

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHEROKEE COUNTY
Court of General Sessions

RECEIVED

Honorable J. Mark Hayes, II, Circuit Court Judge MAR 20 2012

Case No. 2010-CP-11-404

S.C. Supreme Court
pm 3-19-12

John Porter Johnson,.....Petitioner,

v.

State of South Carolina,.....Respondent.

APPENDIX

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1. Record on Appeal (18700);
2. Final Brief of Appellant;
3. Final Brief of Respondent;
4. Petition for Writ of Certiorari filed February 27, 2012;
5. Return to Petition for Writ of Certiorari dated March 2, 2012;

6. Court of Appeals Opinion No. 4927 filed January 4, 2012;
7. Respondent's Petition for Rehearing filed January 19, 2012;
8. Proof of Service filed January 19, 2012; and
9. Order Denying Petition for Rehearing filed February 16, 2012;

March 19, 2012

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Cherokee County
Honorable J. Mark Hayes, II, Circuit Court Judge

THE STATE,

Appellant,

vs.

JOHN PORTER JOHNSON,

Respondent.

RECORD ON APPEAL

HENRY DARGAN McMASTER
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ATTORNEYS FOR APPELLANT

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STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHEROKEE)	
The State,)	
)	TRANSCRIPT OF RECORD
-vs-)	2010-CP-11-404
)	
John Porter Johnson,)	
)	July 26, 2010
Defendant.)	Gaffney, South Carolina

B E F O R E:

HONORABLE J. MARK HAYES II, JUDGE

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

KIMBERLY L. LESKANIC, ESQ.
Attorney for the State

RALPH KEITH KELLY, ESQ.
Attorney for the Defendant

Margaret A. Woods
Circuit Court Reporter

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NO EXHIBITS INTRODUCED

1 THE COURT: Now we have State of South Carolina vs. John
2 Porter Johnson. Mr. Kelly.

3 MR. KELLY: Please the Court, Your Honor.

4 THE COURT: Yes, sir, Mr. Kelly.

5 MR. KELLY: Thank you, Judge. I'm representing John
6 Porter Johnson both in the trial of the case and on this
7 appeal before the Court and the the issue, Judge, is the
8 number of jurors, or lack thereof, for jury selection and
9 specifically Title 22 which covers the magistrate courts there
10 are two ways -- there are two different numbers that are
11 required depending on on which way you pick a jury. In 22-2-8
12 selection of a jury list in magistrate's court, if a
13 magistrate is going to pick a jury for one case and one case
14 only, you can, you can pick -- I'm sorry, you can summon at
15 least thirty (30), not more than a hundred (100), I believe is
16 what it says, but it's thirty (30), thirty (30) jurors for the
17 selection process. If you are going to select a jury for a
18 week long, which is by far the most common way we do it now,
19 in fact I don't know the last time I picked a jury just for
20 one case, you -- that is covered by 22-2-90. This ---

21 THE COURT: You mean ninety?

22 MR. KELLY: --- said ---

23 THE COURT: Nine (9) or ninety?

24 MR. KELLY: Ninety, 90. And 22-2-90 Subparagraph (b) as
25 in bravo says that at least 10 (ten) but not more than

1 forty-five (45) days before a scheduled term of trial and the
2 person selected by the magistrate draws at least 40 (forty)
3 but not more than one hundred (100) jurors to serve for one
4 week only and it goes on to say that in the event that the
5 magistrate has trouble getting qualified electors from a jury
6 area, then through court administration they may be allowed to
7 pick at least one (100) hundred but not more than a number
8 determined by court administration to serve for the one week
9 period. In 22-2-120 it it tells us what do to in the event
10 that we don't have enough jurors, we have an insufficient
11 number. In February of this year when I appeared before Judge
12 Howell, I was given the sheet that I've handed up to the
13 Court, seventy-five (75) jurors were summoned which would be
14 an appropriate number between forty (40) and seventy-five
15 (75). If the Court will will notice, the strikes on the
16 numbers to the left are people who were not there, not at --
17 they were just not present for one reason or the other and I
18 don't know why. If you also look at say No. 10, William
19 Brooks, where it has "excused" written by that, that's my
20 handwriting and some other notes there, those are people that
21 were excused by the magistrate. The end result was of
22 seventy-five (75) summoned, only thirty-nine (39) appeared,
23 which was an insufficient number, six (6) of those were
24 excused which left thirty-three (33) from which to pick, it's
25 eighty (82) percent of the potential jury pool was present and

1 I objected to that and I specifically pointed out to Judge
2 Howell that the week before that a term of jury court had been
3 canceled over in Simpsonville and then since then as of late,
4 as as late as last week when I was in Judge Cagle's office in
5 West Greenville, a term of jury court was canceled there Ryan
6 Beasley, Steve Sumner, Kim Varn and several others were there
7 to pick a term for a week and there were insufficient number
8 being less than 40 (forty). So this practice is being
9 followed in other jurisdictions, Judge Howell indicated it had
10 never been raised to him over here in Cherokee County but I
11 raised that and I told by client before the trial, I said,
12 They don't have enough jurors and you can waive that, because
13 he was a student from outta state, and I said, You've come
14 here on a plane, your mom's with you, you spent money and you
15 can waive that, I want you to know that you have that right
16 and he said, I want to assert that right, so that's that's
17 what I did. So, Judge, we we respectfully submit that the
18 Court erred as a matter of law by making us go forward on the
19 case where as here only thirty-nine (39) reported, six (6) of
20 those were excused and left me thirty-three (33) from which to
21 pick when I shoulda had forty (40) from which to pick.

22 And and I also point out that, and and I talked to the
23 prosecutor about this, which by the way was not the prosecutor
24 in in the trial of the case, Joe Mathis is under a contract
25 there, but this this number that the General Assembly said is

1 is specific to magistrate court, it it do -- it's not
2 applicable to general sessions court and I've talked to
3 Michael Morin a little earlier and said he's picked with less
4 than that before and I said, You can do that because I don't,
5 I don't know of a state statute that specifically addresses
6 how many have to be present in in a circuit court trial, I'm
7 sure there's some case law on it, I didn't look, but in
8 magistrate court a lotta things are different just because
9 it's in magistrate court and it's the court closest to the
10 people. For instance, actually those forty (40) have to come
11 from a defined jury area and that is also set forth in Title
12 22. In 22-2-190 it talks about the county jury areas. Now
13 Cherokee County, I I looked, only has two jury areas so I
14 didn't raise that, that was not not an issue but in
15 Spartanburg County there are many jury areas. If you you get
16 a ticket in Chesnee, South Carolina, you have to be from the
17 Chesnee precinct up there. The jur -- the jury for those
18 forty (40) have to be from that area. I'm not sayin' you
19 can't try 'em in Spartanburg Courthouse but that forty (40)
20 have to be from there unless they're affirmatively waived,
21 that's addressed in the magistrate's statute so we would ask
22 that the, that the Court grant our motion and grant our appeal
23 and send us back for a retrial on this case.

24 THE COURT: Thank you, sir.

25 MS. LESKANIC: May it please the Court. Your Honor, as

1 Mr. Kelly stated, Joe Mathis is the one that tried this case
2 back in February of this year in magistrate court. We're here
3 on behalf of the State for the appeal. Looking at Section
4 22-2-90 it says that the magistrate must draw at least
5 forty (40) but not more than one hundred (100) jurors and I
6 think there's a distinction between drawing the number of
7 jurors that are drawn and the number of jurors that are
8 selected. Here seventy-five (75) jurors were drawn for the
9 week and that's stated forth in Judge Howell's return so there
10 were more than sufficient number of jurors to meet
11 Subsection (b) of 22-2-90, being seventy-five (75) jurors when
12 only forty (40) had to be drawn. There were sufficient
13 numbers to choose from to have six (6) strikes for both the
14 State and the defense and six (6) people to be seated on the
15 jury and I believe that that is what Section 22-2-120 that
16 Mr. Kelly referred to would go to if there were not a
17 sufficient number of jurors to ensure that each side would
18 receive their strikes and still have enough for six (6)
19 members to be seated on the jury but it appears from a clear
20 reading of the statute that the magistrate complied with this
21 statute having seventy-five (75) jurors drawn and there were a
22 sufficient number of jurors available for strikes and for
23 seating on the jury. We would ask that the motion be denied.

24 THE COURT: Reply?

25 MR. KELLY: Judge, just briefly. Again, I I would say

1 that there -- 22-2-120 specifically talks about not being
2 sufficient number of jurors and tells what ya have to do, ya
3 have to go back and get some more is what ya have to do and
4 again, I I will tell the Court that it's being followed in
5 other jurisdictions, it just wasn't done in this case.

6 THE COURT: All right. Okay. I will take a look at it
7 and let you know.

8 MR. KELLY: Thank you, Judge.

9 THE COURT: Thank ya'll.

10 MS. LESKANIC: Thank you, Your Honor.

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CERTIFICATE OF REPORTER

I, Margaret A. Woods, Court Reporter in and for the State of South Carolina at Large, hereby certify that I reported the preceding case on June 24, 2010 at the time and place heretofore set forth; and that the foregoing pages numbered from 3 through 8, inclusive, constitute a true and accurate transcription of my stenographic notes of the said proceeding.

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

August 11, 2010

Margaret A. Woods

Margaret A. Woods, Court Reporter

in and for the State of South Carolina at Large.

ORIGINAL

STATE OF SOUTH CAROLINA)
 COUNTY OF CHEROKEE)
)
 State of South Carolina)
 PLAINTIFF,)
)
 VS)
)
)
 John Porter Johnson)
 DEFENDANT.)

IN THE COURT OF COMMON PLEAS
 010CP-11-0404

RETURN
JURY VERDICT

IN THE MAGISTRATE'S COURT
 D-471404

DATE OF HEARING: February 22, 2010
 TRIAL JUDGE: Robert B. Howell
 ATTORNEY FOR PLAINTIFF: Joseph L. Mathis
 ATTORNEY FOR DEFENDANT: R. Keith Kelly

2010 FEB - 8 AM 11:21

This matter came before the Court (Day and Time Certain) on February 22, 2010, pursuant to a Uniform Traffic Ticket charging the Defendant with Driving Under the Influence 1st Offense pursuant to Section 56-5-2930 of the South Carolina Code of Laws.

The Defendant's attorney sought a continuance stating that Section 22-2-90 (B) of the South Carolina Code of Laws had not been complied with by the Court. The motion was denied by the Court.

Pursuant to Section 22-2-90 (B) "... the presiding magistrate must draw at least forty but no more than one hundred jurors to serve one week only."

The jury that was drawn for this term consisted of seventy five (75) jurors. (EXHIBIT A). In selecting the six (6) jurors for this trial neither the State nor the Defendant's attorney extinguished the list of remaining jurors before seating the jury.

