should you decide the lyrics are specific as to Jeremy Hawkins, you may give those lyrics such weight, if any, as you deem appropriate only as to issues of motive and intent about which issues I will fully explain in the law in my

concluding instructions to you.

You must not consider these lyrics as evidence of the defendant's character or in any other way inconsistent with my specific instructions.

The trial court did, however, grant defense counsel's request that a transcript of the lyrics not be admitted into evidence. Instead, the two rap songs at issue were played in their entirety to the jury from a compact disc recording.

We find the trial court did not abuse its discretion in admitting the songs into evidence. Our supreme court addressed a similar question concerning the admissibility of music lyrics in State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001). In that case, the trial court admitted into evidence rap lyrics the accused had written in jail while awaiting trial for the underlying murder charge. The lyrics at issue in Cheeseboro contained violent references to "leaving no prints and bodies left in a pool of blood." Id. at 550, 552 S.E.2d at 313. Applying the basic threshold relevancy analysis set out in Rule 403, SCRE, the supreme court found the admission of this evidence was error because the lyrics lacked any connection to the crimes committed: "We find these references too vague in context to support the admission of this evidence. . . . [T]hese lyrics contain only general references glorifying violence." Id. The court therefore concluded that "[t]he minimal probative value of this document is far outweighed by its unfair prejudicial impact as evidence of appellant's bad character, i.e. his propensity for violence in general." Id.

Applying the same Rule 403, SCRE, relevancy analysis in the present case compels a different conclusion. Unlike the vague lyrics at issue in Cheeseboro, the songs admitted in the present case—by Summersett's own admission—refer specifically to Jeremy Hawkins. Instead of "general references glorifying violence," the songs in this case convey clear animus in the form of violent and vitriolic lyrics directed at Hawkins. The message of these songs is therefore clearly probative of Summersett's alleged motive and intent to kill Hawkins. While we recognize the possibility that the jury could improperly consider the overall violence and profanity of these songs as reflecting poorly upon Summersett's character and his propensity for violence in general, we find no abuse of discretion in the trial court's determination that the danger of unfair prejudice is outweighed by the probative value that arises from the pointed animus conveyed in these songs Summersett wrote and produced. Moreover, the danger of unfair prejudice was diminished by the trial court's instruction to the jury as to the limited purposes for which they could consider this evidence. Notably, Summersett raised no objection to the adequacy of this instruction.

For these reasons, we conclude the trial court did not abuse its discretion in admitting the two rap songs into evidence.

CONCLUSION

In sum, though we find this case presents a number of difficult evidentiary questions, we conclude the trial court's rulings did not exceed the prescribed legal and discretionary bounds discussed above or otherwise rise to the level of reversible error. Finding none of Summersett's claims on appeal warrant reversal, we affirm his conviction in all respects.

AFFIRMED.

HEARN, C.J., KITTREDGE and WILLIAMS, JJ., concur.

[1] In addition to the murder charge, Summersett was also charged with possession of a firearm during the commission of a crime of violence. In light of the sentence imposed for the murder conviction, the trial court found it unnecessary to pronounce sentence for the conviction for possession of a firearm during the commission of a crime of violence.

[2] Viewing the record as a whole, it is notable that the Riley incident was only one of several similar prior bad acts the State attempted to admit into evidence. Carefully applying the Lyle analysis, the trial court thoroughly examined each of these prior acts to determine admissibility—ultimately finding the Riley incident alone satisfied the standard for admission.

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Respondent,

v.

James A. Summersett, Jr., Petitioner.

**ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

Appeal from Charleston County
Daniel F. Pieper, Circuit Court Judge

Memorandum Opinion No. 2008-MO-025
Heard April 1, 2008 – Refiled July 28, 2008

REVERSED

Jack B. Swerling, of Columbia, and Katherine Carruth Link, of
W. Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy
Attorney General John W. McIntosh, Assistant Deputy Attorney
General Donald J. Zelenka, and Assistant Attorney General
Melody J. Brown, all of Columbia, and Ralph E. Hoisington, of
Charleston, for Respondent.

JUSTICE PLEICONES: Petitioner was convicted of murdering his close friend Julian Grant a/k/a Dooley and received a life sentence.[1] The Court of Appeals affirmed in an unpublished opinion,[2] and we granted his petition for a writ of certiorari. We reverse.

FACTS

Petitioner admitted that he shot Dooley, but defended on the ground of accident. The State presented evidence from which the jury could have concluded petitioner intended to shoot Dooley, as well as evidence

that petitioner accidentally shot Dooley while intending to shoot Jeremy Hawkins a/k/a Scrooge, Dooley's cousin. There was evidence in the record supporting all three theories, and the case turned on witness credibility.

In the late afternoon of April 15, 2002, a brawl broke out between petitioner's cousin and Dooley's brother. The families were long time neighbors in a Charleston subdivision, and the young men were well-acquainted. A second fight then erupted between petitioner's brother and Dooley's cousin, Scrooge. Petitioner's brother was armed with a baseball bat given him by petitioner, while Scrooge, according to some witnesses, used a gun to pistol whip the brother. Petitioner, who had a handgun, admitted approaching the pair and hitting Scrooge, who was winning the fight, in the head with the gun. Petitioner claimed to have pulled the gun's hammer back before hitting Scrooge, a move designed to keep the gun from accidentally firing as it was being used as a bludgeon.