Gaffney, South Carolina
 March 9, 2010

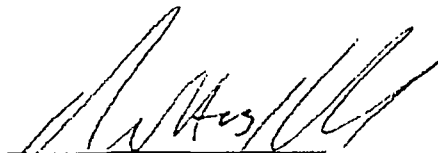

 Robert B. Howell
 Chief Magistrate
 Cherokee County

EXHIBIT A

Cherokee County Magistrate Court

Juror Venire/Worksheet

Sorted By Seq Nbr

FEBRUARY 22, 20

02/22/33
11 05 2010
05:17:18 p.m.
1644872754

Clerk of Court

NAME	ADDRESS	CITY	ZIP	RACE	SEX	DOB	COMMENTS
Atkins, Edith M	[REDACTED]	GAFFNEY	29340	W	F	3/15/1934	
Barton, David M	[REDACTED]	GAFFNEY	29340	W	M	3/7/1950	RETIRED/DISABILITY
Beach, James J JR	[REDACTED]	GAFFNEY	29340	W	M	1/22/1978	SRE/ELECTRICAL HELPER
Beattie, Billy D	[REDACTED]	GAFFNEY	29342	W	M	8/6/1927	
Berry, Jonathan O	[REDACTED]	PACOLET	29372	W	M	6/2/1983	CRACKER BARREL/DISHWASHER
Bonner, Ashley M	[REDACTED]	GAFFNEY	29340	B	F	1/23/1985	SUMINOEE/SERGER
Bridges, Mandi P	[REDACTED]	GAFFNEY	29341	W	F	1/7/1979	CCSD/TEACHER ASSISTANT
Bridges, Terisa A	[REDACTED]	GAFFNEY	29341	W	F	6/18/1952	HOUSEWIFE
Brooks, William R	[REDACTED]	GAFFNEY	29341	W	M	2/17/1986	PRATT INDUSTRIES/EQUIPMENT OPERAT
Builer, Joanne T	[REDACTED]	GAFFNEY	29341	W	F	12/27/1939	
Camp, Laqunda R	[REDACTED]	GAFFNEY	29341	B	F	1/18/1976	NESTLE/PREP WEIGHER
Cobb, Timothy J	[REDACTED]	GAFFNEY	29340	W	M	1/17/1971	PLYGEM SIDING/DISTRICT MGR.
Cooper, Kenneth C	[REDACTED]	GAFFNEY	29341	W	M	9/9/1977	OPERATION DRAINS/SERVICE TECH
Davis-Beattie, Lauren C	[REDACTED]	GAFFNEY	29341	W	F	3/28/1979	SELF EMPLOYED/ESTHETICIAN
Drake, Paul J	[REDACTED]	GAFFNEY	29340	W	M	11/9/1979	NEWARK/ORDER PICKER
Earls, Stephanie M	[REDACTED]	GAFFNEY	29340	W	F	9/19/1964	HOUSEWIFE
Edmonds, Robin W	[REDACTED]	CHESNEE	29323	W	F	3/22/1973	
Estes, Michael S	[REDACTED]	GAFFNEY	29340	W	M	1/11/1951	VALAY PARKING
Goforth, Charles E	[REDACTED]	GAFFNEY	29341	W	M	6/10/1938	

**Cherokee County Magistrate Court
Juror Venire/Worksheet**

FEBRUARY 22, 20

Sorted By Seq Nbr

NAME	ADDRESS	CITY	ZIP	RACE	SEX	DOB	COMMENTS
24 Goudelock, D L JR	[REDACTED]	GAFFNEY	29341	B	M	8/8/1950	US NAVY/RETIRED
26 Greene, Janice E	[REDACTED]	COWPENS	29330	W	F	2/15/1945	UNEMPLOYED
27 Hammons, Carroll M	[REDACTED]	GAFFNEY	29341	W	M	7/8/1948	CHEROKEE SMALL ENGINES
29 Hemphill, Micheal L	[REDACTED]	GAFFNEY	29341	B	M	8/1/1959	TIMKEN/LMA
31 Huggin, Robert L JR	[REDACTED]	GAFFNEY	29340	W	M	12/20/1940	
32 Jefferies, Carmilla Y	[REDACTED]	GAFFNEY	29340	B	F	11/16/1979	
34 Johnson, Kimberley O	[REDACTED]	SPARTANBUR	29307	W	F	7/24/1960	SELF EMPLOYED/RESTAURANT
36 Jolly, Annie	[REDACTED]	GAFFNEY	29341	W	F	4/22/1925	
37 Kilby, Alan C	[REDACTED]	GAFFNEY	29341	W	M	6/10/1954	BOARD OF PUBLIC WORKS
38 Knuckles, Kenneth L	[REDACTED]	GAFFNEY	29341	B	M	6/14/1956	DISABLE
19 Leach, Andrea F	[REDACTED]	GAFFNEY	29341	B	F	10/12/1965	NO EMPLOYMENT SHOWN
0 Lester, Shirley W	[REDACTED]	GAFFNEY	29340	W	F	8/13/1935	
1 Linder, Jacqueline E	[REDACTED]	GAFFNEY	29341	B	F	2/23/1969	HOMEMAKER
2 Litteral, Joseph A	[REDACTED]	GAFFNEY	29340	W	M	1/18/1958	UNIVERSAL NOLIN/SHIPPING
3 Littlejohn, King David	[REDACTED]	GAFFNEY	29341	B	M	11/27/1948	UNEMPLOYED
4 Littlejohn, Tonita M	[REDACTED]	GAFFNEY	29341	B	F	8/24/1973	DSE SYSTEMS/ASSEMBLER
5 Lopez, Valerie A	[REDACTED]	COWPENS	29330	H	F	5/12/1981	SRHS/NR
6 Love, Billy W	[REDACTED]	GAFFNEY	29340	W	M	5/9/1941	
7 Mathis, Malissa T	[REDACTED]	GAFFNEY	29340	W	F	6/15/1972	

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 Clerk of Court
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Cherokee County Magistrate Court

Juror Venire/Worksheet

Sorted By Seq Nbr

FEBRUARY 22, 20

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 05:18:01 p.m.
 Clerk of Court
 144872754

NAME	ADDRESS	CITY	ZIP	RACE	SEX	DOB	COMMENTS
49 McCraw, Bruce W	[REDACTED]	GAFFNEY	29341	W	M	8/11/1966	GASTON COUNTY SCHOOLS/5TH GRADE
50 Mcclraft, Robert J	[REDACTED]	COWPENS	29330	W	M	12/1/1961	WaHS REG./MAINT ELECT
51 Mcnair, Patti J	[REDACTED]	GAFFNEY	29341	W	F	8/2/1964	US AIRWAYS/FLIGHT ATTENDANT
52 Moss, Magen B	[REDACTED]	GAFFNEY	29340	W	F	3/17/1988	UNEMPLOYED
54 Oglesby, Wanda	[REDACTED]	COWPENS	29330	B	F	7/7/1960	DISABLE
55 Oliver, Glenn Edward JR	[REDACTED]	GAFFNEY	29341	W	M	7/26/1953	FIRST PIEDMONT FEDERAL/BANKER
56 Padgett, Donald L	[REDACTED]	GAFFNEY	29341	W	M	9/29/1949	BROAD RIVER BAPTIST ASSOCIATION
59 Phillips, Mary H	[REDACTED]	GAFFNEY	29341	B	F	1/5/1946	TIMKEN/RETIRED
62 Revels, Shirley A	[REDACTED]	GAFFNEY	29342	W	F	12/28/1940	SPARTANBURG COUNTY SHERIFF'S DEP
63 Rivera, Martina J	[REDACTED]	GAFFNEY	29340	H	F	3/9/1987	
64 Said, Summer L	[REDACTED]	GAFFNEY	29341	W	F	5/12/1982	CAROLINA PEDIATRIC ASSOCIATES
65 Shippy, Charles E	[REDACTED]	GAFFNEY	29341	B	M	3/10/1952	RANDOLPH TRUCKING/TRUCK DRIVER
8 Sullivan, Ken D	[REDACTED]	GAFFNEY	29342	B	M	12/21/1977	
9 Turner, Jason S	[REDACTED]	GAFFNEY	29341	W	M	10/17/1976	FREIGHTLINER
1 White, Daisy I	[REDACTED]	GAFFNEY	29340	W	F	10/31/1937	
2 Willard, Lillie M	[REDACTED]	GAFFNEY	29340	W	F	11/18/1918	
3 Winright, Caleb C	[REDACTED]	GAFFNEY	29341	W	M	11/13/1985	CARBOTECH/MACHINIST
4 Winstead, Charles D	[REDACTED]	PACOLET	29372	W	M	7/1/1946	DISABLE
5 Wright, Mary B	[REDACTED]	GAFFNEY	29341	W	F	6/25/1985	

Cherokee County Magistrate Court

Juror Venire/Worksheet

FEBRUARY 22, 20

Sorted By Seq Nbr

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NAME	ADDRESS	CITY	ZIP	RACE	SEX	DOB	COMMENTS	
1	Atkins, Edith M	[REDACTED]	GAFFNEY	29340	W	F	3/15/1934	
2	Barton, David M	[REDACTED]	GAFFNEY	29340	W	M	3/7/1950	RETIRED/DISABILITY
3	Beach, James J JR	[REDACTED]	GAFFNEY	29340	W	M	1/22/1978	SRE/ELECTRICAL HELPER
4	Beattie, Billy D	[REDACTED]	GAFFNEY	29342	W	M	8/6/1927	
5	Berry, Jonathan O	[REDACTED]	PACOLET	29372	W	M	6/2/1983	CRACKER BARREL/DISHWASHER
7	Bonner, Ashley M	[REDACTED]	GAFFNEY	29340	B	F	1/23/1985	SUMINOEE/SERGER
8	Bridges, Mandi P	[REDACTED]	GAFFNEY	29341	W	F	1/7/1979	CCSD/TEACHER ASSISTANT
9	Bridges, Terisa A	[REDACTED]	GAFFNEY	29341	W	F	6/18/1952	HOUSEWIFE
10	Brooks, William R <i>at work</i>	[REDACTED]	GAFFNEY	29341	W	M	2/17/1986	<i>Hospital</i> PRATT INDUSTRIES/EQUIPMENT OPERAT
12	Butler, Joanne T	[REDACTED]	GAFFNEY	29341	W	F	12/27/1939	
13	Camp, Laqunda R	[REDACTED]	GAFFNEY	29341	B	F	1/18/1976	NESTLE/PREP WEIGHER
14	Cobb, Timothy J	[REDACTED]	GAFFNEY	29340	W	M	1/17/1971	PLYGEM SIDING/DISTRICT MGR.
16	Cooper, Kenneth C <i>at work</i>	[REDACTED]	GAFFNEY	29341	W	M	9/9/1977	OPERATION DRAINS/SERVICE TECH
17	Davis-Beattie, Lauren C	[REDACTED]	GAFFNEY	29341	W	F	3/28/1979	SELF EMPLOYED/ESTHETICIAN
18	Drake, Paul J	[REDACTED]	GAFFNEY	29340	W	M	11/9/1979	NEWARK/ORDER PICKER
19	Earls, Stephanie M	[REDACTED]	GAFFNEY	29340	W	F	9/19/1964	HOUSEWIFE
20	Edmonds, Robin W <i>at work</i>	[REDACTED]	CHESNEE	29323	W	F	3/22/1973	<i>High school mom</i>
21	Estes, Michael S	[REDACTED]	GAFFNEY	29340	W	M	1/11/1951	VALAY PARKING
25	Goforth, Charles E	[REDACTED]	GAFFNEY	29341	W	M	6/10/1938	

Clerk of Court

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Print Time: 12:41:51 PM

File: Rollcall.rpt

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Cherokee County Magistrate Court

Juror Venire/Worksheet

FEBRUARY 22. 20

Sorted By Seq Nbr

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	NAME	ADDRESS	CITY	ZIP	RACE	SEX	DOB	COMMENTS
24	Goudelock, D I. JR	[REDACTED]	GAFFNEY	29341	B	M	8/8/1950	US NAVY/RETIRED
26	<i>NO</i> Greene, Janice E	[REDACTED]	COWPENS	29330	W	F	2/15/1945	UNEMPLOYED
27	Hammons, Carroll M	[REDACTED]	GAFFNEY	29341	W	M	7/8/1948	CHEROKEE SMALL ENGINES
29	Hemphill, Micheal L	[REDACTED]	GAFFNEY	29341	B	M	8/1/1959	TIMKEN/LMA
31	Huggin, Robert L JR	[REDACTED]	GAFFNEY	29340	W	M	12/20/1940	
32	Jefferies, Cannilla Y	[REDACTED]	GAFFNEY	29340	B	F	11/16/1979	
34	Johnson, Kimberley <i>O. H. W.</i>	[REDACTED]	SPARTANBUR	29307	W	F	7/24/1960	SELF EMPLOYED/RESTAURANT
36	Jolly, Annie	[REDACTED]	GAFFNEY	29341	W	F	4/22/1925	
37	<i>NO</i> Kilby, Alan C	[REDACTED]	GAFFNEY	29341	W	M	6/10/1954	BOARD OF PUBLIC WORKS
38	Knuckles, Kenneth L	[REDACTED]	GAFFNEY	29341	B	M	6/14/1956	DISABLE
39	Leach, Andrea F	[REDACTED]	GAFFNEY	29341	B	F	10/12/1965	NO EMPLOYMENT SHOWN
40	Lester, Shirley W	[REDACTED]	GAFFNEY	29340	W	F	8/13/1935	
41	Linder, Jacqueline E	[REDACTED]	GAFFNEY	29341	B	F	2/23/1969	HOMEMAKER <i>unemployed</i>
42	Litteral, Joseph A	[REDACTED]	GAFFNEY	29340	W	M	1/18/1958	UNIVERSAL NOLIN/SHIPPING
43	Littlejohn, King David	[REDACTED]	GAFFNEY	29341	B	M	11/27/1948	UNEMPLOYED
44	Littlejohn, Tonita M	[REDACTED]	GAFFNEY	29341	B	F	8/24/1973	DSE SYSTEMS/ASSEMBLER
45	Lopez, Valerie A	[REDACTED]	COWPENS	29330	H	F	5/12/1981	<u>SRHS/NR</u>
46	Love, Billy W	[REDACTED]	GAFFNEY	29340	W	M	5/9/1941	
48	Mathis, Malissa T	[REDACTED]	GAFFNEY	29340	W	F	6/15/1972	

Click of Court

Cherokee County Magistrate Court

Juror Venire/Worksheet

Sorted By Seq Nbr

FEBRUARY 22, 20

1644872754
Clerk of Court

	NAME	ADDRESS	CITY	ZIP	RACE	SEX	DOB	COMMENTS
19	Mccraw, Bruce W <i>NO</i>	[REDACTED]	GAFFNEY	29341	W	M	8/11/1966	GASTON COUNTY SCHOOLS/5TH GRADE
50	Mccraft, Robert J	[REDACTED]	COWPENS	29330	W	M	12/1/1961	WaHs REG./MAINT ELECT
51	Mcnair, Patti J	[REDACTED]	GAFFNEY	29341	W	F	8/2/1964	US AIRWAYS/FLIGHT ATTENDANT
52	Moss, Magen B	[REDACTED]	GAFFNEY	29340	W	F	3/17/1988	UNEMPLOYED <i>man</i>
54	Oglesby, Wanda	[REDACTED]	COWPENS	29330	B	F	7/7/1960	DISABLE
55	<i>NO</i> Oliver, Glenn Edward JR	[REDACTED]	GAFFNEY	29341	W	M	7/26/1953	FIRST PIEDMONT FEDERAL/BANKER
56	<i>NO</i> Padgett, Donald L	[REDACTED]	GAFFNEY	29341	W	M	9/29/1949	BROAD RIVER BAPTIST ASSOCIATION
59	Phillips, Mary H	[REDACTED]	GAFFNEY	29341	B	F	1/5/1946	TIMKEN/RETIRED
62	<i>NO</i> Revels, Shirley A	[REDACTED]	GAFFNEY	29342	W	F	12/28/1940	SPARTANBURG COUNTY SHERIFF'S DEP
63	Rivera, Martina J	[REDACTED]	GAFFNEY	29340	H	F	3/9/1987	<i>Dis 1.5.2010</i>
64	Said, Summer L <i>prevail</i>	[REDACTED]	GAFFNEY	29341	W	F	5/12/1982	CAROLINA PEDIATRIC ASSOCIATES
65	Shippy, Charles E	[REDACTED]	GAFFNEY	29341	B	M	3/10/1952	RANDOLPH TRUCKING/TRUCK DRIVER
68	Sullivan, Ken D	[REDACTED]	GAFFNEY	29342	B	M	12/21/1977	
69	Turner, Jason S	[REDACTED]	GAFFNEY	29341	W	M	10/17/1976	FREIGHTLINER
71	White, Daisy I	[REDACTED]	GAFFNEY	29340	W	F	10/31/1937	
72	Willard, Lillie M	[REDACTED]	GAFFNEY	29340	W	F	11/18/1918	
73	Winright, Caleb C	[REDACTED]	GAFFNEY	29341	W	M	11/13/1985	CARBOTECH/MACHINIST
74	Winstead, Charles D	[REDACTED]	PACOLET	29372	W	M	7/1/1946	DISABLE
75	Wright, Mary B <i>exposed Student</i>	[REDACTED]	GAFFNEY	29341	W	F	6/25/1985	<i>Student 1/11/2010</i>

FORM 4

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

JUDGMENT IN A CIVIL CASE

State of South Carolina

John Peter Johnson

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

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

ACTION DISMISSED (CHECK REASON): Rule 12(h), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other

ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other

DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- See attached order. (Formal order to follow)
- Statement of Judgment by the Court:

This is an appeal from a magistrate jury trial which involves the selection of a magistrate jury and also the interpretation of the legislature's intent when it set forth the manner and method of selecting juries in magistrate's court. The material facts to this appeal are in dispute. The defendant was found guilty of committing a criminal offense by a magistrate jury. Prior to jury selection, the defendant timely objected to proceeding with the jury selection because the pool from which his jury was to be selected (prior to the exercise of preemptory strikes) had fallen to a number of less than 40. Here it appears the number was either 30 or 29. The magistrate disagreed with the request for a continuance. A jury was selected and the defendant was found guilty by the jury. The defendant contends failure to grant the continuance until sufficient number of potential jurors (40) could be assembled in accordance with SC Code section 22-2-120 was an error. The defendant asserts he is entitled to a new trial. After reviewing the applicable code sections concerning jury selection, the defendant is correct and is entitled to a new trial.

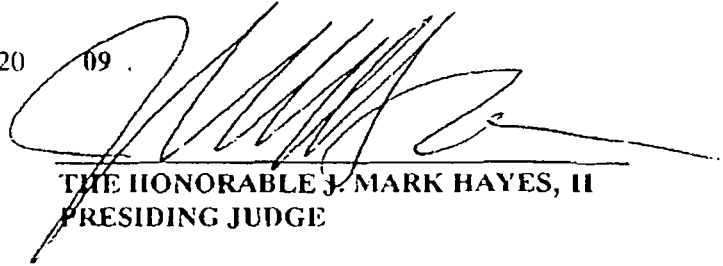
I ask the defendant's lawyer to prepare a more formal order granting the relief. The formal order, once signed and filed, will be the final order of the court.

SC Code sections 22-2-20 to 22-2-150 have been reviewed. The court has attempted to read these sections applying basic rules of statutory construction. These sections have been viewed as a whole to determine legislative intent where ambiguities may exist. In so doing, the court's opinion is that the motion for a continuance was timely made and should have been granted when the number of jurors available fell below the statutory minimum. Even though jury selection occurred, legislative intent does not appear to be such that the court is vested with the authority (once a proper objection is raised) to dictate to the state or the defense that jury selection will occur when the number of people available from which to select a jury may be as few as only the number equal to or less than the number mandated by 22-2-100. Unless the parties consented (failed to object), the names drawn pursuant to either 22-2-80 or 22-2-90 must be randomly

2010 AUG - 21 A 9: 51
 BRANDY W. SCOBEE
 CLERK OF COURT
 COUNTY OF CHEROKEE, S.C.

drawn. The random selection method intended by the legislature does not appear to be accomplished when in advance of the random selection, due to lack number of names, everyone whose name is in the box will be pulled.

Dated at Spartanburg, South Carolina, this 28 day of July, 20 09 .


THE HONORABLE J. MARK HAYES, II
PRESIDING JUDGE

This judgment was entered on the _____ day of _____ 20____, and a copy mailed first class this
day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Keith Kelly
PO Box 2929
Spartanburg, SC 29304

ATTORNEY(S) FOR PLAINTIFF

Kim Leskanic
Cherokee County Courthouse
125 Floyd Baker Blvd.
Gaffney, SC 29340

ATTORNEY(S) FOR DEFENDANT

Brandy McBee

CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHEROKEE)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

John Porter Johnson,)
)
Appellant,)
vs.)
)
The State of South Carolina,)
)
Appellee.)

ORDER
2010-CP-11-0404

IN THE MAGISTRATE'S COURT
D-471404

IN RE:)
)
The State of South Carolina,)
)
Plaintiff,)
vs.)
)
John Porter Johnson,)
)
Defendant.)

RECORDED & INDEXED
JUL 27 11 42 AM 2010

DATE OF HEARING: July 26, 2010
APPELLANT JUDGE: J. Mark Hayes, II
ATTORNEY FOR APPELLANT: R. Keith Kelly, Esquire
ATTORNEY FOR APPELLEE: Kimberly L. Leskanic, Esquire

BACKGROUND

This matter is before the Court on Appeal from a Magistrate's Court jury trial held on February 22, 2010, the Honorable Robert B. Howell, Magistrate Judge, presiding, where Appellant was found guilty of driving under the influence (1st offense) pursuant to S.C. Code Ann. Sec. 56-5-2930 (2009). Appellant timely objected to the manner and method of selecting the jury in his case and sought a continuance of the trial. The trial Court overruled Appellant's objection to the manner and method of selecting the jury and denied the

1
CPW

request for a continuance. Appellant argues that the trial Court erred in its manner and method of selecting the jury and denying Appellant's request for a continuance. The conviction of the Appellant is reversed.

FACTS

Appellant was arrested on August 24, 2008 by a trooper with the SC Highway Patrol and charged with driving under the influence (1st offense) in violation of S.C. Code Ann. Sec. 56-5-2930 (2009). Appellant retained the services of an attorney and requested a jury trial be scheduled. Accordingly, on the morning of February 22, 2010, the case was called for trial, the Honorable Robert B. Howell, Magistrate Court Judge, presiding. Appellant's case was the first case on the docket for the week of February 22, 2010.

Prior to the aforesaid term of Court, the Magistrate drew seventy five (75) names and issued a writ of venire facias for the jurors requiring their attendance on Monday, February 22, 2010 for a one week term of Court in accordance with S.C. Code Ann. Sec. 22-2-90 (2009). However, on the morning of February 22, 2010, thirty nine (39) of the seventy five (75) summoned jurors appeared. During jury qualifications, the trial Judge excused an additional six (6) jurors from the February 22, 2010 term of Court, leaving thirty three (33) potential jurors from which to select a petit jury. Appellant timely objected to being required to select a jury from the jury pool where, as here, less than forty (40) jurors were present and, further, Appellant sought a continuance until such time as a sufficient number of potential jurors could be assembled. The trial Judge overruled Appellant's objection and denied the Motion for a Continuance. Thereafter, a jury was selected and the case proceeded to trial where Appellant was convicted.

LAW/ANALYSIS

Appellant argues that the trial Court erred in overruling his objection to the manner and method of jury selection and in its refusal to grant a continuance until a sufficient number of potential jurors could be assembled. I agree.

The jury selection process in the Magistrate Courts of this State is prescribed by statute in Title 22 of the S.C. Code of Laws. In the instant case, the Magistrate Court selected a jury list for a one week term of Court. S.C. Code Ann. Sec. 22-2-90 (2009) sets forth the procedure and dictates that the Magistrate must draw at least forty (40) but not more than one hundred (100) jurors to serve. The aforesaid statute further provides that if the Court experiences difficulty in drawing a sufficient number of jurors from the qualified electors of the area, the presiding Magistrate may draw at least one hundred (100) names but not more than a number determined sufficient by Court administration to serve for the week. Additionally, S.C. Code Ann. Sec. 22-2-120 (2009) provides that in the event there are not sufficient jurors to proceed, additional jurors must be selected in accordance with other applicable code sections contained in Title 22.