As petitioner began hitting Scrooge, Dooley intervened and pushed petitioner away. According to the defense witnesses, after Dooley shoved petitioner, petitioner began to fall backwards into a ditch. Dooley reached out to catch petitioner, but petitioner hit the ground, the gun discharged, and the bullet hit Dooley who was in the act of reaching/falling towards petitioner. The State's eyewitnesses, in contrast, testified that petitioner pointed the gun at Dooley, who was shot as he backed up with his hands in the air. Other prosecution witnesses testified that after the shooting petitioner, who was emotionally distraught, left the scene but admitted in phone calls that he meant to shoot Scrooge but accidentally hit Dooley.

Dooley was shot in the chest and bled to death.

The evidence established that petitioner and Dooley were good friends. Moreover, it established pre-existing animosity between Scrooge and petitioner based upon Scrooge's affair with petitioner's girlfriend/fiancé, and petitioner's subsequent affair with Scrooge's wife. Animosity existed as well because Scrooge had become a federal drug informant. There was also evidence that petitioner had threatened Scrooge with a gun the previous Thanksgiving.

ISSUES

The Court granted certiorari to consider three evidentiary issues:

- 1) Whether the Court of Appeals erred in finding no reversible error in the trial court's ruling permitting the State to cross-examine petitioner about his out-of-wedlock children?
- 2) Whether the Court of Appeals erred in finding no reversible error in the trial court's decision to admit a prior bad act?
- 3) Whether the Court of Appeals erred in finding no error in the trial court's ruling admitting rap lyrics containing death threats against Scrooge written, sung, and produced in part by petitioner?

We find the Court of Appeals erred in affirming the first two challenged rulings, and reverse and remand for a new trial. With regard to the rap lyrics and any resulting prejudice, their admissibility at petitioner's next trial will depend, in large part, upon the evidentiary showing made in that proceeding. Accordingly, we do not address the merits of that issue here, but admonish the State and the circuit court upon retrial to exercise caution if this issue is raised.

Impeachment/Character Evidence

On direct examination, petitioner testified to his activities on April 15, 2002, including references to taking his son Ques to school, and to planning to pick him up afterwards as he "normally" did. Petitioner explained that

he did not attend Ques' late afternoon baseball game as he "normally" did because of car trouble. This testimony was offered to explain why petitioner had a baseball bat in his automobile which he acknowledged giving to his brother.

The State's cross-examination of petitioner commenced with this exchange:

Q. All right, [petitioner]. By way of background, let's get some clarity on some of these things. You were talking about you have one child?

A. No.

Q. You actually have five children; don't you?

A. Six.

Q. Six children?

A. Yes.

Q. By how many different women?

A. Five.

Q. So you have six children by five different women?

A. Yes.

Q. Okay. Have you ever had any of those children while you were in wedlock with your wife? Did you ever have any children out of wedlock?

A. I'm not legally married.

Q. Okay. So you just have children ---

(Petitioner's Attorney): Objection. If we could approach.

A bench conference followed during which petitioner's attorney objected, saying "I'm aware this is cross-examination but this seems like it is more character evidence." The solicitor responded that his question was proper because (1) petitioner "put his character on the stand" (2) [petitioner had claimed to be] "good family man with one child and all of the testimony has been about the one child" and (3) "there had [already] been a lot of testimony about adultery in the evidence." Petitioner's attorney pointed out, however, that the solicitor had not objected to his cross-examination of various State's witnesses about their adultery, to which the solicitor responded "Because it is relevant."

The judge found the solicitor's cross-examination proper because petitioner had been portrayed "as if he is a good person and he only has one child." The State reinforced the trial judge's misimpression that petitioner had testified he only had one child: although petitioner's attorney pointed out petitioner had never so testified, his objection to this line of questioning was overruled. The interrogation continued, during which, among other things, the solicitor challenged petitioner to name the mothers of his children.

The Court of Appeals held that petitioner's attorney's objection to the cross-examination may have been untimely, and thus the propriety of the cross-examination may not have been preserved for appellate review. We disagree. The cross-examination began with an unusual series of questions and it was not immediately

apparent that the solicitor was delving into the number of petitioner's children and his relationship with them and their mothers. We find the objection was timely.

Next, the Court of Appeals found that it was unnecessary to decide whether petitioner put his character trait as a good father in issue during his direct examination or whether he had merely been testifying to a narrative of events. We find petitioner did not put his character as a good father in issue. Moreover, while the number of children and mothers is undoubtedly probative of petitioner's fertility, and may raise doubts about his commitment to societal conventions, it sheds no light on whether or not he is a good father to those children. Even if petitioner had put this character trait in issue, the cross-examination was not relevant.