Appellant argues that the legislature intended for there to be a minimum number of jurors from which to select a petit jury and that in the instant case, the minimum number required is forty (40), which is consistent with the remedy provided in S.C. Code Ann. Sec. 22-2-120 if there are an insufficient number of jurors to proceed to trial. Appellee argues that where, as here, the trial Court summoned seventy five (75) jurors and neither party exhausted the remaining jurors before seating a six (6) person jury, there is no error.

This Court reviewed S.C. Code Ann. Sec. 22-2-20 thru 22-2-150 (2009). Applying basic rules of statutory construction to the aforesaid sections and viewing them as a whole

to determine legislative intent where any ambiguity may exist, this Court finds that the Motion for Continuance was timely made and should have been granted where, as here, the number of jurors available for jury selection fell below the statutory minimum number required. Even though jury selection occurred, legislative intent does not appear to be such that the trial Court is vested with the authority to dictate to the State or the Defense that jury selection will occur when the minimum number required is unavailable from which to select a jury. Unless both parties consent, the names drawn pursuant to either S.C. Code Ann. Sec. 22-2-80 (2009) or S.C. Code Ann. Sec. 22-2-90 (2009) must be randomly drawn. Therefore, the random selection method intended by the legislature does not appear to be accomplished when in advance of random selection there is an insufficient number from which to choose. For this reason, I find that the trial Court erred as a matter of law in overruling the Appellant's objection, denying a continuance and requiring the State and the Defendant to proceed to jury selection and trial.

CONCLUSION

Accordingly, the trial Court's decision is

REVERSED.

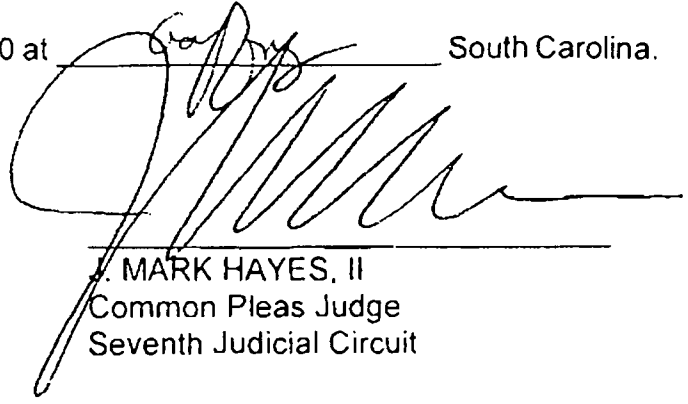
GIVEN under my hand and the Seal of this Court this 6th day of

October

, 2010 at

Gayles

South Carolina.



J. MARK HAYES, II
Common Pleas Judge
Seventh Judicial Circuit

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of General Sessions

J. Mark Hayes, Circuit Court Judge

Case No. 2010- CP - 11 - 404
U.T.T. No. D-471404

The State,Appellant.

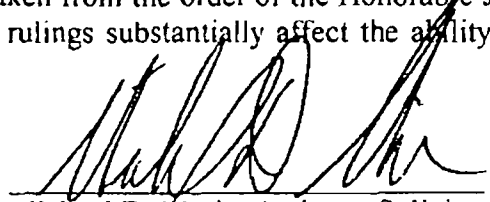
v.

John Porter Johnson,.....Respondent.

NOTICE OF APPEAL

The State of South Carolina appeals the order dated August 2, 2010, by the Honorable J. Mark Hayes. This appeal is taken from the order of the Honorable J. Mark Hayes, which quashed the Jury Panel. The rulings substantially affect the ability of the State to prosecute cases in Magistrate Court.

August 3, 2010



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BRANDY W. MCBEE

2010 AUG - 3 P 2:16

CLERK OF COURT
CHEROKEE COUNTY
SOUTH CAROLINA

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of General Sessions

J. Mark Hayes, Circuit Court Judge

Case No. 2010- CP - 11 - 404
U.T.T. No. D-471404

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2010 OCT 14 P 1:27
BRANDY W. MCREE

The State,Appellant

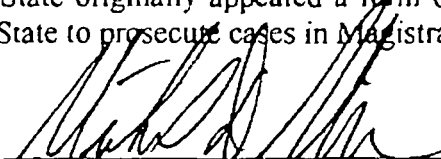
v.

John Porter Johnson,Respondent.

AMENDED NOTICE OF APPEAL

The State of South Carolina appeals the final order dated October 6, 2010, by the Honorable J. Mark Hayes. This appeal is taken from the order of the Honorable J. Mark Hayes, which quashed the Jury Panel. The State originally appealed a form order. The rulings substantially affect the ability of the State to prosecute cases in Magistrate Court.

October 14, 2010


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Attorney for Respondent

SOUTH CAROLINA DEPARTMENT OF PUBLIC SAFETY
UNIFORM TRAFFIC TICKET

STATE OF SOUTH CAROLINA VERSUS
FIRST NAME: John MIDDLE NAME: Porter LAST NAME: Johnson
STREET ADDRESS: _____ CITY: _____ STATE: _____ ZIP CODE: _____

STATE LICENSED: MD DRIVER'S LICENSE NO.: _____ COL: MD DRI LIC CLASS: C
VEH. LIC. NO.: _____ STATE: MD MAKE OF VEH: MER YEAR: 2003 COOL. VEH: _____ AIGED: _____ SUPER VEH: _____ COMM: _____
HAZ. MT. _____ MOPED _____ MTRCYCL _____ OTHER _____

YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL OFFICER

NAME OF TRIAL OFFICER: T. COURT STREET AND NO.: 312 E. Frederick St
DATE OF TRIAL: 09/24/08 TIME OF TRIAL: 1400 CITY: Gaffney STATE: SC ZIP CODE: 29340

VIOLATION - COUNTY APPEARANCE REQUIRED: YES VIOLATION SECTION NO.: 56.5-2930
DUI 1st.

OWNER OF VEHICLE: A. HOWARD DATE OF ARREST: 08/24/08
ADDRESS OF OWNER: Arnold MD DATE OF VIOLATION: 08/24/08

SALE DEPOSITED: TRAC NAME OF ARRESTING OFFICER: E. J. MCABEE RANK: Sgt

DESCRIPTION OF ACCUSED: W/M 05/01/1974 5'10" 170 lbs COUNTY: Charocee PLATE NO.: 622 DISTRICT: 4

CASE BEFORE: _____ MAGISTRATE _____ JAIL COURT
COURT COURT: _____ FAMILY COURT FEDERAL COURT
NAME OF TRIAL OFFICER: _____
IF DIFFERENT FROM ABOVE: _____

DEFENDANT: DID NOT APPEAR APPEARED
DISPOSITION: _____ VIOL: _____

MOBILE PROCESSED COUNTY: _____ CITY: Gaffney CODE: 1
FORFEITED BOND PLEA: NOT GUILTY _____

TRIAL BY: TRIAL OFFICER JURY
VERDICT OF TRIAL: GUILTY DATE OF TRIAL IF ANY: 08/22/10
LIT: _____

AMT. SUSPENDED: 997 AMT. COLLECTED: 997 AMT. SUBMITTED: _____
LONG: _____

COMMITTED TO: _____ OFFENSE CODE: 99 B.A. LEVEL: ATF
DATE: 08/22/10 D 471404


TRIAL OFFICER'S COPY

COURT NO.

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.

By: _____


MARK R. FARTHING

Assistant Attorney General

Office of Attorney General
Post Office Box 11549
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(803) 734-3727

ATTORNEYS FOR APPELLANT

December 13, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Cherokee County
Honorable J. Mark Hayes, II, Circuit Court Judge

THE STATE,

Appellant,

vs.

JOHN PORTER JOHNSON,

Respondent.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Record on Appeal on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

R. Keith Kelly, Esquire
Lister, Flynn & Kelly, P.A.
Post Office Box 2929
Spartanburg, South Carolina 29304

I further certify that all parties required by Rule to be served have been served.
This 13th day of December, 2010.



ELLEN R. DuBOIS
Legal Assistant
Office of Attorney General
Post Office Box 11549
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(803) 734-3727

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Cherokee County
Honorable J. Mark Hayes, II, Circuit Court Judge

THE STATE,

Appellant,

vs.

JOHN PORTER JOHNSON,

Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the circuit court judge err in reversing Johnson's conviction based on an alleged insufficiency in the number of potential jurors present for selection where the magistrate properly drew the names of seventy-five jurors in compliance with S.C. Code Ann. § 22-2-90, a qualified jury panel was selected from the available jury pool, and Johnson suffered no prejudice from the jury selection process as conducted?

STATEMENT OF THE CASE

On August 24, 2008, Respondent John Porter Johnson, a resident of Maryland, was arrested for driving under the influence in Cherokee County, South Carolina. The arresting officer issued Uniform Traffic Ticket #D-471404 to Johnson for a violation of S.C. Code Ann. § 56-5-2930. On February 22, 2010, a jury trial was commenced in the Cherokee County magistrate court before the Honorable Robert B. Howell, chief magistrate for Cherokee County. At the conclusion of trial, the jury convicted Johnson as charged. Subsequently, Johnson appealed his conviction to the Cherokee County court of common pleas.

On July 26, 2010, Johnson's appeal was heard by the Honorable J. Mark Hayes, II, circuit court judge. Following the hearing, the circuit court judge issued an informal order reversing Johnson's conviction due to an alleged error in the jury selection process. The State then timely filed a notice of appeal. Subsequently, on October 11, 2010, the circuit court judge issued a final order reversing Johnson's conviction. The State then timely filed an amended notice of appeal on October 14, 2010. This appeal follows.

STATEMENT OF FACTS

In the early morning hours of August 24, 2008, Respondent John Porter Johnson was stopped and arrested for driving under the influence. (R. p. 26). Subsequently, a jury trial was commenced in the Cherokee County magistrate court. (R. p. 10). Prior to trial, Johnson sought a continuance based on an alleged error in the jury selection process conducted pursuant to S.C. Code Ann. § 22-2-90(B). (R. pp. 10). The magistrate denied Johnson's motion based on the fact seventy-five jurors were drawn prior to trial and a sufficient number were present for jury selection to proceed. (R. p. 10). In this case, seventy-five jurors were drawn and summoned, thirty-nine jurors appeared for court, and thirty-three jurors remained after six jurors were excused. (R. pp. 11-16). Subsequently, six jurors were selected for trial without either party exhausting the list of potential jurors. (R. p. 10). Johnson was then tried and convicted. (R. p. 19). Subsequently, he appealed his conviction to the Cherokee County court of common pleas, asserting a minimum of forty jurors were required before jury selection could proceed. (R. p. 23).

On July 26, 2010, a hearing was held regarding Johnson's appeal. (R. p. 3). Johnson noted an appropriate number of jurors were summoned as required by S.C. Code Ann. § 22-2-90(B). (R. p. 4). However, Johnson asserted the magistrate erred by making him select a jury from only thirty-three potential jurors, the total number remaining after several jurors were excused, as opposed to the forty jurors he believed were required. (R. pp. 4-5). In response, the solicitor pointed out a sufficient number of jurors were drawn as required by the applicable statutory provision and a sufficient number of jurors were available to select a valid jury from even if all peremptory challenges were exercised. (R. p. 7). The circuit court judge then took the matter under advisement. (R. p. 8).

Subsequently, the circuit court judge issued an order reversing Johnson's conviction. (R. p. 20). The circuit court judge noted seventy-five jurors were drawn and summoned, thirty-nine jurors were present on the day of trial, and thirty-three jurors were available to serve on the jury. (R. p. 20). The circuit court judge concluded the magistrate should have granted the motion for continuance "where, as here, the number of jurors available for jury selection fell below the statutory minimum number required." (R. p. 22). The circuit court judge further held:

Even though jury selection occurred, legislative intent does not appear to be such that the trial Court is vested with the authority to dictate to the State or the Defense that jury selection will occur when the minimum number required is unavailable from which to select a jury. Unless both parties consent, the names drawn pursuant to either S.C. Code Ann. Sec. 22-2-80 (2009) or S.C. Code Ann. Sec. 22-2-90 (2009) must be randomly drawn. Therefore, the random selection method intended by the legislature does not appear to be accomplished when in advance of random selection there is an insufficient number from which to choose.

(R. p. 22). Therefore, the circuit court judge concluded the magistrate erred as a matter of law in overruling Johnson's objection, denying Johnson's continuance motion, and requiring the parties to proceed with jury selection and trial. (R. p. 22). The State then appealed the circuit court judge's ruling.

ARGUMENT

Did the circuit court judge err in reversing Johnson's conviction based on an alleged insufficiency in the number of potential jurors present for selection where the magistrate properly drew the names of seventy-five jurors in compliance with S.C. Code Ann. § 22-2-90, a qualified jury panel was selected from the available jury pool, and Johnson suffered no prejudice from the jury selection process as conducted?

The circuit court judge determined the magistrate erred in overruling Johnson's objection to the manner and method of selecting a jury and in denying Johnson's motion for a continuance. The circuit court judge's ruling was erroneous. The magistrate properly summoned seventy-five potential jurors, which exceeded the minimum number required to be drawn for jury selection under the applicable statutory provision, and a sufficient number of available jurors were present for the drawing of a full, qualified jury panel. Thus, the magistrate properly denied Johnson's motion for a continuance. However, even if the magistrate did err in the jury selection process, the statutory provisions are merely directory in nature and Johnson suffered no prejudice as a result of the selection method employed. A qualified jury panel was properly empaneled in this case, and the magistrate properly exercised his discretion in denying Johnson's continuance motion. Therefore, the circuit court judge's ruling reversing Johnson's conviction should be overturned, and Johnson's conviction and sentence should be reinstated.

In criminal appeals from magistrate court, the circuit court does not conduct a de novo review and is limited to reviewing for preserved errors raised to it by appropriate objections. City of Landrum v. Sarratt, 352 S.C. 139, 141, 572 S.E.2d 476, 477 (Ct. App. 2002); see S.C. Code Ann. § 18-3-70 ("The appeal must be heard by the Court of

Common Pleas upon the grounds of exceptions made and upon the papers required under this chapter, without the examination of witnesses in that court. And the court may either confirm the sentence appealed from, reverse or modify it, or grant a new trial, as to the court may seem meet and conformable to law.”). An appellate court reviewing a criminal appeal from the circuit court may review for errors of law only. City of Aiken v. Koontz, 368 S.C. 542, 546, 629 S.E.2d 686, 688 (Ct. App. 2006). In criminal cases, appellate courts sit to review errors of law only and are bound by the factual findings of the trial court unless clearly erroneous. State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 505 (Ct. App. 2004); see Rogers v. State, 358 S.C. 266, 269, 594 S.E.2d 278, 279 (Ct. App. 2004) (“Brandon clearly misconstrues our standard of review, for in criminal appeals we sit to review errors of law only.”).

A. Proper Application of the Statutory Jury Selection Process in Magistrate Court

The cardinal and overriding rule of statutory construction is for the courts to determine and effectuate legislative intent. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). All rules of statutory construction are subservient to the rule that legislative intent must prevail if it can reasonably be discovered from the statutory language construed in the light of the statute’s intended purpose. State v. Morgan, 352 S.C. 359, 365-366, 574 S.E.2d 203, 206 (Ct. App. 2002). A subtle or forced construction of the words of a statute for the purpose of expanding its operation is prohibited. Goldston v. State Farm Mut. Auto. Ins. Co., 358 S.C. 157, 177, 594 S.E.2d 511, 522 (Ct. App. 2004).

A statute as a whole should receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy for which it was enacted. City of Camden

v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997). The legislature's intent should be ascertained primarily from the plain language of the statute, and the appellate court must apply clear and unambiguous terms of a statute according to their literal meaning. Landis, 362 S.C. at 102, 606 S.E.2d at 505. Courts will reject a statutory interpretation which would lead to a plainly absurd result which could not possibly have been intended by the legislature or which would defeat the plain legislative intent. State v. Sweat, 379 S.C. 367, 377, 665 S.E.2d 645, 650 (Ct. App. 2008).

The procedure for the selection of juries in criminal cases in magistrate court is codified under Chapter 2 of Title 22 of the South Carolina statutory code. Under S.C. Code Ann. § 22-2-90(B), "[a]t least ten but not more than forty-five days before a scheduled term of jury trials, a person selected by the presiding magistrate **must draw at least forty but not more than one hundred jurors** to serve one week only." (emphasis added). Section 22-2-120 further provides:

If at the time set for trial **there are not sufficient jurors to proceed** because one or more have failed to attend, have not been summoned, or have been excused or disqualified by the court, additional jurors must be selected from the remaining names or in the manner provided in Section 22-2-80 or Section 22-2-100.

(emphasis added). Jurors must be selected from the jury pool until six jurors and four alternates are selected. S.C. Code Ann. § 22-2-100. Each party is entitled to a maximum of six peremptory challenges as to primary jurors and four peremptory challenges as to alternate jurors. Id.

Under the applicable statutory provisions, the magistrate in this case was required to have between forty and one hundred jurors' names drawn for jury service for the week of Johnson's trial. The magistrate summoned seventy-five jurors for trial, and Johnson

conceded this fact to the circuit court judge on appeal. Because the magistrate summoned a number of jurors between forty and one hundred, the magistrate complied with the clear, unambiguous requirements of Section 22-2-90.

However, although the magistrate complied with the required process for the drawing of jurors, the circuit court judge concluded the potential jurors available for selection fell below the perceived statutory minimum requisite. The circuit court judge concluded the random selection method intended by the legislature could not occur when there were an insufficient number of potential jurors from which to choose a jury. The circuit court judge's ruling in this regard was erroneous.

Chapter 2 of Title 22 of the statutory code does not contain a provision specifically establishing the minimum number of jurors required to be present in the jury pool before jury selection can proceed. Although the magistrate is required to draw at least forty names, there is no explicit requirement forty potential jurors must be present. Instead, as illustrated by the language in Section 22-2-120, only a sufficient number must be present to proceed. If a sufficient number are not present, Section 22-2-120 provides the appropriate process to cure any deficiency. See S.C. Code Ann. § 22-2-120 (identifying the procedure for procuring additional jurors when "there are not sufficient jurors to proceed").

In the case sub judice, the magistrate summoned seventy-five potential jurors, which was thirty-five potential jurors over the minimum total required to be drawn by Section 22-2-90. Prior to trial, thirty-nine potential jurors were present and six were excused or stricken, leaving a remaining available jury pool of thirty-three potential jurors. The maximum required jury size consisted of six primary jurors and four

alternates. At a maximum, Johnson and the solicitor could have exercised a combined twenty peremptory challenges in striking potential primary jurors and alternates.

Therefore, since ten jurors were necessary to comprise a juror panel of six jurors and four alternates and a maximum of twenty potential jurors in the jury pool could be stricken with peremptory challenges, thirty jurors were necessary to constitute a sufficient panel present to proceed. Thirty-three jurors were available for selection in this case.

Therefore, there was a sufficient number of potential jurors present to select a full jury panel, including alternates, even if all available peremptory challenges were exhausted; and, critically, a proper jury panel was selected from this available jury pool.

The circuit court judge's order reversing Johnson's conviction erroneously expanded the statutory requirements by establishing a minimum number of potential jurors required to be present for jury selection even though this requirement was not articulated in any of the applicable statutory provisions enacted by the legislature. See State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Cl. App. 1999) ("We, of course, must take the statute as we find it, giving effect to the legislative intent as expressed in its language. We cannot under our power of construction supply an omission in the statute."). This ruling was improper because it ignored the plain language of the statutory provisions and expanded their clear requirements beyond the General Assembly's mandates, which only required the drawing of between forty and one hundred potential jurors. The circuit court judge further erred in concluding "there [was] an insufficient number [of jurors] from which to choose" because a full jury panel was selected from the

available potential jurors.¹ (R. p. 22). As the circuit judge's ruling constituted clear legal error and impermissibly expanded the statutory requirements of the applicable code sections, the decision of the circuit court judge should be reversed, and Johnson's conviction should be reinstated.

B. Directory Nature of the Statutory Provisions and Lack of Prejudice

Historically, South Carolina courts have been liberal in interpreting statutory provisions regarding the drawing and summoning of jurors. State v. Wells, 162 S.C. 509, 523, 161 S.E. 177, 183 (1931). Statutes related to the manner of selecting juries have traditionally been viewed as merely directory as opposed to mandatory. State v. Washington, 82 S.C. 341, 345, 64 S.E. 386, 387 (1909). "Irregularities in the listing, drawing, and summoning of jurors may be often waived, and, even if not waived, are not in themselves acts so prejudicial as to require the quashing of a venire or to warrant the Court in setting aside a judgment based upon a finding or verdict of a jury irregularly drawn." Wells, 162 S.C. at 523, 161 S.E. at 183. Without a showing of prejudice, irregularities in the manner of drawing a jury cannot serve as the basis for quashing a jury venire. State v. Davis, 239 S.C. 280, 284, 122 S.E.2d 633, 635 (1961). "An error without prejudice does not warrant reversal." State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005).

In the case at bar, even assuming the magistrate erred in his interpretation of the statutory provisions regarding the manner of jury selection, these provisions are merely directory and should have been liberally construed. Assuming forty potential jurors were

¹In his order reversing the conviction, the circuit court judge acknowledged a jury was selected from the potential jurors available prior to trial. (R. p. 20).

statutorily required to be present before jury selection could commence, any irregularity in the number of jurors present in this case could not serve as a basis to quash the jury panel and overturn the conviction without some resulting prejudice. Johnson made no assertions of prejudice to the circuit court judge on appeal, and the circuit court judge made no findings of prejudice in overturning the conviction. Critically, there has been no suggestion any member of the jury panel was unqualified in any way, and there is no evidence to support such a finding. See Washington, 82 S.C. at 344-345, 64 S.E. at 387 (“There is . . . no showing that the jurors drawn were not good and lawful men and no showing that appellant was in any way injured by the alleged irregularities.”).

A full, qualified jury was selected from the jurors available prior to trial. See State v. Rasor, 168 S.C. 221, 233, 167 S.E. 396, 401 (1933) (“There is nothing before us to show that any member of the petit jury, who tried the defendants, failed to possess any qualification for a juror as laid down in the Constitution. In the absence of any showing to the contrary, this Court must assume that the trial jury was legally and properly constituted, and that each and every individual member thereof was qualified to act as a juror as prescribed in the Constitution.”). Johnson received a fair jury trial by a qualified panel randomly selected from the community, and he was entitled to nothing further. See Palacio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999) (“[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury.”). Johnson suffered no prejudice as a result of any irregularities occurring in the selection of the jury in this case. See State v. Smith, 200 S.C. 188, 196-197, 20 S.E.2d 726, 730 (1942) (“The defendant has not shown, or attempted to show, that he was prejudiced. . . . The drawing apparently was a public one, held at the proper time and

place, and regularly conducted by the proper officers. Any irregularity has not affected the right of the defendant to a trial by a fair and impartial jury, nor prejudiced him in any way.”).

On appeal to the circuit court judge, Johnson failed to articulate any prejudice resulting from the jury selection method employed. See State v. Smith, 230 S.C. 164, 168, 94 S.E.2d 886, 887 (1956) (“The burden is upon the appellant to satisfy this court that there has been prejudicial error.”). Therefore, even assuming the magistrate erred in allowing a jury to be selected from the available jury pool, the circuit court judge erred in reversing Johnson’s conviction for an error of law not resulting in any prejudice. See State v. Crocker, 366 S.C. 394, 408, 621 S.E.2d 890, 897 (Ct. App. 2005) (“To warrant reversal, an appellant must show both error and resulting prejudice.”). The circuit judge’s ruling should be overturned, and Johnson’s conviction should be reinstated.