Before this Court, the State has taken a different tack, arguing that the evidence was elicited not as character evidence but rather to impeach petitioner's testimony. We are unable to discern what in petitioner's direct testimony was impeached by the evidence of his six out-of-wedlock children and their mothers' names.

The ultimate ruling by the Court of Appeals was that any error in permitting this testimony was harmless in light of the other evidence of petitioner's promiscuity, that is, that petitioner had had a sexual relationship with Scrooge's wife. We are not confident that a single adulterous relationship equates to "promiscuity" in the same sense that fathering six children by five different women does, and thus do not agree that this evidence was harmless because it was merely cumulative to other evidence of promiscuity.

In short, petitioner did not put his character as a good father in issue, nor is evidence that he has fathered six children by five mothers probative whether he is, in fact, a good father. Further, adultery with a married woman does not make one "promiscuous" as that term is commonly understood and thus the evidence of petitioner's out-of-wedlock children was not cumulative to the evidence of his adultery. The State's cross-examination was not designed to elicit any evidence probative either of petitioner's guilt or of his credibility, but rather was intended solely to paint him as a person who does not respect societal norms, and to suggest that he was an irresponsible individual who did not even know the names of his children's mothers. The circuit court erred in allowing this questioning, and the Court of Appeals erred in deeming it "cumulative." We find both error and prejudice. We need not decide, however, whether this error alone would warrant reversal in light of a second erroneous evidentiary ruling by the trial court.

Other Bad Acts

As mentioned above, the State presented two different theories: either petitioner intentionally shot Dooley, or Dooley was hit as petitioner targeted Scrooge. Petitioner's defense theory was accident; that is, that the gun discharged accidentally when he hit the ground as he fell backwards.

In 1993, petitioner fired a shot which struck an acquaintance of petitioner's, Ernest Riley, in the foot. Petitioner was charged with assault and battery with intent to kill in connection with that shooting, and eventually pled *nolo contendere* to the charge. The State sought to introduce evidence of this event under Rule 404(b), SCRE and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), to show the absence of accident or mistake in the Dooley shooting.

The issue arose after attorney Thrower testified as a defense witness to post-shooting telephone conversations on April 15 in which petitioner maintained he had accidentally shot and killed Dooley. Before beginning Thrower's cross-examination, the State sought a ruling whether it could examine Thrower about the Riley case in which he had represented petitioner. The State maintained the Riley shooting was probative of petitioner's current claim of accident because he had previously claimed that the shooting of Riley, also an acquaintance, was likewise an accident. Petitioner's counsel protested that, among other things, in this case petitioner claimed to have accidentally fired the gun, while in the Riley case he admitted intentionally shooting at the ground, but that Riley was accidentally injured when the bullet ricocheted and hit his foot. Moreover, the State argued "similarity" in that both shootings took place in the Orleans Wood subdivision, in both cases petitioner fled from the scene, and in both cases he subsequently maintained in phone conversations that the shooting was accidental. Petitioner's attorney protested that these were

completely separate incidents, and that petitioner was not using "accident" in its legal meaning. The judge eventually ruled that the Riley shooting admissible to show an absence of mistake or accident in the Dooley shooting.

Thrower then testified before the jury to the facts, as he recalled them, surrounding the 1993 Riley shooting, but his recollection was vague. The State later called Riley. He testified that petitioner had gotten in a fight with Riley's fiancée's sister and pulled a gun on her. Riley "confronted" petitioner about this incident, and two days later petitioner "confronted" Riley, and pulled a gun on him, pointing it at Riley's head. Riley testified he told petitioner to go ahead and kill him, since everyone knew petitioner carried "a little .22 that would usually crap on him" and therefore was not afraid. In fact, it was as petitioner was pointing the gun down that it fired: the bullet hit the ground and ricocheted up, hitting Riley in the heel.

The Riley shooting is not probative whether the Dooley shooting was an accident, intentional, or unintentional. The facts of these two shootings are not analogous to a situation where, for example, a man who is on trial for shooting and killing his second wife claims accident, having previously "accidentally" shot and killed his first spouse. Here, there is no "logical relevance" between the two shootings. State v. Lyle, *supra*; State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001).

The admission of the Riley shooting was prejudicial error and the Court of Appeals erred in deferring to the trial judge's discretion in admitting this evidence. This error alone, but especially in combination with the improper cross-examination of petitioner, requires we grant a new trial on both charges. Accordingly, the decision of the Court of Appeals affirming petitioner's convictions and sentence is

REVERSED.

TOAL, C.J., MOORE, WALLER and BEATTY, JJ., concur.

[1] He was also convicted of possession of a firearm during the commission of a crime of violence but received no separate sentence.

[2] State v. Summersett, Op. No. 2005-UP-373 (S.C. Ct. App. filed June 10, 2005) (App. pp. 819-827).

CERTIFICATE OF COUNSEL

Counsel for Appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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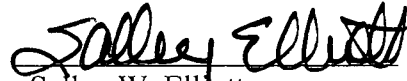
ALAN WILSON
Attorney General

SC Court of Appeals

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY:


Salley W. Elliott
S.C. Bar No. 1871

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR APPELLANT

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