C. Denial of Motion for Continuance

A decision on whether to grant or deny a motion for continuance rests in the sound discretion of the trial court. State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005). Appellate courts in South Carolina typically show great deference to the trial judge regarding these decisions. State v. Colden, 372 S.C. 428, 435, 641 S.E.2d 912, 916 (Ct. App. 2007). The denial of a motion for continuance will not be disturbed on appeal absent a clear abuse of discretion. State v. Ravenell, 387 S.C. 449, 455, 692 S.E.2d 554, 557 (Ct. App. 2010). “The granting or refusal of a motion for continuance is within the discretion of the trial judge and his disposition of such a motion will not be reversed on appeal unless it is shown that there was an abuse of discretion to the prejudice of appellant. . . . [R]eversals of refusal of continuance are about as rare as

the proverbial hens' teeth." State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957).

Based on an alleged legal error in the manner of jury selection, the circuit court judge concluded the magistrate erred in denying Johnson's continuance motion and in requiring the parties to proceed with jury selection and trial. The circuit court judge's ruling was erroneous. The magistrate properly concluded there were a sufficient number of jurors present from which to select a jury. For this reason, the magistrate denied Johnson's motion for a continuance designed to allow more potential jurors to be assembled. Subsequently, consistent with the magistrate's determination enough jurors were present to proceed with jury selection, the required number of qualified jurors were selected to constitute a valid jury panel. Johnson was then tried and convicted. As a sufficient number of jurors were available to select a proper jury panel, the magistrate did not err in denying the motion for continuance.² See State v. Cook, 204 S.C. 295, 298-299, 28 S.E.2d 842, 844 (1944) ("It is axiomatic that disposal of such a motion [for continuance] is within the sound discretion of the trial Judge and his exercise of the latter will not be disturbed on appeal unless abuse of it is shown, with resulting prejudice to appellant[.]"). Therefore, the circuit court judge erred in reversing the magistrate's ruling. The circuit court judge's ruling should be reversed, and Johnson's conviction should be reinstated.

²Notably, Johnson was arrested on August 24, 2008, and moved for a continuance before trial on February 22, 2010. Johnson's trial took place 540 days after his arrest, which further supports the magistrate's decision to deny the continuance motion.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment of the circuit court be reversed and the judgment and conviction of the magistrate court be reinstated and affirmed.

Respectfully submitted,

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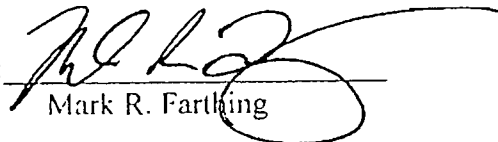
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ATTORNEYS FOR APPELLANT

December 13, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Cherokee County
Honorable J. Mark Hayes, II, Circuit Court Judge

THE STATE,

Appellant,

vs.

JOHN PORTER JOHNSON,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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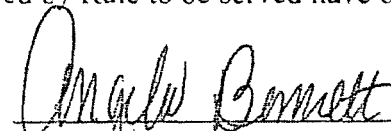
Respondent.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Final Brief of Appellant on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 13th day of December, 2010.



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FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Did the circuit court judge err in reversing Johnson's conviction based on an insufficiency in the number of potential jurors present for selection where the magistrate drew the names of seventy-five jurors in compliance with S.C. Code Ann. § 22-2-90, a jury panel was selected from the available jury pool, and Johnson suffered prejudice from the jury selection process as conducted?

STATEMENT OF THE CASE

On August 24, 2008, Respondent John Porter Johnson, a resident of Maryland, was arrested for driving under the influence in Cherokee County, South Carolina. The arresting officer issued Uniform Traffic Ticket #D-471404 to Johnson for a violation of S.C. Ann. § 56-5-2930. On February 22, 2010, a jury trial was commenced in the Cherokee County magistrate court before the Honorable Robert B. Howell, chief magistrate for Cherokee County. At the conclusion of trial, the jury convicted Johnson as charged. Subsequently, Johnson appealed his conviction to the Cherokee County court of common pleas.

On July 26, 2010, Johnson's appeal was heard by the Honorable J. Mark Hayes, II, circuit court judge. Following the hearing, the circuit court judge issued an informal order reversing Johnson's conviction due to an error in the jury selection process. The State then timely filed a notice of appeal. Subsequently, on October 11, 2010, the circuit court judge issued a final order reversing Johnson's conviction. The State then timely filed an amended notice of appeal on October 14, 2010. This appeal follows.

STATEMENT OF FACTS

In the early morning hours of August 24, 2008, Respondent John Porter Johnson was stopped and arrested for driving under the influence. (R. p. 26). Subsequently, a jury trial was commenced in the Cherokee County magistrate court. (R. p. 10). Prior to trial, Johnson sought a continuance based on an error in the jury selection process conducted pursuant to S.C. Code Ann. § 22-2-90(B). (R. p. 10). The magistrate denied Johnson's motion based on the fact seventy-five jurors were drawn prior to trial and allegedly a sufficient number were present for jury selection to proceed. (R. p. 10). In this case, seventy-five jurors were drawn and summoned, thirty-nine jurors appeared for court, and thirty-three jurors remained after six jurors were excused. (R. pp. 11-16). Subsequently, six jurors were selected for trial. (R. p. 10). Johnson was then tried and convicted. (R. p. 19). Subsequently, he appealed his conviction to the Cherokee County court of common pleas, asserting a minimum of forty jurors were required before jury selection could proceed. (R. p. 23).

On July 26, 2010, a hearing was held regarding Johnson's appeal. (R. p. 3). Johnson noted an appropriate number of jurors were summoned as required by S.C. Code Ann. § 22-2-90(B). (R. p. 4). Further, Johnson asserted the magistrate erred by requiring him to select a jury from only thirty-three potential jurors, the total number remaining after several jurors were excused, as opposed to the forty jurors to which he was entitled. (R. pp. 4-5). In response, the solicitor noted that a sufficient number of jurors were drawn

as required by the applicable statutory provision and a sufficient number of jurors were available to select a jury even if all peremptory challenges were exercised. (R. p. 7). The circuit court judge then took the matter under advisement. (R. p. 8).

Subsequently, the circuit court judge issued an order reversing Johnson's conviction. (R. pp. 19-22). The circuit court judge noted seventy-five jurors were drawn and summoned, thirty-nine jurors were present on the day of trial, and thirty-three jurors were available to serve on the jury. (R. p. 20). The circuit court judge concluded the magistrate should have granted the motion for continuance "where, as here, the number of jurors available for jury selection fell below the statutory minimum number required." (R. p. 22). The circuit court judge further held:

Even though jury selection occurred, legislative intent does not appear to be such that the trial Court is vested with the authority to dictate to the State or the Defense that jury selection will occur when the minimum number required is unavailable from which to select a jury. Unless both parties consent, the names drawn pursuant to either S.C. Code Ann. Sec. 22-2-80 (2009) or S.C. Code Ann. Sec. 22-2-90 (2009) must be randomly drawn. Therefore, the random selection method intended by the legislature does not appear to be accomplished when in advance of random selection there is an insufficient number from which to choose.

(R. p. 22). Therefore, the circuit court judge concluded the magistrate erred as a matter of law in overruling Johnson's objection, denying Johnson's continuance motion, and requiring the parties to proceed with jury selection and trial. (R. p. 22). The State then appealed the circuit court judge's ruling.

ARGUMENT

Did the circuit court judge err in reversing Johnson's conviction based on an insufficiency in the number of potential jurors present for selection where the magistrate drew the names of seventy-five jurors in compliance with S.C. Code Ann. § 22-2-90, a jury panel was selected from the available jury pool, and Johnson suffered prejudice from the jury selection process as conducted?

The circuit court judge determined the magistrate erred in overruling Johnson's objection to the manner and method of selecting a jury and in denying Johnson's motion for a continuance. The circuit court judge's ruling was correct. The magistrate summoned seventy-five potential jurors, which exceeded the minimum number of forty jurors present for jury selection under the applicable statutory provision, and only thirty-three remained for the jury panel. Therefore, the magistrate erred as a matter of law in denying Johnson's motion for a continuance. The clear intent of the General Assembly is that a minimum of forty jurors must be present and available for selection in a magistrate court jury trial.

Procedures in the magistrate court are largely determined by statutes. The magistrate court is unlike any other court in the court system. Many of the procedures set forth in the operation of the magistrate courts of this State are dictated by statutes, not court rules. The legislature recognized the magistrate court as the court closest to the people and many times defendants appear in the magistrate court as pro-se litigants. Therefore, greater protections have been afforded by the legislature, the people's representatives elected to the General Assembly. One of those protections is a minimum number of jurors that must be available for jury selection when a defendant is charged with a

crime. Another protection is the lack of discovery in the magistrate court so as to prevent an abuse of a pro-se litigant's resources, both time and financial.

The magistrate erred as a matter of law in denying Johnson's motion for a continuance and the learned circuit court judge properly reversed the conviction. The circuit court judge's ruling should be upheld.

In criminal appeals from magistrate court, the circuit court does not conduct a de novo review and is limited to reviewing preserved errors raised to it by appropriate objections. City of Landrum v. Sarratt, 352 S.C. 139, 141, 572 S.E.2d 476, 477 (Ct. App. 2002); see S.C. Code Ann. § 18-3-70 ("The appeal must be heard by the Court of Common Pleas upon the grounds of exceptions made and upon the papers required under this chapter, without the examination of witnesses in that court. And the court may either confirm the sentence appealed from, reverse or modify it, or grant a new trial, as to the court may seem meet and conformable to law."). An appellate court reviewing a criminal appeal from the circuit court may review for errors of law only. City of Aiken v. Koontz, 368 S.C. 542, 546, 629 S.E.2d 686, 688 (Ct. App. 2006). In criminal cases, appellate courts sit to review errors of law only and are bound by the factual findings of the trial court unless clearly erroneous. State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 505 (Ct. App. 2004); see Rogers v. State, 358 S.C. 266, 269, 594 S.E.2d 278, 279 (Ct. App. 2004) ("Brandon clearly misconstrues our standard of review, for in criminal appeals we sit to review errors of law only.").

A. Proper Application of the Statutory Jury Selection Process in Magistrate Court

All rules of statutory construction are subservient to the rule that legislative intent must prevail if it can reasonably be discovered from the statutory language construed in the light of the statute's intended purpose. State v. Morgan, 352 S.C. 359, 365-366, 574 S.E.2d 203, 206 (Ct. App. 2002). A subtle or forced construction of the words of a statute for the purpose of expanding its operation is prohibited. Goldston v. State Farm Mut. Auto. Ins. Co., 358 S.C. 157, 177, 594 S.E.2d 511, 522 (Ct. App. 2004).

A statute as a whole should receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy for which it was enacted. City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997). The legislature's intent should be ascertained primarily from the plain language of the statute, and the appellate court must apply clear and unambiguous terms of a statute according to their literal meaning. Landis, 362 S.C. at 102, 606 S.E.2d at 505.

The jury selection process in the magistrate court of this State is prescribed by statute in Title 22 of the South Carolina Code of Laws. In the instant case, the magistrate selected a jury list for a one week term of court. S.C. Code Ann. Sec. 22-2-90 (2009), sets forth the procedure and dictates that the magistrate must draw at least forty, but not more than one hundred jurors to serve. Section 22-2-90 (C) further provides:

If a court has experienced difficulty in drawing a sufficient number of jurors from the qualified electors of the area and before implementing a process pursuant to this subsection,

seeks and receives the approval of South Carolina Court administration, the person selected by the presiding magistrate may draw at least one hundred names, but not more than a number determined sufficient by court administration to serve one week only.

Jurors must be selected from the jury pool until six jurors and four alternates are selected. S.C. Code Ann. § 22-2-100. Each party is entitled to a maximum of six peremptory challenges as to primary jurors and four peremptory challenges as to alternate jurors. Id. In the event that an insufficient number of jurors are available at the time of jury selection, S.C. Code Ann. § 22-2-120 dictates additional jurors must be selected from the remaining names or in a manner provided in Section 22-2-80 or Section 22-2-100.

Under the applicable statutory provisions, the magistrate in this case was required to have between forty and one hundred jurors for jury service for the week of Johnson's trial. The magistrate summoned seventy-five jurors for trial, but only thirty-nine presented themselves for jury selection. Thereafter, the magistrate excused six jurors, leaving a total of thirty-three for potential jury service. Title 22 of the Code clearly and unambiguously sets forth a mandatory minimum of jurors that are to be available for service and clearly and unambiguously sets for the remedy in the event that less than the minimum number present themselves. S.C. Code Ann. § 22-2-120 (2009).

The government's interpretation of the statutes is tortious at best and misleading at worst. Under the government's interpretation, the magistrate could "draw" names of persons who have died or moved away after the jury

box was prepared in accordance with S.C. Code Ann. § 22-2-60. But, so long as the magistrate drew more than forty but less than one hundred names and eighteen jurors presented themselves as a jury panel, a trial could be held. (An alternate juror is not mandatory.)

In the instant case, the magistrate summoned seventy-five potential jurors in an effort to have a sufficient number present to conduct jury trials. However, only thirty-nine potential jurors presented themselves for jury service and six of those were excused, leaving a jury pool of only thirty-three potential jurors. Learned counsel for the defense properly and timely objected to being required to select a jury from less than the minimum number required by the statute, but was overruled and required to proceed with the trial. The circuit court judge's order reversing Johnson's conviction for the error of law is correct and should be upheld.

B. Directory Nature of the Statutory Provisions and Lack of Prejudice

The government relies on three cases indicating the South Carolina courts have been liberal in interpreting statutory provisions regarding the drawing and summoning of jurors. However, the government's reliance is misplaced. All cases cited by the government relate to the circuit courts of this State, not the magistrate courts.

The magistrate courts of this State are the people's courts. And, persons routinely appear before the magistrate courts without the benefit of legal counsel. Therefore, the General Assembly set forth by statute many

procedures and safe guards in the magistrate courts that are not set forth in the circuit courts of this state. Persons appearing in the circuit courts routinely employ legal counsel who not only rely on statutes, but court rules and court cases handed down by the appellate courts of this state to dictate the procedures in circuit court.

The government has proffered no case holding that the statutes controlling procedures in the magistrate court are directory in nature only. The government further argues that Johnson was not prejudiced. However, Johnson was prejudiced per se when the magistrate required him to go forward with less than the minimum number of potential jurors available.

C. Denial of Motion for Continuance

The circuit court judge concluded that the magistrate erred in denying Johnson's continuance motion and in requiring the parties to proceed with jury selection and trial. The circuit court judge's ruling is correct and should be upheld. An insufficient number of potential jurors were present to proceed with jury selection and the magistrate should have granted a continuance and selected additional jurors in accordance with S.C. Code Ann. § 22-2-120¹.


¹ The Government notes Johnson's trial was held 540 days after his arrest, which supports the magistrate's decision to deny a continuance motion. The Government's position is incredible where, as here, the Government is charged with calling cases for trial on their docket.

CONCLUSION

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

Respectfully submitted,

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BY: 
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ATTORNEYS FOR RESPONDENT

November 30, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Cherokee County
Honorable J. Mark Hayes, II, Circuit Court Judge

THE STATE,

Appellant,

vs.

JOHN PORTER JOHNSON,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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ATTORNEYS FOR RESPONDENT

January 4, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Cherokee County
Honorable J. Mark Hayes, II, Circuit Court Judge

THE STATE,

Appellant,

vs.

JOHN PORTER JOHNSON,

Respondent.

PROOF OF SERVICE

I, Toria D. Richardson, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served. This 4th day of January, 2011.

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

The State,

Appellant,

v.

John Porter Johnson,

Respondent.

Appeal From Cherokee County
J. Mark Hayes, II, Circuit Court Judge

Opinion No. 4927
Heard November 3, 2011 – Filed January 4, 2012

REVERSED

Attorney General Alan Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant
Deputy Attorney General Salley W. Elliott, Assistant
Attorney General Mark R. Farthing, all of Columbia;
and Solicitor Barry J. Barnette, of Spartanburg, for
Appellant.

Ralph Keith Kelly, of Spartanburg, for Respondent.

HUFF, J.: The State appeals an order of the circuit court reversing John Porter Johnson's conviction of driving under the influence (DUI) on the

basis of an alleged insufficiency in the number of potential jurors from which to draw a jury for Johnson's trial in magistrate court. We reverse the circuit court order and reinstate Johnson's conviction.

FACTUAL/PROCEDURAL BACKGROUND

The facts of this case are undisputed. Johnson was arrested on August 24, 2008, and charged with DUI. His case was called to trial on February 22, 2010, and was the first case on the docket for that week. Prior to the term of court, pursuant to section 22-2-90 of the South Carolina Code, the magistrate drew seventy-five names for jury service, and issued a writ of venire facias requiring the jurors' attendance on February 22, 2010, for a one week term of court. On the morning of February 22, 2010, thirty-nine of the seventy-five summoned jurors appeared. During jury qualifications, the magistrate excused six of those thirty-nine, leaving thirty-three jurors from which to select the petit jury for Johnson's trial. Johnson objected to being required to select from a jury pool of less than forty jurors, asserting a failure of the court to comply with code section 22-2-90(B), and sought a continuance. The magistrate overruled the objection and denied the motion for continuance. A six-member jury was drawn, and neither Johnson nor the State extinguished the list of remaining jurors in seating the jury. The case proceeded to trial, and Johnson was convicted.

Johnson filed a notice of appeal to the circuit court asserting the magistrate erred in overruling his objection to going forward with an insufficient number of jurors available, because section 22-2-90 required a minimum of forty jurors. Johnson maintained the magistrate should have granted him a continuance until a sufficient number of jurors could be assembled in accordance with section 22-2-120 of the South Carolina Code. In his argument before the circuit court, Johnson asserted that the legislature provided that a specific number of jurors are required to be present in magistrate court. He argued that the practice being followed in other jurisdictions in the state was to cancel a jury term where "there were insufficient number being less than 40(forty)." Johnson insisted that he should have had forty jurors to choose from for his jury, and the magistrate erred in making him go forward when there were only thirty-three available. The State, on the other hand, argued that section 22-2-90 required only that

the magistrate draw at least forty and not more than one hundred jurors, and there is a distinction between the number of jurors drawn and the number of jurors selected. It argued there were more than sufficient jurors to meet subsection (B) of 22-2-90, as seventy-five were drawn where the statute only required that forty be drawn. Additionally, the State asserted there were sufficient jurors available to ensure that each side would receive its maximum strikes and still have enough jurors available to seat a six-member jury.

The circuit court took the matter under advisement and later issued an informal order reversing Johnson's conviction, but indicated a more formal order would be prepared that would become the final order of the court. The court subsequently issued a written order reversing Johnson's conviction. It concluded, after reviewing sections 22-2-20 through 22-2-150 of the South Carolina Code, and applying basic rules of statutory construction to determine legislative intent, the number of jurors available for jury selection fell below the statutory minimum number required. The circuit court found the random selection method intended by the legislature would not be accomplished when, in advance of the random selection, there is an insufficient number from which to choose. Accordingly, the circuit court concluded the magistrate erred as a matter of law in overruling Johnson's objection, denying his motion for continuance, and requiring the parties to proceed to jury selection and trial. This appeal followed.

ISSUE

Whether the circuit court erred in reversing Johnson's conviction based on an alleged insufficiency in the number of potential jurors present for selection where the magistrate properly drew the names of seventy-five jurors in compliance with section 22-2-90 of the South Carolina Code, a qualified jury panel was selected from the available jury pool, and Johnson suffered no prejudice from the jury selection process as conducted.

STANDARD OF REVIEW

"In criminal appeals from magistrate or municipal court, the circuit court does not conduct a de novo review, but instead reviews for preserved error raised to it by appropriate exception." State v. Henderson, 347 S.C.

455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001). In criminal cases, the appellate court reviews errors of law only. City of Rock Hill v. Suchenski, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007). Accordingly, this court's scope of review is limited to correcting the circuit court's order for errors of law. Id.

LAW/ANALYSIS

The State contends the circuit court erred in reversing Johnson's conviction, as a qualified jury was properly empaneled and the magistrate properly exercised his discretion in denying Johnson's motion for continuance. We agree.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). If it can be reasonably discovered in the language used, legislative intent must prevail. Id. The language of a statute must be construed in light of the intended purpose of the statute, and whenever possible, legislative intent should be found in the plain language of the statute itself. State v. Gaines, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008). Additionally, statutes which are part of the same legislative scheme should be construed together. Stardancer Casino, Inc. v. Stewart, 347 S.C. 377, 383, 556 S.E.2d 357, 360 (2001). In interpreting a statute, the court should give words their plain and ordinary meaning, without resort to subtle or forced construction to limit or expand the statute's operation, and the language of the statute should be "read in a sense which harmonizes with its subject matter and accords with its general purpose." State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). A court must take the statute as it finds it, giving effect to the legislative intent as expressed in the language of the statute, and cannot, under its power of construction, supply an omission in a statute. State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999).

A review of Chapter 2 of Title 22 reveals the following pertinent code sections in this matter concerning the selection of juries in magistrate court:

In October of each year, the State Election Commission must provide to the chief magistrate for administration of each county, at no cost, a jury list compiled in accordance with the provisions of Section 14-7-130. The chief magistrate for administration of the county must use these lists in preparing, for each jury area, a list of the qualified electors in these jury areas, and must forward these lists to the respective magistrates.

S.C. Code Ann. § 22-2-50 (2007).

A constable or other person appointed by a magistrate shall, during the first thirty days of each calendar year, prepare a jury box for use in the magistrate's court which shall be provided by the governing body of the county. Each box shall contain two compartments designated as A and B respectively. The person charged with the preparation of the box shall, within the specified period, place in Compartment A of the box the individual names of all qualified electors in the Jury Area. After Compartment A has been filled with names, the box shall be locked and kept in the magistrate's custody.

S.C. Code Ann. § 22-2-60 (2007).

(A) In all cases except as provided in Section 22-2-90 in a magistrates court in which a jury is required, a jury list must be selected in the following manner:

A person appointed by the magistrate who is not connected with the trial of the case for either party must draw out of Compartment "A" of the jury box at least thirty but not more than one hundred names, and

this list of names must be delivered to each party or to the attorney for each party.

(B) If a court has experienced difficulty in drawing a sufficient number of jurors from the qualified electors of the area, and, before implementing a process pursuant to this subsection, seeks and receives the approval of South Carolina Court Administration, the person selected by the presiding magistrate may draw at least one hundred names but not more than a number determined sufficient by court administration for the jury list, and must deliver this list to each party or the attorney for each party.

S.C. Code Ann. § 22-2-80 (2007).

(A) In addition to the procedure for drawing a jury list as provided for in Section 22-2-80, in a magistrates court which schedules terms for jury trials, the magistrate may select a jury list in the manner provided by this section.

(B) At least ten but not more than forty-five days before a scheduled term of jury trials, a person selected by the presiding magistrate must draw at least forty but not more than one hundred jurors to serve one week only.

(C) If a court has experienced difficulty in drawing a sufficient number of jurors from the qualified electors of the area, and, before implementing a process pursuant to this subsection, seeks and receives the approval of South Carolina Court Administration, the person selected by the presiding magistrate may draw at least one hundred names but not more than a number determined sufficient by court administration to serve one week only.

(D) Immediately after the jurors are drawn, the magistrate must issue a writ of venire facias for the jurors requiring their attendance on the first day of the week for which they have been drawn. This writ must be delivered to the magistrate's constable or the sheriff of the county concerned.

S.C. Code Ann. § 22-2-90 (2007).

The names drawn pursuant to either Section 22-2-80 or Section 22-2-90 must be placed in a box or hat and individual names randomly drawn out one at a time until six jurors and four alternates are selected. Each party has a maximum of six peremptory challenges as to primary jurors and four peremptory challenges as to alternate jurors and any other challenges for cause the court permits. If for any reason it is impossible to select sufficient jurors and alternates from the names drawn, names must be drawn randomly from Compartment "A" until sufficient jurors and alternates are selected.

S.C. Code Ann. § 22-2-100 (2007).

If at the time set for the trial there are not sufficient jurors to proceed because one or more have failed to attend, have not been summoned, or have been excused or disqualified by the court, additional jurors must be selected from the remaining names or in the manner provided in Section 22-2-80 or Section 22-2-100.

S.C. Code Ann. § 22-2-120 (2007).

In summary, our statutes require a constable or other person appointed by a magistrate to prepare a jury box for use in the magistrate court, which

contains two compartments, designated as A and B, and to place in Compartment "A" of the box the individual names of all qualified electors in the Jury Area. S.C. Code Ann. § 22-2-60 (2007). Except where jurors are drawn for a weeklong term of court under section 22-2-90, the person appointed by the magistrate must draw out of Compartment "A" of the jury box at least thirty but not more than one hundred names, with this list then delivered to each party or to the parties' attorneys. S.C. Code Ann. § 22-2-80(A) (2007). Where a magistrate court schedules terms for jury trials, the procedure to follow is similar to that of section 22-2-80, but requires that the person selected by the presiding magistrate draw at least forty, but not more than one hundred, jurors to serve a one week term. S.C. Code Ann. § 22-2-90(B) (2007). Like section 22-2-80, section 22-2-90 includes a provision that if the court has experienced difficulty in drawing a sufficient number of jurors from the qualified electors of the area, it may seek the approval of South Carolina Court Administration to allow the person selected by the presiding magistrate to draw a minimum of one hundred names to serve. S.C. Code Ann. §§ 22-2-80 (B) (2007); 22-2-90(C) (2007). Whether drawing names pursuant to section 22-2-80 or, as in this case, for a weeklong term of court pursuant to section 22-2-90, the individual names must be randomly drawn out, one at a time, until six jurors and four alternates are selected, and each party is allowed a maximum of six peremptory challenges as to primary jurors and four peremptory challenges as to alternate jurors. S.C. Code Ann. § 22-2-100 (2007). If it is not possible "to select sufficient jurors and alternates from the names drawn, names then must be drawn randomly from Compartment 'A' until sufficient jurors and alternates are selected." *Id.* "If at the time set for the trial there are not sufficient jurors to proceed because one or more have failed to attend, have not been summoned, or have been excused or disqualified by the court, additional jurors must be selected from the remaining names or in the manner provided in Section 22-2-80 or Section 22-2-100." S.C. Code Ann. § 22-2-120 (2007).

We agree with the State that there is no provision in Chapter 2 of Title 22 specifically establishing a minimum number of jurors required to be present in the jury pool before jury selection can proceed. The plain wording of section 22-2-90 requires only that a person selected by the presiding magistrate draw a minimum of forty jurors to serve for a one week term. It

does not require that forty jurors be present and available in the jury pool before jury selection can proceed for a trial.

Further, section 22-2-100 mandates the individual names be randomly drawn until six jurors and four alternates are selected, with each party being allowed a maximum of six peremptory challenges as to primary jurors and four peremptory challenges as to alternate jurors. Thus, as noted by the State, allowing for the maximum number of primary (six) and alternate (four) jurors along with the maximum number of combined peremptory challenges (twenty), thirty jurors would be sufficient to meet such needs. Although it could possibly take every single one of the individual jurors to ultimately seat a jury, the names would still be drawn in random order, with different decisions regarding the parties' choices on whether or not to use their peremptory challenges affecting the ultimate make-up, and therefore allowing for the randomness of the jury.

Additionally, we note that in those cases where the jury is not being selected for a weeklong term of court, section 22-2-80(A) allows the person appointed by the magistrate to draw a minimum of thirty names for a jury trial in magistrate court. If the drawing of only thirty names is sufficient under section 22-2-80, thus allowing for a maximum of thirty potential jurors to present themselves for jury selection in those cases, such a number should likewise be sufficient from which to select a jury under section 22-2-90, as there is no difference in the number of primary and alternate jurors and the number of peremptory strikes available to each party whether drawing names pursuant to section 22-2-80 or pursuant to section 22-2-90. Therefore, construing these statutes, which are part of the same legislative scheme, together, and reading the language of these statutes in a sense which harmonizes with the subject matter and accords with its general purpose, we find the presence of thirty-three jurors in this case was sufficient to select a qualified jury panel from the jury pool.

Johnson and the circuit court effectively read section 22-2-90 as requiring that a minimum of forty individuals appear and be available for jury selection, while the plain terms of the statute require only that forty individual names be drawn and ordered to appear. Indeed, section 22-2-120 seems to recognize that some of the summoned jurors may fail to appear.

However, it is only when "it is impossible to select sufficient jurors and alternates from the names drawn" and "there are not sufficient jurors to proceed because one or more have failed to attend, have not been summoned, or have been excused or disqualified by the court" that steps must be taken to remedy an insufficient jury pool. S.C. Code Ann. §§ 22-2-100; 22-2-120. The legislature has set forth no specified number of jurors required to be present and available in the jury pool before jury selection can proceed. As noted, a court cannot, under its power of construction, supply an omission in a statute. White, 338 S.C. at 58, 525 S.E.2d at 263. By asserting a mandatory minimum of forty jurors are required to be present and available for selection in a magistrate court jury trial, Johnson and the circuit court seek to supply an omission in the statute and expand the statute's operation. Further, we find such an interpretation to be inconsistent with the legislative intent in enacting these statutory provisions. Here, there were sufficient jurors available to ensure that each side would receive its maximum strikes and still have enough to seat a jury. Accordingly, we conclude that the circuit court erred in finding the thirty-three jurors available for jury selection fell below the statutory minimum number required.

In light of our holding in this case, we find it unnecessary to address the State's alternate assertion that, even assuming the magistrate erred in his interpretation of the statutory provisions, the statutory provisions are merely directory and Johnson suffered no prejudice. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

CONCLUSION

For the foregoing reasons, we reverse and reinstate Johnson's conviction.

REVERSED.

PIEPER and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

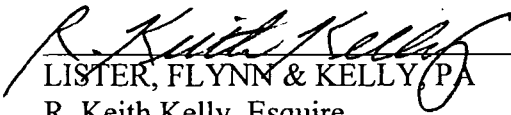
APPEAL FROM CHEROKEE COUNTY
Circuit Court

J. Mark Hayes, II, Circuit Court Judge

Opinion No. 4927
Heard November 3, 2011 – Filed January 4, 2012

The State..... Appellant,
v.
John Porter Johnson..... Respondent

RESPONDENT'S PETITION FOR REHEARING



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**Attorneys for Respondent John Porter
Johnson**

RECEIVED
JAN 19 2012
SC Court of Appeals

Respondent 's Petition for Rehearing

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondent respectfully requests the Court reconsider and rehear that portion of Opinion No. 4927 filed January 4, 2012 addressing the number of potential jurors required to be present for selection.

Respondent respectfully submits that in reversing the decision of the Circuit Court that this Court overlooked or misapprehended the points set forth below.

The Court's opinion in this matter misconstrues the law that this Court relied on in reaching its decision.

In reviewing Sections 22-2-80 and 22-2-90, this Court found no distinction between the number of jurors required to proceed to trial. As this Court correctly noted, each party is allowed six peremptory challenges as to primary jurors and four peremptory challenges as to alternate jurors for a total of twenty peremptory challenges. Twenty-six present jurors would be a minimum number to seat a jury in a Magistrate Court case.

Assuming, arguendo, without conceding that there is no distinction between Sections 22-2-80 and 22-2-90, both parties in a weeklong term of Magistrate Court would be required to use the same twenty-six jurors on every case on the docket.

The Respondent argues that is not the intent of the General Assembly. Thirty jurors present is a sufficient number to ensure a random selection in the jury process for a single trial in Magistrate Court. And, the General Assembly deemed forty jurors present sufficient to ensure a random selection in the jury process for a weeklong term of Magistrate Court.

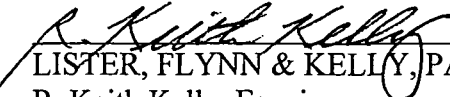
The Respondent argues further that the General Assembly's passage of two

separate and distinct code sections is further evidence of its intent that there is a difference in the jury selection process between a single trial and multiple trials the same term of Court. Otherwise, one code section would be redundant.

Respondent respectfully requests that this Court reconsider and rehear its opinion issued January 4, 2012 after fresh, de novo review of the evidence presented in the record.

Respectfully Submitted,

January 10, 2012



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**Attorneys for Respondent John Porter
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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Cherokee County
Honorable J. Mark Hayes, II, Circuit Court Judge

THE STATE,

Appellant,

vs.

JOHN PORTER JOHNSON,

Respondent.

RECEIVED
JAN 19 2012
SC Court of Appeals

PROOF OF SERVICE

I, Tammy B. Gilbert, certify that I have served the within Respondent's Petition for Rehearing on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
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I further certify that all parties required by Rule to be served have been served. This 19th
day of January, 2012.

BY: Tammy B. Gilbert
Tammy B. Gilbert
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The South Carolina Court of Appeals

The State,

Appellant

v.

John Johnson,

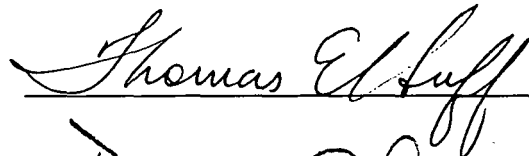
Respondent.

The Honorable J. Mark Hayes, II
Cherokee County
Trial Court Case No. 2010-CP-11-00404

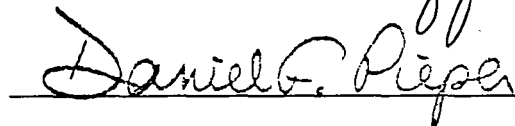
ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

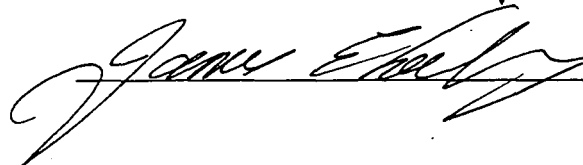
It is, therefore, ordered that the Petition for Rehearing be denied.



J. Huff



J. Pieper



J. Lockemy

Columbia, South Carolina

cc: Assistant Attorney General Mark Farthing
Barry Joe Barnette, Esquire
Ralph Keith Kelly, Esquire

FILED
16 February 2012

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHEROKEE COUNTY
Court of General Sessions

Honorable J. Mark Hayes, II, Circuit Court Judge

Case No. 2010-CP-11-404

John Porter Johnson,.....Petitioner,

v.

State of South Carolina,.....Respondent.


PROOF OF SERVICE

I, Toria D. Richardson, certify that I have served the within Appendix on Respondent by depositing copies of the same in the United States mail, postage prepaid, addressed to:

MARK R. FARTHING
Assistant Attorney General
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Columbia, SC 29211

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

This 19th day of March, 2012.

BY: 

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MAR 20 2012

S.C. SUPREME COURT